

BRECON BEACONS NATIONAL PARK AUTHORITY

Telephone (01874) 624437

Plas y Ffynnon
Cambrian Way
Brecon
Powys LD3 7HP

Dear Member

A meeting of the **ACCESS AND RIGHTS OF WAY COMMITTEE** will be held in **CONFERENCE ROOM 1, PLAS Y FFYNNON, CAMBRIAN WAY, BRECON ON 12TH NOVEMBER 2004 at 11.30 a.m.** when your attendance is requested.

Yours sincerely

CHRISTOPHER GLEDHILL
CHIEF EXECUTIVE

Cllr P Ashton
Cllr Mrs M Morris
Cllr J Morris
Cllr K Pathak
Cllr E Williams
Cllr A Baynham (Chairman)
Cllr A Carrington

Cllr M Reece
Cllr P Hopkins
Mrs P Thomas
Mr J Suter
Mr C Young
Mr M Thomas, MBE

Fire Evacuation Advice

***In the event of a fire, please exit the building via the main staircase,
and assemble in the car park at Assembly Point 3***

Please note that this committee meeting follows a site inspection by members of the Access and Rights of Way Committee.

Lunch will be provided for members after the meeting

AGENDA

1.0 MINUTES

To receive the minutes of the meeting held on 20th October 2004 and to authorise the Chairman to sign them as a correct record. (**Enclosure 1**)

2.0 CORRESPONDENCE

To receive and consider the attached schedule of correspondence and make any recommendations thereon. (Below).

3.0 MEMBERS DECLARATION OF INTEREST

To receive any declarations of interests from members regarding items to be considered on the agenda (***Members' attention is drawn to the Declaration of Interests sheet circulated with the Attendance Sheet at the meeting, and the need to record their interests in writing.***)

4.0 DECISIONS RELATING TO THE DEFINITIVE MAP : MODIFICATION ORDERS - WILDLIFE AND COUNTRYSIDE ACT 1981

4.1 Application for Modification of the Definitive Map and Statement by adding a Public Footpath at 'The Meadow', Priory Groves, Brecon *Eifion Jones*

File reference: PAR804/501/M

MEMBERS TO NOTE: In view of the large volume of annexes for this agenda item, these have not been recirculated. Please refer to the agenda of the meeting held on 20th October 2004 and bring that agenda to the meeting.

A copy of the annexes are available for inspection at the Authority's office: Plas y Ffynnon, Cambrian Way, Brecon.

Under the terms of the Delegation Agreement with Powys County Council the National Park Authority is required to keep the Definitive Map and Statement under continuous review and, upon the discovery of evidence, make amendments to the Map and Statement, by order, as necessary. This application, made under Section 53 of the Wildlife and Countryside Act 1981 requires the Authority to consider the making of a Definitive Map Modification Order to add a length of footpath not currently shown on the Definitive Map based on 20 years usage.

4.1.1 The Application:

Notice of the application was served on the landowner on the 9th July 2001.

Details of the application are shown on the map at **Annex 13**.

4.1.2 Description of the route

From point A on the map at grid reference SO04892939 and located in Priors Groves, Brecon and proceeding in a southerly direction through a meadow (enclosure no. 8927) and gradually turning to a south westerly direction to reach a ditch. On crossing the ditch it continues in a generally westerly direction, adjacent to Afon Honddu, along an earth path for approximately 45 metres to reach point B at grid reference SO04752920. A total length of approximately 280 metres.

4.1.3 Legal Background

Section 53 of the Wildlife and Countryside Act 1981 imposes a statutory duty upon the Authority and by subsection (2) the Authority shall-

“(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3).”

The events specified in subsection (3) include:

“(3)(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

and,

(3)(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-

(i) 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, being a right of way to which this Part applies”

Section 31 of the Highways Act 1980 provides for the presumption of dedication of a public right of way following 20 years continuous use. Subsection (1) states:

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

It is necessary to show that there has been uninterrupted use by the public over a period of 20 years in the belief that the use was as of right. The public must have used the way without force, without stealth and without licence (*nec vi, nec clam, nec precario*).

