Agenda Item: 7

Meeting of:	**Public Rights of Way Sub Committee**
Date of Meeting:	**Wednesday, 06 September 2023**
Relevant Scrutiny Committee:	Environment and Regeneration
Report Title:	Application for Modification of Definitive Map and Statement Wildlife and Countryside Act 1981 s53(3)(c)(iii) - to delete the full extent of footpath no.73, Barry as recorded on the definitive map.
Purpose of Report:	This report deals with a claim that a route running from ST09876793 the south-western end of adopted highway at the Clos Cwm Barri hammerhead to ST09606752 Porthkerry Country Park at the edge of Mill Wood should be deleted from the definitive map and statement.
Report Owner:	David Hunt, Countryside Access Manager
Responsible Officer:	Marcus Goldsworthy - Director of Place
Elected Member and Officer Consultation:	Cllr Bronwyn Brooks - Cabinet Member Phil Chappell – Operational Manager, Regeneration Irene Thornton - Senior Lawyer (Legal Services) Steve Pickering - Countryside Team Leader Ian Robinson – Head of Sustainable Development Management Colin Cheeseman - Ecologist Michael Clogg - Operational Manager, Engineering Lorna Cross - Operational Manager Property Cllr Janice Charles - Ward member Cllr Naomi Marshallsea – Ward Member Cllr Howard Hamilton – Ward Member
Policy Framework:	This report is a matter for decision by the Planning Sub-Committee - Public Rights of Way

Executive Summary:

- This report deals with a claim that a route running from ST09876793 the south-western end of adopted highway at the Clos Cwm Barri hammerhead to ST09606752 Porthkerry Country Park at the edge of Mill Wood should be deleted from the definitive map and statement.
- The report sets out the relevant evidence and legal tests, including the weight that can be given to that evidence, to inform a determination on whether or not to make a Definitive Map Modification Order (DMMO).
- The relevant sub-committee is required to assess the evidence and determine whether to make an appropriate DMMO capable of giving effect to that evidence, or to decline the application. In making the determination the sub-committee must base its consideration on the legal tests outlined in the appended investigation report.

Recommendation

1. That the Vale of Glamorgan Council decline to make a Definitive Map Modification Order in respect of the application.

Reason for Recommendation

1. As set out within the appended investigation report.

1. Background

1.1 As set out within the appended investigation report.

2. Key Issues for Consideration

2.1 The Sub-Committee is required to assess evidence and determine whether to make an appropriate Definitive Map Modification Order (DMMO) capable of giving effect to that evidence, or to decline the application.

2.2 In making the determination the Sub-Committee must base its consideration on the legal tests outlined in the appended investigation report.

2.3 The determination should be based upon the evidence provided.

3. How do proposals evidence the Five Ways of Working and contribute to our Well-being Objectives?

3.1 The Well-being of Future Generations (Wales) Act 2015 is about sustainable development. The Act sets out a 'sustainable development principle' which specifies that the public bodies listed in the Act must act in a manner which seeks to ensure the needs of the present are met without compromising the ability of future generations to meet their own needs. In meeting their sustainability duty, each body must set objectives that highlight the work the body will undertake to contribute to meeting the seven Well-being Goals for Wales.

3.2 The activities set out in this report will contribute to the national well-being goals and help ensure we have a resilient Wales, the five ways of working will be embedded throughout the response. We have worked collaboratively with other partners and consultation has taken place with the community in order to shape our response.

4. Climate Change and Nature Implications

4.1 The application has no effect on climate change or nature implications.

5. Resources and Legal Considerations

Financial

5.1 Resource implications are unable to be taken into account when determining DMMO applications.

Employment

5.2 Resource implications are unable to be taken into account when determining DMO applications.

Legal (Including Equalities)

5.3 Determination of DMMO applications under s53 of the Wildlife and Countryside Act 1981 is a statutory duty. The Authority has received a direction from the Welsh Ministers to reach a determination before the 30th September 2022. Due to the size of the application and resultant implications, it has been impossible to meet this deadline.

5.4 The applicant is entitled to seek appeal of a decision not to make an order by serving notice of appeal on the Welsh Government – Planning and Environment Decisions Wales and the Authority.

6. Background Papers

Investigation report (appended).

The Vale of Glamorgan Council

Planning Sub Committee (PROW): 6th September 2023

Report of the Director of Place

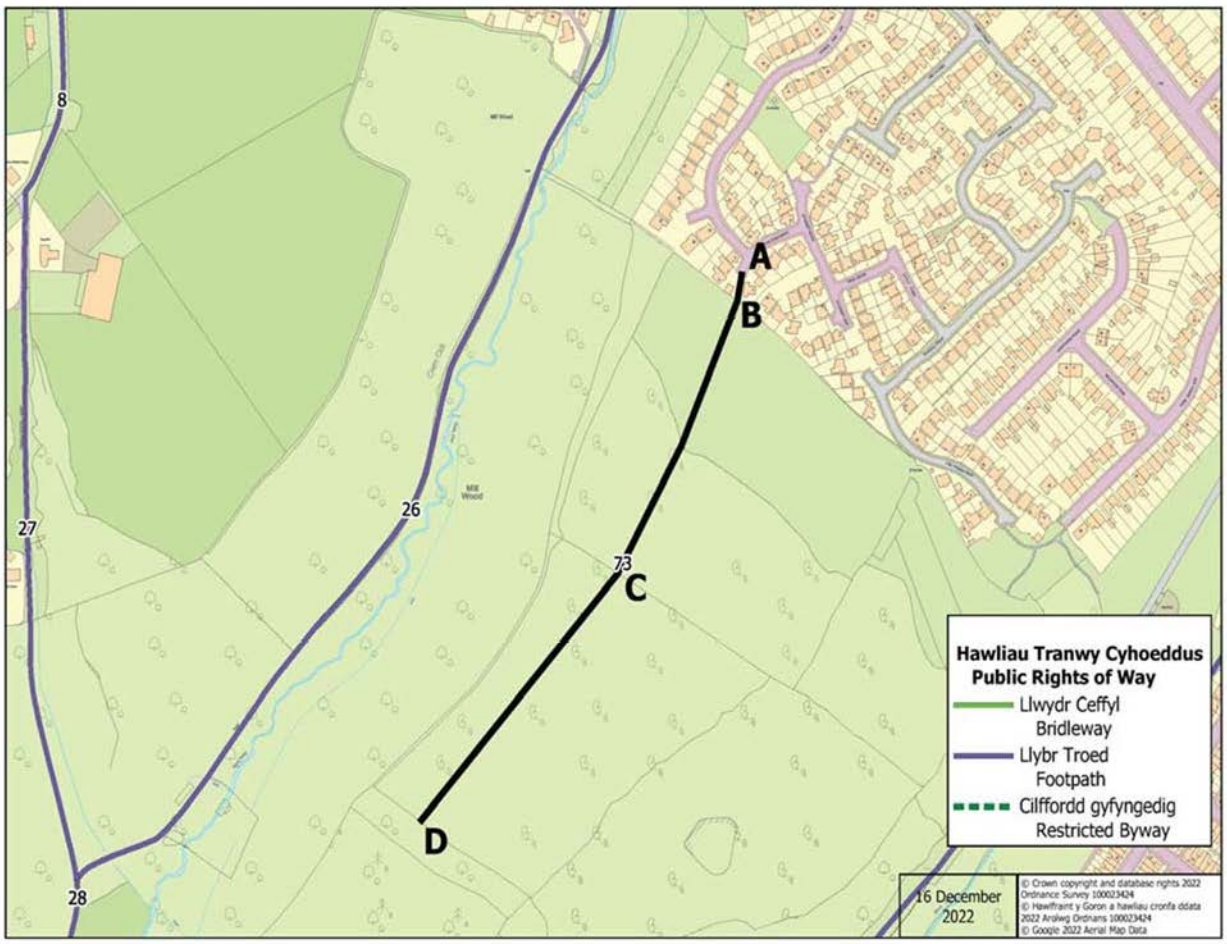
Application for Definitive Map Modification Order Wildlife and Countryside Act 1981 s53(3)(c)(iii) Footpath 73 Clos Cwm Barri

Contents

1. AIM OF REPORT

1.1 This report deals with a claim that Footpath 73 should be deleted from the Definitive Map.

1.2 The outcome sought by the application, if successful, is to remove footpath 73 from the Definitive Map and Statement (**DMS**) in its entirety. The path is shown on the plan below as A-B-C-D. This is also shown on the plan at Document 3.



1.3 The aim of this report is to set out the relevant evidence and legal tests including the weight that can be given to that evidence in order to inform a determination on whether or not to make a Definitive Map Modification Order (**DMMO**). The report will also consider the terms in which such an order, if agreed, should be made.

2. LEGAL FRAMEWORK

The Definitive Map and Statement

2.1 The Definitive Map and Statement are documents that provide legally conclusive proof (subject to the comments below) of the existence and location of the public highways recorded in them, to the extent detailed in section 56 of the Wildlife and Countryside Act 1981. The documents are conclusive in so far as they relate to footpaths, bridleways, restricted byways, byways open to all traffic and specified particulars pertaining tothose.

Continuous Review of the Definitive Map and Statement

2.2 Section 53(2) of the Wildlife and Countryside Act (the 1981 Act) requires the Vale of Glamorgan Council (VOG), as a surveying authority, to keep the Definitive Map and Statement (DMS) under continuous review. Upon (but only upon) the occurrence of "events" set out within subsection (3) it is required to make such modifications "as appear requisite in consequence of the occurrence of the event". This is done by making Definitive Map Modification Orders (DMMOs).

2.3 Section 53(2):

> *(2) As regards every definitive map and statement, the surveying 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); and*
> >
> > *(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event*

2.4 Section 53(3) sets out the events giving rise to the need for an order under 53(2). The part relevant to this application is set out below.

Wildlife and Countryside Act 1981 s53

> *(3) The events referred to in subsection (32) are as follows*
>
> > *(a) The discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –*
> >
> > > *(iii) that there is no public right of way over land shown in the map and statement as a highway of any description or any other particulars contained in the map and statement require modification*

2.5 It is therefore necessary in considering this application to determine, firstly whether there has been a discovery of evidence since FP73 (the route) was added to the DMS and secondly whether, if there has been, whether that evidence, when considered with all other relevant evidence shows that the route should be deleted from the DMS or modified.

2.6 To be given weight, evidence must be relevant to the decision in hand. A Definitive Map Modification Order (DMMO) decision cannot take into account factors such as desirability, need, nuisance or suitability. The effect on amenity, antisocial behavior or other such circumstances which arise from the recording of the route are also not to be taken into account. It is not relevant to consider, in connection with this decision, whether there were or were not procedural irregularities connected with the making or confirmation of the original order.

The Discovery of Evidence

2.7 The Court of Appeal considered the relevant provisions of the 1981 Act in ***R v SSE, ex p Simms & Burrows*** [1991] 2 QB 354. The joined cases were about whether the evidential presumption at s.56 of the 1981 Act carries through to the review stage,

i.e. whether the presence of a way on a definitive map is to be treated as conclusive once an authority finds itself in a review situation. However, the observations of the Court in relation to what is necessary to engage the review jurisdiction in the first place are helpful.

