

MEETING	PLANNING COMMITTEE
DATE	25 th July, 2016.
TITLE	Wildlife and Countryside Act 1981 An application to register a footpath between Haulfryn and Pen y Caerau, Garn Fadryn, Community of Tudweiliog.
PURPOSE	To consider whether the Authority should make a Modification Order
RECOMMENDATION	That Gwynedd Council should make a Modification Order under Section 53(3)(c)(i), Wildlife and Countryside Act 1981 to register the claimed path on the Definitive Map of Public Rights of Way.
AUTHOR	Dafydd Williams Head of Regulatory Department

1.0 INTRODUCTION

- 1.1 This report refers to an application to register a public footpath near Garn Fadryn in the Community of Tudweiliog.
- 1.2 The application is made on the basis that the public have walked this path unhindered, continuously and as of right (that is without the landowner's permission) over a period of more than twenty years.

2.0 BACKGROUND

- 2.1 In October 2014, an application was received from Councillor Simon Glyn under Section 53 of the Wildlife and Countryside Act 1981, to register on the Definitive Map a public footpath from Haulfryn to Pen y Caerau.
- 2.2 The claimed path starts from the unclassified road at Haulfryn and proceeds through a field gate in a north westerly direction along a defined track, past Pen y Caerau and then through a pedestrian gate where it connects to public footpath no.20 in the Community of Buan.
- 2.3. The claimed footpath is shown between points A-B-C on the plan provided in Appendix 1.

3.0 LEGAL BACKGROUND

- 3.1 A highway may be created through dedication by the landowner of a public right of passage across his land, coupled by acceptance of the route by the public. Such dedication may be expressed through some

overt action; or presumed, either from a period of undisputed use as of right by the public or from documentary evidence recording at some time in the past the status then attributed to the way concerned.

- 3.2 Section 53 of the Wildlife and Countryside Act 1981 (“the 1981 Act”) imposes a duty on Gwynedd Council as “surveying authority” to keep the Definitive Map and Statement under continuous review.
- 3.3 Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows *“that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates...”*.
- 3.4 Where the evidence in support of the application is user evidence, Section 31(1) of the Highways Act 1980 is applied:-

“Where a way.... has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate.”
- 3.5 Section 31(2) states that *“the 20 years is calculated retrospectively from the date when the right of the public to use the way is brought into question.”*

4.0 LAND OWNERSHIP

- 4.1 The requisite Certificate of Service was submitted by the applicant confirming that notice of the application had been served on all affected landowners.
- 4.2 The section of claimed path between points A and B affects land currently owned by Mr and Mrs Russell of Llanbedrog.
- 4.3 The section of land between B and C is currently owned by Mr Ian Wilson of Pen y Caerau, Garn Fadryn.

5.0 EVIDENCE IN SUPPORT OF THE APPLICATION

User Evidence

- 5.1 The application is supported by 12 Statements of Evidence showing evidence of public use ranging from 1940 to 2014. The bar chart provided in Appendix 2 summarises the claimed use as indicated on the Statements.

- 5.2 Under Section 31 of the Highways Act 1980, where a path has been used by the public by right and without hindrance for a full term of twenty years without any overt action by the landowner to prevent this, then it is assumed that the path has been dedicated as a highway.
- 5.3 The twenty year period is calculated retrospectively from the time when the right of the public to use the path was first brought into question.
- 5.4 From examining the evidence, it seems that the public's right to use the path was first challenged in September 2014. This particular date is confirmed by 11 persons in support of the application.
- 5.5 All users in support of the application state they have used the path for a period in excess of twenty years.
- 5.6 Of the 12 users, six claim "monthly" usage of the route, five claim "weekly" usage and one person claims to have used the path on a daily basis.
- 5.7 The users claim to have used the route for recreational purposes.
- 5.8 None of the users report to have any connections with the landowner.
- 5.9 In June 2016, interviews were carried out and two people provided witness statements in support of the claimed route. These witness statements are provided in Appendices 3 and 4 of this report.

