

Report of the Head of Legal, Democratic Services and Procurement

Rights of Way and Commons Sub-Committee - 18 June 2014

**ALLEGED PUBLIC FOOTPATH FROM PENTRECHWYTH ROAD TO
BROKESBY ROAD AND FOOTPATH NO. 451
- COMMUNITY OF BONYMAEN**

Purpose:	To determine the application as required by the provisions of the Wildlife and Countryside Act 1981.
Policy Framework:	The Countryside Access Policy No. 4.
Statutory Tests:	S. 53(2) and 53(3)(b) of the Wildlife and Countryside Act 1981.
Reason for Decision:	Evidence being sufficient to show the paths have been dedicated.
Consultation:	The British Horse Society, The Open Spaces Society, Natural Resources Wales, The Ramblers Association, local representatives of The British Horse Society and the Ramblers Association, two Local Members, Treasurer of the adjacent and former Canaan Congregational Chapel, Developer of the other adjacent property no 94 Pentrechwyth Rd, This Council's officers within:- Parks Operations, Highways Control and Coordination, Streetscene, Crime Prevention and Housing.
Recommendation(s):	It is recommended that a Modification Order be made.
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Legal Officer:	S. Richards
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1.0 Introduction

- 1.1 An application was submitted on the 3rd March 2013 to register a 50 metre length of path which passes alongside the Canaan Congregational Chapel which closed in the same month. Plan No. 1 shows the length concerned

between points A and B. The claim was initially supported by eight people who apart from two allege use in excess of twenty years. On the 7th November 2013 a further six user evidence forms were submitted, each signatory having alleged a minimum of twenty years use.

- 1.2 All the usual individuals and organisations have been consulted and one objection has been made by the person who converted the former New Inn public house into a residential property, which is situated immediately to the west and adjacent to the path. That developer enclosed the path with two boards at either end of the path, although the path is not shown in the Land Registry and to date no one has provided any proof of title.

2.0 Grounds for Recognising the Path as a Public Right of Way

- 2.1 The provisions of the Wildlife and Countryside Act 1981 oblige the Council to continually review its Definitive Map and Statement being the legal record of all known public rights of way. (Appendix 1 includes the relevant sub-section.) The former Swansea Borough Council was excluded from the review of public paths in the early 1950's which lead to the production of the Definitive Map and Statement. However a number of modification orders have been made for paths in this area and so it now forms part of the Definitive Map.

- 2.2 The common means by which a path is made the subject of a modification order, is where here has been a minimum period of twenty years uninterrupted use. That period is calculated by counting retrospectively from either the first occasion the alleged right to use the way is brought into question or from the date of the application, whichever is the earlier. Appendix 2 includes the relevant sub-section of Section 31 of the Highways Act 1980 which provides the grounds for recognising the statutory presumption that a way has been dedicated to the public.

3.0 The Evidence

- 3.1 In or around March 2013, the person referred to in paragraph 2.1 closed the path and so as a result, the application was submitted to this Council. It is contended the path has been open and use has been continuous throughout the whole of the period being claimed, 1993-2013.
- 3.2 The total number of people who have provided evidence comprises fifteen who allege an average of forty years use, seven of whom have been interviewed, three who state they have each used the path for the full twenty year period. The Secretary to the Canaan Chapel has also claimed to have been making use of the path throughout the whole twenty years to inspect the rear of the premises. In addition both Local Members have been interviewed, one of whom has also stated to have used the way for the full twenty year period. Lastly a resident of Grenfell Town (Road) who was not one of the claimants, but was met on a site visit, confirmed she also has used the path for each of the twenty years concerned.

