

CITY AND COUNTY OF SWANSEA

NOTICE OF MEETING

You are invited to attend a Meeting of the

RIGHTS OF WAY AND COMMONS SUB COMMITTEE

At: Committee Room 2, Civic Centre, Swansea

On: Wednesday, 3 December 2014

Time: 2.00 pm

AGENDA

	Page No.
1 Election of Chair for the Remainder of the 2014/2015 Municipal year.	
2 Apologies for Absence.	
3 Disclosures of Personal and Prejudicial Interests.	1 - 2
4 Minutes. To approve and sign as a correct record the Minutes of the Meeting of the Rights of Way and Commons Sub Committee held on 8 October 2014.	3 - 6
5 Extinguishment of Footpath No 88 - Community of Llangyfelach.	7 - 17
6 Footpath No. 64 - Community of Llanrhidian Higher.	18 - 45
7 Date of Next Meeting - 2 p.m. on Wednesday, 28 January 2015.	



Patrick Arran
Head of Legal, Democratic Services & Procurement
25 November 2014

Contact: Democratic Services: - 636016

RIGHTS OF WAY & COMMONS SUB COMMITTEE (12)

Councillors

Labour Councillors: 8

Ann M Cook	Jennifer A Raynor
Joe A Hale	Robert V Smith (Vice-Chair)
Jane E C Harris	Des W W Thomas
Yvonne V Jardine	T Mike White

Liberal Democrat Councillors: 2

Paul M Meara	John Newbury
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Independent Councillor: 1

Keith E Marsh	
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Conservative Councillor: 1

Linda J Tyler-Lloyd	
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Officers:

Phil Holmes	Head of Regeneration & Planning
Deb Smith	Directorate Lawyer, Legal, Democratic Services & Procurement
Sandie Richards	Principal Lawyer
Kim Flanders	Planning Policy & Environment Manager, Regeneration & Housing Department
Chris Dale	Countryside Access Team Leader (Rights of Way), Regeneration & Housing Department
Mike Workman	Rights of Way Officer, Legal & Democratic Services & Procurement
Democratic Services	
Planning Services	
Archives	
Spare	

28 Copies

Disclosures of Interest

To receive Disclosures of Interest from Councillors and Officers

Councillors

Councillors Interests are made in accordance with the provisions of the Code of Conduct adopted by the City and County of Swansea. You must disclose orally to the meeting the existence and nature of that interest.

NOTE: You are requested to identify the Agenda Item / Minute No. / Planning Application No. and Subject Matter to which that interest relates and to enter all declared interests on the sheet provided for that purpose at the meeting.

1. If you have a **Personal Interest** as set out in **Paragraph 10** of the Code, you **MAY STAY, SPEAK AND VOTE** unless it is also a Prejudicial Interest.
2. If you have a Personal Interest which is also a **Prejudicial Interest** as set out in **Paragraph 12** of the Code, then subject to point 3 below, you **MUST WITHDRAW** from the meeting (unless you have obtained a dispensation from the Authority's Standards Committee)
3. Where you have a Prejudicial Interest you may attend the meeting but only for the purpose of making representations, answering questions or giving evidence relating to the business, **provided** that the public are also allowed to attend the meeting for the same purpose, whether under a statutory right or otherwise. In such a case, you **must withdraw from the meeting immediately after the period for making representations, answering questions, or giving evidence relating to the business has ended**, and in any event before further consideration of the business begins, whether or not the public are allowed to remain in attendance for such consideration (**Paragraph 14** of the Code).
4. Where you have agreement from the Monitoring Officer that the information relating to your Personal Interest is **sensitive information**, as set out in **Paragraph 16** of the Code of Conduct, your obligation to disclose such information is replaced with an obligation to disclose the existence of a personal interest and to confirm that the Monitoring Officer has agreed that the nature of such personal interest is sensitive information.
5. If you are relying on a **grant of a dispensation** by the Standards Committee, you must, before the matter is under consideration:
 - i) Disclose orally both the interest concerned and the existence of the dispensation; and
 - ii) Before or immediately after the close of the meeting give written notification to the Authority containing:

- a) Details of the prejudicial interest;
- b) Details of the business to which the prejudicial interest relates;
- c) Details of, and the date on which, the dispensation was granted; and
- d) Your signature

Officers

Financial Interests

1. If an Officer has a financial interest in any matter which arises for decision at any meeting to which the Officer is reporting or at which the Officer is in attendance involving any member of the Council and /or any third party the Officer shall declare an interest in that matter and take no part in the consideration or determination of the matter and shall withdraw from the meeting while that matter is considered. Any such declaration made in a meeting of a constitutional body shall be recorded in the minutes of that meeting. No Officer shall make a report to a meeting for a decision to be made on any matter in which s/he has a financial interest.
2. A "financial interest" is defined as any interest affecting the financial position of the Officer, either to his/her benefit or to his/her detriment. It also includes an interest on the same basis for any member of the Officers family or a close friend and any company firm or business from which an Officer or a member of his/her family receives any remuneration. There is no financial interest for an Officer where a decision on a report affects all of the Officers of the Council or all of the officers in a Department or Service.

CITY AND COUNTY OF SWANSEA

MINUTES OF THE RIGHTS OF WAY AND COMMONS SUB-COMMITTEE

HELD AT THE CIVIC CENTRE, SWANSEA ON WEDNESDAY 8 OCTOBER
2014 AT 2.00 P.M.

PRESENT: Councillor J A Raynor (Chair) presided

Councillor(s):

A M Cook
K E Marsh

Councillor(s):

P M Meara
R V Smith

Councillor(s):

L J Tyler-Lloyd
T M White

ALSO PRESENT:

Councillor C M R W D Thomas - Newton Ward Member

Officers:

S Richards - Principal Lawyer
M Workman - Rights of Way Officer
J Parkhouse - Democratic Services Officer

21. **APOLOGIES FOR ABSENCE**

Apologies for absence were received from Councillors J E C Harris, Y V Jardine, J Newbury and D W W Thomas.

22. **DISCLOSURES OF PERSONAL AND PREJUDICIAL INTERESTS**

In accordance with the Code of Conduct adopted by the City and County of Swansea, no interests were declared.

23. **MINUTES**

RESOLVED that the Minutes of the meeting of the Rights of Way and Commons Sub-Committee held on 13 August 2014 be accepted as a correct record.

The Sub-Committee were updated on the following:

Minute No. 15 - Extinguish Right of Way - Path No. 88 - Community of Llangyfelach

It was reported that the Order could be referred to the Planning Inspectorate who could consider the request to sever the Order. However, that does not mean the request will be successful. The Chair requested that a written report be provided at the next scheduled meeting.

24. **ALLEGED PUBLIC FOOTPATH FROM BIRCHGROVE ROAD TO SMITH'S ROAD - COMMUNITY OF BIRCHGROVE**

The Head of Legal, Democratic Services and Procurement presented a report to determine the application in accordance with the provisions of the Wildlife and Countryside Act 1981.

It was outlined that on 5 December 2013 an application was made under the provisions of the Wildlife and Countryside Act 1981 to the Council to recognise the path shown on the attached plan provided at Appendix 1 as a public right of way on foot. The claim had been supported by 10 individuals who allege an average of 40 years use of the path. The usual means by which an application is determined is to assess whether the way had been dedicated under Section 31 of the Highways Act 1980, that is if there had been a minimum period of 20 years uninterrupted use from the date the alleged existence of the path was called into question. Appendix 2 of the report provided the relevant extract. The date was taken either from the occasion the path was blocked or warnings given to the public that no such right existed or from the date of the application.

The path comprises tarmac for its central portion being 2.5 metres wide and flanked by two grass verges which increase the width of the lane to 6 metres. Five bollards had been placed at its junction with Birchgrove Road and three at its junction with Smith's Road. The path is included as a publicly maintained highway on the Council's Plan of Adopted Streets. Section 36(6) of the Highways Act 1980 requires all authorities in England and Wales to provide and keep up to date a list within its area of such highways which are maintained by them and Appendix 3 provided further information on what the list should include. The Sub-Committee was also provided with the history of the path.

It was concluded that the evidence shows that the Council has adopted the entire width of the path between point A and B and so given its physical character it must have a minimum status of footpath. It is possible to be accessible by equestrians but there is no evidence of such use. The application had specified the narrower central section which is tarmacked and subject to the formal adoption procedure under Section 228 of the Highways Act 1980. As such, that narrower section could be made the subject of a Legal Event Modification Order so that it could be added to the Definitive Map and Statement. Given that it would be made on the basis that it had already been recorded as a public highway, there will be no opportunity for the public to take issue with that and so the Order would not have to be advertised.

RESOLVED that a Legal Event Modification Order be made to add the path shown A-B into the Definitive Map and Statement reflecting the 2.5 metre wide length of footpath.

25. **APPLICATION TO REGISTER LAND KNOWN AS CASTLE ACRE GREEN, NORTON, SWANSEA AS A TOWN OR VILLAGE GREEN - APPLICATION NO. 2731(S)**

The Head of Legal, Democratic Services and Procurement presented a report to inform the Sub-Committee of the proposal to hold a non-statutory inquiry.