Glidewell LJ observed at p.388B-C that:

> *"…section 53(3)(c) differs from the preceding subparagraphs in that the use of the word "discovery" suggests* ***the finding of some information which was previously unknown and which may result in a previously mistaken decision being corrected*** *This information will normally, if not always, relate to a fact or situation which already existed at the time when the definitive map was prepared. In this way, paragraph (c) is to be distinguished from its predecessors. If I am right in my view that paragraph (c) is concerned with the correction of mistakes as a result of newly discovered information…" [emphasis added]*

Russell LJ said at p.392H:

> *In particular I am satisfied that section 53(3)(c), with its use of the word "discovery", embraces the situation where a mistaken decision has been made and its correction becomes possible because of the* ***discovery of information which may or may not have existed at the time of the definitive map."*** *[emphasis added]*

2.8 Later, Potts J observed in ***Mayhew v SSE*** (1993) 65 P & CR 344 at p.353 and 354

> *"…the "event" in section 53(3)(c) is concerned with* ***the finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared****". [emphasis added]*
>
> *"In the 1981 Act, the power of the surveying authority under section 53(2) is not to make such modifications as may appear to it to be desirable. It is to make such modifications to the map and statement as appear to be requisite in consequence of the occurrence of any of the events specified in subsection (3)."*

2.9 More recently, the Deputy Judge held in **Burrows v SSEFRA** [2004] EWHC 132 (Admin) at [26] and [28] that:

> *26* ***An Inquiry cannot simply re-examine the same evidence that had previously been considered when the definitive map was drawn up*** *The new evidence has to be considered in the context of the evidence previously given, but there must be some new evidence which in combination with the previous evidence justifies a modification…****Section 53(3) must require the discovery of evidence which was not produced to the decision maker who made or approved the existing version of the definitive map*** *" [emphasis added]*

2.10 In ***Kotarski v Secretary of State for the Environment, Food and Rural Affairs*** [2010] EWHC 1036 (Admin) it was held that the discovery that there was a divergence between the definitive map and the statement could amount to the discovery of evidence justifying modification.

2.11 The question of what amounts to "the discovery by the authority of evidence" was further considered in ***R. (on the application of Roxlena Ltd) v Cumbria County Council*** [2019] EWCA Civ 1639 . In this case it was argued that relevant evidence already discovered once could not be the subject of a subsequent discovery within the meaning of s.53(3)(c)(i). Hence, it was argued, evidence produced to

support an application which was not proceeded with due to a failure to comply with procedural requirements could not be regarded as having been discovered to support a subsequent application. The Court of Appeal rejected that argument, finding that the substance of the evidence must also be considered in order for a relevant event in s.53(3)(c) to have occurred. Lindblom LJ said at paragraphs 62 and 63:

> *"In each case the occurrence of the specified 'event' is not simply the 'discovery' of the evidence in the sense of its being physically found. It also requires a consideration of that evidence, together with any other relevant evidence available to the surveying authority, which actually 'shows' the circumstance in subsection (c)(i), (ii) or (iii) – in effect, therefore, a composite event. That consideration of the evidence must surely be a consideration of its substance, by the surveying authority, rather than its merely being received from the applicant with the application. It involves the surveying authority undertaking that 'mental process' on the evidence discovered. If the evidence has not been 'considered', a relevant event for the purposes of section 53(3)(c)(i), (ii) or (iii) will not have occurred. The event cannot occur until one of those three circumstances has actually been shown.*

2.12 It is not the case that any small item of evidence not previously considered will be sufficient to justify an order for deletion being made. The case of ***Trevelyan v Secretary of State for Environment Transport and the Regions*** [2002] EWCA Civ 266 confirms that "evidence of some substance" is needed before the Definitive Map and Statement are modified to delete or downgrade a right of way. Lord Phillips MR stated at paragraph 38 of *Trevelyan* that

> *"Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."*

2.13 It was stated in **R (Leicestershire CC) v Secretary of State for the Environment Food and Rural Affairs** (QBD) [2002] EWHC 171 (Admin) that "The presumption is against change, rather than the other way around".

2.14 In **R v SSE ex** p**arte Kent County Council** CO/2605/93 –the Inspector refused to confirm an order under S53(3)(c)(iii) on the basis that the confirmed order would have deleted the whole of the footpath whose position, but not existence, was in dispute. In upholding the decision, the judge stated that it seems inherently improbable that what was contemplated by section 53 was the deletion in its entirety of a footpath or other public right of way of a kind mentioned in section 56 of the Act of 1981, the existence, but not the route, of which was never in doubt. In other words, it is not appropriate to delete a route from the DMS if all that is in doubt is the precise alignment of the route.

2.15 In summary therefore:

a. The jurisdiction to review the definitive map and statement and make a Definitive Map Modification Order

(DMMO) relies upon there have been an "event" as defined by s.53(3) of the 1981 Act.

b. To fall within the "event" described at s.53(3)(c) there must have been a "discovery" of "evidence", which may or may not have been in existence at the time the route was added to the definitive map, but must not have been considered by the decision maker when the route was added to the definitive map.

c. What is clearly precluded from the ambit of s.53(3)(c) is a re-examination of the same material that has previously been considered.

d. Even if evidence was previously known about it can still be discovered if its implications were not previously considered.

e. The presumption is against change in the case of a deletion, so the new evidence, if it is to justify the change, must be of some substance.

f. It is inappropriate to delete a route if all that is in doubt is its precise alignment.

2.16 The route was originally added to the DMS on the basis of long user of the route under s 31 of the Highways Act 1990. It is therefore useful to understand the legal basis for its initial addition to the DMS. This will put into context some of the arguments which are being made for its deletion.

Presumption of Dedication – HA1980 s31

2.17 The Highways 1980 s31 is the statutory basis for the presumption of dedication of public rights, as below.

Highways Act 1980 s31:

> *(1) Where a way over any 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.*

The section contains numerous considerations that should be applied when determining the application. Extracts from the section and a brief outline as to their effects are clarified below:

> *…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…*

It is a principle of Common Law that use cannot give rise to acquisition of rights if that use has been on the basis of a criminal offence.

> *…actually enjoyed…*

Sufficient use of the way must be shown for the required period.

> *…by the public…*

The use must be shown to have been by the public at large. Private use by employees, tenants or a particular category of people cannot qualify

> *… as of right…*

For use to give rise to a presumption of dedication it must be 'as of right'. This means that use must be

without force, secrecy or permission (*nec vi, nec clam, nec precario*).

… without interruption…

Interruption means actual or physical stopping by the landowner or someone acting on their behalf. This interruption must have been made with the intent to prevent the public using the way; interruption occurring for an unrelated purpose, such as building works or car parking, will not qualify.

… for a full period of 20 years…

The time period to be considered under the Highways Act 1980 is 20 years use prior to the date the way was called into question.

… no intention during that period to dedicate it.

The intention not to dedicate must be supported by demonstration of overt acts that have been sufficiently communicated so that the public at large are aware. Circumstances such as a letter between a landowner and the Council or a clause in a tenancy agreement would not be sufficient to show a lack of intention to dedicate.

Capacity to dedicate

2.18 In ***Jaques v Secretary of State for the Environment***, The Independent, 9 June 1994 the question arose as to whether under s31(1) there has to be an owner capable of dedicating land as a highway over the whole of the relevant 20 year period. Laws J held that the fact that during the 20-year period there is no single person in possession of the land capable of dedicating (such as when it is in the possession of a tenant who can in conjunction with his landlord dedicate the way) whilst fatal to a claim to implied dedication at common law, cannot defeat a claim under s.31(1). A right of way cannot arise, however, under s.31(1) if, during part of the relevant period, there is no person at all having the legal right to create a public right of way. This occurred in Jacques because land was requisitioned by the military, so the freeholder was dispossessed, but the MOD in possession did not acquire the title. A freehold owner has the right to dedicate a right or way and powers to manage the land so as to prevent such rights from being acquired.

Throughout the relevant period in this case, the land crossed by the route (A-B) was in the freehold ownership and possession (subject at times to tenancies) of the Land Authority for Wales (LAW) and then in the hands of developers or private individuals (A-B) or in the case of B-D in the hands of the LAW and then the Vale of Glamorgan Council (**VOG**).

Statutory incompatibility

2.19 It may be, however, that a statutory body or company will not have power to dedicate where such dedication would be incompatible with its statutory duties. S31 (8) of the HA1980 says:

(8)Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.

2.20 This issue could potentially be relevant in this case because LAW and VOG are both statutory bodies. In ***Ramblers Association v Secretary of State for Environment Food and Rural Affairs*** [2017] EWHC 716 (Admin) however, it was decided that the relevant date for determining statutory incompatibility is the date when the fact finding tribunal was considering the question; per Dove J, at paras 44 – 5:

"There are in my view sound practical reasons why the facts should be assessed at the point in time when the question arises. Firstly, the consideration of whether or not the recognition of the right of way would be incompatible with the statutory undertaker's statutory duties is

in large part going to be a forward-looking exercise. It is an examination of the position at the time when the order is being considered, but against facts and forecasts which consider the question not simply at that moment, but also looking forward to consider whether on the balance of probabilities it is likely that in future the statutory undertaker's statutory duties would be compromised and there would be incompatibility between the operator's statutory objects and the existence of the way. The fact that it is a forward-looking exercise would render it peculiar for that test to be applied at some point in the past.

Secondly, it would be a curious factual enquiry for an examination to be made as to the safe and efficient operation of the railway, for instance, in the present case either at 1970 or 1986. Such an enquiry would have to be taken on the basis of technical standards and engineering knowledge at that point in time in the past (assuming that could be reliably ascertained). Evidence of accidents or near misses or other difficulties in operating the railway after the date in 1970 or 1986 would be inadmissible or at least arguably irrelevant. The artificiality of such an enquiry is in my judgment a strong pointer towards it being inappropriate to examine the question under section 31(8) at some earlier date than the date of determination. Mr Laurence recognised the force of the difficulties created by the exclusion of supervening events bearing directly upon the safe and efficient operation of the railway, and in his reply he sought to develop a hybrid approach whereby it would be possible for the Inspector to take account of such evidence, albeit still reaching a conclusion based upon a date at the start of the relevant 20 year period. In my view, whilst respecting Mr Laurence's endeavour to try to find a solution to the problem created by adopting an earlier date for examination of the question, this hybrid approach throws into sharper focus the practical problems created by taking the earlier date as the date for assessment. How such a hybrid approach could operate in practice is, in my view, very unclear and uncertain. Whilst there may be a mismatch between the timescales for the questions posed under section 31(1) and 31(8) when considering whether an order should be made or confirmed, the nature of those enquiries (retrospective under section 31(1), and both retrospective and importantly prospective under section 31(8)) and the practical issues with which they are engaged justify the difference in the times at which those questions are to be assessed."

In this case, by the time the Inspector determined that the order should be confirmed, the land A-B was all in the hands of private individuals and B-D was all in the hands of VOG as part of Porthkerry Country Park. The creation of a public right of way is not incompatible with the statutory purpose of holding land as public open space.