The Routes Claimed

- 3.3 The majority of public paths, as would be expected, lead from one public path to another or provide a link between two carriageways that is a street or a road. A lesser number may terminate at a place of interest, view point, or as is the case in Gower, at mean high water level.
- 3.4 The application specified the route A-B but point B, terminates on a path which is not recorded as a public one. It is evident that the path continues in two directions from point B, one being B-D, where point D does terminate on the registered public path no.381. The other extension of the path is B-C where point C terminates on Brokesby Road being an adopted public highway. So whilst the claim did not include these two additional lengths of path, the Council is obliged to consider any evidence which shows a path has public status. This is set out in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (Appendix 1), that is, the discovery by the Authority of evidence which (when considered with all other relevant evidence to them) shows that a right of way exists. The additional length B-C and B-D are wholly under the ownership of this Council.
- 3.5 Those interviewed were therefore asked to clarify the route they have taken from point B and a second batch of six evidence forms did identify on the plans, these additional lengths used by those individuals.
- 3.6 The length A-B-C has been identified by eleven people, seven of whom claim continuous use from 1993-2013. The former secretary to the Canaan Chapel, only claims to have used A-B periodically, as he needed to check on the condition of the chapel throughout the relevant period (and in fact before 1993).
- 3.7 The other reasons given for making use of the path, include to take children to Kilvey Hill, to visit the Liberty Stadium, to walk to Morrison's for shopping, to use the local Gwyndy Stores (and previously other shops that once existed on Pentrechwyth Road), also to walk to Bonymaen Post Office, to distribute leaflets in the area, to walk to the local primary school, to visit the laundrette and to walk dogs.
- 3.8 The path is currently overgrown with tall grass and some blackberry bushes but a worn and narrower path could still be identified running through the centre noted during a site visit on the 4th September 2013.
- 3.9 According to those interviewed it has been assumed that the Council has been responsible for cutting back the vegetation along the path and responsible for installing a set of barriers approximately mid way along the path and at its south eastern end. This allegedly was to prevent motorcyclists joy riding the path. The two dates given by claimants as to when this was thought to have occurred was either 2009 or as early as the late 1990s. In the case of the latter date it is thought this was when other similar barriers were installed on Brokesby Road at its junction with Grenfell Town, shown by a line across this road at about point C.

- 3.10 The previous Council owned flats at Brokesby Close which occupied the now grassed open space between the rear of the houses of Pentrechwyth Road and Brokesby Road. The flats were demolished in or around 2003 / 2004 and the area landscaped in 2005 after the contract for the start date was issued in January of that year.
- 3.11 This Council also installed the chicane at the southern entrance to the path at point B, placed the gate at the entrance to the path at point C and improved the steps and handrail at point D. A photograph of these features was taken in 2005 and that from point B shows a worn path in the centre of the claimed public path between points A and B.
- 3.12 A Traffic Regulation Order was made under the Road Traffic Regulation Act 1984, which came into effect on the 3rd November 2006 to restrict vehicular access along these former estate roads. "Road" under that Act is defined as a place to which the public have access, as well as being a highway. Therefore the Council had already recognised the public were using these roads. The path between points B1 and B2 has been retained from its former position as a footway which ran alongside the wider and previous estate road. The total width of path between C and B was an estate road although a narrower footway was positioned within the current width.

4.0 Evidence against the Application

- 4.1 The person responsible for closing access along the path between points A and B, has not provided any reason why the public could not have enjoyed the access as claimed throughout the relevant period. He submitted a photograph of the New Inn public house dated June 2009 which appears to show a path alongside, passing between vegetation.
- 4.2 The developer wished to point out there is alternative means of access to Grenfell Town and Brokesby Road via Footpath No. 381 shown between points E and D. However this in itself would not undermine the validity of the application. How suitable or what amenity value the path may provide would not be facts that can be taken into account in deciding whether the path should be registered as a public one.

5.0 Distribution of Claimants/Specialist User Groups

- 5.1 Another issue which commonly occurs when "urban" paths are the subject of a claim is whether the use is by the public at large, rather than by a more limited number of people who reside in the adjacent streets. In the case of the latter, the question arises as to whether a limited number of residents can be said to represent the general public. The two cases which specifically dealt with this point are contained in Appendix 3.
- 5.2 In order to assess this possibility Plan Nos. 2 and 3 show the approximate location of where the claimants live.