It was outlined that the Council had received an application made by Dr Robert Leek on behalf of the Castle Acre Village Green Action Group under Section 15(3) of the Commons Act 1996 in respect of land known locally as Castle Acre Green, Norton, Swansea. The application sought to register the land as a town or village green and a plan of the land was provided at Appendix 1.

It was added that the land in question is not registered at HM Land Registry. However, it had been confirmed by the Council that the land had been maintained by its Parks Services Department since the 1970s and the Council had made an objection to the application. The Head of Legal, Democratic Services and Procurement had used the delegated authority granted by the Sub-Committee on 15 February 2012 to instruct Counsel to advise on the application and the appropriate procedure to be adopted in determining the application. Counsel had advised that there are issues of fact and law in dispute and it would be appropriate to hold a non-statutory inquiry. The holding of such an inquiry will ensure that evidence from both the application and the objectors can be heard and tested and the issues examined and argued. Once the inquiry had taken place, Counsel will issue a report with recommendations for the Sub-Committee to consider.

RESOLVED that the contents of the report be noted.

26. **APPLICATION TO REGISTER LAND AT PICKET MEAD, NEWTON, SWANSEA AS A TOWN OR VILLAGE GREEN - APPLICATION NO. 2730(S)**

The Head of Legal, Democratic Services and Procurement presented a report to inform the Sub-Committee of the proposal to hold a non-statutory inquiry.

Minutes of the Rights of Way and Commons Sub-Committee
(08.10.2014) Cont'd

It was outlined that the Council had received an application by Mr Simon Arthur under Section 15(2) of the Commons Act 2006 in respect of land at Picket Mead, Newton, Swansea. The application sought to register land as a town or village green and a plan of the land was provided at Appendix 1.

It was added that the land in question is owned by the Council and the application site forms part of common land unit CL 4(S). It is of note that the Council in its capacity as landowner had not made an objection to the application. However, an objection has been received from Carrington Moore Estates who own Picket Mead House and have the benefit of an easement over the land. The Head of Legal, Democratic Services and Procurement had used the delegated authority granted by the Sub-Committee on 15 February 2012 to instruct Counsel to advise on the application and the appropriate procedure to be adopted in determining the application. Counsel had advised that there are issues of fact and law in dispute and it would be appropriate to hold a non-statutory inquiry. The holding of such an inquiry will ensure that evidence from both the applicant and the objectors can be heard and tested and the issues examined. Once the inquiry has taken place, Counsel will issue a report with recommendations for the Sub-Committee to consider.

RESOLVED that the contents of the report be noted.

27. **DATE OF NEXT MEETING**

NOTED that the next meeting be held at 2.00 p.m. on Wednesday 3 December 2014.

The meeting ended at 2.17 p.m.

CHAIR

Report of the Head of Legal, Democratic Services and Procurement

Rights of Way and Commons Sub-Committee - 3 December 2014

EXTINGUISHMENT OF FOOTPATH NO. 88 COMMUNITY OF LLANGYFELACH

Purpose:	To decide whether to: <ul style="list-style-type: none">(a) Refer the Order as made for confirmation(b) Abandon the Order and make another.(c) Request that the Planning Inspectorate sever the Order.(c) Defer consideration until the village green application has been determined.
Policy Framework:	PPO16 of the Countryside Access Plan.
Statutory Test:	Section 118 of the Highways Act 1980.
Reason for Decision:	Members to decide.
Consultation:	All statutory consultees which included the Clerk to the Community Council, the owner/occupiers of 4 Cae Penpant, 49 Heol Waun Wen and Penpant House, Dwr Cymru, the Ramblers Association and their local representative, Wales and West Utilities, the British Horse Society and their local representative, the Open Spaces Society, Natural Resources Wales, BT and Byways and Bridleways Trust.
Recommendation(s):	As previously that the provisions of Section 118 can be satisfied and therefore the Order be referred to the Planning Inspectorate for determination.
Report Author:	Michael. J. Workman
Finance Officer:	Sarah Willis
Legal Officer:	Sandie Richards
Access to Services Officer:	Phil Couch

1.0 Introduction

- 1.1 On the 13th August 2014 this Committee considered the proposal to extinguish the footpath between points A-X and from Y-B-C-D-E-F. At the time the informal consultations were undertaken no objections had been raised. Consequently the 124 objections and the 33 from the local primary school that were subsequently made to the Order were unforeseen.
- 1.2 13 objections were withdrawn with the majority of the outstanding objections being concerned with the determination of the application for village green status. It would appear that the objectors believe that the Order was made to enable the site to be developed in the future. The report is attached for reference.

2.0 Issues Arising from Previous Meeting

- 2.1 At the meeting on 13th August 2014 this Committee expressed concern over the loss of the section of the path A-X that is the subject of the Order where it crosses over the land that is subject of the village green application given the volume of objections to its potential loss.
- 2.2 Due to the objections this Council cannot confirm the Order and so could either abandon the Order or refer the Order to the Planning Inspectorate for its determination.
- 2.3 A third alternative was raised as to whether this Council could refer the Order to the Planning Inspectorate but request that the section A-X be retained and so only the remainder of the path be extinguished.
- 2.4 The Welsh Office Circular 5/93 (and therefore produced in 1993) is still the most recent set of guidelines directly applicable to Wales on processing public path orders. There is no reference to the possibility of dividing or severing an Order. However the more up to date Rights of Way Circular 1/08 and produced in 2008 does make reference to an Inspector's power to modify an order under Section 118 of the Highways Act 1980. This circular applies to England. Consequently the Planning Inspectorate for Wales were asked if this option would be available and the response was that an Inspector "should be able to deal with the modification process".
- 2.5 If this option was pursued and the appointed Inspector agreed to the request and was minded to sever the Order any decision made on that basis would have to be advertised given the result would be the extinguishment of only part of the way.

3.0 Summary

3.1 The Order could be referred as made and the case forwarded that the majority of objections are not relevant as:-

- (a) the existence or otherwise of a village green has no bearing on whether there is a need for the path;
- (b) that there is a suitable alternative in being and adopted, which is the basis for the Order and so the provision of Section 118 can be satisfied.

3.2 The Council could decide to simply abandon the Order and make another so that it only includes the length Y-B-C-D-E-F given:-

- (a) this section can no longer be used;
- (b) there is an alternative via the adopted Estate paths and footways;
- (c) the strong opposition to the loss of the section A-X which had not been raised prior to the Order being made.

3.3 Thirdly the Order could be sent to the Planning Inspectorate and a request made for the Order to be severed so that only the section Y-B-C-D-E-F be extinguished on the same basis as 3.2 above. Three options arise:-

- (a) The request may not be accepted.
- (b) If the request is accepted, the appointed Inspector could nonetheless still decide that the order should not be severed and confirm the order as made.
- (c) The Order is severed although the "modification" to the original order would have to be re advertised and itself subject to objections.

3.4 Finally not to progress the Order until the issue concerning the village green application has been determined. The possible consequences are:-

- (a) The land is not given village green status and so the current position would remain unchanged.
- (b) If the village green application succeeds, then it is possible all the current objections could be withdrawn. However this is not necessarily guaranteed as some members of the public may still consider the public path should remain.

4.0 Equality and Engagement Implications

There are no equality and engagement implications associated with this report.

5.0 Financial Implications

Although the cost of referring to the Planning Inspectorate for determination will depend on how it is treated, it is expected to mainly involve officer time and some minimal advertising costs, which can be covered from existing budgets.

6.0 Legal Implications

There are no legal implications associated with this report.

