

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

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

#### ALLEGED PUBLIC FOOTPATH FROM LANDOR DRIVE TO THE CROFT - COMMUNITY OF LOUGHOR

<b>Purpose:</b>	To amend the report as required by this Sub-Committee on the 26 <sup>th</sup> February 2014
<b>Policy Framework:</b>	Countryside Access Plan
<b>Reason for Decision:</b>	To inform the Sub-Committee
<b>Consultation:</b>	Not applicable
<b>Recommendation(s):</b>	To note and agree the required amendments.
<b>Report Author:</b>	M. J. Workman.
<b>Finance Officer:</b>	S. Willis
<b>Legal Officer:</b>	S. Richards
<b>Access to Services Officer:</b>	P. Couch

#### 1. Introduction

- 1.1 At the Committee meeting on the 26<sup>th</sup> February 2014 it was noted some of the text in the report under the heading “the Possible Existence of a Public Path via G-F” did not correspond to the letters on Plan No. 3.
- 1.2 It was decided an amended report should be submitted to this Sub-Committee. The appended report has been reproduced in full with the required changes.

#### 2. Recommendations

This Sub-Committee to accept the changes made to the report as attached.

#### 3. Equality and Engagement Implications

The decision to make the Modification has already been made at the meeting of the 26<sup>th</sup> February 2014. Consequently an Equality and Engagement Assessment is not applicable.

**4. Legal Implications**

There are none from this report.

**5. Financial Implications**

There are no financial implications.

**Background Papers:** row 203

**Appendices:** Appendix A - The previous report of the 26<sup>th</sup> February 2014

## Appendix A

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

Rights of Way and Commons Sub-Committee - 26 February 2014

#### ALLEGED PUBLIC FOOTPATH FROM LANDOR DRIVE TO THE CROFT - COMMUNITY OF LOUGHOR

<b>Purpose:</b>	To consider whether: <ul style="list-style-type: none"><li>(a) to record the claimed public path in to the Definitive Map and Statement;</li><li>(b) to amend the current position of footpath No. 43.</li></ul>
<b>Policy Framework:</b>	The Countryside Access Policy No. 4.
<b>Statutory Text:</b>	Section 53(2) and 53(3)(b) of the Wildlife and Countryside Act 1981
<b>Reason for Decision:</b>	There is sufficient evidence to show the claimed route has been used as of right and without interruption for the requisite minimum period of 20 years that the path should be made the subject of a Modification Order. There is also evidence to show that footpath No 43 ought to be shown in a different alignment and that part of this path should be deleted.
<b>Consultation:</b>	The Byways and Bridleways Trust, The Ramblers Association, The local representative of the Ramblers Association, The British Horse Society, The Local representative of the British Horse Society, The Open Spaces Society, The Countryside Council for Wales, The owner of the land containing a local resident living adjacent to the path and the Local Member.
<b>Recommendation(s):</b>	It is recommended that a Modification Order be made.
<b>Report Author:</b>	M. J. Workman.
<b>Finance Officer:</b>	S. Willis
<b>Legal Officer:</b>	S. Richards
<b>Access to Services Officer:</b>	P. Couch

## 1. Background

- 1.1 An application has been made to register a public path from a point commencing on a tarmacked path between House Nos. 64 and 66 Landor Drive to the hammerhead of the road known as "The Croft" (as shown on Plan No. 1) via A-B-C-D-E-G. Under the provisions of the Wildlife and Countryside Act 1981 this Council is obliged to determine the claim. The principles under which a public path could be recognised are set out under Appendix 1, the relevant extract from the 1981 Act being contained in Appendix 2.

### THE BASIS OF THE APPLICATION

- 1.2 The application made on the 23<sup>rd</sup> February 2010, was originally supported by the submission of 31 user evidence forms, although a further five were subsequently added later that year, reflecting an average of 16 years' use for the 36 persons supporting the claim. In 2013 a further four user evidence forms were submitted three of whom each claim to have enjoyed use for the minimum period of 20 years. So 17 of these persons have themselves claimed to have walked the route for a minimum of twenty years. Therefore, the application is based on there having been sufficient long-term use under Section 31 of the Highways Act 1980 to show the way has been the subject of a presumed dedication as a public footpath. The relevant extract is contained in Appendix 3.
- 1.3 The plans attached to the user evidence forms varied in their depiction of the route, but further clarification was sought from the 11 people who were subsequently interviewed as to its precise alignment. The route shown on Plan No. 1 best represents what has been claimed.