Burden of Proof

2.21 There is an obligation on the Authority to keep the DMS under continuous review. Having received the application, it is under a duty to consider whether any new evidence has been discovered and if it has, to determine whether on the balance of probabilities it shows that the DMS should be modified.

2.22 Should the Authority make an Order it will be advertised publicly and opportunity to object will exist. Any objections that are received and not withdrawn will result in the order being referred to PEDW for adjudication.

Route Status

2.23 The route is recorded as a Public Footpath, which is a highway over which the public have a right of way on foot only. They are differentiated under the Highways Act 1980 from footways, which are pavements alongside roads.

Ouster of jurisdiction

2.24 Schedule 15 paragraph 12 of the 1981 Act says:

Proceedings for questioning validity of orders

12(1)If any person is aggrieved by an order which has taken effect and desires to question its

validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.

(2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.

(3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever.

2.25 It is not therefore, open to anyone now to question the validity of the Order which was originally made to add the route to the Definitive Map.

3. LAND OWNER NOTIFICATION

3.1 The applicant confirms that the requirement of Wildlife and Countryside Act 1981 Schedule 14, Paragraph 2 have been complied with and that affected landowners have been notified.

4. BACKGROUND

4.1 The case relates to a footpath (FP73) which was recorded on the DMS following a decision by a planning inspector (Document 90b) on 25th March 2003 to confirm an Order made by the Council on 22 January 2002 (Document 95). The Order was confirmed following a public hearing and an unaccompanied site visit.

4.2 Applications were made for the deletion of the route in 2009. The investigation reports relating to these applications are appended at Documents 114 and 115 and these set out clearly the background to the development of the housing at the former Cwm Barri Farm (**the Development**). That background is not repeated here except where it is directly relevant to the matter under consideration. The two applications were dismissed by an Inspector following a section 14 Appeal by his decision letter dated 4th November 2011 **(2011 DL**). (Document 125).

4.3 FP73 runs from Clos Cwm Barri over a private shared driveway serving 6 and 8 Clos Cwm Barri and forming part of the titles to those properties, into and though Porthkerry Country Park (**PCP**) and ends at a point D on the plan at Document 3 within PCP.

4.4 The most contentious part of the route is A-B. The owners of the driveway over which it runs complain about the intrusion of users on their privacy and sense of security and have consistently maintained that FP73 ought not to be shown on the DMS as a public right of way.

4.5 The land affected by FP73 A-B was formerly farmland and was acquired by Land Authority Wales (**LAW)** for the purposes of development. Planning permission was obtained for its development under outline planning permission 90/00248/OUT in 1994. There was a related s106 agreement (**The s106 Agreement**) dated 21st November 1994 made between the Vale of Glamorgan Borough Council (**VOG**) and LAW. Part of the land, known as Phase 3 of the Development, (crossed by A-B) was transferred to Taylor Wimpey (**TW**) in 1997 and is held under title number WA761544. TW obtained reserved matters approval for the relevant part of Phase 3 (the part on which FP73 lies) under consent number 98/0014/RES. A further reserved matters consent number 99/00164/RES was granted in March 1999 for a later and smaller part of the Phase.

4.6 In accordance with the provisions of The s106 Agreement a parcel of land to the South of Phase 3 (**Extension to PCP**) and now crossed by B-D of FP73 was conveyed to VOG on 21st November 1994. Under the terms of the transfer VOG covenanted to hold it as public open space as an extension to PCP. Point D is on the boundary between the Extension to PCP and the land which was PCP before it was extended.

4.7 The suite of documents which governed the acquisition and development of the Development anticipated and intended that an access would be provided from Phase 3 to the extension to PCP for both vehicles and pedestrians. It was intended that the right of access would be included in the transfer of the extension of PCP to VOG for the benefit of its servants, agents and licensees.

4.8 There was a requirement in 2.5 of the s106 agreement to provide a roadway and pedestrian access to the land edged green on the s106 plan (Document 93-93c) from point x on the s106 plan (a point on Pontypridd Road) to the Extension to PCP. In the event, a vehicular access was provided for maintenance purposes, but the intended pedestrian access was not. Taylor Wimpey was, in due course, released from its obligation to provide the access for pedestrians.

4.9 The inspector in 2002 was aware of this (see paragraph 20 of the decision letter) **(DL**) so, although these facts are outlined at length in support of the application, they are not new evidence. The application contains extensive criticism of the manner in which these matters were dealt with at the time. The outcome, however, is common ground, most relevantly for this application, it is accepted by the applicant c that there is no question that the route which is now FP73 was used by right as a result of any provisions in the s106 Agreement, because it is accepted that it is not the access which was provided for in that agreement.

4.10 The s106 Agreement required that the transfer of the Extension to PCP to the Council would include a right of way for the Council and its servants agents and licensees over the access to be provided pursuant to 2.5, but that right was not, in fact, granted. The only right of access provided in that transfer (Document 122) was a right of access which was personal to the Council and intended for maintenance purposes. Neither the s106agreement nor the transfer of the Extension to PCP is listed as being a document which was in front of the Inspector in 2002, but it is clear from his decision letter that he was at least broadly aware of these requirements. The failure to include that right (however it came about) means that the public did not have a right to use the route of FP73 between A and B in reliance on such a right.

4.11 In 1999 [redacted] submitted an application for a DMMO to add FP73 to the DMS. The Order was made by the Council on 22nd January 2002 and confirmed by an inspector appointed by Planning Inspectorate (PINS) in March 2003.

4.12 In 2000 TW, who were receiving complaints from the occupiers of no 8 Clos Cwm Barri about members of the public accessing PCP across their driveway, made an application for planning permission, (number 00/00376/FUL) to close the access at B. The application was refused. At the time the Council still required its private access to PCP.

4.13 Once the DMMO had been confirmed in 2003, Officers of the Council undertook work to accommodate FP73. The Applicant has complained that the alignment of the route on the ground does not reflect the alignment as shown in the order. This issue is not relevant to the claim (see 2011 DL paragraph 24 Document 125). The Applicant has accepted this and asked for the material on misalignment to be excluded from the claim, but Officers declined to do so on the basis that once submitted the evidence must be considered to determine whether or not it discloses anything relevant to the claim.

4.14 The Applicant has objected to the existence of FP73 for many years and has made numerous allegations (both previously and in the course of her submissions in support of this Application) against Officers of the Council and others concerning many aspects of the way in which the route came into legal and physical existence and the way in which it came to be added to the DMS. This includes detailed discussion of the way in which all parties dealt with the fulfilment (or otherwise) of the s106 obligations and contractual obligations in the mid to late 1990's when the land was being developed. She has made allegations against TW of breach of planning control, saying that the access created over the driveway to No 6 and No 9 was unlawful development and should not have been created. It has been made clear to the Applicant previously that these matters are not material to the question of whether FP73 should be deleted from the DMS. Whether or not there were procedural or other irregularities concerning the original investigation of the Order or its making or confirmation is not of itself material to this claim. It is much too late to challenge the decisions which were made 20 or more years ago. The outcome of those actions form part of the material background (for example as to whether there was a right to use the route) but there is no basis on which the actions themselves can be taken into consideration.

4.15 It is part of the Applicant's case that FP73 should not be on the DMS because the route recorded cannot have been used for 20 years prior to the date of the Application. This is because, the Applicant says, prior to the development of plot 255 (now number 9 Clos Cwm Barri) there was no gap in the hedge at point B. There was a gap about 10 m to the east, on land which is now within 9 Clos Cwm Barri. The Applicant says that the gap at B was created by TW in 1998 and was closed off again by them in 1999 by erecting a fence panel. It was that action which precipitated the claim in 1999. The Inspectors addressed the question of the trigger to the claim, or the date of challenge, in paragraphs 17-19 and 24-25 of DL and in 2011 DL paragraph 34. This matter was also considered by the Council in relation to the 2009 applications and is referred to in the two investigation reports. It is not a new issue.

4.16 The exact location of the gap in the hedge was not considered by the Inspector in 2009 to be an issue which prevented the path from being added to the DM. The information as to its possible earlier location is not new.

4.17 There was evidently a change of plan during the development of Clos Cwm Barri (**CCB**) because in earlier versions of plans relating to the Development a footway (or paved footpath) was clearly shown on plans as a continuation of the eastern footway of CCB to the boundary with the Extension to PCP. In later plans this was not shown and the boundary wall of no 9 CCB was erected across the land which had previously been shown as the footpath extension to the CCB footway. This meant that the route of the path, which had previously been indicated, was blocked by the wall. The facts relating to this have been set out at length in the submissions made by the Applicant. Whilst this is factually true, it is not material. It merely explains how the physical layout seen today and in existence at the time of the original Application to add FP73 to the DMS came into existence. The Inspector referred to the revision of the plans at paragraph 18 of the DL. It is not a new issue.

4.18 The Applicant has submitted to the Council a very significant volume of information, much of which is in the form of submissions containing her interpretation of events. The submissions are lengthy and highly repetitive, but they have all been carefully considered to assess whether they refer to or reveal any new evidence or information which is of relevance. All of the items of evidence submitted have also been considered to assess whether they contain any new evidence. This report seeks to highlight the issues which are relevant and not those which are not. This is in the interests of ensuring that the salient points are brought to the fore and are not obscured by issues which will not assist in progressing the claim.

4.19 Two major themes raised which are irrelevant to this decision are:

(a) That the footpath has been incorrectly laid out by the Council i.e. that the route laid out does not reflect that which is described in the Order. This is not material to the question of whether or how the route should be depicted on the DMS and that has been expressly recognised by the Applicant (see Document 53). For this reason the issue is not addressed in this report, but all the points made have been considered to determine whether any of them are material to the claim. To the extent that any are, they are addressed under the relevant headings below.

(b) There are numerous allegations of dishonesty, incompetence, fraud, misfeasance in public office and other civil and criminal wrongs made against the Council, its officers and others. The documents containing these have all been considered to assess whether any points could be of relevance to the decision, but none of the allegations, even if proven, could be relevant to the claim under consideration in this case. There is a very real risk that many of the allegations are defamatory, so they are not repeated in this report. The Applicant is aware that the opportunity to challenge alleged procedural irregularities and errors in the DL has long passed. This was set out clearly in the 2011 DL.

5. EVIDENCE AND STATMENTS

5.1 The claim takes the form of a number of submissions by the applicant, supplemented by documentary evidence. The submissions are described below and assessed in the section entitled Case Assessment.

Document 4 – 6 - The Application Submission

5.2 This contains the basis of the Applicant's claim as originally formulated, which is that evidence has come to light since the decision to confirm the Order was made, that the majority of the users of the footpath did so by licence (i.e. by right) and not as of right.

5.3 The submission goes on to discuss the 1999 Application and the route over which the Applicant says that the applicant in 1999 (for addition of the route to the DMS) was claiming a right of way. There is reference to evidence that the route which was used prior to October 1998 was different to the route which was used after October 1998. Reference is made to a fence panel which was erected in 1999, said to have been put in place by TW to secure the boundary of plot 255 (9 Clos Cwm Barri).

5.4 A petition signed by 138 residents in 1999 is also referred to. It is said that if the Inspector had seen the petition he would have been bound to consider it to be irrelevant.