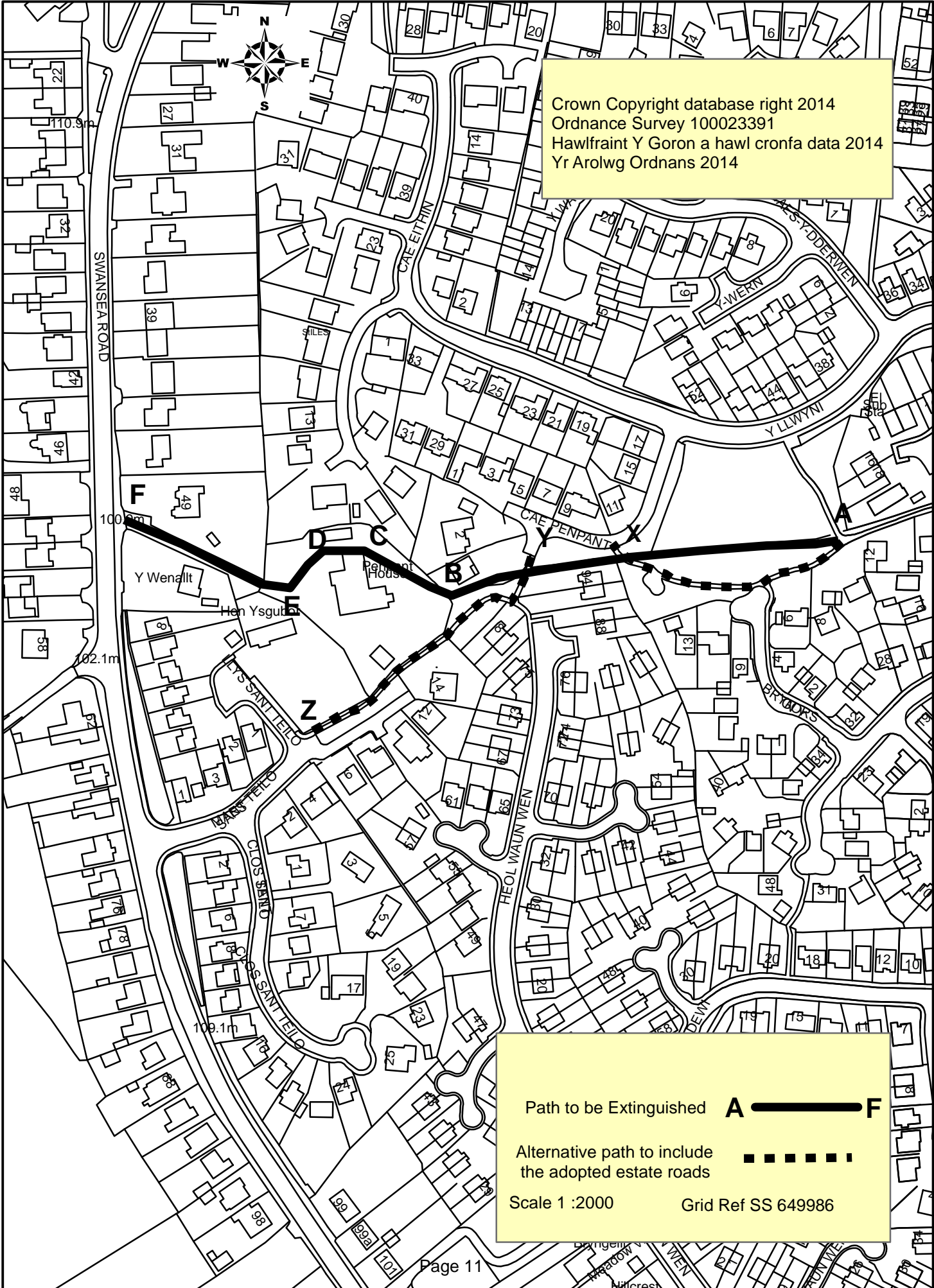
Background Papers: ROW-000232

Appendices:

Appendix A – Site Plan

Appendix B - Previous report to this Committee on the 13th August 2014

Crown Copyright database right 2014
Ordnance Survey 100023391
Hawlfraint Y Goron a hawl cronfa data 2014
Yr Arolwg Ordnans 2014



Path to be Extinguished **A — F**
Alternative path to include the adopted estate roads **-----**
Scale 1 :2000 Grid Ref SS 649986

Report of the Head of Legal, Democratic Services and Procurement

Rights of Way and Commons Sub-Committee – 13 August 2014

EXTINGUISHMENT OF FOOTPATH NO. 88
COMMUNITY OF LLANGYFELACH

Purpose:	To decide whether to proceed with the Order for confirmation or to abandon the Order.
Policy Framework:	PPO16 of the Countryside Access Plan.
Statutory Test:	Section 118 of the Highways Act 1980.
Reason for Decision:	To decide whether to proceed with the Order for confirmation or to abandon the Order.
Consultation:	All the statutory consultees which included the Local Member, the Clerk to the Community Council, the owner/occupiers of 4 Cae Penpant, 49 Heol Waun Wen, and Penpant House, Dwr Cymru, The Ramblers Association and their local representative, Wales and West Utilities, the British Horse Society and their local representative, the Open Spaces Society, Natural Resources Wales, B.T. and Byways and Bridleways Trust.
Recommendation(s):	That the Extinguishment Order be referred to the Planning Inspectorate for determination
Report Author:	Mike Workman
Finance Officer:	Sarah Willis
Legal Officer:	Sandie Richards
Access to Services Officer:	Phillip Couch

1.0 Introduction

1.1 On the 11th day of March 2014 this Council made an Extinguishment Order under section 118 of the Highways Act 1980 to remove the length of path shown between points A-B-C-D-E-F. Footpath No. 88 between points A-X is under the ownership of this Council, the remaining sections

under the ownership of those who have title to the three separate properties built on the path. The alternative is vested in this Council having been adopted as public ways.

1.2 One hundred and twenty four objections were made to this Order and another thirty three from the pupils of Llangyfelach Primary School.

1.3 The Order was made under delegated authority by officers of this Council. As objections have been made to the Order, there is no authority for officers to decide whether the Order should be forwarded to the Planning Inspectorate or be abandoned.

1.4 Under the Act, the Council has the discretion to abandon the Order after it has been made if it considers it is not expedient to confirm the Order.

2.0 Background

2.1 Lliw Valley Borough Council made a Diversion Order in 1988 to take account of the earlier housing development between points B-C-D-E-F. That Order failed as there was no consent from the owner of land over which the alternative was intended to pass.

2.2 Since 1988 further residential development has occurred within Llangyfelach at different times. At each phase alternative paths and footways have been set out by the individual developers which in effect have created an alternative route for Footpath No. 88.

2.3 The attached plan shows the alternative route as a broken line which includes tarmacked footpaths via A-X and Y-Z between 1.5 and 2.0 metres in width, but in the case of the latter set in a wider corridor. A-X passes across an area of green open space. The remaining lengths of the alternative includes the footway of Cae Penpant and the footway alongside Maes Teilo.

2.4 The footways and footpaths between points A-X-Y-Z and onto Swansea Road have been adopted as public highways and included into this Council's "list of streets". Therefore that adoption has secured the public's right to utilise this alternative walkway.

3.0 Grounds for Making an Order under Section 118 of the Highways Act 1980

3.1 An order may be made if it is considered the path is not needed for public use.

3.2 The basis for making this Order is evidently due to the existing alternative that has been secured and which is in good condition.

3.3 The Council and/or the Welsh Ministers shall not confirm an order unless they are satisfied it is expedient to do so having regard to the extent to which the path would be used by the public.

- 3.4 The objection apart from three letters, are solely concerned with the loss of what is considered to be a village green between points A and X, and the presumption the Extinguishment Order is linked to the potential development of the site. Each objector and the Headmaster of Llangyfelach Primary School were sent a letter explaining the reasons why the Order was made. Secondly that their concerns over the loss of the green area of open space is likely to be determined in October this year, when a public inquiry will be held to determine the outstanding application to register the area as a village green. At the time of writing thirteen people have withdrawn their objection after having received this explanation of why the Order was made.
- 3.5 However two responded to state that they do not wish to withdraw for the following reasons:
- (a) The extinguishment is a forerunner to leaving a plot of land which could then be used for rebuilding.
 - (b) The village green is accessible by this footpath.
 - (c) There may be other access to the village green but none cross the village green.
 - (d) The closure of Footpath No. 88 will result in increased walker traffic through the alternative route.
 - (e) Footpath No. 88 allows access to a local shop through a flat surface, whereas the alternative is via steep incline.
- 3.6 Section 118 also enables a Council or the Welsh Ministers to take account of any other order that has been made to provide an alternative. In this example no additional order is outstanding as the alternative has already been set out and adopted. Consequently consideration can be given to the existing alternative and therefore whether the path being extinguished is likely to be used, given the provision of the alternative.
- 3.7 Therefore addressing the outstanding objections:
- (a) If the site was to be developed, then the consent could make provision for the existing path and in effect build around the path. Alternatively consent for development does provide valid grounds for either diverting or extinguishing the path, if it is necessary to enable the development to proceed. As such whilst the existence of a public path is a material consideration as to whether or what type of comment is granted, it would not of itself prevent a development. Nonetheless there is no outstanding application to develop the site.

- (b)&(c) Should the area being designated as a village green, access to and over that green would be obtainable from all the surrounding paths and adopted roads. There would be no need to retain a public footpath. (notwithstanding a public footpath and the land over which it crosses cannot be designated as a village green).
 - (d) There is no path set out across the grass, it is simply a designated line following an old field boundary consisting of a bank and a row of mature trees.
 - (e) The alternative therefore is more likely to be used throughout the year as it is tarmacked and also provides access to the same destinations. Secondly apart from the section between X-Z the remaining length is on level ground. There is no level alternative to the section X-Z.
- 3.8 Section 118 also states that any temporary circumstances preventing or diminishing the use of the path shall be disregarded. Therefore the fact that part of Footpath No. 88 has been built on, is not a reason in itself for extinguishing the path. The basis for why it is considered the Order should be confirmed however is due to the provision of the alternative.
- 3.9 The decision as to whether or not an Extinguishment Order should be confirmed shall have regard to this Council's Access Policy and the relevant extracts are contained in Appendix 1.
- 3.10 Any order that diverts, creates or extinguishes a public path can render the Council liable to pay compensation to the owners of the land adversely affected. In this instance the effect the loss of the public right of way would have where it can be shown:
- (a) the value of an interest of a person in land is depreciated; or
 - (b) that a person has suffered damage by being disturbed in his enjoyment of the land in consequence of the coming into operation of the Order.

There is no perceived loss to the Council as a consequence of this Order being confirmed and coming into operation. Evidently the confirmation of the Order would be in the interests of those three properties built across the path.

