

## Report of the Head of Legal Democratic Services and Procurement

### Rights of Way and Commons Sub-Committee - 23 April 2014

#### ALLEGED PUBLIC FOOTPATH FROM FOOTPATH NO. 11 TO FOOTPATH NO. 10 - COMMUNITY OF ILSTON

<b>Purpose:</b>	To consider whether a public footpath exists between points A-B-C
<b>Policy Framework:</b>	The Countryside Access Policy No. 4.
<b>Statutory Test</b>	Section 53(2) and 53(3)(b) of the Wildlife and Countryside Act 1981
<b>Reason for Decision:</b>	There is insufficient evidence of continuous use by the public at large.
<b>Consultation:</b>	The Open Spaces Society, The British Horse Society, The Ramblers Association, Community Council, Previous Local Representative of the Ramblers Association, The Local Member, Somerset Trust, Nicholaston Farm, Gelli Deg (two residents), Gower Commoners Association.
<b>Recommendation(s):</b>	It is recommended no Modification be made.
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### 1.0 Introduction

- 1.1 An application was submitted in 2000 to register the path shown on Plan No. 1 as a broken line between points A-B-C. The claim was supported by seven user evidence forms although only two people from that number are still remaining in support. An additional nine people submitted user evidence forms in 2009. The eleven people all claim to have used this path in excess of twenty years up until 2009.
- 1.2 The basis of the claim is that there is sufficient long term use to raise the presumption the path has been dedicated to the public. Appendix 1 includes

the relevant provisions and tests that the Council is required to consider under the Wildlife and Countryside Act 1981. They are twofold in that an order could be made on the balance of probability that there is sufficient evidence to show the path exists. Alternatively, that it is only reasonable to allege such a public path exists. If the latter test is to be satisfied, then those alleging the status of the path, must initially satisfy the contention that the path could have become dedicated. To rebut this presumption the objector must provide irrefutable evidence that such a presumption could not have taken place. If that cannot be done then an order should be made and the evidence tested before an Inspector, who would then have to satisfy him or herself of the higher test, that the path does exist on the balance of probabilities.

1.3 Appendix 2 includes Section 31 which sets out the tests which are required to satisfy the twenty years uninterrupted period of use under the Highways Act 1980.

1.4 Appendix 3 sets out the alternative means by which such a dedication could be inferred under common law.

## **2.0 The Path**

2.1 The path appears for most of its length as a narrow worn earth track reflecting pedestrian use over a grassy slope. The claim was made as a result of earth being dumped over the path at approximately point B in 1999. However, it is not clear for how long this remained but evidently it was interpreted as a challenge to the public's use of the way. Even if it was not intended to be a challenge, it is unclear if this interrupted the use of the path. Consequently, due to the uncertainty as to how to interpret this event, the date of the application in 2000 could be taken to call the existence of the alleged public path into question, therefore the relevant period is 1980-2000.

2.2 Between points A and B, the path passes over a rural common registered as Unit CL8. The public had no access rights across the common until it was designated as part of the access land in May 2003, as a result of the Countryside and Rights of Way Act 2000. Plan No. 2 shows the extent of the access land in relation to the claimed public path. Any access enjoyed by the public after May 2005 would not count as being "as of right". Section 13(2) of the Countryside Act 2000 prevents use of a route across access land as giving rise to a claim. This includes claims based on common law or under section 31 of the Highways Act 1980. Nonetheless, as the date of the application precedes the designation of the access land, the earlier date must be taken to count as the first occasion the existence of the right of way was called into question.

2.3 Of the eleven, ten claim to have made use of this path from 1980-2000. Of these, four have said they first started making use of the path in the 1970s, one from in the early 1960s and another quoted 1946. This provides some evidence of the even longer term use of the path.

