

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

Planning Committee – 10 January 2017

### PUBLIC RIGHTS OF WAY – ALLEGED PUBLIC FOOTPATH ALONG HEOL RHYD, CRAIG CEFN PARC IN THE COMMUNITY OF MAWR

<b>Purpose:</b>	To consider whether to accept or reject the application to make a Modification Order to record a public footpath on the Council's Definitive Map and Statement of Public Rights of Way
<b>Policy Framework:</b>	The Countryside Access Plan 2007-2017: 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>	The evidence is considered sufficient to satisfy the statutory tests set out in this report and to make a modification order to record the claimed footpath on the Definitive Map and Statement
<b>Consultations:</b>	Legal, Finance and Access to Services and all the statutory consultees, including local members, landowners and the prescribed organisations.
<b>Recommendation:</b>	It is recommended that the application be accepted and that a modification order be made
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#### 1. Introduction

- 1.1 An application was made on the 20<sup>th</sup> October 2010 by Mawr Community Council for a Modification Order to add a public footpath to the Authority's Definitive Map and Statement at Heol Rhyd, Craig Cefn Parc between registered footpath numbers RN30B and RN31. A plan showing the route claimed A-B and the adjoining registered public footpaths is enclosed at Appendix 1.

- 1.2 At the time of submission, the application was not made in the correct form. Upon notifying the applicant of the deficiency in the application, the application was resubmitted in the proper manner on 15<sup>th</sup> April 2011.
- 1.3 Seventeen users have submitted completed evidence questionnaires in support of the application.
- 1.4 The purpose of this report is to establish whether the evidence submitted is sufficient to show that there has been dedication of the route claimed as a public footpath.

### **The Law**

- 2.1 The application was made under the provisions of the Wildlife and Countryside Act 1981. Section 53(3)(b) requires the Council to modify the Definitive Map and Statement following the expiration of any period such that the enjoyment by the public of a way raises a presumption that the way has been dedicated as a public path.
- 2.2 Section 31 of the Highways Act 1980 raises the presumption that a way has been dedicated as a highway if the route has been used by the public “as of right” (not by force nor stealth nor permission) and without interruption for a period of 20 years unless there is sufficient evidence that there was no intention during that period to dedicate it. This is known as “statutory dedication”.
- 2.3 If the tests for “statutory dedication” are not satisfied, it may be appropriate to consider whether there has been “common law dedication”. This would require consideration of three issues; whether any current or previous owners of the land had the capacity to dedicate, whether there was express or implied dedication and whether there was acceptance of the highway by the public.
- 2.4 For “common law dedication” the landowner would need to have not just acquiesced to public use but in some way facilitated or encouraged

that use and a lesser period than twenty years may be sufficient. Evidence of use by the public 'as of right' may support an inference of dedication and may also show acceptance by the public.

### **Preliminary Considerations**

- 3.1 Heol Rhyd is not a highway that is adopted by this Authority. However, the northern and southern sections of Heol Rhyd are recorded as forming part of the public footpath network for the area. This claim is for that section of Heol Rhyd not currently registered as a highway of any description linking those sections recorded with footpath status. To establish a public right of way use must be from one highway to another. This claim easily satisfies this requirement
  
- 3.2 The land is not registered at the Land Registry. Extensive investigations have been undertaken to determine the owner of the land including the examination of historic documents, reviewing adjacent titles, discussions with local residents and a notice addressed to the owner of the land being placed on site. However, the owner could not be determined.

## **4 Consultations**

- 4.1 Those consultees listed on the first page of this report have been informally consulted regarding the application in accordance with advice given in Welsh Office Circular 5/93 which has recently been modified and replaced with Welsh Government Guidance to Local Authorities dated October 2016. Such consultations were conducted in August 2011 and again in October 2016.
  
- 4.2 Notification was received from the Highways Department of the Council that surfacing of the path was carried out several years ago to assist local residents. This was on the understanding that the works were a one off offer and the Council were not agreeing to the adoption of the way.