4.0 Conclusion

- 4.1 For the above reasons it is considered the order could be confirmed by the Welsh Ministers if it is submitted to the Planning Inspectorate for determination.

5.0 Equality and Engagement Implications

5.1 There are no equality and engagement implications with this report.

6.0 Financial Implications

6.1 There are no financial implications associated with this report.

7.0 Legal Implications

7.1 There are no legal implications associated with this report.

Background Papers: ROW-000232

Appendices: Appendix 1

APPENDIX 1

- (a) Policy PPO16 states:

“Extinguishment will be considered where the requisite legal tests are met that the path is no longer needed for public use. This test may be met if there is alternative public access that has effectively replaced the path.”

- (b) Under paragraph 5.16:

“Large scale development can completely alter an existing landscape and the access needs of the public will change considerably. To reflect this change the existing public access may require partial or complete alteration, but in doing so the overall public access should be maintained or enhanced.”

PPO17:

“Diversions of paths across sites affected by development will only be permitted where it is proven that the path must be diverted to enable the development to be carried out, and only then where an acceptable alternative route is provided.”

PPO18:

The stopping up of paths for development will only be permitted in exceptional circumstances.

Agenda Item 6

Report of the Head of Legal, Democratic Services and Procurement

Rights of Way and Commons Sub-Committee – 3 December 2014

FOOTPATH NO. 64 - COMMUNITY OF LLANRHIDIAN HIGHER

Purpose: The report presents an update on this issue.

Report Author: M. J. Workman

Finance Officer: S. Willis

Legal Officer: S. Richards

Access to Services Officer: P Couch

FOR INFORMATION

1. Background

- 1.1 On the 17th July 2013 this issue was referred back to this Committee as the original Modification Order that was made on the 5th November 2009 had been rejected by the Planning Inspectorate on the basis the Order was incorrectly drafted.
- 1.2 This Committee was obliged to confirm it wished a second Modification should be made given the time that had elapsed since the first (as highlighted in paragraph 1.8(a) to that report and as appended).
- 1.3 The second Modification Order was made on the 25th July 2013 to which two objections were made.
- 1.4 The Order was not referred to the Planning Inspectorate until the 14th May 2014, because the owners of Penyrheol and the neighbouring premises Caerau were attempting to negotiate a mutually acceptable alternative path. Given that was not possible, the Modification has to be determined by the Planning Inspectorate who have decided to hold a Public Inquiry. This is scheduled to be held at the Penclawdd Community Centre, Banc Bach, Penclawdd on the 17th December 2014 commencing at 10.00 a.m.

2. Equality and Engagement Implications

There are no financial implications associated with this report.

3. Legal Implications

There are no legal implications associated with this report.

4. Financial Implications

There are no financial implications associated with this report.

FOR INFORMATION

Background papers:

Bundles 1-3 and Appendix 1 as prepared for the Public Inquiry.

Appendices:

Appendix 1 - The Report to the Rights of Way and Commons Sub-Committee on the 17 July 2013.

ROW-000092/MJW

EJF - 31.10.2014

Report of the Head of Legal, Democratic Services and Procurement

Rights of Way and Commons Sub-Committee - 17 July 2013

**PUBLIC PATH 64
COMMUNITY OF LLANRHIDIAN HIGHER**

Purpose:	To decide to re-make the Modification Order for the same purpose.
Policy Framework:	The Countryside Access Plan, Section 4.12.
Statutory Tests:	Section 53(3)(c).
Reasons for Decision:	(i) The original modification was rejected by the Planning Inspectorate. (ii) It has not been possible to resolve the anomaly by negotiation. (iii) A Modification Order has to be re-made due to the time that has elapsed since the first. This Committee has to re-determine the matter.
Consultation:	The landowners of Penyrheol and Caerau, Finance, Economic Regeneration and Planning.
Recommendation(s):	It is recommended that a Modification Order should be made to amend the written statement to describe Footpath No. 64 as passing via Penyrheol Farm as shown in the Definitive Map.
Report Author:	M J Workman
Finance Officer:	Kim Lawrence
Legal Officer:	S Richards

1.0 Background

- 1.1 On 6th August 2009 the issue concerning the report was submitted to the Cabinet Member for Economic and Strategic Development (as appended to this report). It highlighted the anomaly which exists between the depiction of Footpath No. 64 in the Definition Map and its description in the Statement.

- 1.2 On 5th November that year a modification was made to correct the error on the basis the Definitive Map is correct and so the description in the Statement was altered to reflect the alignment of the path shown in the Definitive Map.
- 1.3 The path is shown passing alongside Penyrheol Farm and the owners and occupiers objected on the basis the Statement reflects the correct position of the path.
- 1.4 As a result the Order was referred to the Planning Inspectorate which was rejected, but not on the evidence, rather that the Order should have included a plan showing the path and that the incorrect sub-section of the Wildlife and Countryside Act 1981 was quoted.
- 1.5 Issue was taken with the decision and some concession from officers within the Inspectorate that the Order as drafted could be acceptable. It was nonetheless returned to the Council on 8th October 2010 by the appointed Inspector with further advice from the Inspectorate received on 15th December 2010 and on 11th July 2011.
- 1.6 As the Order had been rejected, an opportunity arose to pursue an alternative means of resolving the problem as this had been previously suggested by the then Local Member. One option was to consider the possibility of diverting the path to a route that would be mutually acceptable to the owner, this Council and the public.
- 1.7 From 6th September 2011 until 20th March 2013, various attempts had been made to identify an alternative route which would be acceptable to both the objector to the original Order and the neighbouring premises, namely Caerau, over whose land the path is described in the Statement. The proposal was in effect to initially place the alternative path approximately along the boundary of the two properties, before bringing the path to the south of Penyrheol Farm into the "sunken lane". In the event, the owner of Penyrheol informed this Council in a letter dated 20th March 2013 that they are unable to consider a diversion of the path until the issue of the Modification has been determined.
- 1.8 As such the position now reverts to that of August 2009 when this Council decided the written statement should describe the path that passes alongside Penyrheol Farm. The reason for bringing the second report to Committee is twofold:
 - (a) Under the provisions of the 1981 Act, the date specified in the Order must not be more than 6 months before the making of the Order.
 - (b) Since the Order was made the objection letter set out a number of issues to which reference should be made before another decision is taken.

- 1.9 So if there is a resolution by this Committee to make an Order, the date specified in that Order should not be more than 6 months after that meeting.
- 1.10 Given the previous decision was made approximately three and a half years ago, a new resolution is needed.
- 1.11 Since the Order was made the objection letter made several points as to why the Order should have shown the public path via Caerau. Two additional unsigned statements were submitted, one from the uncle and one from the cousin of the present owner (born in 1922 and 1942 respectively). The former, who was born at Penyrheol Farm recalls the occasion when the funeral procession was diverted away from passing north alongside that farm which he states was due to the gradient of the track. He also stated he saw no one use the path via Penyrheol. The cousin said the southern part of the lane was almost impossible to walk due to springs and wells, but said cattle were taken this way although with difficulty, which is why in his opinion no one travelled that way.
- 1.12 The letter raised questions of the report.

In summary:

- (i) That owners of Penyrheol Farm deny having seen anyone use the path alongside their property and that is supported by the statements by the mother and aunt of the owner.
- (ii) That reference to Section 31 of the Highways Act 1980 is considered to be relevant by the Council, but there is no evidence of use of the path alongside Penyrheol. Consequently the section cannot be applied.

Comment - Reference to Section 31 was given to identify one of the means by which a public path may be presumed to have become dedicated. The report does point out that in this case the anomaly has stemmed from a conflict between the Map and Statement since the Draft Map and Statement was produced in 1954. Consequently it is not necessary to establish a minimum period of twenty years' use since 1954.

- (iii) That the report accepts there was rubble in the path between points B and G and so it should be established when this first prevented access to establish the first date the route was called into question.

Comment - The objector did not offer any date, as it would be they who presumably would know (if anyone) when this occurred. In any event, unless that obstruction occurred before 1954, then such a date would be irrelevant.

- (iv) There is no evidence of use throughout the twenty years immediately preceding the date the electric gate was installed across the path in 2004.

Comment - Again, there is no requirement to establish this is the case.

- (v) That there is no evidence of common law dedication.

Comment - This is an issue as to whether either one of the other of the routes were subject to such dedication.

- (vi) That there is no evidence of use since the land evaluation was undertaken as a result of Finance Act 1910.

Comment - This may or may not be relevant, depending on how much weight is given to the significance of this evaluation.

- (vii) That the owners of Penyrheol Farm were unaware of the series of reviews of the Definitive Map and Statement.

Comment - This would not be considered relevant, provided this Council's predecessors complied with the requirements of the National Parks and Access to the Countryside Act 1949, then it is incumbent upon those occupiers and owners of land at the time of the reviews to make their objections or representations known to their Surveying Authority.

- (viii) That because the funeral procession was diverted away from the path, this constitutes a challenge to the existence of the public way.

Comment - No date is given as to when this occurred, the reason given by the relation was the gradient and ground conditions were unsuitable for the procession.

- (ix) That too much weight is given to the depiction of the path in the Definitive Map.

Comment - The report has provided a balanced assessment within paragraph 10.1.