5.5 The submission refers to a release by the Council's lawyer in 1999 of the obligation on TW pursuant to an s106 agreement to provide an access from the new estate to the adjacent public open space and alleges that it was inappropriate to rely on that release.

5.6 It is stated that the Inspector on the original application did not have in front of him some large scale engineering drawings relating to phase 3 of the development and that he probably did not realise that the screen wall to the west of plot 255 (9 Clos Cwm Barri) had been moved.

5.7 The submission refers to an alleged misalignment of the route after confirmation of the Order and to alleged potential breaches of planning control by TW.

5.8 The conclusion of the submission alleges that the use of the route was only made possible by a series of errors on the part of TW, the Council, solicitors and conveyancers and the Inspector.

Document 7 – letter 210902

5.9 This is not new evidence

Document 8 - Supplementary Submission 1

5.10 This submission goes into some detail about the planning history of the site and analyses the provisions of the planning permissions and section 106 Agreement which are said to relate to the land over which the route runs. It is argued that the creation of the gap in 1998 by grubbing out the hedge was unauthorised development. Part of the argument is that the gap at point B was not created until 1998 so it could not have been used for 20 years by 1999. It goes on to refer to an application made in 2000 by TW to close the gap. Permission was refused by the Council. It is alleged that the reason for that refusal was to appease residents who were petitioning for a pedestrian access to the public open space adjacent to the development. It is stated in conclusion that the access at the end of Clos Cwm Barri is not the access which was required to be provided by the s106 agreement.

Document 9 – letter 080400

5.11 An objection to planning application 00/0376/FUL. This is not new and is not relevant to the decision in hand.

Document 10 – Title WA761544

5.12 Taylor Wimpey's title to Phases 1 and 3. This is referred to in the discussion of the case below, where the significance of some entries has been considered, but it is not new evidence which justifies a change to the DMS.

Documents 11 to 13 – Registered Titles

5.13 Westbury and Persimmon titles to land in the Development which add nothing material to the case.

Documents 14 – 16, 18, 21, 23 extracts of plans

5.14 These contain no new information not available to the Inspector in 2002.

Document 17 – list of documents

5.15 Contains no evidence

Document 19 – covering email, letter and photographs

5.16 Contains no new relevant information

Document 20, 22 Screenshots of VOG's planning website

5.17 Contains no new relevant information.

Documents 24 and 25 – letters

5.18 Relate to the fulfilment of s106 and other planning requirements and the content is neither new nor relevant.

Document 26 – Press cutting 120799

5.19 This is not new evidence

Document 27 – photograph 8 Clos Cwm Barri 1999

5.20 This is not new evidence

Documents 28 – 32 letters

5.21 Relate to the creation of the new gap at 8 Clos Cwm Barri in 1998 and a proposal in 2000 to close it and contain no new relevant information.

Document 33 –photograph

5.22 This depicts a different unidentified path and is not relevant

Document 34 – 36 – petition

5.23 This is not new evidence.

Supplementary Submission 2 (document 37 and 38)

5.24 This relates to the alleged misalignment of the route by the Council after the Order was made. It refers to the fact that the DL states that the path goes through the field gate rather than to the field gate.

Documents 39 to 42, 43, 47 Extracts from transfers to developers

5.25 These are considered in the case assessment in relation to the argument made in relation to licence, but they do not contain any relevant new information.

Document 43 Transfer to Taylor Wimpey Phase 1

5.26 The relevance of this is discussed in the case assessment. It does not contain any new information justifying the modification of the DMS.

Document 43 Extract of Transfer to Taylor Wimpey Phase 3

5.27 The relevance of this is discussed in the case assessment. It does not contain any new information justifying the modification of the DMS.

Document 48 entitled adduced evidence to support supplementary submission 1 etc.

5.28 This repeats the argument that the removal of the hedgerow in 1998 was done without the necessary consents and that the access was unauthorised development. It asserts that before 1998 access was only possible through a gap in the hedge on land which became plot 255. The unauthorised development undertaken is said to have allowed members of the public to use that route to access the recently extended Country Park. The placement of a fence panel to close the gap is said to have precipitated the claim in 1999 and makes the point that the claim was based on a gap created in 1998. It is asserted that footpath rights founded on failings should never have arisen or been asserted.

Document 49 – letter 181208

5.29 Contains no relevant evidence

Document 50, 51, 52, 54 – Documents relating to process1999

5.30 Relates to process concerning the 1999 DMMO application and contains no relevant evidence.

Document 53 53a, 55, 55a – 55c Document 56 to 56h, 57 – 57h, 80, 80a – Documents relating to alleged misalignment of the route

5.31 Relate to alleged misalignment of the route, accepted by the Applicant not to be relevant and contain no new relevant evidence.

Document 58 – 60 correspondence with PEDW and determination direction

5.32 This is not evidence in the application

Documents 61- 74 – Consultation letter and responses

5.33 None of the responses to the consultation letter contain any new relevant information, though all have been considered.

Document entitled "legal submissions in response" document74a

5.34 This document raises a substantive point relating to the alleged incapacity of LAW to dedicate a right of way by reason of the alleged incompatibility of doing so with its statutory duties (a concept known as statutory incompatibility). It refers to s31(8) of the 1981 Act which makes it clear that an authority will not be able to dedicate a right of way where to do so will be contrary to its statutory duties.

5.35 Reference is made to 2.86 acres of land behind Hawthorn Road which is held by the Council as public open space and the fact that walking on that land would have been by right. It is asserted that there were errors and irregularities in connection with its transfer and the registration of the s106 agreement as a local land charge, but this land is not affected by the route and the point, whilst not disputed, is neither new nor relevant.

5.36 With reference to the land behind Hawthorn Road, which is said to be subject to a statutory trust, submissions have been made by the Applicant (Document 131) to the case of ***Day v Shropshire*** [2020] EWCA Civ 175, with the implication that this somehow affects the position in relation to FP73. This case, however, concerns the sale of land subject to a statutory trust and has no relevance to public rights of way. Land sold, whether in compliance with the procedures required to free land of statutory trusts or not, will be sold subject to any rights of way which affect it.

5.37 Reference is also made to the acquisition by CPO of land around Broad Close. The landholding is said to have included a track from Pontypridd Road with permissive footpath rights and it is said that during the CPO process the land was recognised as not being a public highway. This may well be the case, but the land does not form part of the route in question, so the matter is not relevant.

5.38 The argument that the use of the way is by licence made in Document 4 is repeated in this document.

5.39 The argument is made that the use of the public open space was by right from the date of the Council's acquisition in 1994. The document confirms in paragraph 12 that the Applicant is not asserting that anyone was able to use the part of the route A-B by right by reason of any right granted to them as the owners of homes on the development.

5.40 Appendix A refers to the legal framework of LAW and Welsh Development Agency.

Submission 2 – response to Stephen Pickering's email of 21 February (doc 75 75a – 75d) and Documents 81 and 82

5.41 This submission relates to the content of the consultation letter issued by the Council following the direction by PEDW to determine the Application. It does not relate to the substance of the Application to be determined. It is alleged by the Applicant that the letter was deliberately worded in such a way as to draw attention to Mr and Mrs Underdown and incite action towards them and their property, which is denied by the Council. This all relates to events long after the making of the Order and its confirmation and is not relevant to the matter in hand.

5.42 Other issues are raised relating to the procedure surrounding the making of the Order, details of the wording of the Order, appearances at the hearing in 2002 and alleged failure to give proper notice that the order had been made. These issues are not relevant to the decision in hand.

5.43 This representation goes on, however, to touch on a point which is of potential relevance which is that at the date of the making of the Order and its confirmation it appears to have been assumed that Clos Cwm Barri was adopted, whereas it was not adopted until much more recently. It raises the question how could the route have started at a point which was not and never had been a public place, if there was no established public route leading to it. This is addressed later in this report.

Document 76 – 76e, 77 – Further submission in response to consultation

5.44 This relates to the precise alignment of the route and includes no new relevant evidence.

Document 78, 78a, 88 and 88a and addendum document 104 – Dispelling the myths

5.45 This covers issues already raised in earlier submissions and matters which have no bearing on the application in hand, concerning the basis on which numbers 9, 8 and 6 Clos Cwm Barri were transferred to the plot purchasers. It refers to the making of the Order in response to the 1999 application and lists evidence considered in that process and forwarded to the Inspectorate. It refers in more detail to the petition signed by 138 people. It goes on to make allegations in relation to the misalignment of the route and refers to the presentation of the matter to committee in June and July 2010 and subsequent attempts at enforcement of the route, making an allegation against the Council of the expropriation of the Underdowns' land. It repeats the point that the route claimed was claimed over land now within the boundary of number 9 Clos Cwm Barri. It criticises the details of the application in 1999. It contains no new information or evidence relevant to the decision.

Documents 79-79d entitled The 1999 Footpath Applicant – Martin Morris etc

5.46 This document refers to [redacted] purchase of his home and to the fact that earlier layout plans of the development showed the route of the pedestrian access on land now within the boundary wall of no 9 Clos Cwm Barri. The layout was changed later so that the intended route was included in the garden of number 9 and enclosed by a wall. It outlines the Applicant's understanding of the 1997 transfer of Phase 3 to TW and of the s106 agreement. It outlines her understanding of VOG's involvement with the Development and an alleged failure to promptly register the s106 Agreement as a local land charge, together with events which are said to have led to its registration. It outlines the history of the ownership of the public open space and PCP and asserts that the public had a right to roam on that land. It restates the argument that the occupiers of the Development were able to use the route by licence, though it is argued that this did not extend to the route from A to B. An allegation is made that the making of the Order was negligent and that the Council knew that the right of way did not exist and that the Order was a nullity. There is a complaint about the Council relinquishing its private right over the route in 1997 and it is reasserted that the access provided at Clos Cwm Barri was not

provided in accordance with the s106 Agreement. The submission describes the author's understanding of [redacted]' actions leading up to making the application and those of Councillor Hawthorn. It states the Applicant's opinion of what [redacted] should have done in preference to making the footpath application. There is an interpretation of the photographs which were relied on in support of the application and a short analysis of the user evidence and its implications. [redacted] is criticised for having made the application in 1999 which led to 20 years or more of controversy, according to the Applicant. Doubt is cast on whether notice was given to TW of the application. It contains no new information or evidence relevant to thedecision.

Document 83 – 84 – concerning the sealing of the DMS

5.47 This contains nothing of relevance to the claim as it relates to procedural matters concerning the DMS as a whole.

Document 85-85b 86 – comments on a third party response to consultation

5.48 This contains no new relevantinformation.

Document 87 87a

5.49 Contains no new relevant information as it relates to the loss of the original DMMO which was confirmed in 2003.

Documents 90- 90d

5.50 90 a and b contain no evidence and are copies of the certified copy 2002 Order and the 2003 DL.

5.51 90c is a representation made by a local resident, [redacted], in response to the application made by the Applicant in 2009 to modify the DMS as it relates to FP73. [redacted] referred to rights granted to her on the purchase of her property and addresses the question of the adoption of Clos Cwm Barri. She pointed out that the route form Pontypridd Road to point A was not part of the Inspector's consideration in 2003. She provided her comments on the adequacy of the evidence provided in support of the application and provided her own comments in relation to an alleged route from Pontypridd Road to point A. 90d is the title to her property, 8 Llys-y Coed.