That use must have occurred over a defined line.

The 20 year period may be shown at any time in the past and is generally taken to run backwards from the time when the use of the path was first “called into question”.

If the presumption is raised the onus is then on the landowner to show evidence that there was no intention on his part to dedicate a right of way. This must be by some overt act on the part of the landowner to show the public at large that there was no such intention. Such evidence may consist of notices or barriers, or by the locking of the way on one day in the year, and drawing this to the attention of the public, or by the deposit of a Statutory Declaration to the effect that no additional ways (other than any specifically indicated in the dedication) have been dedicated as highways since the date of the deposit.

The leading case on modification orders is a judicial review decision in the High Court in 1989 and known as “the O’Keefe case” (*R. v Isle of Wight County Council, ex parte O’Keefe* (1989)). A number of aspects of the authority’s investigation and determination were closely scrutinised in that case and there were four particular issues which can be used as a way of examining the duty upon the authority in handling such matters:

- (a) there is a duty on the Authority to investigate and this report contains the full particulars of the result of officers’ careful examination of all the evidence;
- (b) the Authority must consider all the evidence and decide whether a modification order should be made. It is for the Authority to apply the law to the facts put before it;

- (c) the relevant law has to be considered by the Authority. The statutory duty is set out in 6.1.8 above and the report contains advice on the weight attached to certain evidence before the Authority;
- (d) in coming to a decision, the Authority must act in accordance with the rules of natural justice and must act in a quasi-judicial manner. The Authority must not take into account irrelevant considerations and must in turn consider all relevant considerations. The application must be dealt with fairly.

The report concludes with a recommendation. It is for this Committee to consider the evidence and, on a balance of probabilities, either accept or reject the recommendation.

4.1.4 Notice of the application was served upon:

Mr. N. Gaskell, Priory Mill, Hay Road, Brecon - owner of the land in question since 2000.

4.1.5 Consultations

Consultations were carried out with the following groups on 15th June, 2004:

Powys County Council - Highways Department
Powys County Council - Countryside Section
Brecon Town Council
County Councillor
Countryside Council for Wales
Ramblers' Association
British Horse Society
Byways and Bridleways Trust
Open Spaces Society
Auto-Cycle Union
National Grid PLC
SWALEC
Dwr Cymru Welsh Water
British Gas
Environment Agency
British Telecom
Royal Mail

The comments received are listed below:-

Powys County Council Countryside Section - "...no information or knowledge to contribute about this alleged path...On the face of it, it does seem a slightly curious path, since it merely diverges, and then converges again with Footpath 21. Is there some reason, such as a problem with FP21 at this point, why anyone would wish to divert from FP21 for a short distance, taking a slightly longer route?"

Brecon Town Council – "...The Planning Committee would like to support Mr. Gaskell in his objection to the use of the enclosure known as the meadow as a public footpath".

The Ramblers Association - "I do not have much personal knowledge of the path concerned, but do recall using the same or a similar line to the one in question on two or three occasions in the last 15 years when walking through Priory Groves to Anod Bridge. I think that there is no doubt that the public have actually used a path across this meadow for many years, and have not been discouraged or prevented from doing so until about two years ago. The reason why this path has come into use could well be that the definitive line of path 21 has not been usable until recently, but this factor is probably not relevant to the claimed usage. There has also probably been a desire for walkers to walk closer to the river and take an easier and more pleasant path than that in the woods."

Additionally, a letter in support of the landowner has been submitted by the Farmers' Union of Wales and is shown at **Annex 14**.

4.1.6 Evidence submitted to substantiate the application

Evidence Forms and Statements

The application is supported by 52 Public Rights of Way Evidence Forms (**Annex 15**). Use of the path is claimed for varying periods of time between 1925 and 2001 (when use of the path was first 'called into question') and this is plotted as a chart at **Annex 16**. 16 people who completed Evidence Forms and one other were interviewed by officers and statements prepared (**Annex 17**). In each case their individual period of usage ranges from 27 to 73 years.