## **The Evidence**

- 2.4 There are currently two people who reside at properties in close proximity to the path upon whom the Council could rely, in addition to another who lives within the area. Other than these three, all other eight claimants are long term visitors to the nearby campsite and use this path during their stay in the summer.
- 2.5 Two couples are from Cardiff, a family from Northampton and one person is from Derby. Use is therefore confined by them to a limited period each year. Whilst the two local residents referred to above live in close proximity to the path, it is questionable whether they could be said to represent the general public. The concept of special user is set out in Appendix 4. At the present time the Council has a signed statement taken from one of the more recent supporters in 2009, and three additional statements made in 2000, one of whom is the applicant, who has moved out of the area.
- 2.6 The issue is whether the degree and extent of use would satisfy the requirements of Section 31 of the Highways Act 1980. If the use by the two referred to above were discounted then, eight do not use the path for the majority of the year. Therefore the available evidence that the path would have been subject to continuous use by the general public can not be qualified. Even if that evidence could show otherwise there is the issue as to whether those who live away could be relied on to continue to support and provide additional evidence at any subsequent hearing or public inquiry.
- 2.7 There is no registered owner of the land crossed by the path, but representations have been received by the owners and occupiers of one of the nearby farms. They have stated they have an interest in the land and it is their view no such public way exists, their comments are as follows.
- (i) They have regularly cleared the field by cutting back the vegetation which is why the path remains accessible.
  - (ii) There is already a defined footpath to the north.
  - (iii) There was no Parish record of a right of way prior to 1954 (where any such record should have been kept) or subsequent to that time.
  - (iv) The First Definitive Map was produced in 1954 and there was nothing shown on that nor indeed on any subsequent maps of a bridleway or public right of way.
  - (v) In view of the fact that nothing has previously been recorded, they fail to see how any public right of way exists on what is public open space. Consequently, there is no existing statutory right of access.
- 2.8 Regarding points (ii),(iii) and (v), a public right of way can come into being after the relevant date of the Definitive Map. Regarding (iv) it is possible the claimed public path is a variation of that shown on the first Definitive Map as

discussed below. In addition and in respect of (v), only the section A-B crosses access land but the statutory right of access across only came into existence along the path via A-B since May 2005.

- 2.9 On a site visit in September 2013, one of the owners of the neighbouring farms identified the position of a former ditch that was excavated by his father sometime in the 1980's, to divert the water away from their fields to the south running off Cefn Bryn. In addition a ditch was similarly dug by a neighbouring property in 1999 to also divert the same run off away from their premises. It is suggested that these ditches made walking along the line of the path difficult if not prevented continued access. As such it is possible that these ditches could have interrupted use, but there has been no further evidence to support this contention.
- 2.10 Ilston Community Council have stated they consider this path is a public right of way, but have not provided any evidence.

### **3.0 Documentary Evidence**

- 3.1 The process that was followed to produce the current Definitive map and Statement is contained in Appendix 5. The Parish Map as drafted by the Council of Penmaen identified a path A-C as a probable public one but it was never shown on any of the draft maps nor was it within that Parish. The path fell within the Parish called "Lands Common to the Communities of Llanrhidian Higher and Lower, Nicholaston, Penmaen, Penrice and Reynoldston" for which there was no Parish Council.
- 3.2 The bold line shown on the attached plan was however shown on all the four editions of the review Maps, that is the Draft, Provisional, First Definitive and Special Review Maps. It is difficult to say whether the claimed public path is that which is shown on these Maps, but it is possible, given the scale of 1:25000 that was used to draw these four Maps.
- 3.3 Both the path shown as a bold line and the Parish Route appear as surveyable features on the first, second and third edition of the Ordnance Survey. A site visit in November 2008 revealed a route via that shown on the Parish Survey, but in May 2013 it was noted to be overgrown with bramble, possibly as a result of the time of year.
- 3.4 From at least the 1878 Ordnance Survey until the 1913 the field containing the path shown on the earlier editions of the Ordnance Survey was divided into three. It was only after the two field boundaries were removed that the alignment of this earlier path appears to have been changed to that being claimed. Appendix 6 provides further details.
- 3.5 It is therefore possible that the claimed public path was that previously aligned via the route shown on the draft maps and / or that shown on the Parish Map, were intended to be recognised as a public path. However, there was no Parish Council for the area containing the path and no action was taken by the neighbouring Parish Councils of either Nicholaston or Penmaen to

determine which (if either) should be recognised. Further details on the involvement of these Councils can be found under Appendix 7.

- 3.6 The current landowners of the adjacent field and who object to the claim, consider there had been a dispute over the ownership of this field between the Somerset Trust and the Penrice Estate. That if the latter had an interest in the field they would have objected to the path being shown on the drafts to the Definitive Map. There is no record that any objections were made to these earlier draft maps. Also the Penrice Estate plans dated 1782 and 1814 would appear to rule out it ever fell within the curtilage of their Estate

#### **4.0 Consultations**

- 4.1 All the usual organisations, individuals and the Local Member have been contacted but the only responses received are referred to in paragraphs 2.2 and 2.3. A site meeting was held with those who have managed and maintained the field containing the path concerned.