Document 90e entitled means of access and means of passage to Footpath 73

5.52 This sets out a definition of a highway, means of access and means of passage and recites extracts from Highways Act 1980. The origin of the definitions of means of access and means of passage are not given and they are not necessarily accepted as being accurate or appropriate for use in the context of the arguments made. The document makes several arguments

Means of access to footpath 73

5.53 It is argued that the access track between 99 and 101 Pontypridd Road was the only direct access from Pontypridd Road to the land conveyed to LAW in 1977 (subsequently developed for housing). This was apparently the only access included in the transfer. It is asserted that the Inspector incorrectly identified the tenants of the land in the DL. It describes the development of 99a Pontypridd Road and asserts that access from the original access on Pontypridd Road was impossible from around 1996 when Phase 2 was sold to Westbury. This is not new evidence, as it is clear from paragraph 22 of the DL that the Inspector was aware that this had blocked the track but was satisfied that users found another way

through close by. The exact means by which users approached point A is not material to the existence of the route from A – D.

5.54 The document refers to the compulsory purchase of land around Broad Close Barry in 1994. It is asserted that a conveyance in 1935 contained covenants preventing public rights of way from being established over the land. It is not clear by what mechanism a covenant in a private conveyance could prevent a public right from being established by long use. It is asserted that the original access lane was, confirmed not to be a public highway. Whether or not this is the case, it does not impact on the question of whether the route A-D should be a public footpath, because it makes no difference whether the public arrived at that point over a route which was wholly or partly a public right of way, as long as they did as a matter of fact arrive at that point and use the route from that point onwards for a period of 20 years or more in a manner capable of establishing a claim.

Application for DMMO 1999 and the Order in 2002

5.55 The document refers to the application made in 1999 and rehearses points made previously about the way in which the access point over which the route runs came into existence and how the claim was prompted. It refers to the making of the Order and makes the point again that point A was historically a point in a field remote from an acknowledged public highway. It describes again the creation of the access point in 1998 to 1999. It refers to alleged breaches of planning control and the creation of a gap which did not exist until 1998. It is alleged that the Inspector did not understand that the gap was newly created.

5.56 Paragraph 9 asserts that there was an error by the Inspector in identifying the route has having started at the farm entrance at 99a. It is alleged that he confused that track with another at Broad Close. This allegation is not supported by any evidence.

Application in 2009 for DMMO

5.57 The submission makes reference to an application made by the Applicant in 2009 to add a public right of way to the DMS. The Applicant made an application to add a route from point A to 99a Pontypridd Road. This was refused and she has taken this as evidence that no such right of way existed.

5.58 The submission provides a response to a representation made by a resident, [redacted] ([redacted]' married name) to the application made in 2009 (Document 90c). It sets out minor differences in the description of the route in the DL as compared to the Order made and provides commentary on what the Applicant believes [redacted] must have known. It is suggested that the Inspector was misled by the Order into believing that Clos Cwm Barri was adopted at the time of his decision. It suggests that point D was not a place of popular resort throughout the relevant period because it was not a point of access to PCP until 1994. The submission asserts that there was a right for residents to pass on Clos Cwm Barri but not for the general public, but that this right did not extend to the private driveway between A and B. It responds at considerable length to representations made by DMG to an application for a DMMO made in 2009. The essence of the point appears to be that if there was no route from Pontypridd Road to point A between 1979 and 1999 then point A cannot be the start of a public right of way.

5.59 It is suggested that the decision by Mr Laslett in 2003 that the route "projected" back to Pontypridd road was overturned by the Inspector in 2009,

Document 90g – 90i

5.60 These together set out the Applicant's understanding of the legal framework for the Land Authority for Wales and argue that LAW lacked the statutory capacity to dedicate public rights of way, repeat the argument that use of the way was by licence and that the use of the POS was by right. These arguments are addressed in the case assessment below, but no new evidence is contained in these documents.

Document 91- 91b

5.61 This is supplementary information in support of the submission contained in Document 90e but does not contain any new information which is relevant to the application.

Document 92 and 92a to h

5.62 This is a plan from the Land Registry showing title numbers which does not advance the claim and various registered titles and plans dated between 2004 and 2020. They are TW's title WA761544 and the titles to 6, 8 and 9 Clos Cwm Barri. The information in these, so far as it is relevant is considered in the case assessment.

Document 93

5.63 Screenshot of VOG website for planning application 1990/00248/OUT which contains no relevant evidence.

Document 93a

5.64 Planning brief relating to land at Cwm Barry Way which contains no new information of any relevance

Document 93b to d

5.65 S106 agreement 21st November 1994. This has been extensively referred to by the Applicant who alleges breaches of its requirements but for the reasons set out this is not relevant to this claim and is not new information.

Document 93e

5.66 Outline planning permission 90/00248/OUT. This is neither new nor relevant to this claim.

Document entitled Misconduct in public office (doc 94 96, 96a, 97, 99,100, 102, 103)

5.67 These documents together make numerous allegations in relation to conduct, failure of process and acts of misconduct. There is an extensive critique of a legal briefing note and legal advice note prepared in 2007 by a solicitor employed by the Council, but no new evidence is included, only the Applicant's understanding or interpretation of events, repeating arguments already made. The notes themselves are not evidence which would justify a change to the DMS, having been prepared after the Order was made. The briefing note (Document 100) sets out the events concerning FP73 from 1999 to 2007. The advice note (Document 99) contains the advice given by the solicitor in relation to the private maintenance access at Clos Cwm Barri, VOG's right to carry out works to the boundary and how alleged antisocial activity on FP73 might be addressed. They contain nothing of relevance to this claim.

5.68 Allegations are made of errors in the wording of the Order, but these matters are not the subject of this application. Under Schedule 15 paragraph 12 of the 1981 Act the validity of the order cannot now be questioned. The Inspector in 2011 explained this in his 2011 DL paragraphs 13 and 14.

Document 95 and 98

5.69 Are not new evidence, both are a copy of the modification Order from2002.

Document 101

5.70 A plan containing no new information about the status of the right of way

Document 105

5.71 This contains no new information or evidence and is not relevant to the application in hand. The documents referred to have all been considered before or add nothing to the case as they are not relevant. The Inspector in 2011 considered aerial photographs which were the same or contained materially the same information. Aerial photographs cannot in any event provide persuasive evidence of the status of a right of way or the basis on which it is used. The Inspector in 2011 also considered and commented on OS maps and nothing which is new material has been produced.

Document 106

5.72 An email from Mrs Underdown which contains no evidence.

Document 107

5.73 An exhibit list which is not evidence and reveals no new information.

Document 108 Document entitled Second Dossier dated 17th Feb 2014

5.74 This sets out arguments seen in documents listed previously and refers to facts previously outlined. It contains no new evidence. It alleges errors and inconsistencies in the drafting of the Order. Nothing is new.

Documents 109 to 112

5.75 Contain no evidence but are a covering letter to document 108 and extracts from the Rights of Way Law Review.

5.75.1 Email from Mrs Underdown 6th January 2023

5.75.1.1 Contains no relevant evidence

5.75.2 Representation dated 16th January from Mrs Underdown

5.75.2.1 Contains nothing new which is relevant to the application. Outlines correspondence and process from over 20 years ago.

5.75.3 Victim Impact Statement of Mrs Underdown 7th February 2023

5.75.3.1 Contains nothing new which is relevant to the application. Outlines correspondence and process over a lengthy period.

5.75.4 Mrs Medhurst document 18th December 2022 request for time extension

5.75.4.1 Identified apparent anomalies on the one drive.

5.75.5 Mrs Medhurst email dated 8th January 2023

5.75.5.1 Points out error in heading of report which refers to 53…(i) which has been amended.

5.75.5.2 Otherwise no relevant representation

5.75.6 Mrs Medhurst document entitled One Drive and DIR response

5.75.6.1 Points out a number of minor errors in the report which have been amended.

5.75.6.2 Otherwise no relevant representation

5.75.7 Mrs Medhurst Further Submission on DIR and OneDrive Documents 004 005 006 091a and DIR 90c

5.75.7.1 This document contains no representations which are relevant to the decision in question. The discovery by Mrs Medhurst that [redacted] and [redacted] are the same person is not new material evidence.

5.75.8 Email 19th January 2023 from Mrs Medhurst and attachments.

5.75.8.1 Does not contain any new material.

5.75.9 Email 12th February from Mrs Medhurst to Mr Docherty

5.75.9.1 This contains no representations relevant to the decision in hand. Mrs Medhurst has made a number of references to statutory trusts and to the case of Day v Shropshire [2020] EWCA Civ 175. This case concerns the sale of land subject to a statutory trust and has no relevance to rights of way in general and in particular has no relevance to FP73.

5.75.10 Mrs Medhurst Document 21st February 2023 Grant of Outline Planning Permission 1990

5.75.10.1 This does not include new evidence. The site survey of 1977 is said by Mrs Medhurst to have been considered by the Inspector when the matter was previously determined and on that basis it cannot be new.

5.75.11 Amended submission of Mrs Medhurst 1st May 2023

5.75.11.1 This contains no evidence which is relevant to the decision in hand. The "discoveries" made by Mrs Medhurst, even if accurate, are not discoveries of evidence nor has any express information been given as to how these circumstances are relevant to the DMMO application.

5.75.12 Expert report of Christine Cox 10th April 2023

5.75.12.1 This report is a commentary by an expert on the interpretation of aerial photographs on photographs of the site dating between 1969 and 2000.

6. CASE ASSESSMENT

6.1 The Application consists, in the main, of submissions rather than evidence and the submissions are lengthy and repetitive. The following themes have been identified:

Errors in Relation to the Making and Confirmation of the 2003Order

6.2 As has previously been clearly stated by the Inspector in 2011 (see for example paragraph 5 of his decision letter, (Document 95) errors made in relation to the process of the making and confirmation of the Order are not material to the question in hand and in so far as there were any errors, these could have been challenged at the time of the decision to confirm the Order, but they were not. It is now far too late to do so. The ouster clause in Schedule 15 paragraph 12 of the 1981 Act applies. The Inspector in 2011 made it clear in his 2011 DL that these matters are not material to the determination of a claim to delete a right of way.

Allegations of wrong doing by the Council, its officers andothers

6.3 This Application is not the appropriate mechanism to consider such allegations, as was explained by the Inspector in 2011. Most, if not all, of the actions complained of are alleged to have taken place many years ago and do not relate to the matters which are material to this application.

6.4 The events surrounding the release of TW from its obligation to provide an access to the Extension to PCP are not relevant to the question to be determined. If there was any breach of planning control or of contract, that is a separate matter and took place many years ago. The matters referred to are neither new nor relevant and no new relevant evidence has been provided or identified. These issues were addressed in the 2011 DL.

6.5 Whether or not the use of the route was only made possible by a series of errors on the part of TW, the Council, solicitors and conveyancers and the Inspector, as alleged, that is not relevant to this claim. This was made clear by the inspector in 2011 (paragraphs 95, 96 and 97 2011 DL Document 95) who also made it clear (paragraph 13) that it is not appropriate on a DMMO application of this type to revisit and re- examine the decision on the 2002 Order.