2.0 Conclusion

- 2.1 The evidence on the balance of probabilities that the public path should be described as passing via Penyrheol Farm has not altered by any information provided in the objection letter. Consequently the original resolution should stand.

3.0 Financial Implications

3.1 There are no financial implications with regard to this report.

Recommended:- That a Modification Order should be made to amend the written statement to describe Footpath No. 64 as passing via Penyrheol Farm as shown in the Definitive Map.

Background Papers: Row-92

Appendices: The report of 2009

Report of the Head of Legal and Democratic Services

Area 2 Development Control Committee

Date 23rd June 2009

PUBLIC FOOTPATH NO. 64

COMMUNITY OF LLANRHIDIAN HIGHER

Summary

Purpose:	To consider whether the depiction in the Definitive Map or the Statement for this path is correct.
Policy Framework:	Countryside Access Policy No. 4.
Reason for Decision:	That the evidence shows the path is correctly shown in the Definitive Map.
Consultations:	All the usual organisations have been consulted including all the owners and occupiers of the land; the Byways and Bridleways Trust; the Ramblers Association; the British Horse Society; the Commons Open Spaces and Footpath Preservation Society; the Countryside Council for Wales; G. Bligh (equestrian riders' interests); L. Locke (local representative of the Ramblers Association and Gower Society); Councillor R Lewis
Recommendation(s):	It is recommended that: (i) This Committee recommend to Cabinet that a Modification Order be made to correct the Definitive Statement and if no objections are made to confirm the same as an unopposed Order.

1. Introduction

This report deals with the discrepancy between the depiction of this path in the Definitive Map and the Statement which describes a different route. Because there is a conflict it is necessary to make a Modification Order to correct either its depiction or description. This is required due to this Council's obligation under the provisions of Section

53(c) to the Wildlife and Countryside Act 1981 to continually review and update the Definitive Map and Statement when it discovers such evidence. (See Appendix 1 for a fuller explanation).

DESCRIPTION OF THE ROUTE SHOWN ON THE DEFINITIVE MAP

1.2 Legal Principles

Under the provisions of the Wildlife and Countryside Act 1981 Section 53(2), this Council is obliged to amend the Council's record of public rights of way, known as the Definitive Map and Statement. Claims for additions to the Map and Statement are called "Schedule 14 applications" as they are made under this provision to the 1981 Act. They often are based on the public being able to demonstrate their long-term use of the path whether by showing:

- (a) the minimum period of twenty years, as is required by Section 31 of the Highways Act;
- (b) a greater or lesser period than twenty years but under common law;
- (c) the Council is also obliged to make amendments to the Map and Statement where it discovers evidence that shows a public path exists.

1.3 The manner by which the Definitive Map and Statement can be changed is by making a Modification Order, which modifies that Map and Statement. That Order will be subject to objections and representations but can only be confirmed by this Council if it is unopposed. If it is opposed the Order has to be referred to the National Assembly for Wales for determination.

1.4 Under the provisions of Section 31 to the Highways Act 1980 (Appendix 3) a public right of way will be deemed to have been dedicated to the public if a minimum period of twenty years uninterrupted use can be shown to have been enjoyed by the public provisions of Section 53(b) to the Wildlife and Countryside Act 1981 therefore apply (Appendix 1).

1.5 This twenty year period is calculated by counting retrospectively from the first occasion the public's alleged right to use the way was brought into question. This usually happens when the path is blocked by something like a locked gate or fence. When the twenty year period has been identified it is usually termed the "relevant period". If there is no physical barring of the way then the relevant period is counted retrospectively from the date a Schedule 14 application is made.

1.6 Another means by which a path may be presumed to have been dedicated is under common law (Appendix 4). In these circumstances

the landowner would have to show that he or she had not just acquiesced to public use but in some way facilitated or encouraged that use. The owner of all the land containing the claimed public path would therefore have to be identified but the period of use need not necessarily be twenty years and could be for a lesser period.

- 1.7 In addition, the Council may discover other evidence which suggests a public path exists. Under the provision in Section 53(3)(c)(i) to the Wildlife and Countryside Act 1981, a Council is obliged to make a Modification even if it is only reasonable to allege such a way exists (Appendix 1). Such evidence could include user evidence and/or documentary evidence.

The Present Position with Footpath No. 64

- 1.8 The issue is whether part of the length and position of footpath no. 64 as currently registered is correct. The Definitive Map shows the path via Pen-yr-Heol as shown on the attached plan no 1 from point C to point H. The statement which accompanies the Definitive Map suggests the path passes alongside Caerau via point A-D-E-F-H. When a conflict appears between the Map and Statement it is necessary to determine which is correct as the two of course should relate to the same route.
- 1.9 At the entrance to Pen-yr-Heol (at point C), public access is barred by an electric gate which was erected by the owners of this farm in 2004. The path is further obstructed by overgrown vegetation and rubble between point B and G. South of point H there is no defined path where the path crosses the northern part of the common as much of this area is overgrown.

Description of the Route as Referred to the Definitive Statement

- 1.11 According to the Definitive Statement the path is described as commencing east of Pen-yr-Heol Farm, but it is not more specific. Assistance can be obtained by reading the original description by the Parish Council which gave rise to the current statement. An explanation of the relevance of the Parish Card and earlier Definitive Reviews can be obtained in Appendix 5.
- 1.12 However not only does the "Parish Description" place the path via what is now Caerau (between points D-E), so does the "Parish Map". It is not clear from that map precisely which side of the property Caerau the path passed, but it rejoins the remaining length of footpath no. 64 where it proceeds south across the common.
- 1.13 Today there is no path via A-D-E-F-H in the position described in 1951. That route is blocked at the road at point A by a hedge which forms the field boundary at point A. At point D there is a fence and a small wooded area between D and the property of "Caerau". There is no

path or any form of access alongside this property, and a steep drop at point E. Access to the common is not possible at the present time although there is an overgrown gap at point F.

- 1.14 In reality, footpath No. 64 commences on the road from Three Crosses and Blue Anchor at the entrance to Pen-yr-Heol Farm as shown on Plan No. 2 at point C and proceeds via the farm in a southerly direction to cross Mynydd-Bach-y-Cocs Common. Footpath No. 65 branches off the path before the path divides again, prior to joining the road from Three Crosses to Cilonnen at point L.

The Evidence

- 2.1 The sources of information comprise various editions of Ordnance Survey plans, tithe plans and its Appointment, the Finance Act 1910, plans, apportionments and field book and accounts from members of the public who have either lived at or in close proximity to the path. The minutes for the previous Parish Council, Swansea Borough Council, Glamorgan County Council and Gower, Rural District Council meetings have been checked for the period when footpath no. 64 would have been considered by the Parish Council in the early 1950s.
- 2.2 There is no record of this path having been discussed at any of the four Councils during this period of time.

Ordnance Survey Plans

- 3.1 The depiction of paths on the various editions of these maps do not establish that a public right of way exists along any of the routes shown. It merely records what was a surveyable feature at the time of the survey. Consequently reference to these maps only assists in determining whether a particular path existed, for what period of time and in what position.
- 3.2 The earliest Ordnance Survey Map available is that surveyed between 1812 and 1814 at a scale of 2" to 1 mile. It was never published for sale but formed the basis of subsequent editions at the scale of 25" to 1 mile.

On this 1812/1814 edition Pen-yr-Heol Farm is shown together with a holding known as Hencae, which is no longer in existence but located at what would now be point B (Plan 1). A track is shown leading from point C to point B leading on south to Mynydd-Bach-y-Cocs Common to join the road from Three Crosses to Cilonnen. There is no such feature shown via A-D nor in fact are there any buildings depicted alongside this route. At this scale, the depiction of this track suggests it was a prominent feature and the fact it connects one recorded highway to another suggests it formed a link between the two.

- 3.3 The next earliest survey is a plan produced under the Tithe Commutation Act 1836 and dated 1847 for the Parish of Llanrhidian Higher. The relevance of the evidence of Tithe and the Apportionment is contained in Appendix 6. The track C-H (Plan 1) is shown on this plan as a route widening as it proceeds south toward the common. It is excluded as titheable as it was not productive land and referred to as "commonable land". This either suggests it was used as some form of road by the public or that it was an access way for those who had rights to graze livestock on the common.
- 3.4 The First Edition of the Ordnance Survey was published in 1879 and shows both the route C-H and A-D-H (Plan 1). The path passing via Pen-yr-Heol being the wider of the two. There are two paths shown passing either side of the property, known as Caerau. The Second and Third Edition of the Ordnance Survey plans shows both the routes C-H and A-D-H, although the path between A-D-H is shown as passing via the western side of Caerau and marked as "Footpath"
- 3.5 No fourth edition was ever published at the 1:2500 scale as confirmed by all the map holding institutions in the UK.
- 3.6 The 1938 Ordnance Survey edition at a scale of 6" to one mile shows the same features as the third edition and the current property of Caerau being marked as Pant-yr-Heol.
- 3.7 The Ordnance Survey 1970 edition at the scale of 1:2500 does not show the path A-D-H (Plan 1) and the property that was shown as Pant-yr-Heol has been renamed "Caerau". A track is shown between A and Caerau but no further. The route alongside Pen-yr-Heol is still shown as before.
- 3.8 An additional feature common to the editions of 1914 and 1970, at the scale of 1:2500, is a line across the track at point G and in the 1970 edition a line across the track at point C (Plan 1). The significance being that this would either represent a gate or fence or some other form of barrier.
- 3.9 There is also a 1913 edition of the Ordnance Survey with additions of 1948 at the scale of 6" to one mile. This means in 1948 additional or updated features were marked on the plan such as name changes, new buildings added or those no longer in existence removed, but no new survey undertaken. The significance being that the features shown in 1948 occurred three years before the Parish Council surveyed the route. No path is shown via Caerau, although that property is also and confusingly named Pen-yr-Heol.