The section of path that passes between House Nos. 64 and 66 between points A - B is under the ownership of this Council and was acquired as an Open Space from those who developed the earlier housing at Landor Drive. The path is tarmacked and positioned alongside the southern boundary, with the remaining width of the gap being grass. A site visit on the 5 March 2010 revealed much of the field containing the remaining length of path had been cleared of vegetation given the land was the subject of outline planning permission to build four homes (reference 2009/1216). Where the path proceeded west from point B stone slabs had been placed along an approximate length of 10 – 15 metres. Also a telegraph pole marked the approximate position of the path where it curves south west from point C.

- 1.4 One point of terminus of the alleged footpath joins the existing Public Footpath No. 43 at point D. However, the public deviates from the recorded position of this footpath by walking from point E to G rather than E-F before joining The Croft. Consequently, the legal status of two sections of path need to be considered, that is A-B-C-D and E-G.

- 1.5 All the usual organisations, individuals and landowners have been consulted. The owners of the field B-C-D-E have objected, as has one of the residents living in close proximity to the alleged public path between points A-B.

### **THE PLANNING PERMISSION**

- 1.6 Outline consent was granted for four detached dwellings with detached garages at the Area Development Control Committee on 21<sup>st</sup> February 2012. Responses to the consultations resulted in a question on “what rights of way exist between Landor Drive and The Croft, given the previous developer of Landor Drive, Wilcons had donated the strip of path between points A and B as open space for use by the public”.
- 1.7 The approved permission was subject to Condition 11: Notwithstanding the details on the on-site layout plan dated 2<sup>nd</sup> August 2011, “any future scheme shall include details of an unenclosed footpath between The Croft and Landor Drive. Where the footpath would be enclosed adjoining Plot 4, the path should have a minimum width of 3m. The footpath shall be completed and thereafter maintained in accordance with the approved details unless otherwise agreed in writing by the Local Planning Authority.” Plot 4 being the proposed dwelling nearest the rear of the properties at Landor Drive, that is south of point B.
- 1.8 The above condition is evidently dependent on the implementation of any detailed consent. One of the responses received was from the Local Member who wished to point out that until and if detailed consent is implemented, then there is no obligation on those developing the land to provide a path for the public.

### **THE EVIDENCE**

- 2.1 The claim is based on the premise that the public have acquired the right to use the route due to the continuous and uninterrupted minimum period of twenty years referred to in paragraph 1.2. Under Section 31 of the Highways Act 1980, it is necessary to determine when the alleged existence of the public right of way was first called into question so that the relevant twenty year period can be calculated by counting retrospectively from this date. The reason the application was made was due to the path being blocked in October 2009, when a fence was erected across the path at point B and a notice installed which read “No entry. This is not a public footpath”. Therefore, the claimants need to show there has been a continuous uninterrupted period of use from 1989-2009.
- 2.2 The reasons given for using the path is primarily as a short cut to reach Castle Street and Glebe Road via The Croft shown on Plan No. 2. 29 people said they visit the shops on Castle Street and, since 1997, the Spar Store. 20 said they use the path to access the bus stops; 16 to

reach the Post Office; four to take their children to the primary school and another three stated they knew others who use the path for this purpose. Five others stated it was used to walk their dogs and another three said it was used for recreational reasons. Previously, there was a butcher, baker and garage on Castle Street, which was another reason given for using the path. Plan No. 2 identifies these current premises.

- 2.3 14 claimants were interviewed and provided details of the use made of the path which are contained in Appendix 6.

### **EVIDENCE SUBMITTED AGAINST THE RECOGNITION OF THE PATH A-B-C-D AS A PUBLIC FOOTPATH**

- 3.1 Two objections have been raised; one from the owner and occupier of one of the adjacent houses to the claimed public path and the other from the owner of the field containing the paths between points B-C-D.
- 3.2 The first objection referred to has been based on the antisocial activities the occupier says have occurred within the lane between A-B. Therefore her concern is that recognising this footpath as a public one will only exacerbate or encourage more people to walk this way, therefore resulting in an increase in the problems she has already endured.
- 3.3 A copy of the letter from this objector has been included in Appendix 7, which details the series of unfortunate incidents. However, as has already been made clear to this objector, the issue before this Council is whether the public have a right to use the path and therefore any history of its misuse cannot be taken into account when evaluating the evidence.
- 3.4 The other objection dated the 16<sup>th</sup> June 2010 was forwarded by the representative of the current owner of the field and the person who wishes to develop the land B-C-D-E. Copies of the objection letter and this Council's response can be read in Appendix 8. At a subsequent meeting the owner's representatives raised further issues as discussed below.
- 3.5 The previous owner, who also represents the current owner, stated that in 2000 he was working for twelve months when he was involved in the construction of House Nos. 7 and 8, The Croft as shown on Plan No. 3. He stated he saw no schoolchildren use the path nor being taken by their parents or older children to catch the bus. He queried whether the most convenient bus stop is on Castle Road, given there is one at the Monument (shown as point BSh on Plan No. 2), this being a more convenient bus stop to which people would walk if they lived on Landor Drive.