5.3 Whilst it is inevitable that the majority of those who use the path will live in reasonably close proximity to the path, there are four who live outside the immediate vicinity of the path who themselves have claimed to have made regular use, for each year throughout the relevant period.

6.0 Conclusion

6.1 In the absence of any counter evidence, it is clear that the path has been in use for the period 1993-2013 and that the use is uninterrupted. Whilst the majority of those who made use of the path do live in a relatively confined area there are a contingent who do not. Consequently the test as to whether it is reasonable to allege a public path exists via the route A-B-C as a public right of way can be satisfied.

Recommended: That a Modification Order be made for the path A-B-C and if no objections are made to confirm the same as unopposed.

7.0 Route B-D

7.1 This additional section is evidently a well-defined path which has been constructed for public use. There are steps at approximately point D with handrails to assist pedestrians and is a continuation of Footpath No. 381, which extends for 92 metres.

7.2 This section was not included in the application and of the seven persons interviewed; five have indicated they have used this path, although only three have said they have done so throughout the relevant period 1993-2013. One other who was not interviewed claims use of the path between 1993-1998.

7.3 One of the three interviewed lives in Llansamlet and outside the immediate vicinity of the path. The only other confirmed evidence of long term use is by the two who live in Pentrechwyth Road. Consequently on the numbers of those who can show such use, as well as their distribution, it is difficult to conclude on the evidence that has been forwarded, that the path has been used by the public at large.

7.4 Whilst the currently recorded evidence of use is limited, the path has nonetheless been in existence since at least 1948, the route being depicted in the 1950 edition of the ordnance survey plan with a survey date of two years earlier. It is under the ownership of this Council and formed one of the paths when Brokesby Close was in existence from about the 1960s until they were demolished by the early 1990s.

7.5 The land is under the management of the Council's Housing Department and the surrounding grass being maintained by the Parks Department. The path is tarmacked, contains street lighting and at point D steps and a handrail. As such there is clear evidence that not only has this Council acquiesced to public use, but has encouraged and made access more convenient for the public. Under such circumstances it could be concluded that there has been an express dedication of the path to the public and that has been accepted by the public.

- 7.6 There is also evidence that the path has been in existence since 1948 and provided access for those who also lived at Brokesby Close.
- 7.7 This path also connects to the currently registered public path no 381. This short section of path was the subject of a declaration by the former Chief Executive of Council of the City of Swansea in in 1980 under Section 34 of the Highways Act 1959, to the effect the Council recognised the existence of this public path. At that time this path provided access to Brokesby Close and Pentrechwyth Infants School. Brokesby Close was then not adopted as a public highway, but since those properties were demolished, the path has resumed its former function as an alternative means of access running parallel to Pentrechwyth Road.
- 7.8 Given the manner in which this path has been managed it could be concluded that there has been a dedication under common law of the path B to D and therefore be made the subject of a modification order.

Recommended: That a Modification Order be made for the length of path B to D and if there are no objections to confirm the same as unopposed.

8.0 Equality and Engagement Implications

The decision as to whether to make a modification order has to be based on the evidence and so the desirability, convenience or suitability of recognising the path as a public one can be considered. As such an equality impact assessment is not required.

9.0 Financial Implications

There are no financial implications to making a modification order.

10.0 Legal Implications

There are none other than the tests set out in the report.

Background Papers: ROW-000203

Appendices: Appendix 1 - Extract from the Wildlife and Countryside Act 1981
Appendix 2 - Extract from the Highways Act 1980
Appendix 3 - Special User Group

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:
- (a) as soon as reasonably practical after 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 anyway in the area to which the map relates of any period such that the enjoyment by the public of the way during that period rises 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.

APPENDIX 2

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

APPENDIX 3

SPECIAL USER GROUPS

- (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.