Summary of Map Evidence

- 3.10 It appears therefore that the map evidence shows the route the Parish Council identified as a public path alongside what is now "Caerau" was not in existence when they surveyed the paths in 1951.

However, the base map the Parish Council used for their survey was the 1913 edition with additions in 1938 which may explain why they drew the line of the path via Caerau because it was marked as a footpath on that edition.

Finance Act 1910

- 4.0 The passing of this Act meant that landowners had to pay a tax on the value of their land, which was payable every time the land changed hands (for a fuller explanation see Appendix 7). The relevance being that if any public right of way crossed land, the owner could obtain a deduction on that tax. To make a false declaration would constitute a criminal offence.
- 4.1 The apportionment which is a ledger listing by number all the farm holdings, records each field and whether such dedications were made. The fields under the ownership of this farm are shown on a Second Edition Ordnance Map.
- 4.2 Entry No. 98 for Pen-yr-Heol was listed as a "house garden, agricultural land, buildings equalling 15 acres in total". A £2.00 deduction was made for the existence of a public right of way. There is no other path shown other than that currently registered, which is shown as a separate and clearly identifiable strip of land adjacent to the parcel for Pen-yr-Heol. Whilst this may suggest this track was not part of the farm, it provides valuable information because any public way would usually not be recorded as part of the parcel of land. The farm Pen-y-Graig immediately to the west also has a deduction made in its value for the existence of a public right of way. On its western boundary there is also a registered public footpath no. 66. Consequently there is justification for interpreting this deduction for the route currently registered as Public Footpath 64.
- 4.3 Entry 94 relates to the holding for Pen-yr-Heol and what is now Caerau. A further entry makes reference to a deduction as having been made under the tithe apportionment. One possibility is the deduction concerned the road from Three Crosses to Blue Anchor which divided the fields belonging to Pant-yr-Heol at that time.

Interview With Residents And Previous Occupiers

- 5.1 The current owners and occupiers of Pen-yr-Heol Farm, Mr & Mrs Jones have lived at this address since approximately 1974. They say their deeds describe the path passing alongside their property as a

“horseway”. There is no statutory definition for “horseway” and so it could imply equestrian rights for the public or a way for those who have a licence or permission to ride and lead horses and possibly other animals to the common.

- 5.2 The current owners said they have seen very few people use the path, but by implication concede it has been used by the public. However they placed an electric gate at the entrance at point C in 2004 as they have been burgled three times. Prior to this time there was a wooden gate but it was never locked.
- 5.3 In their view it is a route that has been used by previous generations to drive cattle from and to the common.
- 5.4 They pointed out there is a spring in the vicinity of point B (Plan 1) which is why the track has always been boggy. This is a reason why they consider the alternative route via Caerau would have been used by the public as a footpath.
- 5.5 The mother of Mr Jones of Pen-yr-Heol was interviewed. She lived at Pen-yr-Heol from birth in 1931 until she moved in 1952. She said she has been visiting the farm on a regular basis throughout her life and in her opinion no member of the public has used the path since her childhood.
- 5.6 Mrs Jones recalls a double gate at point A (Plan 1), and said she was about five years old when it was removed and the resulting gap replaced by an earth bank on which the hedge later developed. Mrs Jones said the path to Pant-yr-Heol existed as a vehicular route until it was changed to the alternative track J-K at the time the name of the property was changed to Caerau.
- 5.7 When she was young, Mrs Jones remembers a small gate at point F (Plan 1) which provided access to the common via the path which she recalls passed to the eastern side of what is now Caerau, formerly Pant-yr-Heol.
- 5.8 Mrs Jones' elder sister was also interviewed. She lived at Pen-yr-Heol from birth in 1920 until 1976. She does not remember the public using this path from C-B-H (Plan 1). She does remember a gate and stile at the beginning of the path at point A and confirmed there was a path which passed alongside the eastern side of what was then Pant-yr-Heol before accessing the common via a gate point F.
- 5.9 She and her sister recall there was rear access to this property which is why on some maps, there appears to be a path on its eastern side. Also the steep drop that exists today at the southern side of the property has been caused by the construction of a wall and bank, yet previously it was possible to walk via the side of this property as it was a gradual slope.

- 5.10 She recalls her mother taking a horse and trap via the lane C-H and confirmed there was a gate across the track at point G put there by her grandfather, although whilst never locked, was usually tied . The path had to be kept stock-proof as he kept cattle in the fields to the south. This may account for why the line shown across the path at point G first appeared on the 1:2500 scale of 1914 edition plan and is absent on earlier editions.
- 5.11 Both sisters recall a funeral procession being refused access by their parents via the path C-H and that it was diverted via A-F. However they were unable to say when this occurred.

Summary Of Evidence from Mr And Mrs Jones and Mr Jones' Mother and Aunt

- 6.1 It appears a gate existed at point A, but was removed in about 1936. This would account for why the path was still shown on the 1938 addition to the 1913 edition but absent on the 1948 addition.
- 6.2 Both sisters are able to give an account as to why there appears to be a path passing either side of the property at Pant-yr-Heol on the earlier Ordnance Survey plans and why there is a steep drop today on the southern side of that property, giving the impression no path could have existed at this point.
- 6.3 Both verify there was access to the common via a gate at point F. Mrs Jones the younger sister can also offer an explanation as to why the path via A-H disappears from the 1948 addition and why the new access track to Caerau J-K-E appears on the 1970 edition. It was created by the new owner of that property who was responsible for changing its name from Pant-yr-Heol to Caerau.
- 6.4 The current owners of Pen-yr-Heol, who have been living at that property since 1974 say the path had been used on an infrequent basis until they placed an electric gate across the northern entrance to the track in 2004. Whilst this conflicts with Mr Jones' mother and aunts' accounts, it highlights use was infrequent, given both his mother and aunt visited Pen-yr-Heol, and never saw anyone pass by.

Evidence from Owners and Occupiers of Caerau

- 6.5 The present owners and occupiers of Caerau, Mr & Mrs Lott, were interviewed. They have been resident at that property since 1967. Mrs Lott understands there were three cottages at the site of Caerau and the track A-D-E (Plan 1) merely provided access to those cottages. Mr Lott confirmed there used to be an access directly to the common via point F via what was a wooden gate, but he replaced it with a metal gate. It is now an overgrown gap with much of the northern field in the common overgrown and almost impenetrable as evidenced by a site

visit on the 16th October, 2007. Mr Lott said it was about two years ago when cattle were last grazed on the common which is why growth has not been kept in check.

- 6.6 Mrs Lott said when she moved into her property there was no gate at point A nor any path from A-D, nor has she seen anyone attempting to obtain access via her property.
- 6.7 Both Mrs Jones' mother and Mrs Lott were involved in a private dispute over whether the track via C-B formed part of the access to Caerau. The Hearing was held in either 1973 or 1974 and various witness statement taken which may have provided information on what public access had been enjoyed. However the Court no longer has the record of this case and Mrs Lott has been unable to produce any records.
- 6.8 Mrs Lott said she received a visit from the Parish Council, who informed her the track C-B was a bridleway although she could not say when this occurred.

Summary of Evidence from Owners of Caerau

- 7.1 Mrs Lott has confirmed there has been no gate at point A (Plan A) on the path since 1967, which one would expect given the route was no longer shown on any of the O.S. maps after the 1938 addition. Mrs Lott said that there was however a gate at point F which was in existence in 1967 so there had been access to the common from Caerau and probably Pant-yr-Heol before it was renamed Caerau. However, whether the general public made use of it is unknown.

Owner/Occupier of Foxwood

- 8.1 Mr Zorko lives in Foxwood which is the property immediately adjacent to the field which contained the route A-D (Plan 1). He has been resident at the house since 1997 and said there has been no gap or gate in the field boundary at point A since he has lived at that property.

Overall Summary

- 9.1 If the Definitive Map and Statement is to be altered, then there needs to be sufficient evidence to show an error was made when the path in question was included into the Map and Statement. The relevant date for the 1st Definitive Map is 1954 which was based on all the information and surveys undertaken by the then Parish Councils in around 1951. The question therefore is was there already a public path via the route C-B-G-H in 1954 or via A-D-E-F-H.
- 9.2 As highlighted in Appendix 2, the Court of Appeal has established that there must be an initial presumption that if there is an entry of a path into the Definitive Map that right exists.