- 3.6 When the houses on The Croft were being constructed the owners say The Croft would have been closed as it would have been a building site. Also, the land at that time sloped from Castle Street to the field to the north. Consequently, machinery was transporting soil from the fields to raise the level of the land upon which The Croft and its houses was built. Therefore, it would have been too dangerous for people to walk through the field and the development site prior to the building of the houses. If the development of The Croft resulted in the closure of the claimed public path, this would have interrupted their use within the relevant period of 1989-2009. However, none of the claimants have made any reference to this and three specifically stated access remained available. One person was clear that the "original" path was positioned to the west of and just inside the boundary wall of the Gospel Hall. Therefore it was not necessary to walk via what is now the Croft. Plan No. 3 shows the former location of the Hall, "GH" and the earlier path. Another person said that the houses on the eastern side of The Croft were built first and those on the western side built later and so when The Croft was set out it could be used throughout the housing development.
- 3.7 In approximately 2001-2002, the previous owner of the field, together with his brother, said they dumped a 3-4 feet high mound of waste and earth in the field near point B on plan no.1. This was to prevent unauthorised lorries reversing along the lane between points A and B and unloading spoil, garden waste and some commercial industrial waste onto their land. They then discovered local residents were dumping garden waste on their land as they noted a worn path over the earth mound. It was at this time they said they installed a timber barrier across the top of this mound. They said the wooden barrier was pushed over so they had to reinstate a barrier over several years, but it was continually being damaged. One of the Claimants stated she recalls a 2-3 feet high mound of soil being placed at this point sometime between 1995-2000 and also recalls a wooden barrier. This made it difficult for the children to use but she said it only lasted a few weeks as it was removed by persons unknown. Two claimants stated they never remember seeing a barrier or mound and two others stated the previous landowner attempted to prevent access "but people continued to make their way through." Two others did not recall there was a problem, one of whom said it was quite common for garden waste to be dumped at this location.
- 3.8 The owners also wish to point out that the Council's Environmental Health Officers had also been in contact with them over the tipping which is why they took measures to block access. However due to the number of queries that section receives each year they are unable to provide any record of previous correspondence. The landowners have not been able to produce any copies of letters or photographs of the site at this location at this time.

- 3.9 The primary issue is whether the wooden barrier and mound of earth deposited in or around 2000 interrupted the continuous use of the path between 1989-2009. According to one of the claimants, it only remained for a few weeks, yet according to the previous landowner efforts were made to repair the damage to the barrier before replacing it over a much longer period. Assuming this act interrupted the continuous use, then the relevant period would be set back from 1980 to 2000. If this is correct, only one person can show use commencing as early as 1980 and he has already stated he would not wish to attend any public inquiry.
- 3.10 It has also been pointed out that the butcher's shop closed in about 1990, the baker's shop burned down in 1995 and the Spar stores opened in 1997. Therefore, he questions how much use was made of the path during the early part of the 1990s.

### **SPECIALIST USER GROUP**

- 3.11 Another issue which should be considered is whether those that made use of the path can be said to represent the general public. The majority of those who use the path live at Landor Drive and reside in one particular part of that Estate. However there are seven persons who do not. Previous cases on such localised use are highlighted in Appendix 5 and the distribution of the Claimants has been plotted on Plan No. 4 Poole -v- Huskinson [1843] clearly shows there can be no dedication to a limited part of the public. However, use by those who can represent the whole community could be said to represent the public. Nonetheless the question arises as to whether there are sufficient number of people who do not live in Landor Drive that can be said to represent the whole community. There is no user evidence available to show this path existed prior to the housing development at Landor Drive although there is evidence of access to footpath No. 43 from Castle Street. It is evident the path was only used once these homes were built. No persons living toward the eastern end of Landor Drive have stated that they have made use of the path, which may reflect that their preferred means of access to Glebe Road and Castle Road is via Glanymor Park Drive.

### **CONCLUSION**

#### **THE SECTION A-B-C-D**

- 4.1 The first issue to determine is whether there has been a minimum period of twenty years' use prior to the first occasion the alleged existence of the public way was called into question. The previous owner has stated that efforts were made to prevent unlawful dumping of waste in or around 1999 / 2000 by the erection of a wooden barrier and mound of soil. He also stated that these attempts continued over a period of years. By implication this could have had the effect of challenging or interfering with public access until the barriers were

removed. This is not accepted by six claimants and others do not recall any issue with access this time. According to the owners, they made repeated efforts to repair the barrier. Even if the public were able to make their way over, around or by removing part of the barrier, the route or width as claimed would have been restricted. According to one of the claimants it was an attempt to prevent access, although it only prevented smaller children. There is however case law in 2002 which concluded that acts of interruption if removed by the public could be treated as acquiescence by the landowner.

