

## Report of the Head of Legal and Democratic Services

Planning Committee - 6 September 2016

### PUBLIC RIGHTS OF WAY – VARIOUS ALLEGED PUBLIC RIGHTS OF WAY BETWEEN HENDREFOILAN ROAD, HUNTINGDON WAY AND WAUNARLWYDD ROAD IN THE COMMUNITIES OF KILLAY, SKETTY & COCKETT

<b>Purpose:</b>	To consider whether to accept or reject the application to make a Modification Order to record various public footpaths 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 footpaths 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 modification order be made.
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#### 1. Introduction

- 1.1 An application was made in 2010 for a Modification Order to add various public footpaths to the Definitive Map and Statement between

Huntingdon Way, Hendrefoilan Road and Waunarlwydd Road. A plan showing the routes claimed is enclosed at Appendix 1.

- 1.2 The purpose of this report is to establish whether the evidence submitted is sufficient to show that there has been dedication of the routes claimed as public paths.

## **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. This is included at Appendix 2.
- 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”. This section is included at Appendix 3.
- 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 The land between points D1 and D2 on the plan shown at Appendix 1 is registered Common Land namely CL6(S) West Cefn Coed Common. There have been public access rights for air and exercise over this land since the provisions of section 193 of the Law of Property Act 1925 came into force. Consequently, the public have already been entitled to use this part of the route since that time and therefore any use since that time will not have been "as of right". The consequence of this is that the route claimed between D1 and D2 will not be considered as part of the application.
- 3.2 It should be noted that there is no statutory provision for this Council to ensure any one route is retained across the common to enable the public to pass between points D1 and D2. As a result, this Council has no duty to maintain a route and must ask permission from the owner of the Common to cut back overgrown vegetation or to carry out any other maintenance in order to allow continued public access.
- 3.3 The route claimed between points D3 and G forms part of the adopted highway and is maintainable at public expense. Therefore, the route between these points will not be considered as part of the application.
- 3.4 To establish a public right of way use must be from one highway to another or to a point of public interest or to land across which there are already public rights of access such as common land or access land.
- 3.5 Forty-four users have submitted evidence to support the application. Various combinations of the possible routes are claimed.

3.6 Given the information above, the routes which will be considered as part of this report and for which evidence has been received are as follows:

- (a) A-B-C Between Huntingdon Way and Hendrefoilan Road
- (b) A-B-H-E Between one point and another along Hendrefoilan Road
- (c) A-B-H-D-F Between one point and another along Hendrefoilan Road
- (d) A-B-H-D-D1 Between Hendrefoilan Road and West Cefn Coed Common
- (e) C-B-H-E Between Huntingdon Way and Hendrefoilan Road
- (f) C-B-H-D-F Between Huntingdon Way and Hendrefoilan Road
- (g) C-B-H-D-D1 Between Huntingdon Way and West Cefn Coed Common
- (h) E-H-D-F Between one point and another along Hendrefoilan Road
- (i) E-H-D-D1 Between Hendrefoilan Road and West Cefn Coed Common
- (j) F-D-D1 Between Hendrefoilan Road and West Cefn Coed Common
- (k) D2-D3 Between West Cefn Coed Common and the adopted highway near Cwmllywd Nature Reserve

#### **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.

4.2 The Council is the owner of the small grassed area of land near point C and four other owners have been identified and contacted.

- 4.3 The route between F and G is not registered with the Land Registry. The owner of the common land (D1 to D2) has been identified and part of the route (D3 to G) is the adopted highway. Notices were placed on site addressed to the owner or occupier but it has not been possible to establish the owner of the remainder of this route (F to D1 and D2 to D3)
- 4.4 The owners of the land between points H1 and D and five others have objected to the application.

## **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 The evidence appears sufficient to find that the path between points D and H was obstructed by the landowner at point H1 by the installation of earth mounds and barbed wire fencing in 2009. However, not all the variations of routes used would require passage between points D and H.

5.4 It would therefore appear reasonable to establish a relevant period of 1989 to 2009 for all those routes that require the passage of point H1 and a relevant period of 1990 to 2010, being the date of the application, for all others.

**(b) User Evidence**

5.5 Forty-four claimants have submitted evidence of use in support of the application. However, the evidence suggests that various combinations of routes are used and not all claimants allege use of all the possible routes.

5.6 Nine claimants have not submitted sufficient information to determine which routes they have used and therefore their evidence has been discounted.

5.7 Of the thirty-five claimants who have identified the routes taken, twenty six allege twenty years use across the respective relevant periods. The following table identifies the relevant period for each of the routes claimed and the number of users who allege twenty years continuous use across that period. The main reasons for using the various paths appear to be recreation, dog walking, use as part of a larger circular route and to enjoy the views afforded.

Relevant Period	Route claimed	Number of users
1989 to 2009	A-B-H-D-F	16
	A-B-H-D-D1	14
	C-B-H-D-F	13
	E-H-D-F	17
	C-B-H-D-D1	15
	E-H-D-D1	14
1990 to 2010	A-B-C	14
	A-B-H-E	15

	C-B-H-E	12
	F-D-D1	20
	D2-D3	24

5.8 The user evidence is supportive of the frequent use of the claimed routes throughout the appropriate relevant periods for each path which raises the presumption in favour of the dedication of the footpaths. However, it is necessary to consider whether there is sufficient evidence to rebut this presumption i.e. that the landowner demonstrated to the public that there was no intention to dedicate a public right of way.