Discrepancy between the Definitive Map and the Decision Letter

6.6 It is argued that new evidence has been discovered of discrepancies between the Decision Letter (DL) and the route as depicted on the Definitive Map. The case of ***Kotarski*** is relied on in support of the argument that this requires the route to be deleted. In ***Kotarski*** there were major and irreconcilable differences between the route as described in the Definitive Statement and the route as shown on the Definitive Map. In this case there is no discrepancy between the Definitive Map and the Definitive Statement. An issue has been raised in respect of a grid reference used to identify the location of the path, but to the degree of accuracy used, the references are correct. The arguments made relate, in any event, to the exact alignment of the route and not to its existence and following the case of ***Kent*** this would not justify the deletion of theroute.

Misalignment of the Route after the Order was Confirmed

6.7 The Applicant has expressly accepted that this is not relevant to the Application. This was made clear by the Inspector in 2011 and iscorrect.

Use of the Route of FP73 having been by licence

6.8 The argument is made by the Applicant (Document 4) is that the owners of houses in the Development used the route by licence during the period of their ownership of those houses.

6.9 The basis for this argument is that a licence to use the route was acquired by the owners of houses on the development as successors in title to the developers from whom they bought their houses.

6.10 For example, the transfer to TW of Phase 1 dated 30th May 1995 (Document 43) contained the following provision:

> *"IT IS AGREED AND DECLARED THAT Wimpey shall not by virtue of this Transfer acquire or be entitled to any easement of way light or air (other than specifically granted by this Transfer) which would or might interfere with or restrict the free use of the Retained Land for building or any other purpose and any enjoyment of any way or light or air by Wimpey from the Retained Land shall be deemed received by means of licence only"*

6.11 The Retained Land was defined in that transfer as the land edged blue on the Plan and *"each and every part thereof"*. This Retained Land is shown on the relevant register of title (Title Number WA761544) (Document 10) as *"edged and numbered 6 and 7 in blue on the filed plan"*. The land shown on the filed plan in that way does not include the land affected by B to D of FP73, but it does include the land affected by A-B.

6.12 The provision referred to, however, is not of a type which automatically "runs with the land". For the owners of properties acquired from TW (or any other developer) to be bound by the provision it would have had to be included in the transfer to the plot purchasers. The title to 13 Ffordd Cwm Cidi (Phase 1) has been examined and the provision is not included in the transfer dated 19th July 1996 from TW to [redacted] or recorded on the register of title (number WA798191) (Document 118). By way of a further check, the title to 31 Ffordd Cwm Cidi (Briard) (number WA847484) (Document 120) has also been examined and there is no record in the title of such a provision. Typically, plot sales on an estate are all in the same or very similar form, so the evidence is that the provision was not included in the titles for plots on Phase 1.

6.13 The owners of properties on Phase 3 also do not benefit from this type of licence in respect of their use of FP73. There was a provision of a similar nature in the transfer of Phase 3 to Taylor Wimpey dated 19th November 1997. The "Retained Land" in that case was defined as *"the remainder of the land comprised in Title No WA 69908 and each and every part thereof".* By that date, the land crossed by PF73 B to D was in the ownership of VOG in title number WA895681 and so also did not fall within the definition of retained land.

6.14 The written user evidence considered by the Inspector in 2002 included only that of people who lived on Phase 1 or Phase 3 of the Development or did not live on the Development at all, so it is not necessary to consider the position in respect of Phases 2 to 5 in detail, as it has no potential to make a difference to the weight which should be given to the evidence. No new user evidence has been presented.

6.15 The argument made by the Applicant in respect of this licence is, therefore, flawed and does not justify the reconsideration of the user evidence.

6.16 The analysis of the user evidence in the light of this flawed argument adds nothing to the material facts of the case. The user evidence has in any event been considered already and is not new evidence.

Reservation of rights over 6 and 8 Clos Cwm Barri

6.17 A further matter concerning the rights of the owners of houses on the Development, not raised by the Applicant, has been considered as part of the investigation of this claim, having come to light when the titles to the properties were considered. The titles to numbers 6 and 8 Clos Cwm Barri had rights reserved out of them at the time of the transfer from TW to the current owners. One of the rights reserved affected the shared driveway, which was defined as an Accessway. The right was as follows:

> *"In respect of all parts of the Estate to which access is to be gained over the Accessways..... to pass with or without vehicles (below first floor*
>
> *level only) along that part of the Accessways shown coloured blue on the Plan".*

It was reserved in favour of the registered proprietors from time to time of any parts of the Estate and all persons authorised by them. The Estate is defined so as to mean all of Phase 1 and all of Phase 3 of the development. The area coloured blue on each plan is the part of the relevant title which is the shared driveway over which FP73 runs.

6.18 The clause means that all the owners of plots on Phase 1 and Phase 3 of the Development are entitled by right to cross the two parts of the shared driveway from the Clos Cwm Barri direction in order to access number 6 or number 8 Clos Cwm Barri, or the boundary wall of 9 Clos Cwm Barri and from the PCP direction, they have the right to cross the shared driveway to access any part of Phase 1 or Phase 3 of the development.

6.19 Consideration has been given to whether this is cogent new evidence, which when considered with the other evidence available to the Council requires the DMS to be modified by the deletion of FP 73 or any part of it. The conclusion is that it does not.

6.20 In order for a claim as of right to succeed, the users must demonstrate that there has been a sufficient level of use by the public over a period of twenty years to draw to the attention of a reasonable landowner that a right of way was being asserted. To justify a change to the DMS the evidence would have to be such as to indicate that the new evidence casts doubt on that so that the route should be removed from the DMS.

6.21 The scope of the private right reserved for owners of land in Phase 1 and Phase 3 is only to access other parts of the Estate (Phases 1 and 3) so it does not extend to a right to use the Accessway (shared driveway) to gain access to PCP, which is not part of the Estate as defined. This means that a person who was a resident of Phase 1 or Phase 3 who walked across the land to gain access to PCP would not be exercising their private right of way but using the route as of right. It is an oddity of this case that when returning to their home on Phase 1 or Phase 3 they would be exercising the private right of way because they would then be accessing part of the Estate.

6.22 The evidence, thus, means that the return journey of some of the users (from PCP to the development) would have been by right. This, however, makes only a small difference to the claim because it would have been (and clearly was) readily evident to the owners of the land crossed by FP73 (as to any reasonable owner) that all users walking from the Development towards PCP were using the route as of right and not by right and that a proportion of those coming the other way (those who did not live on Phase 1 or Phase 3) were also using it as of right and not by right. This level of use - by the same

number of people – would have been sufficient to bring to the attention of a reasonable landowner that a public right of way was being asserted. To cause a change to be made to the DMS new evidence must be substantial, not only any small piece of evidence will be sufficient. (***Trevelyan*** [2002] and ***Leicestershire***).

6.23 In reaching this conclusion account has been taken of the fact that the Inspector in 2002 considered not only user evidence forms, but also heard oral evidence and saw other documents. He saw a letter from [redacted] (No [redacted] Clos Cwm Barri) indicating that in July 1999, as soon as they moved in, they put up signs indicating that the route was private and not a footpath for access to the field. That is an indication that there was a noticeable degree of use by the public at that time, which he understood to be outside the scope of the right which had been recently included in the transfer of the property to him (Document Number 123 [redacted] and Mr and Mrs Underdown also wrote, in a document submitted to the hearing, of having experienced some disruption from people wanting to "cross our drive to gain access to Porthkerry Park as it is" (Document number 124). None of which we have recognised to be our immediate neighbours". The owners of the shared driveway later placed gates across the drive to show that it was not a continuation of the pavement to the fields. In the same document they referred to users who lived 7/10 and 6/10 of a mile from the site in locations which are not within the Development. This all suggests that there was evidence of use from people other than those for whose benefit the rights had been reserved.

6.24 For these reasons this new evidence is not of sufficient significance to justify the deletion of the route.

Use by right of the Public Open Space

6.25 The Extension to PCP (and over which B-C-D runs) was held from 21st November 1994 onwards as public open space and it may be arguable that the public walked on that land by right rather than as of right from that date onwards. This issue is raised as part of the application. It is clear, however, that both the Inspector in 2002 and the Inspector in 2011 were aware that the land was public open space. No new evidence or evidence which has not previously been considered in relation to this issue, has been adduced (See 2011 DL paragraphs 74-79). As in 2011, it would be inappropriate to revisit this issue now.

The Exact Location of the Gap between Phase 3 and PCP and the creation of a new gap

6.26 The submissions by the Applicant raise issues concerning the exact location of the gap in the hedge in the vicinity of plot 255 and the date when that gap was opened up.

6.27 Issues relating to the exact location of the gap in the hedge in the vicinity of plot 255 (9 Clos Cwm Barri) and the date when the gap at B was opened up were clearly brought to the attention of the Inspector in 2002. The matter is expressly referred to in the minutes of the committee meeting of 19th November 2001 (Document 126) and also in the DL. The earlier access point is referred to by the Inspector as being 10m to the east of point B (paragraph 17 DL). This may well be as shown on some of the aerial photographs examined in the expert report of Christine Cox referred to below at paragraphs 6.47 to 6.49 (Document 132) but it is not evidence of a new issue. The possibility was clearly considered by the Inspector who heard the evidence in 2002.

6.28 The Inspector was clearly aware that the section of hedge where the maintenance access was provided was removed in 1998 and that a gate was erected in its place. The Inspector in 2011 expressly deals with this issue in paragraph 34 of his 2011 DL. No evidence has been produced in relation to this issue

which raises anything new. In any event, this argument relates to the precise alignment of the route rather than its existence and so does not justify the deletion of FP73.

6.29 It is alleged (Document 4) that some large-scale engineering documents recently identified by the Applicant were not considered by either the Inspector in 2002 or in 2011 and that without them the Inspector might not have understood the change between the route originally intended for the right of way and the route on the DMS. It is clear, however, that both were aware that the plans for this part of Phase 3 changed. The Inspector in 2002 referred specifically to the screen wall of 9 Clos Cwm Barri in paragraph 19 of his decision letter. It is clear that he was aware of the revised layout and that he considered two plans which showed the change of detail concerning the flank wall. Plan number 1439 06 02 D was available to him, as was plan 1439 02 01 which showed the previous layout in which the eastern footpath of Clos Cwm Barri continued to the boundary of the Extension to PCP. The Inspector also had in front of him an extract from plan1439 02 04 dated 11 04 2000 (Document 128), which clearly shows the line of the garden wall of No 9 Clos Cwm Barri. Inspectors are experienced in reading plans and the removal of the footway was referred to by him in his decision letter (paragraph 18). The detailed engineering plans referred to do not provide evidence of matters which have not already been considered. They were not physically before the Inspector, but to justify a decision to amend the definitive map by the removal of a route already included cogent new significant evidence is needed, not any small piece of new evidence will suffice. The plans do not include new information which was not in front of the inspector. The point, in any event, relates to the precise alignment of the route, not to its existence.