- 4.2 A second question has been raised as to whether access would have been available via the route when the houses on The Croft were being constructed. Whilst this section of path via The Croft did not directly affect the length claimed between points A-B-C-D, if access to Castle Road or Glebe Road was not possible due to the development of The Croft, then it is reasonable to question whether the claimed path A-B-C-D could have been in continuous use and therefore that use was interrupted.
- 4.3 This has been raised with some of the claimants and none have conceded the development of The Croft did interfere with their use. Moreover that the original path was adjacent to, but not via The Croft.
- 4.4 The third issue is whether those in support of the application can be said to represent the public at large. There is evidence of use by seven who do not live in Landor Drive.

#### **SHOULD A MODIFICATION ORDER BE MADE**

- 4.5 The test set out in Appendix 2 under 3(b) relate to user evidence only. As such it is arguable that to justify making an order, the evidence must show a public right of way exists on the balance of probabilities. Under the test 3(c), however, the discovery of any evidence which shows it is reasonable to allege a public path exists would be sufficient to make a Modification Order. The issue therefore is, if the lower test is applied, is it reasonable to conclude a public path exists. Case law assists in this regard, in that under the ruling from R -v- Secretary of State for Wales ex parte Emery [1996], a landowner would have to provide irrefutable evidence to show a public path could not exist. The allegation that access was interrupted in 2000 is not supported by any photographs or independent witnesses, apart from an acknowledgment by one of the Claimants that the barrier existed but was only difficult for children to use.
- 4.6. The allegation that The Croft blocked access during its development has not been established as an irrefutable fact. Again there are no photographs, plans or correspondence between the previous developer and this Council in this regard.

- 4.7 The issue regarding whether use has been by the general public is less easy to determine in relation to whether a modification order can be made. No specific guidance can be found from case law or from the Planning Inspectorate on what proportion of the total number of users would satisfy this criteria. As such, it is possible for this Council to conclude use is by the wider community.

**Recommended:-** that a Modification Order be made for the length of path so claimed between points A-B-C-D.

### **THE POSSIBLE EXISTENCE OF A PUBLIC PATH VIA E-G ( PLAN NO.3)**

- 5.1 This length of path is not recorded as a public right of way, although it is the route the claimants have identified as the one they have used to access The Croft. It also contains a double pedestrian barrier at point G. The registered public footpath is shown via the route E-F, but cannot be used today, nor is it known when it first became unavailable for use.
- 5.2 The two houses at either side of the northern end of The Croft, numbered 6 and 9, were completed in 2003 and are believed to have been the last houses built on this road. It was noted from a site visit and from the representatives of the owner of part of the field, one of whom owned this lower section of the land that there are oak trees about 6-7 metres high between points E and F. According to this previous owner the trees have been there for some thirty years. Both representatives of the developer are from the area and said they have personal knowledge of the site. Furthermore, one of the owner's representatives can confirm that the barriers at point G have been in existence for at least 15 years as he can recall his son could not drive his small motorcycle past this point.
- 5.3 It is not known when or by whom these pedestrian barriers were installed. It could have been a measure to either prevent motorcycle access into the field or prevent younger people bicycling or running on to The Croft. Whatever the reason for its installation, the barrier is an acknowledgement that the public have been passing through this point, even if it was mistakenly on the assumption this was the position of the public path.
- 5.4 It is also clear that the existence of the footway via The Croft south of point G provides access for the public.
- 5.5 From an examination of the earlier ordnance survey plans, the path was in the position shown by the Definitive Map E-G-J on the second edition of the ordnance survey 1899. However, it appears to have migrated over the years with its location by 1985 coinciding directly with E-G. The previous owner also said he believes the path ran slightly farther west than its current position borne out by the Ordnance

Survey Plan dated 1971 which was surveyed in 1970. The path subsequently became incorporated into the central part of the Croft and so effectively displaced the original alignment. Therefore the path shown on the current Definitive Map south of point F bears no resemblance to the route surveyed in 1970 by the ordnance survey. Plan No. 3 shows the three different alignments superimposed on to the current ordnance survey plan. It is also worth noting that a number of the claimants recall walking close to the Gospel Hall before The Croft was built. That building, now demolished, is shown by the letters GH on Plan No. 3. According to the previous owner The Croft was completed in about 2003 as he was involved in building two of these properties at that time.