#### **5.0 Summary**

- 5.1 There is evidence that the claimed public path has been in use since at least the 1940s and that the path appears to have been available for twenty years prior to 2000 by at least ten people.
- 5.2 It was not the path identified by the Parish Council of Penmaen, although they were not responsible for surveying the paths in this neighbouring Parish. However it is possible it was the path shown on all four editions of the earlier drafts to the Definitive map and on the three earlier editions of the ordnance survey.
- 5.3 The objector who has expressed an interest in the land has not provided any conclusive proof to show why the path could not have become dedicated since 1954.
- 5.4 To make a Modification Order the lower test is whether it is reasonable to allege a public way subsists (see paragraph 3(c)(i) of Appendix 1). This would be on the condition the general public have enjoyed a minimum period twenty years uninterrupted use and that use has been widespread. Secondly, that the landowner has not been able to adduce any irrefutable evidence that he or she had no intention to dedicate the path throughout the relevant period, in this case 1980-2000.
- 5.5 The issue therefore is whether:
- (a) a modification can be made based on the user evidence of a path that came into existence from approximately the 1940's; or
  - (b) on the possibility it is the same path which has been shown on the earlier reviews of the Definitive Map and Ordnance surveys and was simply omitted from the last edition.

- (c) on the basis the use of the later path was enjoyed on the premise that such a right always existed and so the public accepted the variation to that earlier path.

## **6.0 Conclusion**

- 6.1 (1) It is possible this route was that shown on all the earlier drafts of the Definitive Map but for some unknown reason, was never included into the current one.
- (2) It is also possible the path that is claimed, reflects a variation of the route that was shown on the earlier edition of the Definitive Map and was intended to have been shown on the current edition of the Definitive Map. However the path is not shown on the current Definitive Map and so there can be no presumption that its existence on the earlier drafts is conclusive evidence of its status of as public path.
- (3) Those who use the path and could be said to represent the public at large do not live in the vicinity of Gower and their use is confined to their visits whilst on holiday. Therefore in themselves they cannot establish continuous use. The two who live in close proximity and who can show the current path has been open and available for use throughout the relevant period do not represent use by the public at large.
- (4) The user evidence that is available and upon which this Council would be dependant, would not be sufficient to satisfy the provisions of Section 31 of the Highways Act 1980.
- (5) At this stage the objector has not provided any irrefutable evidence to show why the path, as claimed, could not have become dedicated during the period 1980-2000. However, the application has not shifted the burden of proof to the landowner (whoever that may be) to rebut the claim. So, accordingly the lesser test under Section 53(c) it is not possible to satisfy the lower test, which is that "it is reasonable to allege such a public path exists".
- (6) The Council is therefore not obliged to make a Modification Order, on the evidence that can be relied upon. Should a fresh application be made with greater supporting evidence then the matter would have to be re considered.

## **7.0 Equality and Engagement Implications**

- 7.1 The procedures and tests that are applicable to determine such an application do not require an equality and engagement assessment.

## **8.0 Legal Implications**

- 8.1 There are none other than those contained in the report.

## **9.0 Financial Implications**

9.1 There are no financial implications to making a Modification Order.

### **Background Papers:**

ROW-000027.

### **Appendices:**

Appendix 1 - Relevant extract from the Wildlife and Countryside Act 1981.

Appendix 2 - Highways Act 1980.

Appendix 3 - Dedication under Common Law.

Appendix 4 - Special User Group.

Appendix 5 - History of the compilation of the Definitive Map and Statement.

Appendix 6 - History of the Depiction of a path close to or along that being claimed.

Appendix 7 - Previous involvement of Nicholaston Parish Council.

Appendix 8 – Plan No.1

Appendix 9 – Plan No.2

**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:

(a) as soon as reasonably practical after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in sub-section 3; and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

(3) The events referred to in sub section (2) are as follows:-

(b) the expiration, in relation to any way in the area to which the map relates of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway;

(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 not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A a byway open to all traffic;
- (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
- (iii) that there is no public right of way over land shown in the map and statement as a highway of any description ,or any other particulars contained in the map and statement require modification.

**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 evidence 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 insufficient evidence that the landowner did not intend to dedicate a right of type being claimed
  - use must be by the public at large
- (i) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such

that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A a byway open to all traffic;

- (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
- (iii) that there is no public right of way over land shown in the map and statement as a highway of any description ,or any other particulars contained in the map and statement require modification.

**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. User of right, is 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) for 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.

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 is not of itself necessarily sufficient as opposed to section 31 of the Highways Act 1980 where after 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) for whatever period is being considered, acquiesced to that use and took measures to facilitate public use.

This means the landowners have to be identified and that there is evidence to show they wished to have the route dedicated to the public.

**SPECIAL USER GROUP**

- (a) The Planning Inspectorate has produced advice on this matter in that they say there is no strict legal interpretation of the term 'public'. The dictionary definition being 'the people as a whole' or 'the community in general'. Arguably and sensibly that use should be by a number of people who together may be taken to represent the people as a whole/the community.

