

## RIGHTS OF WAY COMMITTEE - 25TH JULY 2005

**SUBJECT: APPLICATION FOR A MODIFICATION ORDER TO AMEND THE MONMOUTHSHIRE COUNTY COUNCIL DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY IN RESPECT OF ADDING A PATH IN THE COMMUNITY OF BEDWELLY**

**REPORT BY: DIRECTOR OF THE ENVIRONMENT**

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### 1. PURPOSE OF REPORT

1.1 To consider entering into a Creation Agreement with Developers for provision of a footpath.

### 2. SUMMARY

2.1 The report sets out the evidence regarding an application to claim a right of way from Commercial Street to River Terrace, Pengam with a solution in the form of a Creation Agreement.

### 3. LINKS TO STRATEGY

3.1 There is a duty to maintain the Definitive Map and Statement.

3.2 The Authority has a number of "cross cutting" objectives which include sustainability, health promotion, social inclusion, equal opportunities (as an employer and in service delivery) and e-government. Officers should seek to ensure that all proposals are in keeping with these wider objectives and reports should, wherever possible, make clear how this would be achieved.

### 4. THE REPORT

#### 4.1 Background

- i) As Members are aware this Committee has delegated powers to determine applications for Definitive Map Modification Orders under Section 53 of the Wildlife and Countryside Act 1981. This report relates to an application to ADD a path to the definitive map and statement.
- ii) The term "public rights of way" is used to mean paths, tracks and unmetalled roads over which the public have the right to walk and in some cases ride horses and possibly drive motor vehicles.

These may be classified as follows:-

A **footpath**: over which the right of way is on foot only.

- A **bridleway**: over which there is a right of way on foot and on horseback or leading a horse, and also for the use of a pedal cycle.
- A **byway open to all traffic**: this means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used.
- iii) The Wildlife and Countryside Act 1981 places a duty on the County Borough Council to keep the existing definitive map under continuous review, make Modification Orders as necessary to take account of the occurrence of events requiring the map to be modified and to prepare definitive maps for any part of the area not previously surveyed.
  - iv) The definitive map and statement will be modified by means of Orders made by the surveying authority i.e. the County Borough Council. The Wildlife and Countryside Act enables any person to apply to the surveying authority for an order to amend the definitive map.
  - v) The procedure for making such an application is detailed in Schedule 14 of the Wildlife and Countryside Act. The application before you has been compiled to these requirements. The said procedures are referred to in the report.
  - vi) When determining the application before you, members will be acting in a quasi-judicial capacity. Before making an order, members must be satisfied that the evidence shows, **on the balance of probabilities**, that a right of way of a particular description exists. Each application must be dealt with on its own merits, noting the interests of both the applicants and the landowners.
  - vii) The application before you is concerned with rights that are alleged to already exist and not as to whether it would be prudent or beneficial to create them. The suitability of a way for users who have a right to use it, for example the nuisance that they are alleged to cause are not factors that should be considered by the Committee. **Members are also required to view the route of the proposed right of way in question.**
  - viii) When considering the evidence that follows, members must be aware of the provisions of Section 31 of the Highways Act 1980 thus enabling members to determine whether there is sufficient weight of evidence to make an order.

Section 31 of the Highways Act states:-

"where a way over any land other than a way of such a character that use of it by the public could not be given rise at common law to any presumption of dedication, has been actually enjoyed by the public as a right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."

If in the case before you members are satisfied that the right of way has been used for a period in excess of 20 years, then there arises a presumption that the owner intended to dedicate the path as a right of way. It should be noted by members that the said 20 year period must be calculated retrospectively from the date when the way was first called into question.

- ix) If following the site visit the Committee decides to make an Order, then once this decision has been reached the County Borough Council has to give notice of its general effect. Following members' decision there is a right of appeal to the National Assembly for Wales. A period of at least 42 days from the date of first publication of the notice must be allowed for objections.

If there are any valid objections the County Borough Council has to refer the Order, together with the objections to the National Assembly for Wales who will then arrange for the Order and the objections to be considered by an independent Inspector. If no valid objections are made within the said objection period then the County Borough Council may confirm the order itself as an unopposed Order.