The route of the path claimed by each person is indicated on maps supplied with the Evidence Forms and/or in a description on the Form itself. Those who were interviewed were asked to describe the route in more detail. One witness has failed to provide any description of the path on the Evidence Form.

Information Leaflets

Brecknock Wildlife Trust leaflet "Nature Trail Through the Priory Groves, Brecon" (1970) (**Annex 18**) - it states in the leaflet "...the trail continues across the meadow skirting the thickets of field rose and bramble...leave the meadow on the path close to the river..."

Shell/County Trust Nature Trails 1972 leaflet "Priory Groves Brecknock County Naturalists' Trust" (**Annex 19**) - it states in the leaflet "...after entering the meadow...the trail continues across the meadow skirting the thickets of field rose and bramble outside the wood fence..."

4.1.7 Other evidence discovered

First Edition Ordnance Survey 1" Map 1832 (with later revisions) - shows no features in the meadow (**Annex 20**)

Tithe Map Parish of St. John the Evangelist (1840) - shows no features in the meadow (**Annex 21**)

First Edition Ordnance Survey 25" Map 1889 - clearly shows a path or track leading into the meadow from the north but no features in the meadow itself (**Annex 22**).

Second Edition Ordnance Survey 25" Map 1904 - clearly shows a path or track leading into the meadow from the north but no features in the meadow itself (**Annex 23**).

Provisional Edition Ordnance Survey 6" Map Revision of 1903 with Additions in 1938 - clearly shows a path or track leading into the meadow from the north but no features in the meadow itself (**Annex 24**).

Finance Act 1910 Valuation Map and Field Book - based on an Ordnance Survey Second Edition 25" Map the Map (**Annex 25**) shows the same detail as the Map in 6.1.30. However, the Fieldbook (**Annex 26**) is unhelpful in determining whether a public right of way exists as the "Form VII" referred to cannot be located.

The representation of a path or track on an Ordnance Survey map is not evidence that it is a public right of way. It is only indicative of its physical existence at the time of the survey. Similarly, the absence of any indication of a path on a map does not necessarily lead to a conclusion that one did not exist.

4.1.8 Documents associated with the preparation of the Definitive Map and Statement:

Survey Card -

Compiled by the Parish Council during the preparation of the Breconshire County Council Definitive Map and Statement. It is undated but presumed to be 1951 consistent with other rights of way in the Parish. The card describes footpath no. 21 as “in Groves. Very well defined and greatly used by the public”. It is identified as “Bottom Path Groves” (**Annex 27**).

Accompanying map (original rough drawings) - drawn on Ordnance Survey sheet at the scale of 6 inches to the mile - Footpath no. 21 is shown to be located adjacent and to the east of a boundary feature for much of its length and adjacent to an area of mixed woodland/scrub for the remainder of its length (**Annex 28**).

Pre-Draft Definitive Map (c. 1956) - drawn on Ordnance Survey sheets at the scale of 6 inches to the mile - Footpath no. 21 is shown to be located adjacent and to the west of a boundary feature for its whole length and passing to the north of a small quarry at its southern end (**Annex 29**).

Breconshire Draft Definitive Map (1957) - drawn on Ordnance Survey sheets at the scale of 1:25000 scale - Footpath no. 21 is shown on top of a boundary feature. Given the thickness of the line of the footpath there is no indication as to which side of the boundary the footpath should fall (**Annex 30**).

Breconshire Definitive Map (1967) - the final published stage of the Definitive Map drawn on 2½ inches to the mile. Footpath no. 21 is shown in a similar fashion to that on the Draft Map, that is on top of a boundary feature. Again, given the thickness of the line of the footpath there is no indication as to which side of the boundary the footpath falls (**Annex 31**).

Definitive Review Map (1992) - drawn on a scale of 1:10000 the Footpath no. 21 is shown to be located adjacent and to the west of a boundary feature for its whole length and appears to pass through the small quarry at its southern end (**Annex 32**).

Current Consolidated Definitive Map (1994) - drawn on a scale of 1:10000 the Footpath no. 21 is shown to be located adjacent and to the west of a boundary feature for its whole length and appears to pass through the small quarry at its southern end (**Annex 33**).