- 5.6 Secondly, the installation of the barrier has been accepted by previous and present owners as defining the position of the walked route. The user evidence suggests the route as shown on the 1985 edition is the route that has been in use until The Croft was opened, except for the short section between points E and F which did not change when The Croft was set out. The evidence of the previous owner and his presence on site in 2000 when he was involved in the building of the two houses, adds further weight to the fact E to G is the path which has been in use.
- 5.7 It is clear the Definitive Route is incorrect south east of point E from Map evidence and from the use made of E-G by the public since at least 1980.
- 5.8 Consequently, it is proposed to make a Modification Order to recognise E-G as the public footpath and to delete the section E-F-J as shown on Plan No. 3. Whilst The Croft is adopted and incorporated the public footpath, the Definitive Map still depicts this path as running along the centre of The Croft. The Croft being a public carriageway can no longer be classified as a public footpath and therefore cannot be shown on the Definitive Map.

**Recommended:-** that a Modification Order should be made to delete that length of footpath between points E-F-J as shown on Plan No. 3, but to add that length E-G as shown on the same plan.

#### 5.9. **Equality and Engagement Implications**

The EIA Screening Form has been completed with the agreed outcome that a full EIA report was not required:

The requirement to consider the application can not take account of the issues raised regarding the discrimination against people on the basis of age, disability, gender re-assignment, marriage and civil partnerships, pregnancy and maternity, race, religion or non-belief, sex, sexual orientation and Welsh Language. The decision as to whether to make a modification has to be based on the evidence submitted and

undertaken independently of any of the above criteria. The desirability, convenience or suitability of recognising the path as a public one are not matters which this Council nor the Planning Inspectorate can take into consideration. As such no equality impact assessment was required.

## **6. Legal Implications**

6.1. There are no legal implications other than those mentioned in the body of the report.

## **7. Financial Implications**

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

## **FOR INFORMATION**

### **Background papers:**

ROW-000203

### **Appendices:**

Appendix 1: Legal Principles concerning applications made to record public paths.

Appendix 2: Extract from the Wildlife and Countryside Act 1981.

Appendix 3: Extract from the Highways Act 1981.

Appendix 4: Common Law Principles.

Appendix 4: Special User Group.

Appendix 5: Details of evidence from the Claimants.

Appendix 6: Letters of objection from a resident.

Appendix 7: Letter of objection from owner of land and this Council's response.

## **APPENDIX 1**

### **LEGAL PRINCIPLES**

- Under the provisions of the Wildlife and Countryside Act 1981 Section 53(2), this Council is obliged to keep the Council's record of public rights of way, known as the Definitive Map and Statement under continuous review. 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.

The Council is also obliged to make amendments to the Map and Statement where it discovers other evidence that shows a public path exists.

- 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. Once the Order has been made it cannot be withdrawn or abandoned, unlike public path diversion, extinguishment and creation orders where the Council could do so if it considered it did not wish to pursue an order, perhaps for example, where there were overwhelming numbers of objections which it had not envisaged originally.

- In terms of applications to add routes, 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 2).
- 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.
- 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.
- 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 2). Such evidence could include user evidence and/or documentary evidence.

## APPENDIX 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.

### 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 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 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. 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.

## APPENDIX 5

### 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 used 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.

## APPENDIX 6

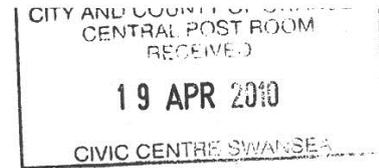
- 1.1 The path it is said is used by pupils of Castell Lluchwr Primary School who live at Landor Drive and older school children who use the path to catch the bus, which stops at the junction of The Croft with Castle Road to go to schools in Llanelli, Gorseinon College and Gowerton Comprehensive. This is marked BSh on Plan No. 2.
- 1.2 The Loughor Foreshore is a popular destination and the path has been used to gain access to Footpath No. 43 to Gwydr Place.
- 1.3 The current housing at Landor Drive and Taliesin Place has been in existence since approximately 1980. Two residents of Taliesin Place have said that they utilise two paths leading from this road to access the northern hammerhead at Landor Drive, shown point X on Plan No. 2, in order to reach this claimed public path.
- 1.4 One Claimant said when he was undertaking work on his house in Landor Drive he placed concrete slabs on the path. However, a number of Claimants have referred to planks having been placed on sections of the path from an earlier time. Both were designed to assist people in crossing the field, as it was prone to becoming muddy in wet weather.
- 1.5 Another Claimant stated she met the person who owned the field before the person referred to in 3.7, took ownership. This occurred on a few occasions when visiting one of her friends and said if she saw him when shopping for example, she would speak to him. She believes he accepted people used the path as he never took issue with people using the path.
- 1.6 All the claimants who have been interviewed were asked if they were ever confronted or challenged by the present or previous landowners prior to 2009, and all said they had not. It does appear that no specific

verbal warning or written notification by means of a sign was ever displayed to bring it to the attention of the claimants that no public path existed until the notice and barrier was placed across the path at point B on Plan No. 1 in 2009. However, there is some evidence the public's use was interrupted in or around 2000, as discussed.

