

Report of the Head of Legal, Democratic Services and Procurement

Rights of Way and Commons Sub-Committee – 8 October 2014

**ALLEGED PUBLIC FOOTPATH FROM BIRCHGROVE ROAD
TO SMITHS ROAD - COMMUNITY OF BIRCHGROVE**

Purpose:	To determine the application in accordance with the provisions of the Wildlife and Countryside Act 1981.
Policy Framework:	Section 4 of the Countryside Access Plan.
Reason for Decision:	Recognition of the status of the public path and to determine the application requiring its addition to the Definitive Map and Statement.
Consultation:	All the usual statutory consultees which included the three local Members, Ramblers Association and their local representative, the British Horse Society and their local representative, the Open Spaces Society, Natural Resources Wales, Green Openspaces and Heritage Alliance for Swansea, Byways and Bridleways Trust, Highways and Transport Service Unit.
Recommendation(s):	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 path.
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Legal Officer:	Sandie Richards
Access to Services Officer:	Phillip Couch

1.0 Introduction

1.1 On the 5th December 2013, an application was made under the provisions of the Wildlife and Countryside Act 1981 to this Council to recognise the path shown on the attached plan as a public right of way on foot (Appendix 1 provides the relevant extract). The claim has been supported by ten individuals who allege an average of forty years use of the path. The usual means by which an application is determined is to assess whether the way has been dedicated under section 31 of the Highways Act 1980, that is if there

has been a minimum period of twenty years uninterrupted use from the date the alleged existence of the public path was called into question. (Appendix 2 provides the relevant extract) This date is 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.

- 1.2 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 have been placed at its junction with Birchgrove Road and three at its junction with Smith's Road.
- 1.3 The path is included as a publicly maintainable highway on this 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 maintainable by them (Appendix 3 provides further information on what the list should include).

2.0 The Path History

- 2.1 The path first appears on the second edition of the 1899 ordnance survey plan as a vehicular width road some 6.0 metres wide and forming part of Smith's Road. Its appearance as a wide road is shown on the 1976 edition of the ordnance survey plan although that edition was based on one in 1969 and specifies it has included some additions after that earlier survey. Therefore this may be why the plan did not display the reduction in the width of the eastern end of Smith's Road. One resident of Smith's Road stated the road was altered and the cul-de-sac at the eastern end of that road developed in 1971. Nonetheless the total width of the road has not varied, as the current path including the two sections of grass remains at 6.0 metres.
- 2.2 On the 3rd May 1981, this Council adopted Smith's Road including the central part of the path shown A-B under the Private Street Works Code. Those living in the houses fronting Smith's Road, were required to each contribute to the cost of its improvement prior to the Council agreeing to maintain the road. Given the path was created as a public highway under an Act of Parliament this constitutes a legal event that is referred to under section 53(3)(a)(iii) as contained in Appendix 1. Therefore a modification order could be made to reflect this event, known as a legal event modification order, and so no public notice, advertising the order would be required, as the order would take effect on it being made.
- 2.3 In August 2010 the grass areas on either side of the path were also added to the plan of maintainable highways as part of an adoption review. As these two sections of highway were not added to the list of streets by any formal or legal procedure, then a legal event modification order cannot be justified to include this greater width. However it constitutes additional evidence that the Council took the view the whole length of path to be a public one.

- 2.4 As such the path has therefore never been closed to pedestrians and so the date of the application, that is 2013 will count as the date the existence of the right of way was called into question.
- 2.5 The inclusion of a route into the Council's plan of maintainable highways is evidence it is a highway, but gives no guidance as to its status. However as the minimum status of any highway is a footpath it must at the very least be a public right of way on foot.
- 2.6 The Council has been presented with user evidence that the path has been accessed by pedestrians prior to its adoption in 1981. Whilst the applicant has confirmed that the route that is the subject of the application is solely the central tarmacked section of 2.5 metres width, there is evidence of the entire width having been used prior to the closure of the road to vehicles. As such this Council is obliged to consider any evidence that shows a public way may exist.
- 2.7 The entire width including the grass verges have nonetheless been subject to long term use although there are only two persons who can show use from 1951, showing a minimum of twenty years prior to Smiths Road being narrowed (assuming the date of 1971 is accurate). In addition evidence that until the present day, the way has only been used by pedestrians confirming its minimum status as a public footpath.
- 2.8 Given any public footpath ought to be shown on the Definitive Map a modification should be made. As such the list of streets and Definitive Map are not mutually exclusive documents, although there will be a considerable degree of overlap.
- 2.9 As the later addition of the "grass verges" to the list of streets cannot be included into a legal event modification order, then if these were to be included, an evidential order will have to be made and advertised as usual. However there are only two persons who have stated they have made use of the greater width of path for the requisite 20 year period. In addition they live in close proximity to the Road, and so would fall under the category of representing a specialist use group. This is explained more fully in Appendix 4. Consequently it is difficult to conclude there has been a presumed dedication of a public way under the Highways Act 1980 for this earlier period to include both those "grass verges".

3.0 Conclusion

- 3.1 The evidence shows that the Council has adopted the entire width of the path between points 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.
- 3.2 The application has 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 it would be made on the basis that it has already been recorded as a public highway. There would be no opportunity for the public to take issue with that and so the order would not have to be advertised.

4.0 Equality and Engagement Implications

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

5.0 Financial Implications

5.1 There are no financial implications associated with this report.

6.0 Legal Implications

6.1 There are no legal implications associated with this report.

Background Papers:

Appendices: Appendix 1 - Wildlife and Countryside Act 1981
Appendix 2 - Highways Act 1980
Appendix 3 - Section 36(6) Highways Act 1980
Appendix 4 - Special User Groups
Appendix 5 - Plan

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:
 - (a) the coming into operation of any enactment or instrument or any other event whereby:
 - (iii) a new right of way has been created 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 or restricted byway.
 - (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 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

SECTION 36(6) HIGHWAYS ACT 1980

Section 36(6) of the Highways Act 1980 requires a list of maintainable streets to be kept up to date, although it does not specify the details it should provide such as information on the location of the street, its status or width. However many Authorities including this Council, consider a plan to be a more useful means of recording its list.

A 'street' is defined under Section 329 of the Highways Act 1980 as including any highway and any road, lane, footpath, square, alley or passage.

APPENDIX 4

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.