Definitive Statements (1957, 1967, 1992 and 1994) - describe Footpath no. 21 consistently as “from path 7 leading north-east via The Groves to path 9”.

Aerial Photographs

Aerial photograph (1985) - there is no obvious evidence of any path along the route claimed (**Annex 34**).

Aerial photograph (18 July 2000) - there is an obvious mark on the ground following the line of the route claimed (**Annex 35**).

Minutes

Extract from Minutes of the Brecon Town Council Planning and Environmental Committee held on Tuesday 24th May, 1977

“Preliminary Suggestions for Treatment of Areas Marked on Map as Being Suitable for Environmental Improvement (subject to negotiations with land owners and users where appropriate)

6. Afon Honddu and Priory Gate

Litter and rubbish clearance from the river bed and banks is once again required. The footpath system requires (*sic*) checking and drainage channels crossing lower paths made easily passable. Some form of link from the meadow path to the upper part of the Struet would be an asset and either a light footbridge or stepping stones and handrail over the salmon ladder could be the answer.”

4.1.9 Discussion

The first matter that arises for discussion is the depiction of footpath no. 21 on the various Definitive Map editions and associated documents dating from the period between the early 1950s to the early 1990s. Whilst the application is concerned with the addition of an alleged footpath the location of footpath no. 21 is mentioned in the statements submitted by both the applicant and the landowner. The scales of maps used in the compilation of the Definitive Map and the various notations used make interpretation of some maps difficult, however, it is clear from the most recent Definitive Maps that footpath no. 21 lies to the west of the boundary fence, that is, within The Groves (land owned by Powys County Council) and not in the area of land affected by this application. Only one of the people interviewed recalled a footpath at this location even though the survey card (c. 1951) describes it as “greatly used by the public”. No cogent evidence has been discovered that would suggest that the present Definitive Map is in any way incorrect.

In terms of the route claimed in the application there is a strong consensus amongst the witnesses as to:

- i. the location of the path;
- ii. the presence of stiles and gates;
- iii. the existence of signs stating “no fires” and “no camping” that were erected in the 1990s;
- iv. the fact that there was never any form of challenge by the landowner until 2001;
- v. the fact that permission was not required to use the route

A minority of witnesses recalled or mentioned:

- i. a sign stating “private property” with “footpath only” or “keep to path” on it;
- ii. the installation of a wooden bridge either by the former Borough Council or the then National Park Committee (possibly in the mid-1980s or later but there is no general consensus on this point);
- iii. the existence of a worn path through the meadow

It also appears that a wider belief had existed for some time that a path existed through the meadow. This is demonstrated by the fact that:

- i. a bridge was installed in the vicinity of the route by the former Borough Council or the then National Park Committee;
- ii. that gates were erected on the route by the then National Park Committee;
- iii. that the path is referred to in the Nature Trail leaflets.

It is probably the case that no consultation was undertaken with the landowner prior to the physical works described above taking place. However, there is no record that the landowner objected to these actions or took any action to reverse them.

4.1.10 Response of landowner

The landowner has submitted a detailed response to the evidence adduced at **Annex 36**.

The main issues that are referred to are as follows:

- i. that the map supporting the claim is misleading;
- ii. there are no natural features in the meadow to define a route precisely. The brambles mentioned by some of the witnesses have been creeping into the meadow and away from the boundary. As a result the route of the path has continuously changed to compensate for this. The swathe visible on the ground has resulted from the passage of a tractor;
- iii. the definitive map shows footpath 21 adjacent and to the east of the boundary of the meadow. Use of the meadow was necessitated by the footpath becoming overgrown and people diverting around that growth;
- iv. the previous landowner wished people to walk along the boundary;
- v. private property notices have been in existence for many years;
- vi. the public roamed at will throughout the meadow as well as using numerous other paths and tracks.