Other evidence in support of the application

- 5.10 On being consulted during investigation of the claim, Mr and Mrs Russell (who currently own the section A – B) have confirmed that they are supportive of the application to register the claimed path as a public right of way.
- 5.11 Mrs Russell was interviewed regarding use of the path and provided the Council with a written statement (Appendix 5) confirming the following:-
 - the land has been in Mr and Mrs Russell's ownership since 2005.
 - no attempt has been made during that period to prevent the public from using the path.
 - Mrs Russell considered the path to be public.
- 5.12 Contact has been made with Mrs Gwen Williams of Bryn Gwynt, Garn Fadryn who confirms that, between 1982 and 2002, her late husband owned a section of land affected by the claim (A-B).
- 5.13 In her witness statement (Appendix 6), Mrs Williams also confirms the following points:-

- Regular use was made of the path by both local people and visitors to the area.
- No attempt was made by Mr + Mrs Williams to prevent the public from using the route.
- Members of the public never sought permission to use the path.
- Mrs Williams considers the path to be a public right of way.

6.0 OBJECTIONS TO THE APPLICATION

6.1 In a letter dated 2nd June 2016, Mr Ian Wilson and Ms Gillian Taylor of Pen y Caerau confirmed their objection to the application. A copy of this letter is provided in Appendix 7; please note that certain sections have been redacted due to allegations made against third parties, and such allegations are deemed to be irrelevant to the contention of long user.

6.2 The letter may be summarised as follows:-

- The property, Pen y Caerau was purchased in 2008. The conveyance of the property showed no evidence of the existence of a right of way.
- The property is undergoing major renovation work which gives rise to health and safety issues.
- It is stated that the route will have an adverse effect on the security of the property.
- It is claimed that permission was given to certain individuals to use the route through Pen y Caerau.
- It is claimed that the route has been used by stealth.
- It is stated that some of the statements are from members of the same family, about 7 or 8 households, all of whom (allegedly) know each other.
- It is stated that all claimants apart from two live within half a mile of Pen y Caerau.
- It is claimed that there are irregularities with regard to the precise date when the claimants were refused access.
- It is alleged that an insignificant number of people have been seen walking the path.
- There are no public footpath signs.

6.2 Mr Wilson and Ms Taylor's statement of objection is supported by the following documents:

- Nine (standard) witness statements by people disputing the accuracy of the Statements of Evidence in support of the application and certifying that there is no public right of way as alleged (Appendix 8).
- A letter from an individual contesting that he has not seen anyone using the public footpath (Appendix 9). This individual also believes

that a public footpath would adversely affect the enjoyment and value of the property.

- A number of historical documents including various editions of the 6" to the mile and 25" to the mile Ordnance Survey Plans and a Tithe Map. The objectors contend that these documents show no evidence of a right of way

6.3 A letter from another individual (Appendix 10) stating that he has never walked through the garden of Pen y Caerau despite claiming to have an extensive knowledge of the local right of way network. The individual asserts that the path is not recorded on the Definitive Map and that a Local Search did not highlight the existence of a public path at the property.

7.0 COMMENTS ON THE OBJECTIONS

7.1 In response to Mr Wilson and Ms Taylor's letter dated 2nd June, 2016, the Council would make the following observations:-

- It can be assumed that the conveyance did not show a public right of way since the route is not shown on the Definitive Map of the area. If it was shown, the claimants would not have to apply for a Definitive Map Modification Order.
- Health and safety and security issues are not factors that can be taken into account under the relevant legislation. The whole process is concerned with determining, on the balance of probabilities, whether or not public rights actually exist.
- There is no evidence to suggest that permission was given by the owner of Pen y Caerau for certain individuals to use the path. Indeed, the witness statements provided to the Council (as provided in Appendices 3, 4, 5 and 6) indicate that the claimants considered the path to be a public right of way. It must also be noted that the user evidence predates Mr Wilson's ownership of the property by a considerable number of years.
- There is no specific evidence to suggest that the route has been used by stealth. The evidence in support of the application indicates that the public have been using the claimed route often enough and in large enough numbers to demonstrate that the route was used in an open manner by the public.
- There is no specific evidence to suggest a possible collusion between witnesses. It is noted, however, that the users are drawn from the local community. However, in *R v Southampton (Inhabitants) 1887*, the Court held "*user by the public must not be taken in its widest sense ... for it is common knowledge that in many cases only the local residents ever use a particular road or bridge.*" The Council is therefore satisfied that the user has been "by the public" as required by section 31.
- There is strong evidence to suggest that the public were first refused access in September 2014 although it would be impractical to establish