5.9 None of the claimants state that they witnessed any obstructions or notices prior to the 2009 obstruction at point H1 and none claim to have been challenged by the owner or occupier of the land regarding their use. This suggests that the landowners did not take sufficient steps to show the public that there was no intention to dedicate a right of way.

The 2003 aerial photo survey clearly shows the claimed route between points D and H1. See Appendix 5.

5.10 The leaseholder of the land between D and H1 has objected and has advised that he erected the obstructions in 2009 when he ploughed his land to house his cattle and breeding bull. He asserts that he has worked the land for some forty years and that prior to 2009, the borders to this land were overgrown with no discernible track or paths. Whilst he concedes that there have been problems with trespassers, he is adamant that the path has not been continuously exercised over his land as alleged. The solicitors acting for the freeholder of the land between D and H1 have also been in correspondence and neither can

understand how anyone can claim that they have had continuous access to this land.

- 5.11 Given the level of support for these routes and the fact that no claimants suggest that any obstructions had ever existed prior to 2009, further evidence would be required to support the landowners' contention that there could not have been dedication across their land.
- 5.12 The owner of the field between points B and B1 to the west of Huntingdon Way has also claimed that he has regularly attempted to prevent access by putting up fences but these have always been torn down. One user agrees that makeshift fencing was erected but was broken down by bikers or school children. However, he further states that this was then replaced by scaffolding either side of the tree at B1 which solved the trail bike problem without preventing use by walkers.
- 5.13 One claimant mentions that an informal stile at B-B1 was erected for stock-proofing which originally consisted of wooden planks to prevent horses escaping but that this did not stop pedestrian use. He advises that the planks were later replaced with scaffolding poles forming makeshift stiles to assist pedestrians. Five other claimants mention a makeshift stile at this location, two of which state that this has been in place since the 1980s. However, they assert that this has never prevented heavy use of the path by walkers.
- 5.14 Based on this evidence, the owner of the field through which B-B1 passes does not appear to have taken sufficient steps within the relevant period to show the public that there was no intention to dedicate a right of way. The evidence suggests that the public viewed his efforts as a method of stock-proofing and preventing use by trail bikers without hindering pedestrian use.
- 5.15 On 12<sup>th</sup> May 2016, an objection was received from the landowner between points A, B, B1, H, E1 and E. It is claimed that at these points



fences or barbed wire and gates have been removed by the public allowing horses in a nearby field access to the land and the main roads. The grounds person employed by the land owner has indicated that he has repaired the fences many times but that they continue to be vandalised. Through earlier correspondence and telephone calls, the land owner indicated that these activities occurred post 2009, and therefore not during the relevant claim period. As such this information could not have been considered in ascertaining the outcome of this matter. However, in July 2016, the aforementioned grounds person indicated that attempts to restrict access occurred as far back as thirty years ago. Confirmation that restriction to access was implemented in the relevant period was not as yet received at the time of submission of this report.

- 5.16 Two further objections were received from members of the public claiming that footpaths here would be detrimental to the environment, that the area should be kept unspoilt, that there would be public safety concerns due to the disused quarry, that residents have experienced issues with vandalism, fires and motor-bike use and that there would be a risk of injury due to animals. These issues cannot be considered when determining whether or not footpaths have been dedicated. The only issue to determine is whether the legal tests are satisfied i.e. whether or not there has been use “as of right” for the relevant twenty year period.
- 5.17 Without the submission of further evidence in support of the claims of the owners of the land between D and H1 and between B and B1, it must be concluded on balance that public rights on foot have been established across these routes.
- 5.18 There seems to be no dispute with regard to the evidence received in relation to the use of the paths between F-D1 and D2-D3. The Council’s Countryside Access Team has carried out maintenance of these routes as if they were public paths for some years.

5.19 The evidence is therefore considered sufficient to show that there has been “statutory dedication” of public rights on foot across all those paths shown in Appendix 1 and referred to in the Table at paragraph 5.7 of this report.

## **6 Conclusion**

6.1 The evidence submitted is supportive of long term frequent use of the various paths subject to the application with a significant number alleging twenty years use over the relevant periods for each path. Therefore, a presumption in favour of the dedication of the footpaths as public rights of way is raised.

6.3 Objections were received mainly in relation to the route between D and H subject to the obstruction in 2009 disputing the fact that there could have been continuous use across this land over the relevant twenty year period. A further objection was received claiming that it was not possible for the public to enjoy twenty years of uninterrupted use of the relevant period. However, sufficient evidence was not submitted in order to negate the making of a modification order.

6.4 No further evidence has been provided to show that such use was not possible and the evidence of use from the claimants is substantial. Therefore, on balance the evidence from the objectors is not considered sufficient to rebut the presumption that public footpaths have been dedicated.

6.5 It is therefore considered that the evidence available is sufficient to show that public rights of way have been established over all those routes shown on the plan at Appendix 1 and it is therefore recommended that a modification order be made to record these routes 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-000200/KAO

### **Appendices**

APPENDIX 1 – Plan Showing Routes Claimed

APPENDIX 2 – Section 53 Wildlife and Countryside Act

APPENDIX 3 – Section 31 Highways Act 1980

APPENDIX 4 – Dedication Under Common Law

APPENDIX 5 – Aerial Photo from 2003