- 9.3 Unless there is evidence the public's use has been challenged, there would be a presumption that the way has been in existence and had by 1954 been dedicated either under what is Section 31 of the Highways Act 1980 or under common law. Under common law the period of use which could give rise to a presumed dedication could be for a period greater or less than twenty years.(Appendix 4)

Evidence in Favour of its Retention as shown in the Definitive Map

- 10.1 (a) The map evidence shows it has been in existence since 1814;
- (b) Some form of barrier, probably a gate was placed across at southern end by 1914 but never locked;
- (c) The route is highlighted on the Tithe map as untithable in 1847;
- (d) A deduction was claimed and granted to the landowner of Pen-yr-Heol when the 1910 Valuation was undertaken. It specifically stated such a deduction should be made for the existence of a public right of way at Pen-yr-Heol Farm. It would have been a criminal offence to make a false declaration to the Commissioners;
- (e) Mrs and Mrs Jones stated they have seen some people use the path prior to 2004 but an infrequent and low level of use;
- (f) No challenge was made to its entry and its depiction in the list and subsequent drafts of the Definitive Map and Statement in 1955, 1960, 1971 and 1988 by the former residents of Pen-yr-Heol, no member of the public, nor the Parish Council.

Evidence in Favour of Changing the Definitive Map

- (a) The previous occupiers of Pen-yr-Heol say they never saw anyone use the path;
- (b) A funeral procession was refused access on one occasion.
- (c) It was shown on the Parish Map as a public footpath, although it is not clear from this map which side of Pant-yr-Heol it passed;
- (d) The Parish Card drafted in 1951 implies the path passed Pant-yr-Heol route;
- (e) The path via Pant-yr-Heol is shown from 1879 until 1938 on the Ordnance Survey Plan. The previous occupiers of Pen-yr-Heol recall a gate/stile at point A until 1936 and a gate at point F (Plan 1) although could not say when this was removed.

Conclusion

- 11.1 The path via Pant-yr-Heol (now Caerau) had ceased to exist by 1948 which raises the question why did the Parish Council record this path as a public way when they surveyed the area in 1951.
- 11.2 If the path via Pant-yr-Heol (now Caerau) ceased to exist by 1954, but the Parish Council considered such a right existed, then the blocking of this public right of way was challenged either by 1936 on the evidence of Mrs Jones or between 1938 and 1948 according to the map evidence. This implies there had been no use for at least nine years prior to 1954, but possibly as much as eighteen years.
- 11.3 There is far less evidence to show a public path existed via Pant-yr-Heol (now Caerau) in 1954 than via Pen-yr-Heol. Whatever the reason for the Parish Council showing the route via Pant-yr-Heol in 1951, this route did not undergo the four successive reviews that the currently registered path did as it was never shown on the Definitive Map. Neither the previous owner and occupiers of Pen-yr-Heol Farm objected nor the Parish Council who could have identified the error if they considered one existed. More crucially the previous occupiers and owners of Pen-yr-Heol gave an undertaking to the Commissioner that such a public right did exist via their farm at the time of the 1910 Valuation. Furthermore, previous owners of the same farm excluded the lane when the Tithe awards were made in 1847.
- 11.4 Therefore a modification order should be made to correct the description of this path in the Statement to reflect its correct position as shown in the Definitive Map.
- 11.5 There are no financial implications to this report.

Recommended: That this Committee recommend to Cabinet that a Modification Order be made to correct the Definitive Statement and if no objections are received to confirm the same as an unopposed Order.

APPENDIX 1

WILDLIFE AND COUNTRYSIDE ACT, 1981

Section 53 Duty to keep the Definitive Map and Statement under continuous review.

- (2) As regards every definitive map and statement, the surveying authority shall keep the map and statement under continuous review and as soon as possible after the occurrence of any of [events specified in sub section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of the event.
- (3) The events referred to in sub section (2) are as follows:
 - (b) the expiration, in relation to anyway in the area to which the map relates of any period such that the enjoyment by the public
 - (c) the discovery by the Authority of evidence which (when considered with all other relevant evidence available to them shows:
 - (i) that a right of way which is shown on the map and statement subsists or is reasonably alleged to submit over land in the area to which the map relates, being a right of way to which the part applies.

APPENDIX NO. 2

THE BASIS UPON WHICH A MODIFICATION ORDER MAY BE MADE

1. This Council must be satisfied that the existing entry in the Definitive Map and Statement is incorrect. This means that the evidence should show a mistake was made at the relevant date of the First Definitive Map, which in this case is 14th September 1954.

The provisions of Section 32(4)(b) to the National Parks and Access to the Countryside Act 1949 required the Authority to produce a Definitive Map and Statement and also contained in the Section 56(1)(b) and (d) of the Wildlife and Countryside Act 1981. Namely, "the Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein to the following extent, where the map shows a footpath the map should be conclusive evidence that there was at the relevant date a highway as shown on the map...". So if a challenge is being made to an entry to the Map and Statement the evidence must show a mistake was made at the earliest relevant date which is the first date the path was recognised as having legal status.

3. The question therefore is what is considered sufficient evidence to show that such a mistake had been made. The 1981 Act permits a correction to be made when evidence is discovered and considered with all other relevant evidence and so a decision has to be made on the balance of probabilities that an error had been made.
4. The real difficulty lies when the evidence upon which the entries were made into the Definitive Map have been lost or that record is incomplete. This is a common predicament that this and other Authorities face, as once the procedure for finally showing a public right of way has been completed the conclusively of the Map and Statement would have led many Authorities to be less concerned on retaining the reasons for its final inclusion. Nonetheless as a result of previous case

concerning R -v- S for Environment ex parte Simms and Burrows (1990), such deletions, or downgradings and other amendments are deemed possible.

5. The issue therefore is what weight is to be given to the entry into the original map especially when the evidence which led to its inclusion is absent. It was a document prepared pursuant to an Act of Parliament and which was to be an authoritative record, it required various stages leading up to its preparation to be satisfied and gave landowners several opportunities to challenge any proposed entry. It should also be borne in mind that the map was prepared at a time when one could find local people whose memories went back very much further than today's residents.

6. This issue was addressed at the Court of Appeal concerning the case of Trevelyan -v- Secretary of State for the Environment (2000). It concluded there must be an initial presumption in favour of the existence of that public right of way and unless there is evidence to the contrary, it should be assumed the proper procedures were followed and that evidence did exist which made it seriously arguable that the right subsisted at the relevant date, even if no trace of that evidence survives.

APPENDIX 3

HIGHWAYS ACT, 1980

Section 31. Dedication of way as a highway presumed after public use for 20 years.

Where a public way over land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption of a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient that there was no intention during this period to dedicate it.

For Section 31(1) Highways Act, 1981 to operate and give rise to a presumption of dedication the following criteria must be satisfied:

- the physical nature of the path must be such as is capable of being a public right of way
- the use must be 'brought into question', i.e. challenged or disputed in some way
- use must have taken place without interruption over the period of twenty years before the date on which the right is brought into question
- use must be *as of right* i.e. without force, without stealth or without permission and in the belief that the route was public
- there must be sufficient evidence that the landowner did not intend to dedicate a right of type being claimed
- use must be by the public at large

APPENDIX 4

DEDICATION UNDER COMMON LAW

No minimum period of use is required, but the claimants must show that it can be inferred by the landowners conduct, that he or she had actually dedicated the route. Use of right, if not of itself necessarily sufficient. Under statute, twenty years, if proved to have been uninterrupted will be sufficient to show presumed dedication.

Under common law it is still possible that use was due to the landowners tolerance rather than because that landowner had intended to dedicate. Consequently there needs to be evidence that the landowner (or owners) or whatever period is being considered, acquiesced to that use and took measures to facilitate public use.

Obviously this means the landowners have to be identified and evidence that they wished to have the route dedicated to the public.

APPENDIX No. 5

HISTORY OF THE COMPILATION OF THE DEFINITIVE MAP AND STATEMENT

1. The National Parks and Countryside Act of 1949 placed an obligation on all Councils to produce a Definitive Map and Statement. Parish Councils were given the task of surveying all routes they considered may have legal status and in the case of Llanrhidian Higher that was undertaken in 1951 by the production of what has come to be known as the Parish Map (at the scale of 6 " to one mile) and the all too often rather brief description of the path contained on small cards also known as the Parish Card. Some of the descriptions on these cards were more comprehensive than others but in combination with the paths depiction in the "Parish Map " provide a useful record of what routes were considered to have public path status by 1954.
2. The information was passed on to the former Glamorgan County Council who collated the information and produced what was the first Draft Definitive Map which in their opinion reflected routes considered to be public rights of way on 14th September 1954 which became the relevant date of the first Definitive Map published in 1970.
3. The legislation required that the information gathered should be the subject of a review which would allow the public and landowners to make representations or objections to the inclusion or absence of routes in the Draft and Definitive Maps and Statements as published. The result was the production of the initial Draft Map and Statement published in 1955, a Provisional Map and Statement published in 1964, the first Definitive Map and Statement published in 1970, the Draft Special Review of 1971 and the current Definitive Map and Statement published in 1986.