- 1.7 Whilst the route has periodically become encroached by vegetation, the aerial photographs of 2005 and 2009 show the position of the path and this is the route depicted on Plan No. 1.
- 1.8. Three other individuals who live at Castle Street and Culfor Road have said they have used the path to walk their dogs at Glanymor Park. Also two from each of these addresses have friends and relatives in the Glanymor Park Area.

**APPENDIX 7**

**LETTER OF OBJECTION**



Glan y Mor Park  
Loughor

12 April 2010

City and County  
Swansea

Your ref. MJW/EJF/Row 203

Dear Sirs,

Re: Alleged Public Footpath from Landor Drive to The Croft: Community of  
Llwchwr.

I object most strongly to the path being made a right of way. Over the years both my house and garden have suffered badly from passers by.

I herewith list some of the problems I have suffered over the years.

- 1) Most of the windows in my greenhouse have been broken, with the result that I cannot use my greenhouse,
- 2) Several windows in my conservatory have been smashed,
- 3) Rubbish including a bike, stones, bottles and even condoms have been thrown into my garden,
- 4) Youths congregating at my side of the path, where they proceeded to throw stones, eggs, branches of trees at my windows and even coming across to <sup>over</sup> pier through the windows and
- 5) Rubbish, for example, garden waste, rubble and even foodstuff has been dumped at the rear of my garden where it joins this unauthorised path.

If this request goes through, I presume the Council will undertake the responsibility of clearing all the rubbish that will surely be dumped on this path.

I consider the reasons stated above to be suitable grounds for objection against a public right of way being granted. If unfortunately, a right of way is granted, I hope that I will be notified accordingly, with a written explanation as to how you have made your decision.

Yours faithfully

## **APPENDIX 8**

### **LETTER OF OBJECTION FROM THE OWNER OF THE DEVELOPMENT SITE AND THE RESPONSE FROM THIS COUNCIL**

To Mr M J Workman,  
Acting Head of Legal and Democratic Services,  
City and County of Swansea,  
Civic Centre,  
Oystermouth Road,  
Swansea, SA1 3NS

Your reference – MJW/EJF/ROW-203

Dear Mr Workman,

#### **Alleged Public Footpath from Landor Drive to The Croft, Llwchwr**

We refer to your letter dated 31<sup>st</sup> March 2010 re the above, and understand that due to the requirement to provide a full response, the need for a reply within 28 days has been waived.

We therefore offer the following comments.

First, we understand that the applicants may not have completed the full legal procedure required to make this a 'duly made application'. This relates to the need to serve Notice of the Application on all affected owners. The County Council are an affected owner. Your Mr Howard French of the County Councils Property Department does not recall receiving such a Notice.

Second, we can understand the desire for access across our land, as a short cut to services in Castle Street. However, as we are sure you are well aware, in a quasi-judicial process such as this, the desire for access is not a relevant consideration.

Notwithstanding the above comments, we consider the claim should be refused on the grounds that the route being claimed has not acquired public status. Our reasons are as follows. We have attached copies of the supporting statements and maps which we have numbered, to assist (Attachment 1).

To achieve public status, the public at large must have used a specific route, without interruption, for a period of 20 years.

#### **1) A specific route has not been sufficiently defined**

i) The claimed route has not been sufficiently defined on the ground. Beyond the utility pole on the site, the 30 metre section leading to registered public footpath 43 is undefined on the ground. People would therefore have taken various routes over this section during various periods. In winter in particular,

it is understood that the site is wet and muddy. Any users would therefore have taken what they saw as the best route on the day. There is no right to 'wander'.

ii) The 35 maps used to support the application show at least 5 different routes, as shown on the attached plan. These are shown on the attached map (Attachment 2). Route 1 – forms 10. Route 2 – forms 1, 2, 14, and 19. Route 3 – forms 7, 18, 22, 23, 24, 27, 28, 30, 31, 33, 34, and 35. Route 4 – forms 9, 15, 20, 21, and 25. Route 5 – 3, 4, 5, 6, 12, 13, 16, 17, 26, 29, and 32.

iii) Modern O.S. maps do not show a route. If one was visible, professional surveyors working for the O.S. would almost certainly have depicted it on their maps.

iv) The route shown by the claimants on the map attached to their notice to us is different to the route shown by you on the map attached to your letter to us (Attachment 3).