6.30 Whether or not the gap created in 1998 was authorised is immaterial. It is relevant to the alignment of the route that the gap at B was created in 1998, but this is not new evidence. It is apparent that the Inspector was well aware of that fact in 2002. The fact that the gap was not closed in 2000 is also relevant, but is a fact of which the Inspector was aware. The reason why it was not closed is not relevant. The Inspector in 2011 dealt with the 2000 application to close the gap at paragraph 47 of his decision letter. No new evidence has been produced and the points made are not new.

Statutory Incapacity

6.31 The argument raised in the Application concerning the alleged statutory incapacity of LAW to dedicate a right of way is misconceived.

6.32 Statutory incompatibility is a concept in relation to which most of the case law arises from the dedication of town and village greens, but it is accepted that it has the potential to be relevant in the case of a public right of way. It is the case that LAW, which held the land affected by the route for part of the relevant period, is a creature of statute and that it held the development land for the purpose of development. It is also accepted that its powers were, throughout the period of its ownership, focused on the fulfilment of its aim which was to acquire land and dispose of it to others for the purpose of development. The legal position, however, is that the question of statutory incompatibility is to be determined at the date when the tribunal of fact considers the matter – *Ramblers Association v Secretary of State for Environment Food and Rural Affairs* [2017] EWHC 716 (Admin). The issue did not therefore arise in 2003 and does not arise now.

6.33 At the time of the Inspector's decision in March 2003 the land affected by the route was all in private ownership (A-B), or in the ownership of the Council as POS (B-D). The question of statutory incompatibility does not arise for land in private ownership. In relation to the public open space, there is no statutory incompatibility between land held as public open space and the provision of a footpath.

Both purposes allow the public to have access to the land in question for the purposes of recreation. This argument therefore has no bearing on this application.

The Date of Adoption of Clos Cwm Barri

6.34 It is alleged that there was an error made in 2002 because it was assumed that Clos Cwm Barri was adopted, but it was not, meaning that the route began on private land to which the public had no right of access.

6.35 The question of the date of the adoption of Clos Cwm Barri and concerns over point A having been on private land, were addressed by the Inspector in 2011 in paragraph 25 of his 2011 DL and there is no new evidence on this point. As the Inspector then observed, the adoption of a public highway relates to its maintenance and being unadopted does not preclude the existence of public rights over it. Furthermore, the fact that land is private does not of itself preclude the existence of a public right of way. Whilst there was an error in the original DL in referring to Clos Cwm Barri as being adopted, it was determined in 2011 that it would not have rendered the order incapable of being confirmed. Nothing new has been raised. Clos Cwm Barri is now an adopted highway.

The Route from Pontypridd Road to Point A

6.36 It is, broadly speaking, argued that there was no right of way between Pontypridd Road and point A in the relevant 20 year period, but no evidence has been provided to show that that was the case. More importantly, it is not material to this application. It is not material exactly how the public arrived at point A, as long as they did as a matter of fact arrive at that point and use the route from point A to D for a period of 20 years or more in a manner capable of establishing a claim. No evidence has been provided to show that they did not.

6.37 The Applicant states that she did not use an access at 99a Pontypridd Road, was not aware of one and did not believe it likely that there was one, but this is not evidence which justifies a modification order being made for a route some distance away from that point. The Inspector in 2002 was satisfied on the evidence that he heard that the Order should be made from point A to D. No new evidence has been adduced that the route did not exist from A to D.

6.38 The Inspector in 2011 addressed the question whether there was evidence of right of way over the access track between 99 and 100 Pontypridd Road (now 99a Pontypridd Road) at paragraphs 50-54 of his 2011 DL and pointed out that it forms no part of the route to be deleted and that variations of the route leading to FP73 and interruptions thereon have no bearing on whether FP73 was recorded in error. The same applies to arguments now made.

6.39 Reference has been made to the compulsory purchase of land around Broad Close Barry in 1994. It is asserted that a conveyance in 1935 contained covenants preventing public rights of way from being established over the land. This relates to land outside the route of FP73 and this is not material on these points.

6.40 The position relating to the land behind Hawthorn Road owned by the Council as public open space is not material to this application. The land is not affected by the route and the point can have no relevance to the question of whether FP73 should be removed from the DMS or not.

6.41 The fact that during the CPO process relating to land around Broad Close, the track from Pontypridd Road was recognised as not being a public highway is not relevant to this claim. At the time of the CPO process, it was the case that the track in question was not recorded as a public highway and it was no

part of the purpose of the CPO process to enquire into whether that reflected the proper legal position or not. This is not new evidence relating to the status of FP73.

6.42 It has been asserted that there was an error by the Inspector in 2002 in identifying the route has having started at the farm entrance where 99a Pontypridd Road now stands. It is alleged that he confused that track with another at Broad Close. This allegation is not supported by any evidence. The Inspector was clear in his DL that in his opinion the route projected back to Pontypridd Road. Because he was not asked to identify the exact route between Pontypridd Road and point A, he did not do so. It is not a matter relevant to the decision in hand.

Implications of Inspector's 2011 Decision Letter

6.43 The Applicant is wrong to suggest that the decision of the Inspector in 2011 in relation to the 2009 claim for a route from Pontypridd Road to point A can be relied on to show that no route existed. The decision did not overturn any aspect of the decision of the Inspector in 2002. It concluded only that the evidence adduced of the route claimed was insufficient to establish the particular claim. The Inspector stated that "it cannot be concluded …..that the route used is that identified in the appeal".

6.44 Of more significance, though not mentioned by the Applicant in her submission, is the fact that the Inspector in 2011 dismissed claims to remove FP73 from the DMS. The evidence that he considered dealt, to a material degree, with the same arguments as those being rehearsed in this Application. The evidence which was considered in 2011 is evidence which cannot now be "discovered" in support of this new Application. Furthermore, in order to justify a change to the DMS, new evidence of some substance is required and it is notable that arguments now being made and the evidence presented are not substantially different is those addressed by the Inspector in 2011. The new argument raised on this Application is the misconceived argument in respect of the licence in the first submission (Document 4). The argument on statutory incompatibility is a new attempt, on a varied basis, to show that the LAW had no capacity to dedicate a route, but, for the reasons, given it too is a misconceived argument.

6.45 The commentary on the representation made by a resident, [redacted] ([redacted]' married name) to the application for a DMMO made in 2009 makes no new material point and contains no new evidence which is material to this application. The substance of it appears to relate to the question of whether there was or was not at all material times a route from Pontypridd Road to point A. The relevance of this has been addressed above.

Mislabelling on a Plan showing House Locations andAddresses

6.46 The allegation that the Inspector was misled by a plan (Document 18) which showed no 9 Clos Cwm Barri labelled as no 6 contains no new evidence and it is not likely that the Inspector was misled. The plan including the error was plainly before the Inspector and he had the benefit of all the evidence at the hearing as well as of a site visit. The Council's file of documents relating to the appeal hearing includes a plan entitled "Planning Committee 6th September 2001 Footpath Claim 553 WCA 81 Clos Cwm Barri to Porthkerry Park" (Document 126) on which the same error occurred and had been corrected, so it is highly likely that this Inspector's attention was drawn to that error. Speculation that he may have been misled does not justify a DMMO being made to remove the route.

Evidence of Aerial Photographs as Set out in the Report of Christine Cox (Document 132)

6.47 The relevance of these photographs is that wear lines are sometimes apparent on aerial photographs and these can be used as evidence that there has been use of a particular route (though by who, or

what and with what purpose cannot be seen). In this case they photographs are being used to try to show that there was no use of the routes at the times when the photographs were taken.

6.48 This evidence is not persuasive. Firstly, the Inspector on the original application heard the evidence of witnesses at the hearing and also had the benefit of some aerial photographs. He accepted that evidence of the witnesses that they used the route. I do not find the information on these photographs to be sufficient to outweigh that evidence which was given in person by witnesses at the Hearing and was accepted by the Inspector which means that it must be given considerable weight. Secondly, the fact that wear is not obviously visible in aerial photographs cannot reasonably be taken as proof that the route was not used. Use by a few people with relative infrequency can be enough to establish a public right of way but may be insufficient to cause wear which is visible on an aerial photograph.

6.49 Assumptions are made in the report which are not backed by evidence or convincing reasoning and this reduces the weight which it can be given. The 1969 photograph predates the relevant time period by ten years and the 1975 by four years, they therefore do not relate to the 20 years period which was accepted by the Inspector as being the period over which the right of way was established, so their inclusion in the analysis does not add to the relevant information. It is not explained by the author of the report what level or frequency of use would be needed for evidence to show on the photographs and it does not logically follow, as she seems to suggest that because there is evidence of wear from machinery and livestock, use by pedestrians would show in a similar way on the photographs. The former would be more frequent and much heavier than the latter. Only selected areas of the route have been shown in some of the extracts from aerial photographs which have been relied on (for example from 1992) but no reason for this selectivity is given. There appears to be no acknowledgement that by 2000 the housing estate had been built, so a greater weight of wear could be expected than in earlier years. The fact that wear is visible from 2000 does not mean that there was no use before that. The conclusion at 4.3 of the report does not seem to be well reasoned or explained. On balance the report carries insufficient weight to outweigh the opinion of the Inspector who heard the evidence in 2002 who heard the evidence of the witnesses at the hearing and who did inspect some aerial photographs from the relevant period.

Other Matters raised

6.50 Representations and evidence relating to the precise alignment of the route intended by the applicant in 1999 reveal nothing that is new or relevant to the claim.

6.51 A petition signed by 138 residents in 1999 and its treatment by the Inspector in 2002 is referred to. This issue was considered by the Inspector in 2011 at paragraph 32 of this decision letter and no new evidence has been raised in connection with it.

6.52 Allegations are made in relation to the content of the consultation letter sent out in connection with this claim, but they are not relevant to the determination of the claim and do not appear to have any proper foundation.

6.53 The motivation and actions of [redacted], the applicant in 1999 are not relevant to the matter at hand.

7. CONCLUSIONS

7.1 Neither the application nor the Council's investigation of the position has led to the discovery of new evidence which, when considered with all other relevant evidence available shows that there is no public

right of way over the route of FP73 or that any other particulars contained in the map and statement require modification.