the exact date. It is worth noting that the objectors provide no clear evidence to demonstrate that they challenged the public prior to this date. Therefore, in the absence of such evidence, the period of use to be considered under Section 31 is September 1994-September 2014.

- The evidence of use provided by the 12 Statements of Evidence is sufficient in frequency, length and volume to demonstrate a considerable body of public use of the claimed route.
- A photograph has been located (taken by an officer of the Council c.2010) showing a footpath waymark sign which appears to direct walkers through the pedestrian gate at point C towards Pen y Caerau (Appendix 11). It is unclear when this marker post was erected and by whom, although it can be confirmed that the sign has since been removed.
- The nine standard witness forms provided indicate that the objectors used a different route to the claimed route. The relevant point is that the user evidence and witness statements indicate that there has been considerable use of the claimed path which is sufficient to give rise to a presumption of dedication under section 31 of the Highways Act 1980.
- In response to the letter provided in Appendix 9, the user evidence shows uninterrupted use of the claimed route between 1940 and 2014 with 7 of the 12 users claiming over 40 years use. Impacts on the value and enjoyment of a property are not relevant considerations under the legislation governing this procedure.
- The Ordnance Survey maps provided are helpful evidence in showing the *physical existence* of the claimed route. However, it is widely recognised that such maps are less helpful in determining the actual status of the routes shown. This view is supported by the courts (e.g. Attorney General v Antrobus [1905]).
- Tithe documents are solely concerned with *identifying titheable land* and such maps were not intended to establish or record rights of way.
- In response to the letter provided in Appendix 10, it can be assumed that the Local Search did not reveal a public right of way since the route is not shown on the Definitive Map of the area.

8.0 CONSULTATION

- 8.1 The required consultation with the prescribed organisations have been carried out and the responses received are as follows:-

Tudweiliog Community Council

- 8.2 Tudweiliog Community Council has confirmed that the route has been used by local residents for a number of years and is unanimously in support of reopening the path.

The Ramblers' Association

- 8.3 The Area Secretary of the Ramblers' Association observed that the path is well used and that the "Ramblers" would have no objections to the path being registered.

9.0 CONCLUSIONS

- 9.1 It is considered that the user evidence satisfies the requirements of section 31 of the Highways Act 1980.
- 9.2 Although 20 years uninterrupted use, as of right, by the public establishes a presumption that a route has been dedicated to the public, this can be contradicted by evidence showing that the landowner did not intend to dedicate public rights during that time.
- 9.3 Evidence of interruption of the public's use of the way would have to be shown to have been clear and effective in preventing public use.
- 9.4 It appears that the users were not challenged until the right to use the path was questioned in September 2014 following the obstructing of two gates situated on the claimed route. Prior to this date, there appears to be no clear evidence of any overt action taken by the landowners to prevent the public from walking the claimed route.
- 9.5 The user evidence is substantiated by witness statements provided by one of the current landowners, Mr + Mrs Russell and also Mrs Williams, the wife of a former landowner.
- 9.6 After examining all of the evidence, it is considered that, on the balance of probability, a public right of way for pedestrians is reasonably alleged to subsist along the claimed route.
- 9.7 Where such evidence comes to light the Council is obliged to make a Definitive Map Modification Order.

10.0 RECOMMENDATION

- 10.1 That Gwynedd Council should make an Order under section 53(3)(c)(i), Wildlife and Countryside Act 1981, to register the claimed footpath on the Definitive Map of Public Rights of Way.

11.0 BACKGROUND PAPERS

File 4/2/HT/7CC34/GarnFadryn