

## Penderfyniad ar y Gorchymyn

Ymweliad â safle a wnaed ar 27/03/17

**gan Helen Slade MA FIPROW**

**Arolygydd a benodir gan Weinidogion Cymru**

**Dyddiad: 10/04/17**

## Order Decision

Site visit made on 27/03/17

**by Helen Slade MA FIPROW**

**an Inspector appointed by the Welsh Ministers**

**Date: 10/04/17**

**Order Ref: E6840/W/16/516191**

**The Welsh Ministers have transferred the authority to decide this Order to me as the appointed Inspector.**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Monmouthshire County Council: Trellech United Community (Nelson Cottage, The Narth) Definitive Map Modification Order 1999.
- Monmouthshire County Council submitted the Order for confirmation to the Welsh Ministers.
- The Order is dated 29 November 1999 and there is one objection outstanding.
- The Order proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.

**Summary of Decision: The Order is confirmed subject to modifications set out below in the Formal Decision.**

### Procedural Matters

1. I carried out an unaccompanied site visit during the afternoon of Monday 27 March 2017 during a dry sunny spell. I walked the Order route and also around the extended area to see the path in its overall context. I had previously visited The Narth for the purpose of determining an order affecting an adjacent path (Order Reference E6840/W/16/516190 issued 30 January 2017).
2. Due to a shortfall in the statutory objection period at the time of the initial publication of the Order in 1999, the Order was re-advertised on 15 August 2016. Although the Order originally attracted two objections in 1999, the passage of time has resulted in one of the objections falling away. The remaining objector is Mr D Morgan, the local representative of the Open Spaces Society. He believes that higher rights should be presumed to subsist, and considers that the status of the route is more properly a public road. He has sustained his objection throughout the process.
3. The application was originally made by Trellech United Community Council to Gwent County Council in 1991, but the area is currently within the jurisdiction of Monmouthshire County Council (the Order Making Authority, or 'OMA') who made the Order in 1999.

### **Requested Modifications to the Order**

4. The OMA has requested that a small modification be made to the Order to reflect more accurately the power under which it was made. I note that the letter (b) has been

omitted from the citation of the Section of the 1981 Act which identifies the event which prompted the Order, and I intend to correct that if the Order is confirmed.

5. During my examination of the matter I noted that the title appeared to be missing from Part II of the Schedule to the Order, and that some entries in that part of the Schedule were unexplained. I sought clarification from the OMA who explained that the entries related to required fields in the digitised Definitive Statement. I was requested to modify the Order by adding the missing title, which I intend to do if I confirm the Order.

### **The Main Issues**

6. The Order has been made in consequence of an event set out in Section 53(3)(b)<sup>1</sup> of the 1981 Act which provides that the Definitive Map and Statement should be modified where a period of time has expired during which the enjoyment of a route by the public raises a presumption that the way has been dedicated as a public path: in this case as a public footpath.
7. With respect to evidence of the existence of a highway, Section 31 of the Highways Act 1980 ('1980 Act') states that where a way, which is of a character capable of giving rise to a presumption of dedication at common law, has been enjoyed by the public as of right and without interruption for a full period of 20 years, that 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 it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, either by a notice or otherwise.
8. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. In this particular case, I must examine whether or not the documentary evidence supports the existence of higher public rights.
9. In considering whether higher rights might subsist, Section 53(3)(c)(i) of the 1981 Act provides that the Definitive Map and Statement should be modified where evidence has been discovered which shows that, when considered with all other relevant evidence available, a public right of way which is not currently shown in it subsists or is reasonably alleged to subsist over the land in question. At the confirmation stage of the Order I must be satisfied that the right of way subsists. Confirmation of the Order on this basis would require significant modification of the Order and the need to re-advertise it.
10. The test I must apply is the balance of probabilities.

### **Reasons**

#### **Background**

11. The application for this Order was made in 1991 by the then clerk to the Community Council. The application was for footpath status. At that time the OSS representative considered that the route ought to be recorded as a bridleway, but the Community Council maintained its support for a footpath. The Order was made accordingly.

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<sup>1</sup> The letter (b) is missing from the citation

12. The application was made based on user evidence alone, and was supported by 28 completed user evidence forms ('UEFs') and the appropriate certification. Four of the user evidence forms appear to relate to use of a longer, through route from the road C50-5, part of which was the subject of my decision issued in January 2017 (see paragraph 1 above). As I previously concluded, I see no reason why I cannot take this claimed use into account as it includes use of the Order route I am now considering even if I give it slightly less weight than it may deserve.
13. At the time of the original publication of the Order, the landowners of Woodview, Mr and Mrs Holden, submitted a formal objection. The property was later sold to Mr and Mrs Hickin who advised the OMA in 1997 that they had no objection in principle to the establishment of a public right of way, and acknowledged that the Order route was used regularly on foot by local residents.

### ***Evidence of use***

14. By modern standards, the UEF's are not very detailed, but there is no evidence whatsoever to contradict the evidence of user provided, and the use of the way has been acknowledged in writing by one of the owners of the land across which the route runs.
15. I have no reason to conclude otherwise than that the route has been used by the public on foot, as of right, and for an uninterrupted period of at least 20 years. In the absence of any evidence of a contrary intention during that period, the route can be deemed to have been dedicated as a public footpath. As such there is nothing preventing the confirmation of the Order as a footpath.

