

RIGHTS OF WAY COMMITTEE

Date Written	7 th January 2019
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Service Area	Legal & Economic Development
Committee Date	10 June 2019

To: Chair, Ladies and Gentlemen

CYFARTHFA 150

1.0 SUMMARY OF REPORT

- 1.1 To determine an application to record a public right of way from highways to Waunbant (open land) under the Wildlife and Countryside Act 1981.

2.0 RECOMMENDATION(S)

- 2.1 The application be rejected as on the balance of probability insufficient evidence has been provided in support of the application to record the claimed Right of Way, and to advise the applicant that their application has been rejected and that they may appeal in writing against the decision of the Council to the Planning Inspectorate within 28 days from the date of the decision letter.

3.0 INTRODUCTION AND BACKGROUND

- 3.1 A claim to record a public right of way from highways to Waunbant (open land) was submitted to Merthyr Tydfil County Borough Council on 20th February 2009.
- 3.2 The County Borough is required by law to investigate the evidence and make a decision based on that evidence as to whether a public right of way exists, and if so its status. Section 53(3)(b) and (c) Wildlife and Countryside Act 1981 sets out the tests that need to be met when reaching a decision; also current case law needs to be applied.
- 3.3 An order will only be made if the evidence shows that: (a) a right of way “subsists” or is “reasonably alleged to subsist” or (b) “the expiration ... of any period such that the

enjoyment by the public ... raises a presumption that the way has been dedicated as a public path”.

3.4 When considering evidence, if it is shown that a highway once existed then highway rights continue to exist (“once a highway, always a highway”) even if the route has since become disused or obstructed unless a legal order.

3.5 The legal background is to be found at Agenda Item 3.

3.6 Description of the Claim

As depicted on the plan, Cyfarthfa 150, commences at point A grid reference SO02440707 and proceeds in a general easterly direction to point B grid reference SO02590708, it then proceeds in a general east-south-easterly direction to point C grid reference SO002600708, and then in a general southerly direction to point D grid reference SO02600706 it then continues in a general south westerly direction to terminate at point E – grid reference SO02530696.

The route commences on the maintainable highway and then proceeds inward towards the centre of the open area. All routes are circuitous and interlink with one another enabling egress from any route back on to the maintainable highway. The surface is natural.

3.7 Land Ownership

The main claimant stated that the landowner had been notified. Land Registry documents obtained in November 2018 show the land to be owned by S F Pound.

3.8 Maps

Depiction of a route on a map is evidence of a track/path, but NOT of any public rights.

The route is not depicted on any Ordnance Survey map.

3.9 Aerial Photographs

Sections of the route are visible on aerial photographs from 2001, 2003, 2006, 2008, 2010, 2014 and 2017.

3.10 Site Visits

MTCBC officers have walked the route the route as described above.

3.11 The Claim

3.13 The main claimant submitted the relevant forms to make a claim.

Mrs A M Launchbury stated that she had used the path for pleasure (dog walking) for 15 years three times a day on foot. Mrs Launchbury also believed that she had the right to use the route and stated that the land was not fenced off. She further stated that she had never been given permission to use the land. Mrs Launchbury's evidence covers the period 1994 to 2009.

- 3.14 Mr Alun Price stated that he had used the route for recreation (walking) since 1966 several times per week. He stated that he believed he had the right to use the route and that having used it for 43 years he had taken the route for granted. He stated that he had never been given permission to use the route and that there was a clearly defined track and that he would wander freely. He further stated that there were no stiles or gates or signs and that he had never been stopped from using the route. He stated that he had seen other people using the same route and that he was led to believe that this piece of land was dedicated for recreational purposes for the local residents. Mr Price's evidence covers the period 1966 to 2009.
- 3.15 Mr Huw Price stated that he had used the route for 43 years for recreational purposes (walking) daily by both foot and push bike. He stated that he believed he had the right to use the route and that the area had been used historically for recreational purposes with the full knowledge of the landowners. He considered there was implied permission from the landowners due to there being full unhindered access with their full knowledge. He stated that there was a clearly defined track and that he would wander freely without encroaching on private land. He stated that there were gates on the vehicular accesses (locked presumably by the landowner) but ever on the pedestrian accesses. With regard notices he stated that he first noticed signs restricting access in February 2009. He stated that he had never been turned back or stopped from the using the route and that he had seen other people using the route many times. Mr Price's evidence covers the period 1966 to 2009.
- 3.16 Mr Martyn Price stated that he had used the route for over 40 years at least every other day for pleasure (dog walking). He stated that he believed he had the right to use the route with no restrictions and that he had never had permission to use the route. He stated that he would wander freely and that there had never been any gates (only on the track which had been locked). Signs appeared on the site since approximately 15th February 2009. He stated that he had been prevented from using the route and that he had often seen other people using the route. Mr Price's evidence covers the period 1969 to 2009.
- 3.17 Mr Christopher Rees state that he had used the route for walking his dog and as a recreational area for children allowing access to open land. He stated he had used the route since 1976 when he purchased his bungalow opposite and that he had never been stopped from using the route. He uses the route twice daily, in the morning and the afternoon. Mr Rees always believed he had the right to use the land, that it was open land and that there was no prohibition as there was no fencing. He stated that he had never been stopped from using the land and that the children had not been stopped from playing. He further stated that Waunbant farm is next to his bungalow and that no-one had ever specifically stopped him from using the paths. He stated that the paths were clearly identified. He said that he wandered freely for recreational exercise and dog walking. He stated that he had never seen any fences or stiles on the land and referred to there being no gates on the land and