### **Wildlife and Countryside Act 1981 Section 53(3)(c)(i)**

#### **Claimed Right of Way from Commercial Street to River Terrace, Pengam.**

#### **4.2 Introduction**

- 4.2.1 The Authority was contacted in 2004 regarding a building development site at Commercial Street, Pengam on the old A& S Warehouse Site. The local residents had been using a path through the site as a short cut for over 80 years in some instances.
- 4.2.2 An application W.C.A. 5 was received on 12th May 2004, under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to Modify the Definitive Map and Statement of the Monmouthshire County Council by ADDING a footpath from Commercial Street to River Terrace, Pengam. Document No. 1 is a location map of the area. The route of the claimed path can be located in Document No. 2. Unfortunately this application was not submitted in the prescribed manner. A letter was sent to the applicant pointing out the errors but the application was never re-submitted.
- 4.2.3 When work commenced on the site one of the evidence users enquired as to the progress on the application to claim the path through the site. When it was discovered that the application had not been re-submitted for consideration a second application was received in the prescribed manner supported by user evidence forms. This application was received on the 18th February 2005. 14 No. Evidence User forms were submitted to support the application which included a total of 542 years usage. Document No. 2 shows the claimed route. The applicant confirmed that W.C.A. 6 had been served on the landowners, by submitting the Confirmation Notice W.C.A.7 dated 17th February 2005.
- 4.2.4 Eight of the users out of 14 were interviewed in support of the path, with use going back 80 years and had continued until the old warehouse had been demolished and access to the path was no longer available. Document No. 3 is an aerial photograph of the claimed path.
- 4.2.5 A meeting took place with the developers of the site, Castell Homes Ltd and their Solicitor. The developers have commenced building houses on the site and one house is on the line of the claimed path. It was explained that if the application process is progressed and the claimed application is supported by the Rights of Way Committee then the Developer would need to apply for a Diversion Order to realign the path. Another option would be for the Developer to enter into a Creation Agreement under Section 25 of the Highways Act 1980 with the Authority to provide a path through the site but on an alternative route.
- 4.2.6 The Developers have agreed, in principle, to enter into a Creation Agreement to provide a path through the site. Document No. 4. shows the line of the path.
- 4.2.7 To progress the matter the applicant and those persons who provided evidence user forms were contacted to request that they withdraw their application for the claimed path in order that a Creation Agreement could be entered into. All have agreed to withdraw the application in favour of the Creation Agreement.

#### **4.3 Creation of Public Footpath**

- 4.3.1 As mentioned previously, the Developer has agreed in principle to enter into a Creation Agreement.

- 4.3.2 The route of the Creation Agreement is shown on Document No. 4 as A-B. The total length of the path is approximately 65 metres.
- 4.3.3 It is considered it would be appropriate to resolve the claim by entering into a Creation Agreement as both parties agree with this solution.
- 4.3.4 Description of the Path to be Created:

The footpath which shall be 1.8 metres wide commences opposite No. 1 Commercial Street, Pengam between Units 2 and 3 in a westerly direction for approximately 30 metres and then changing to a northerly direction for approximately 11 metres, then westerly alongside the boundary of 5 River Terrace for approximately 24 metres where it terminates on River Terrace, Pengam. The overall length of the path is approximately 65 metres and is shown on the plan by a dotted black line between points A-B.

#### **4.4 Summary**

The Authority has two options in this case. Firstly it may decide to complete the application process under the Wildlife and Countryside Act 1981, and publish an order to this effect.

Alternatively it may enter into a Creation Agreement with the landowner, for the path shown in Document No. 4.

### **5. FINANCIAL IMPLICATIONS**

- 5.1 The cost of processing a Modification Order would be in the region of £1,800.
- 5.2 If the Authority enters into an agreement with the landowner through a Creation Agreement the Authority is required to advertise the Creation Agreement in one local newspaper. An assumed cost of £750.00.
- 5.3 If the Authority agree to pay the legal costs of the Creation Agreement, approximately £500, then this will be added to the above.

### **6. PERSONNEL IMPLICATIONS**

- 6.1 None.

### **7. CONSULTATIONS**

- 7.1 As listed.

### **8. RECOMMENDATIONS**

- 8.1 That Members agree to enter into a Creation Agreement with Castell Homes Ltd for provision of a path from Commercial Street to River Terrace, Pengam.
- 8.2 It is recommended that the Authority pay the legal costs involved in the Creation Agreement.

### **9. REASONS FOR THE RECOMMENDATIONS**

- 9.1 To provide an expeditious and satisfactory solution to the claim under the Wildlife & Countryside Act 1981 and Highways Act 1980.

Author: June Piper, CROW Support Officer

Consultees: Chief Planning Officer

The Applicant

The Landowner

Background Papers: File ETP/ROW/CROW195 Pontllanfraith Offices