- 4.3 Despite being the original applicant, concerns were raised by the Mawr Community Council in November 2016 following a meeting of the full Council. The points raised by the Community Council are set out below:
- 4.3.1 They do not consider the footpath necessary given that there are several other registered footpaths in the immediate area.
- 4.3.2 They believe that the registration of the path would lead to an increase in fly-tipping issues.
- 4.3.3 They do not wish the County Council to incur additional maintenance costs when its resources are already stretched
- 4.4 Whether the registration of the path is considered necessary, whether it would result in extra costs or an increase in environmental issues are not valid considerations when determining whether a modification order should be made. The decision must be purely based on the evidence of use of the path and whether this is sufficient to raise a presumption of dedication.
- 4.5 Mawr Community Council are no longer in support of the application they made in 2010. However, once evidence has been received, this authority is obliged to give consideration to that evidence to determine whether a modification order must be made. Therefore, once an application is made, it cannot be withdrawn.
- 4.6 In December 2016, Mawr Community Council advised that none of the present Council members were in post at the time the application was made. The current Councillors confirmed at a meeting of the 14<sup>th</sup> December 2016 that if it were possible to withdraw the application they would seek to do so.

## **5 Evidence for Statutory Dedication**

### **(a) Calling into Question**

- 5.1 In order to test whether statutory dedication can be established, it is necessary to determine the relevant twenty year period described in paragraph 2.2 of this report. This period has to be calculated retrospectively from the date when the right of the public to use the way was brought into question. This can occur when the path is obstructed to public use or when the landowner makes it clear to the users of the way that he or she does not consider that a public right of way exists.
- 5.2 In the absence of a clear calling into question, the Natural Environment and Rural Communities Act 2006 has established that the date of the application can be taken to be a calling into question and thus can be used to calculate the relevant twenty year period.
- 5.3 In the present case, there has been no event which has resulted in the public's right to use the path being called into question. Therefore, the period in which to consider evidence of use will be from 1990 to 2010.

**(b) User Evidence**

- 5.4 Seventeen claimants have submitted evidence of use in support of the application, twelve of which claim to have used the path for the full twenty year relevant period.
- 5.5 The main use of the path quoted in the evidence would appear to be for leisure and recreation with the path being used mainly as an access to the wider rights of way network in and around the Cwm Clydach Nature Reserve.
- 5.6 There is no evidence that any attempt was made during the relevant period by the owner of the land to prevent use. Therefore there is nothing to show a non-intention to dedicate the way as a public footpath.
- 5.7 For section 31 of the Highways Act 1980 to give rise to a presumption of dedication, use of the way must have been by 'the public'. There is

no legal interpretation of 'the public'. The dictionary definition of the term is 'the people as a whole'. Therefore, it is sensible to assume that use should be by a number of people who together may be taken to represent the public as a whole.

- 5.8 In *Poole v Huskinson* [1843], it was held that there may be a dedication to the public for a limited purpose...but there cannot be a dedication to a limited part of the public
- 5.9 Given that many of the claimants appear to live in reasonable proximity to the path in question, it is important to consider whether they can be considered to represent 'the public' or whether they represent a special user group i.e. a limited section of the public being the only persons for whom the path would be useful.
- 5.10 One claimant lives adjacent to the path and may well be using the path as a private access rather than a public right of way. Four of the other sixteen claimants live in very close proximity to the claimed path and seven others live along Clydach Road (see Appendix 1A). If use was alleged by these persons alone, then it would be considered that the claimants form a special user group
- 5.11 However, three further claimants live along Mountain Road (see Appendix 1A) at reasonable distance from the claimed route. One claimant lives on Lone Road at considerable distance and one claimant lives in Llansamlet at a significant distance.
- 5.12 Therefore, it is considered that the claimants are a group of people who are wide enough to represent the public as a whole.
- 5.13 The evidence is therefore considered sufficient to show that there has been "statutory dedication" of public rights on foot across the path shown in Appendix 1 and being a section of Heol Rhyd, Craig Cefn Parc.

## **6 Conclusion**

- 6.1 The evidence submitted is supportive of long term frequent use of the path subject to the application with a significant number alleging twenty years use over the relevant period 1990 to 2010. Therefore, a presumption in favour of the dedication of the footpaths as public rights of way is raised
- 6.2 No evidence has been provided to show that such use was not possible nor is there any evidence showing that the owner of the land had no intention to dedicate the way as a public path
- 6.3 It is therefore considered that the evidence available is sufficient to show that a public rights of way on foot has been established over the section of Heol Rhyd shown A-B on the plan at Appendix 1 and it is therefore recommended that a modification order be made to record this on the Definitive Map and Statement

## **7 Financial Considerations**

- 7.1 There are no financial implications to this report.

## **8 Equality and Engagement Implications**

- 8.1 There are no such implications to this report

**Background Papers:** ROW-000211/KAO

### **Appendices:**

APPENDIX 1 – Plan showing route claimed

APPENDIX 1A – Plan showing wider area