Officers consider that these points require some clarification in light of the evidence available:

- i. the map submitted as part of the application is sufficient for its purpose and meets the requirements of the relevant regulations. The map submitted is a copy of the Definitive Map with the claimed route added. However, the map submitted by some of the witnesses is hand-drawn and imprecise but it is noted on the map that it is not to scale. Officers do not consider either to be intentionally misleading;
- ii. several of the witnesses have referred to the existence of bramble bushes in some places adjacent to the alleged path. These may have provided a seasonal boundary to some sections of the path. Others recall or mention a defined track across the meadow. This is evident in the aerial photograph dating from 2000 and is likely to have been created both by the passage of a tractor and the effect of trampling by the public. It should be noted however that on the earlier aerial photograph from 1985 there is no evidence of a defined track across the meadow on the route claimed;

- iii. the location of the definitive route of footpath no. 21 is discussed at 6.1.48;
- iv. if this was the intention of the previous landowner, it is possible that it did not appear clear to the to the public;
- v. a sign stating “private property” and qualified by “footpath only” or “keep to path” does not demonstrate an intention not to dedicate - arguably its effect is to admit the existence of a footpath;
- vi. the landowner has provided clear evidence in his submission that there are several paths or tracks being used throughout the meadow. These are not necessarily associated with the alleged route or serve the same or a similar purpose. It is a prerequisite for the success of a claim for a right of way that usage must have occurred over a defined line. It appears from the evidence provided by the witnesses that the claimed line has consistently been used by the public and that there is evidence of that line on the ground.

4.1.11 Further submission by applicant

The applicant has provided a rebuttal to the landowner’s response which is shown at **Annex 37**.

4.1.12 Comments on the draft report

A draft copy of this report was given to both the applicant and the landowner prior to the Committee meeting. The applicant’s comments are shown at **Annex 38** and the landowner’s comments at **Annex 39**. In producing the final report some amendments have been made to the draft report following the submission of these comments.

4.1.13 Conclusion

It would appear from the evidence available that it is reasonable to conclude that a public footpath is reasonably alleged to subsist over the claimed route. It also appears reasonable to conclude that the landowner made no attempt during the period of usage to show an intention not to dedicate a footpath.

The Committee may therefore decide to modify the Definitive Map under the provisions of Section 53 of the Wildlife and Countryside Act 1981 upon the discovery of evidence by the Authority, which when considered with all other relevant evidence available to them shows-

- i) that a right of way which is not shown in the map and statement subsists over land to which the map relates, or
- ii) that a right of way which is not shown in the map and statement is reasonably alleged to subsist over land in the area to which the map relates

The evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right does subsist (R. v. Secretary of State, ex parte Bagshaw and Norton (1995)).

In R. v Secretary of State, ex parte Bagshaw and Norton (1994) Justice Owen stated "Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances...if the evidence from witnesses as to uses is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist then, it would seem to me, to be reasonable to allege such right."

"The question is whether a reasonable person could reasonably allege a right of way having considered all the relevant evidence available..."

In determining the application the Committee must not take into account the desirability or otherwise of the path, nor the way in which it may affect a person or persons.

The Committee must decide, in accordance with the legislation, if, on the balance of probability, a footpath should be added to the Definitive Map. If it is satisfied that this is the case then it should resolve to promote an order to modify the Definitive Map by adding a footpath. If the Committee is not so satisfied then it should refuse the application.

Recommendations:

- a) that the application for a Definitive Map Modification Order be approved on the basis that a right of way which is not shown in the map and statement is reasonably alleged to subsist over land in the area to which the Map relates;***
- b) that the Chief Executive be instructed to make a Definitive Map Modification Order under Section 53 of the Wildlife and Countryside Act 1981 to add a public footpath to the Definitive Map;***
- c) if no representations or objections are duly made to the order during the statutory objection period, or if any so made are***

withdrawn, that the Chief Executive be authorised to confirm the order as an unopposed order.

5.0 OTHER BUSINESS

Such other business as is, in the opinion of the Chairman, of such urgency as to warrant consideration.

SCHEDULE OF CORRESPONDENCE

1. To receive apologies for absence
2. Such other correspondence as, in the opinion of the Chairman, is of such urgency as to warrant consideration