## **2) There has been effective interruption during the relevant 20 year period 1989 - 2009**

i) The previous owners from 1998 to 2008, Jason and Darren Rees, have confirmed that they attempted to interrupt access to the site on many occasions, with fences, wooden barriers, and even an earth bund. They did this because there was constant trespass by persons dumping trash, garden cuttings, hedge and grass clippings, and rubbish, on their land. This can be evidenced by the amount of rubbish the present owner has had to remove from the site deposited there in the last couple of years.

There must also be records in the County Council about this because Jason and Darren Rees received a number of visits and requests from the Environmental Health Officers who said that prosecution would follow if the site was not cleared of rubbish. They also erected a sign on one occasion to try and stop trespass.

These actions are also confirmed within the application. Forms 12, 13, and 31, all refer to access being denied or blocked off.

ii) Access was specifically blocked off by the previous owner to them (Mr E Evans, now deceased) when he put it up for sale in 1998, and by Jason and Darren Rees, when they put the land up for sale in 2008. This was done for obvious reasons; to ensure that potential purchasers did not see a site being strewn with rubbish, and being accessed by trespassers.

iii) The site is low lying and very wet in winter. Use would have been severely reduced in the winter season, and would have been interrupted during very

wet periods. This is evidenced by the fact that some users have laid broken paving slabs over the first part of the route to try and overcome this problem. This information was supplied by the applicant, Mrs Dorrington.

**3) The supporting evidence does not show uninterrupted use by 35 people over a 20 year period**

The following points show weaknesses in the supporting evidence. Taken together, they show that although 18 people may have used a route for 20 years, their evidence is tainted by discrepancies, omissions, and a lack of independent comment and completion.

- i) Forms 19 to 35 have used the claimed route for less than the required 20 years. This leaves only 18 who can claim more than 20 years use.
- ii) Forms 1 to 5 refer to using the route during or before 1981. It is understood that Landor Drive was only built in the early 1980's. There would not have been access through a building site. This casts doubt on their accuracy, as access would clearly have been denied by Wilcon Homes.
- iii) Forms 12, 13, and 31 refer to the route being blocked off or otherwise being denied access. However, the remainder do not refer to the interruption. This puts the accuracy of the remainder in doubt.
- iv) Forms 12 and 13 use exactly the same words. This puts the freely expressed views of those who completed the forms in doubt.
- v) The writing on many of the forms looks similar, as do the way the dates are written. Six forms are almost certainly written by just 3 people (Numbers 1 and 14, numbers 5 and 6, and numbers 8 and 9). Only forms 2, 5, 10, 11, 15, 20, 31, 34, and 35 appear to have been written in a natural script.
- vi) Forms 2, 16, 17, 19, and 21 refer to use by those who completed them from when they were young children. They would not have known about rights of way and public status at such a young age. Of these, two (16 and 21) can recall walking the route from when they were born! Clearly, they cannot have remembered events from their first few years, and they could not walk anyway. This suggests that the forms were filled in without much thought.
- vii) Forms 2, 18, 20, and 34 say that they would not appear at a Public Inquiry. This means that they are not willing to be cross-examined. It therefore casts doubt on the strength of their evidence.
- viii) Many of the questions have not been answered. Others which ask for specific information have just been answered with the word 'yes'. This shows that most forms have been completed without much thought, and without due diligence.

ix) Forms 22, 28, and 31 refer to the route being used as a bridleway. This is very strange. Either the other 32 never saw horses use the route (very surprising in such a location), or doubt must be cast on the accuracy of these three.

x) Although the names and addresses of the supporters have been blanked out, it must be assumed (unless proved otherwise) that they come from a limited geographical area, and do not represent the public at large. A route cannot acquire public status unless it has been used by the public at large.

xi) Doubt is attached to the provenance of the maps because many appear to have been drawn by the same hand, and with the same red marker. This is not a natural occurrence. Under normal circumstances, it would be expected that some would draw the line in a different colour, and in different ways (heavy, light, dashed, dotted, etc). This casts doubt on the freely expressed views of those who completed the forms and maps.

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We therefore request that you recommend the refusal of the application.

Can you please inform me where, when, and by whom, the application being considered, so that I may attend to observe the debate.

Yours, etc

Swansea Council  
Planning & Development  
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01792 636008  
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MJW/RR/ROW-203

SWO-892

12<sup>th</sup> July 2010

Dear Sir,

**Re: Alleged Public Footpath from Landor Drive to The Croft, Community of Loughor**

I refer to my letter dated the 17<sup>th</sup> June and apologise for not being able to respond any earlier.

The joint application by Mrs Dorrington and Mrs Baxter named the Head of Legal and Democratic Services on the certificate of service of notice. The Property Services were subsequently informed on the 26<sup>th</sup> April 2010.