referred to the www.clwydyfagwr website. With reference to signs he stated that 7 signs were erected in the week commencing 16th February 2009. He said that the area was popular with all dog owners in the vicinity and by children playing games and with cycling on the paths. Further Mr Rees states that he is under the impression that the land is subject to planning permission his grievance concerns the withdrawal of rights to public land – open land which has been used by him since 1975/76. Mr Rees' evidence covers the period 1976 to 2009.

3.18 Mr Robert Williams stated that he used the route for pleasure (dog walking) and that his son plays football there and that his son also rides his bike. He stated that he had used the route twice daily for 28+ years and that his father had used the route before him and that his son used his quad bike there. He stated that he believed that he had the right to use the route and that he had seen other people using the route. He stated that he had never been given permission to use the route but that he used it with the full permission of the landowner. He stated that there were several defined routes on the area and that he would wander freely. He stated that he had never seen gates or stiles on the route and that there were no signs until February 2009. He stated that he had never been prevented from using the route and that he had seen many people using the route. Mr Williams' evidence covers the period 1981 to 2009.

3.19 Observations from landowners and other interested parties

An Investigation Report into this route was distributed to all interested parties in December 2018. Comments were received on 4th January 2019 from Blake Morgan LLP on behalf of the landowner Mr S F Pound. On behalf of their client Blake Morgan state “ the grounds for our client's objections are:-

3.20 None of the routes amount to a highway. In order for a way to be a Public Right of Way it must first be a highway. Whilst there is no statutory definition of a highway, the common law definition requires there to be a common route along which people can pass freely and at will. In simple terms, there must be a start and an end,. It is quite clear from Appendix 1 to the Route that it is not possible to identify a route which has a start and an end. The Report itself admits that “it is difficult to ascertain which is the main route”.

With respect, we would go further and argue that it is not possible for the Council to identify any route which can sensibly be said to be a highway, let alone a public highway....

There is no evidence in the Report that the public has used any of the Routes identified. For example no evidence that the public has walked between points A and E, or A and C or A and D or any other permutation. The lack of a defined route is accepted as evidence in support...Supporters confirm the lack of any defined route ... wander freely, wander freely (without encroaching on what is obviously private land) wander, wander freely for recreational exercise and walking dog, wander freely.

It is considered that the Routes are isolated in that there is no evidence that they are connected to any other highway and as such they fail to possess the essential characteristics of a highway. Our client relies upon the decision in *Kotegaonkar v The Secretary of State for Environment, Food and Rural Affairs and Bury Metropolitan Borough Council* (2012)... it is submitted that section 31(1) Highways

Act 1980 has not been satisfied and the Council has no power to make any order to amend the Definitive Map.