### ***Whether there is evidence of the existence of higher rights***

16. Mr D Morgan, the local representative of the Open Spaces Society, has maintained his objection to the Order throughout the time it has been under consideration, and in his Statement of Case advocates that the Order should be modified to show the route as a Byway Open to All Traffic ('BOAT'). He bases this view on the depiction of the route on a variety of historical maps, including the 1810 Enclosure Award plan and the Finance Act maps from 1910.
17. In reviewing the case at the time of its submission to the Planning Inspectorate, the OMA provided a detailed statement of comments on the objection and provided extracts from a range of historical mapping. The OMA's Statement of Case builds on this information, and demonstrates that significant research has been carried out.
18. The earliest mapping appears to be that of the 1810 Enclosure Award and the extract supplied shows that the route was part of a longer route designated as a 'Private Carriage Road and Driftway 20 feet'. The evidence submitted by the OMA shows that a distinction was made in the Enclosure Award between 'public' and 'private' ways and the conclusion drawn by the OMA is that this evidence does not support the existence of higher public rights. It shows only that the route was a private access way. The term 'driftway' does not mean that public bridleway rights exist.
19. The 1846 Tithe Apportionment plan shows the existence of gates across the route at two places, and the OMA considers that this suggests that the route was not considered at that time to be a public vehicular or equestrian through route.
20. The Finance Act 1910 maps show part of the route within the adjoining hereditaments and part of the route outside, or separate from, the surrounding holdings. The

conclusion drawn by the OMA is that this information shows that the route was a shared access way for five separate properties.

21. The study of other historical mapping such as Ordnance Survey ('OS') maps and privately produced county mapping shows the route consistently as a through route, but some are at a very small scale. The OMA considers that the instructions to OS surveyors resulted in the depiction of many routes, public and private, which were clearly marked and permanent, and thus this information cannot be taken to show the existence of public rights. Furthermore the later, large scale OS mapping supports the existence of a number of barriers across the route, probably gates, reinforcing the inference that the route was not considered to carry public vehicular rights.
22. Subsequent maintenance records held by the County Council indicate that the Order route was not considered to be a public route prior to the 1835 Highways Act, and thus was not taken on for maintenance purposes, unlike some nearby routes (e.g. C50-5).
23. Neither the OMA nor the objector has submitted any of the associated written evidence in the form of the authorising Enclosure Act, the actual text of the Enclosure Award, nor any text or descriptions of adjoining or affected plots of land from either the Enclosure Award, the Tithe Apportionment, the Finance Act 1910 or any OS name books or boundary remarks which might have shed light on the nature of the way.
24. The objector relies on the consistent and continuous representation of the route as a through route on historical maps as supporting its status as part of the local highway network, and on the general interpretation of the words 'private' and 'public' in research papers undertaken by other people. Whilst I accept that these definitions may have meant something different in relation to highway matters in the past, without the associated written evidence the interpretation of what was meant by the word 'private' in the context of this particular path can only be a very broad guess.
25. Furthermore, the description of the route as a driftway gives no clear indication of whether this was likely to be a public use of the way or not. Comparison with other descriptions in the relevant Enclosure Award may have helped to clarify this, and to indicate whether the route might be considered as a public bridleway. However the inclusion of other routes described as public in that Award, as demonstrated by the evidence supplied by the OMA, lessens the weight I could give to any such inference of public equestrian rights. The definition of a public bridleway in terms of the Definitive Map and Statement is set out in Section 66 of the 1981 Act, and indicates that it may or may not include the right to drive animals along it. Whether a driftway is always synonymous with a public bridleway is not settled.

#### *Conclusions on the historical documentary evidence*

26. On the evidence available to me, I agree that the route has existed as a physical feature since at least 1810. None of the historical mapping submitted expressly sets out or identifies the Order route as a public route of any sort, not even as a footpath.
27. The exclusion of some of the route from the surrounding taxable hereditaments on the Finance Act 1910 Map is inconclusive with regards to the existence of public vehicular rights. I have nothing on which to base a confident inference of such vehicular rights, or even of public bridleway rights. Despite the legal requirements of the process, which was long, complicated and eventually abandoned, it was executed in slightly different ways around the country. Whilst some weight might be placed on consistency within the documents relating to a particular area, it is difficult to rely on

any assertion of a more general consistency across the country, as promoted by Mr Morgan, particularly in the absence of any of the information from the relevant Field Books or other documentation associated with the process.

28. The records held by the Highway Authority and the OMA show that the path is not shown as being publicly maintainable, and it was not claimed as part of the original Definitive Map process in 1952. Mr Morgan claims that this was because the route was considered locally to be a road. However no evidence to that effect has been submitted, and there is evidence of long-standing (but now missing) pedestrian gates along the route which would not tend to support this theory.
29. Nevertheless, the long-standing existence of the route, and its consistent depiction on maps as a through route, is suggestive of a route forming part of the local transport network. However, the lack of detail on which to base a confident assessment of its public status, notwithstanding how reasonable such an assertion may be, does not provide the level of proof required for me to conclude that, on the balance of probabilities, public bridleway or public vehicular rights subsist.

### **Other Matters**

30. I note that in a letter dated 15 December 1999, Mr and Mrs Hickin made representations regarding the replacement of the kissing gate giving access to the onward route of the footpath from their drive. During my site visit I saw the vestiges of this gate, which remains in an unrepaired state.
31. The repair or replacement of this gate is a matter between the County Council and the landowners and has no effect on my determination of the matter.

### **Conclusions**

32. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed as made on the basis of the user evidence but with some administrative modifications.

### **Formal Decision**

33. I confirm the Order subject to the following modifications:

- In the preamble to the Order, in line 5, insert '(b)' after the reference to 'section 53(3)'
- In the Order Schedule, after the heading 'Part II' insert the sub-heading '*Modification of Definitive Statement – Variation of particulars of path or way*'

*Helen Slade*

**Inspector**