8. RECOMMENDATION

8.1 The Order should not be made.

DOCUMENT LIST

1	AP01
2	AP04 and note
3	Plan of route to be deleted
4	DMMO Deletion Application Submission
5	DMMO Deletion Application Submission Appendix A
6	DMMO Deletion Application Submission Appendix B
7	1999 DMMO Applicant (Mr Morris) letter to Planning Inspector dated 21/08/2002
8	Supplementary Submission 1 to DMMO Deletion Application
9	Letter dated 08/04/200 to Planning Section, Vale of Glamorgan
10	Land Registry Title No. WA761544 - Register and Plan - Wimpey Homes (phases 1 and 3)
11	Land Registry Title No.WA788672 - Register and Plan - Westbury Homes (phase 2)
12	Land Registry Title No.WA891362 - Register - Westbury Homes (phase 4)
13	Land Registry Title No.WA931149 - Register - Persimmon Homes (phase 5)
14	Draft Plan
15	Approved Plan – part 1
16	Approved Plan – part 2
17	List of documents included in the application (super ceded)
18	Location Plan and note
19	Evidence re Order point B
020	Screenshot 2020-09-04 20.44.53 and note
021	Screenshot 2020-09-04 20.44.45 and note
022	Screenshot 2020-09-04 20.50.20 and note
023	Screenshot 2020-09-04 20.50.46 and note
24	Letter dated 11.09.1998 Wimpey Homes to Planning Section, Vale of Glamorgan Council (adduced docs part 1)
25	Letter dated 23.09.1998 Planning Section, Vale of Glamorgan Council to Wimpey Homes (adduced docs part 1)
26	Report in South Wales Echo dated 12.07.1999 (adduced docs part 1)
27	1999 photograph of gap and field gate on route (adduced docs part 1)
28	Letter dated 5.10.1999 from Wimpey Homes (adduced docs 1)
29	Letter dated 11.2.2000 from Wimpey Homes to Planning Section, Vale of Glamorgan Council (adduced docs part 2)
30	Letter dated 8.4.2000 from [redacted] to Planning Section, Vale of Glamorgan Council (adduced docs part 2)
31	Letter dated 19.4.2000 from Planning Section, Vale of Glamorgan Council to [redacted]
32	Letter dated 27 02 2002 from Wimpey Homes to Mr and Mrs G Underdown
33	Fenced Path
34	Petition to Council Part 1
35	Petition to Council Part 2
36	Petition to Council Part 3
37	Supplementary Submission 2 to DMMO Deletion Application Final Draft
38	Supplementary Submission 2 to DMMO Deletion Application Appendix A Final Draft
39	Further Extracts Phases 2 and 4 001
40	Further Extracts Phases 2 and 4 002
41	Further Extracts Phases 2 and 4 003
42	Further Extracts Phases 2 and 4 004
43	Land Transfer LAW and Wimpey Homes 31 95 1995 - Phase 1 also Transfer Plan 1 and 2
44	Extract of Land Transfer LAW and Westbury Homes 29 03 1996 - Phase 2 also Transfer Plan
45	Land Transfer LAW and Wimpey Homes 19 11 1997 - Phase 3 also Transfer Plan
46	Extract Land Transfer LAW and Westbury Homes - Phase 4 also Phases Plan
47	Extract of Land Transfer WDA and Persimmon Homes 27 08 1999 - Phase 5 also Transfer Plan
48	Adduced Evidence to support Supplementary Submission 1 to DMMO Deletion Application
49	Adduced Evidence to support Supplementary Submission 1 to DMMO Deletion Application
50	Text document sent by Applicant to Operational Manager Property, VoG (Landowner) with AP02
51	PINS Notice of Hearing for hearing dated 3rd December 2002
52	Amended Notice from applicant dated 15.10.2020
53	20.11.2020 email - Misalignment of Order Point B - DMMO 2002 No.1
053a	20.11.2020 email - Misalignment of Order Point B - DMMO 2002 No.1 - attachment 1 - [redacted] Letter
54	PROW Register 53B - 17
054a	PROW Register 53B - 17 - attachment - Application Route
55	13.01.2021 email - Breaches of Development Control Planning and Legal Agreements - Cwm Barry Farm Development
055a	Attachment - Photo 1 - Waymarker post A
055b	Attachment - Photo 2 - Pathway behind 9 Clos Cwm Barri leading to pre-existing gap in hedgerow
055c	Attachment - Photo 3 - Hanging post fence panal and wall
56	15.01.2021 email - Breaches of Development Control Planning and Legal Agreements - Cwm Barry Farm Development
056a	Attachment 1 - Site visit SL unlocking gate
056b	Attachment 2 - Site visit rear boundary of 9 Clos Cwm Barri
056c	Attachment 3 - [redacted] photo indicating footpath
056d	Attachment 4 - [redacted] comments on photo identifying footpath
056e	Attachment 5 [redacted] photo blocked
056f	Attachment 6 - [redacted] comments on photo identifying blocked
056g	Attachment 7 - [redacted] letter 17 March 2009
056h	Attachment 8 - Red line alignment of route from order point A to a latching post
57	18.01.2021 email - Breaches of Development Control Planning and Legal Agreements - Cwm Barry Farm Development
057a	Attachment - further evidence of misalignment
057b	Attachment - [redacted] AP01
057c	Attachment - [redacted] map
057c	Attachment - Wimpey letter 11022000
057e	Attachment- [redacted] letter April 2000 objecting to Wimpey application 2000 00367 FUL
057f	Attachment - [redacted] letter 21082002
057g	Attachment - DL paras 1 and 19
057h	Attachment - GT extracts from Committee Reports
58	04.11.2021 PCAC-PEDW letter to Vale of Glamorgan Council - Case Ref CAS-01378-D7T2W4
59	08.11.2021 letter VoG response to to PCAC-PEDW
60	31.12.2021 PCAC-PEDW Direction Decision – CAS 01378D7T2W4
61	Consultation 18.01.2022 -letter

62	Consultation 18.01.2022 - contact list
63	Consultation Response - Dwr Cymru-Welsh Water - objection
64	Consultation Response - Friends of the Earth Barry and Vale
65	Consultation Response - VoG Estates Section
66	Consultation Response - VoG Visible Services-Transport Section
67	Consultation Response - VoG Regeneration Section
68	Consultation Response - Vodafone-Atkins Global
69	Consultation Response - Resident - [redacted] - objection
70	Consultation Response - Resident no name - objection
71	Consultation Response - Resident - [redacted] - objection
72	Consultation Response - Resident - [redacted] - objection
73	19.01.2022 email - Applicant
74	25.02.2022 email - Applicant
074a	Attachment - Legal Submission 1 in response to consultation
75	28.02.2022 email - Applicant
075a	Attachment - Submission 2 in response to consultation
075b	Attachment - Consultation letter 18 January 2022
075c	Attachment - 02-01-22 DMMO No.73 Barry 2002 (No.01) Glamorgan Archives
075d	Attachment - Notice of Making 22 January 2002
76	01.03.2022 email – Applicant
076a	Attachment - [redacted] 2009 objection
076b	Attachment - [redacted] photo blocked
076c	Attachment - [redacted] comments on photo identifying blocked
076d	Attachment - [redacted] photo indicating footpath
076e	Attachment - [redacted] comments on photo identifying footpath
77	01.03.2022 email - Applicant
78	03.03.2022 email - Applicant
078a	Attachment - Applicant Submission 1 - Dispelling the Myths.corrected version 088a
79	15.03.2022 email - Applicant
079a	Attachment - Applicant Submission 2
079b	Attachment - [redacted] Application
079c	Attachment - [redacted] Press
079d	Attachment - MM captioned photographs 1 to 4
80	18.03.2022 email - Applicant
080a	Attachment - [redacted] letter March 2009
81	18.03.2022 email - Applicant
82	18.03.2022 email - Applicant
83	20.02.2022 email - Applicant with subsequent response from VoG
84	20.03.2022 email - Applicant
85	08.04.2022 email - Applicant
085a	Attachment - Resident of Clos Cwm Barri
085b	Attachment - Redacted Form 1 s130 HA 1980
86	08.04.2022 email - Applicant
87	14.04.2022 email - Applicant
087a	Attachment - 02-01-22 - DMMO - No.73 Barry 2002 (No.01) Glamorgan Archives
88	16.05.2022 - email - applicant
088a	Attachment - Applicant Submission 1 - Dispelling the Myths - Corrected…..earlier submission 078a
89	16.05.2022 email - Applicant
089a	Attachment - Supplementary Submission 2 to DMMO Deletion Application Final Draft
089b	Attachment - Appendix A SS2 Final Draft
089c	Attachment - Fenced Path
089d	Attachment - Adduced Docs part 1
089e	Attachment - Adduced Docs part 2
089f	Attachment - Petition to Council Part 1
089g	Attachment - Petition to Council Part 2
089h	Attachment - Petition to Council Part 3
90	16.05.2022 email - Applicant
090a	Attachment - 02-01-22 - DMMO - No.73 Barry 2002 (No.01) Glamorgan Archives (9)
090b	Attachment - Inspector Laslett's Decision 514186
090c	Attachment - DMG Document_
090d	Attachment - Official Copy (Transfer) 06.09.1999 - WA930440 Marles Galatsidas
090e	Attachment - Applicant Submission 3
090f	Attachment - Appendix A Order Schedule and DL
090g	Attachment - Applicant Submission 4
090h	Attachment - Applicant Submission 5 Attachment -
090i	Applicant Submission 6
91	17.05.2022 email - Applicant
091a	Attachment – DMG1
091b	Attachment - Letter to Wimpey from Council Lawyer
92	Land ownership - overview
092a	Official Copy (Register) - WA761544
092b	Official Copy (Title Plan) - WA761544
092c	Official Copy (Register) - WA926134
092d	Official Copy (Title Plan) - WA926134
092e	Official Copy (Register) - WA927955
092f	Official Copy (Title Plan) - WA927955
092g	Official Copy (Register) - WA936463
092h	Official Copy (Title Plan) - WA936463
93	1990-00248 OUT - Planning File - on-line location
093a	Land at Cym Barry Way - Planning Brief
093b	90-00248 S106 Agreement
093c	90-00248 S106 Agreement (plan)
093d	90-00248 - A3 Amended and Approved Plans
093e	90-00248 Decision Notice
94	Applicant Submission 7

95 Notice of DMMO
96 27.05.2022 email - Applicant
096a Updated Appendix - Evidence supporting misalignment of order point B
096b Thornton Briefing Note

Documents received after date provided for receipt of evidence to be included in the draft Investigation Report

97 Applicant submission 7 FFD
98 Notice of DMMO
99 8 Clos Cwm Barri
100 Thornton Briefing Note - redacted
101 Kissing Gate Proposal January 2007
102 8 Clos Cwm Barri IT Advice FD
103 Briefing Note and Comment
104 Dispelling the Myths Addendum FD
105 Misalignment of FP 73 Final Draft
106 Letter to Maitland-Evans re Misalignment and Compensation
107 JU Exhibit list
108 Second Dossier of Facts and Evidence supporting that the DM
109 Cover letter for Sian Davies
110 RWLR - Assembling the Evidence
111 RWR Breach of Nutural Justice ex parte Slot
112 11.06.2022 email - Applicant
113 RWLR O'Keefe Judgement

Additional Documents

114 Investigation Report 2009 Application number 53B-005
115 Investigation Report 2009 Application number 53B-006
116 Omitted duplicates document 43
117 Omitted duplicates document 10
118 Title WA798191 – 13 Ffordd Cwm Cidi
119 Transfer 19/7/1996 TW – Cwm Cidi
120 Title WA847484 31 Ffordd Cwm Cidi
121 Title WA895681 VOG
122 Transfer to VOG 1994
123 Letter dated 23rd January 2002
124 Submission to 2022 hearing by [redacted] and Mr and Mrs Underdown
125 PINS Decision letter 4/11/11 – APP/Z6950/P/2010/515391
126 Minutes of Committee 19/11/2001
127 Plan – footpath claim S53WCA81
128 Plan 1439 02 04
129 Transfer 300799 8 Clos Cwm Barri
130 Transfer 230799 6 Clos Cwm Barri
131 12.02.2023 email - Applicant
132 Expert report of Christine Cox (2023.04.10)