Please note that the information sheet to which you refer, only provides a brief outline of the use made of the path and in itself is often inadequate to progress an application unless further details are obtained. Consequently, a proportion of the Claimants are always interviewed for this reason. Any points you wish to make that conflict with their accounts can be raised with the claimants subsequently, to enable this Council to assess the validity of the Application.

I refer to the points you have made in the same order as follows:-

1. (i) It is accepted that the use of this path may well be less in the winter than summer or less in wet than dry weather, although according to the seven interviewed so far they say their use has continued throughout the winter. For example, one person recalls people using the path during a period of snowfall in order to collect milk left at Castle Street due to vehicular access being unavailable to Landor Drive.

*Cont'd...*

- (ii) Those interviewed confirmed one route was in use. It is in fact standard practice to check with Claimants, there was no variation on the path being claimed. However, if you have contrary evidence that there was significant variation I should be grateful to receive this information.
  - (iii) It is often the case that those completing plans show some variation. However, I would add, that the Principal Claimant drew this line to the rear of Landor Drive on the assumption it would cause the least inconvenience to your client.
  - (iv) I take your point concerning the lack of a route identified by the ordinance survey although if you consider the ariel photograph I have enclosed, dated 2005, it shows the claimed public path quite clearly.
2. (i) The occasions you state your client would have blocked this path are obviously important details that need to be considered and thereafter put to the Claimants for their further comments. Consequently, I would be happy to interview both Mr. Jason and Darren Rees for that purpose. Perhaps you would let me know if this is possible. I have contacted colleagues in the Environment Department as you advise, but they log approximately four thousand calls per week and would need to be given precise dates of the visits which were made by the Council and from whom the complaint originated in order to trace the details and outcome of the inspections.
- Please note that the Forms you have numbered 12 and 13 do not state access was denied but say the previous landowner tried to block access, "but the public made their own way." With regard to Form 31, it does not say the access was denied by the previous landowner, but that access was prevented without notice. However, this will be checked.
- (ii) One of the interviewees has met Mr Evans on several occasions on a social basis and said he had no objection to the land being accessed from Landor Drive.
  - (iii) This point is similar to the one made in your paragraph 1(i). However, may I suggest that laying broken slabs shows that access was required and in use during wetter conditions.
3. (i) The Applicant must demonstrate the route was available during the relevant twenty year period, but does not have to establish that every person who walked the path, themselves made use of that path for a minimum of twenty years.

*Cont'd...*

- (ii) According to one person who was interviewed, her grandparents recall walking across the field now owned by your client before the Housing Development at Landore Drive took place. Nonetheless, this is not of any great significance to the Applicants case as such access was prior to the relevant twenty year period currently assumed to be 1990 to 2010.
- (iii) I refer to my previous comment under your paragraph 2(i).
- (iv) I am not certain why you say Form 12 and 13 use exactly the same words, but perhaps their similarity results from the fact that they derive from a husband and wife.
- (v) Two sets derive from the same household,
- (vi) It is agreed that a person cannot claim then their use of a route from birth. It is usual for this Council to assume a persons length of use to have only been independent from at least the age of ten, unless proved later.
- (vii) Any claimant who is not prepared to attend a public inquiry will have less weight given to their evidence. However, there are various reasons why a person would not wish to attend an inquiry and in itself would not invalidate their evidence.
- (viii) One of the reasons for seeking further information from claimants is to clarify the contents of the Forms and query any omissions. One person who stated the route is a bridleway has been interviewed and does not claim such rights exist.
- (ix) I have written to the others to ask why they have stated the route is a bridleway.
- (x) I should be grateful if you would clarify what you consider constitutes a limited geographical area and any legal authority upon which you rely which define this concept.
- (xi) Noted.

In summary therefore, this Council will continue to investigate the claim and with your assistance consider in more detail, any acts that either blocked access or made it clear to those using the path they had no right to cross the land. In addition, any other information you may wish to produce from other persons who may have knowledge of the area will be considered. Once all

*Cont'd...*

the information is to hand a Draft Report will be circulated to yourself, the Principal Claimant and the local Councillor for further comments. Thereafter, the Final Report will be submitted to a Rights of Way for Sub-Committee who ultimately decide whether a modification should be made to register this path on a public . If an Order is made you would be entitled to submit a formal objection in which case the matter would have to be referred to the Planning Inspectorate for their determination. If this Council decides not to make a Modification Order the principal claimant/s would have the right to appeal to the Planning Inspectorate against this Council's refusal to make a Modification Order. I can advise you when that Committee will determine the Application nearer the time.

I look forward to hearing from you in the near future.

Yours faithfully,

**Acting Head of Legal, Democratic Services & Procurement**