APPENDIX 6

TITHE APPORTIONMENT AND PLANS

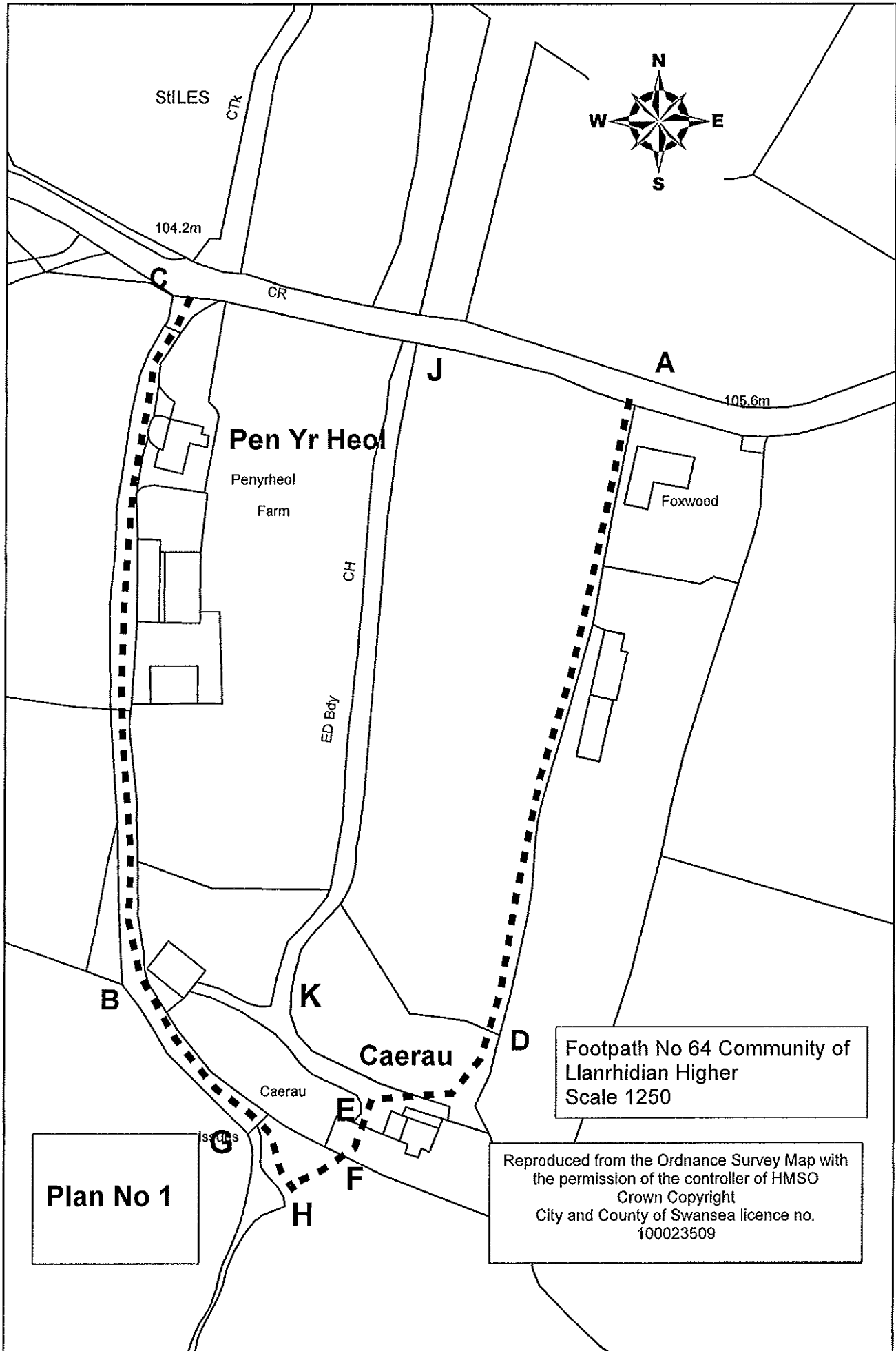
Until the nineteenth century most land was subject to a church tithe which was one tenth of the annual produce of the land which had to be given to the church. The Tithe Commutation Act of 1836 provided that all tithes were converted into a fixed money rent. All land was assessed for the value of its average produce and each field to be accurately measured and recorded in an apportionment book along with the tithe plans. It was prepared under statutory authority by the Tithe Commissioners to show all cultivated land arable and pasture because tithe was payable on land which produced crops. It also had to show waste land and definitive roads which did not produce crops because tithe was not payable on these. If a road or public way passed through the land, a landowner may well require it to be shown so as not to pay tithe on it. As far back as 1989, the Department of Environment Guidance Notes stated "although solely concerned with identifying titheable lands, the maps do mark roads quite clearly as untitheable, thus can provide useful supporting evidence when taken in conjunction with appropriate schedules".

APPENDIX 7
EXPLANATION OF FINANCE ACT 1910

This provided for the levying of tax upon the incremental value of the site itself excluding any increase in value arising from things on the land such as crops and buildings. The tax was to be paid every time the land changed hands.

Land Evaluation Officers were appointed whose task it was to plot and record every piece of land. Their concern with rights of way was in assessing the value of the land but a deduction was made for the amount by which the gross value would be diminished if sold subject to any public rights of way.

Where it came to the disposal of land, a landowner could not claim a deduction if the deduction could have been but was not claimed on the original site value. It should also be noted that valuers would have been reluctant to show any land as public ways if the land could be assessed for duty, indeed, they would have been negligent to do so.



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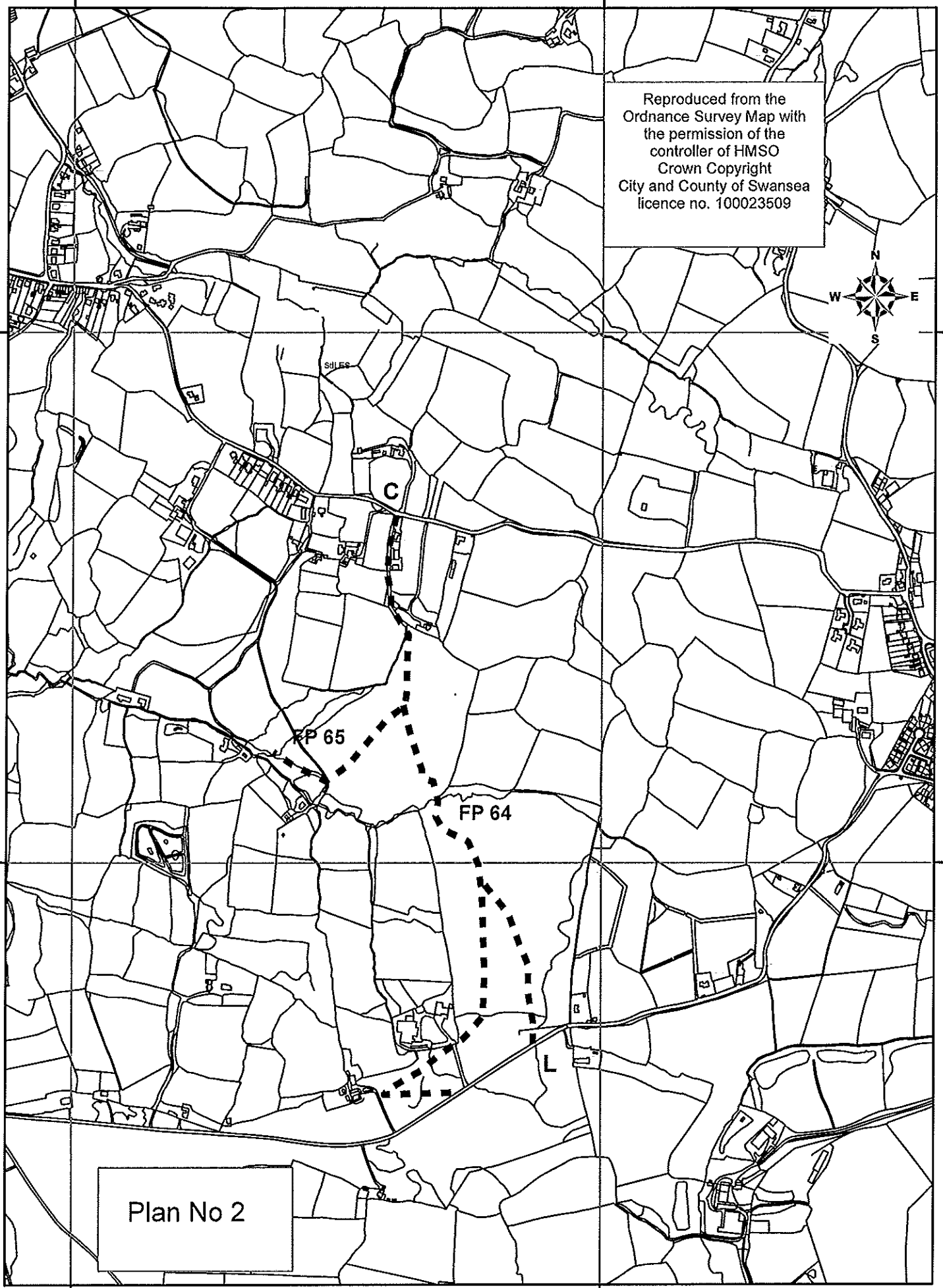


1949 13.124329

1949 13.124329

1939 13.124329

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Plan No 2