- 3.21 There is no evidence of public use of any defined way.
... see comments above. In addition, our client relies upon matter set out in section 3 below. There is no evidence that the “public” used any defined way for any defined period.
- 3.22 There has been no dedication of any highway.
It is not claimed that there has been any express dedication by our client or his predecessor in title ... we submit that the applicants cannot demonstrate the public use of any highway/way for at least 20 years. Our client relies upon the following:- the erection of the signs on the land which clearly state :PRIVATE LAND NO RIGHT OF PUBLIC ACCESS OR RECREATION KEEP OUT. These were erected on the 16/17 February 2009 and clearly demonstrate that our client had no intention of dedicating any of the claimed ways. These signs remain in situ as a continuing public manifestation of our client’s intentions. Any evidence which post-dates the 16 February 2009 cannot be relied upon ... the evidence/claim of the lady described as a “housewife” cannot be taken into account.
- 3.23 The land has been in our client’s family for a considerable period of time Our clients family lived at Waunbant Farm from before 1944 to 2000... family granted a lease dated 10 September 1940 to a number of local individuals to allow the land to be used for recreational purposes (football and other sports). The lease was for a term of 35 years to end July 1975. This clearly demonstrates the use of the land for this period was with permission. The lease granted private rights of way over the land. Any use during this period must be discounted. This is acknowledged by the person described as a “Civil Servant” when he/she says that the land “has historically been used for recreational purposes with full knowledge of landowners” ... and another confirms that the land “had been used by the village and surrounding area’s residents for many decades”. Our client’s father regularly told people using the land to stop doing so and leave. This happened whilst he was residing at Waunbant Farmhouse up to his death in 1994. We are instructed that people left the land when requested to do so. It is not necessary to demonstrate a lack of intention to dedicate that this has to be continuously manifested during the whole of the 20 year period. It is sufficient if there is no intention at some point during that period. Following the decision in Godmanchester Town Council v Secretary of State for Environment, food and Rural Affairs 2007 demonstration of a lack of intention to dedicate at any point within the claimed 20 year period is sufficient to stop time running time.
- 3.23 Following termination of the lease, our client’s parents submitted various applications for planning permission for development of the land. This was notice to the public at large that they intended to develop the land and was a clear rebuttal of any assumption that the land was being dedicated by them for the purpose of a public right of way. The applications were made in 1976, 1978 and 1981 ... no-one claimed any right of way over the land during any of these planning processes.
- 3.24 Our client engaged a private investigator (Swift Investigations) to investigate use of the land and the possibility of any claim of a public right of way. This investigation

lasted between 24 August 2008 and 16 May 2009. Swift attended on 70 different occasions. These investigations found no general use of the land, no general use of anything which could be described as defined right of way. The land was used, at best by a small number (no more than 5 persons walking on it in a haphazard route. there were on site investigations made both prior to and after erection of the signs on the land.

Our client's position is that the application should be refused. There is no route for a highway, it has not been used by the public and our client's and his predecessor did not intend to dedicate the land as a public right of way.

4.0 ASSESSMENT

4.1 This assessment is to assist Councillors in determining the application before them today; an application to modify the Definitive Map and Statement by recording the route known as Cyfarthfa 150.

4.2 Status

PRoW can be claimed as a Footpath, Bridleway, Restricted Byway or BOAT.

4.3 Officers must investigate the claim at the highest status substantiated by the evidence; the investigation could conclude that the route does not exist.

4.4 User evidence demonstrate use of the route albeit that no historic evidence exists of use.

5.0 PERIOD OF USE TO BE CONSIDERED

5.1 In the absence of any challenge to the right of way in question the normal period looked at for the purpose of the establishment of the right of way for long user is 20 years prior to the date of the application itself. In this case Officers consider that it would be the period between the 21st February 1989 and 20th February 2009. The Council is not satisfied that the path was being used at that time although it is evident that the path is being used today.

5.2 Councillors will note from the report before them that the path has not been used for a full period of twenty years.

6.0 THE LINE OF THE ROUTE

6.1 Routes are discernible on the ground.

7.0 HISTORICAL AND OTHER EVIDENCE

7.1 The routes are not depicted on any cartographic sources.

8.0 USER EVIDENCE

8.1 Councillors are requested to take into account user evidence as described above. Councillors are also requested to take into account the observations made on behalf of the landowner

9.0 SUMMARY

9.1 Councillors will note from the Report before them that the paths have been enjoyed by the public but that they do not actually lead anywhere. They are circuitous. A right of way is a right to pass from point A to point B by a defined route. The route presented as part of this report do not actually lead anywhere, all routes lead back on to the same maintainable highway.

9.2 Officers consider that the evidence above does not establish the existence of the rights now claimed, i.e., over the relevant period and at all material times before it.

9.4 It is concluded that on the balance of probabilities the requirements of S. 31(1) and (2) Highways Act 1980 have not been met.

10.0 FINANCIAL IMPLICATIONS

10.1 Officer's time is involved in investigating the routes and writing the report. Should Councillor's accept Officers recommendations there is no further costs to the authority if however, Councillors determine that the public rights of way exist, there will be a financial implication in advertising the Orders and also for dealing with the Public Inquiry if an Order is made and there is an objection to it.

10.2 If an Order is confirmed, there will be a financial implication in that the routes will need to be signed. As Councillors are aware, financial implications are not to be considered by the Committee when determining this application as the County Borough Council has a statutory duty to make an Order if it believes that there is sufficient evidence to support it.

ELLIS COOPER
DEPUTY CHIEF EXECUTIVE

COUNCILLOR GERAINT THOMAS
REGENERATION AND PUBLIC
PROTECTION

BACKGROUND PAPERS		
Title of Document(s)	Document(s) Date	Document Location
Cyfarthfa 150	8 th January 2019	Economic Development Unit 5
Does the report contain any issue that may impact the Council's Constitution?		no