However, Coleridge L J in R -v- Residents of Southampton 1887 said that "use by the public' must not be taken in its widest sense - for it is a common knowledge that in many cases only the local residents ever use a particular road or bridge. Consequently, use wholly or largely by local people may be use by the public as depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local people as a whole/the local community".

- (b) In contrast to this view was the decision made by Lord Parke in Poole -v- Huskinson 1834 who concluded: "there may be dedication to the public for a limited purpose...but there cannot be dedication to a limited part of the public". This case was quoted by an Inspector in 1997 appointed to consider an application to add a public bridleway to the Definitive Map for North Yorkshire County Council. Here the route had also been in use for 40 to 50 years. That Inspector concluded: "In the case before Lord Parke, residents of the same parish were held to constitute a limited part of the public and I therefore believe the inhabitants of the Parish of Cliffs should also be held to constitute a limited part". The Inspector refused to confirm the Order.

**HISTORY OF THE COMPILATION OF THE DEFINITIVE MAP  
AND STATEMENT**

1. The National Parks and Access to the 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. This resulted in 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 to the former Glamorgan County Council who collated the information and produced the first Draft Definitive Map which in their opinion reflected routes considered to be public rights of way on 14<sup>th</sup> 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 series of reviews, which would allow the public and landowners to make representations or objections to the inclusion or absence of routes in the various editions of these earlier Draft Maps. The result was the production of the initial Draft Map and Statement published in 1955. Objections to the inclusion or omission of routes were considered in 1956 and the results of those decisions were again subject to further objections which resulted in a further series of hearings which took place in the 1960s. The Provisional Map and Statement published in 1964 was the effect of those objections so determined. Once published, landowners were given another opportunity to object and these were heard in the Quarter Sessions in around 1968. The result was the production of the first Definitive Map and Statement published

in 1970. The passing of the Countryside Act 1968 required all Councils to reclassify routes they had designated as roads used as public (R.U.U.Ps) into either footpaths, bridleways or byways open to all traffic. This resulted in the production of the Draft Special Review of 1971, published in 1974, to which objections could be made. Those inquiries were mainly held in 1980 which when determined lead to the production of the current Definitive Map and Statement published in 1988.

**HISTORY OF THE DEDICATION OF A PATH CLOSE TO OR  
ALONG THAT BEING CLAIMED**

The bold black line is shown on all the precursor maps to the current Definitive Map and also appears on all the early editions of the Ordnance Survey. That is the first, second and third edition (1878, 1899 and 1915 respectively) at a scale of 25" to one mile. The 1973 edition at a scale of 1:2500 and the 1953 edition of 6" to one mile also shows this path, although both of these were based on a survey undertaken in 1913.

The earlier three editions recorded the land concerned being divided into three fields with a path passing through the field boundaries. It is not possible to say if they contained stiles, kissing gates or field gates or a combination of these, and if gates whether they were locked.

It is evident that once those who were utilizing this track no longer needed to pass through the available gaps in the field boundaries, then they would have been able to follow the more gradual slope of the field. Therefore it is possible this is the reason why the path changed (this is from the bold line to the broken line).

Two claimants have said they started using the path in the 1940s and the other in the 1970s, although it is uncertain which of the two paths at that time were in use.

The 1953 Ordnance Survey edition included additions made in 1948 and so one would presume the three fields were still in existence at that time. However by the 1973 edition no new survey had taken place and so it is likely at some point between 1948 and 1973 the field boundaries were removed and the "newer" path came into existence.



**PREVIOUS INVOLVEMENT OF NICHOLASTON PARISH COUNCIL**

There are no records of the Penmaen Parish Council having ever been formed and therefore no records of Council meetings until Local Government Re-organisation in 1974 disbanded Parishes and the new Community of Ilston was formed.

Nicholaston Parish did not form a Council although from 1900 until 1982, the ratepayers held meetings at irregular intervals to elect “officers” and to discuss issues of local importance. The National Park and Access to the Countryside Act of 1949 required the Local Authority to survey its public paths, and that this function was undertaken by the Parish Councils. Consequently, the minutes of the meeting were checked from 1949 until 1982. Reference was made to public paths at some meetings but there is no record of any discussions made in respect of the path having been consistently shown on all the editions of the earlier drafts of the Definitive Map. However, even though this path was never in the Parish of Nicholaston, the meeting did make representations on Bridleway No. 8 at the time the Draft Special Review Map of 1972 was being considered. This is was outside the Parish of Nicholaston being on the southern flank of Cefn Bryn. Consequently it is evident those in attendance were concerned with other paths in the vicinity of their Parish but seemingly had no concern over the path shown on the editions of the Definitive Maps.