



## Order Decision

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by Janine Townsley LLB (Hons)

an Inspector appointed by the Welsh Ministers

Date: 05/10/2023

Reference : ROW/3244272

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- This Order was made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Gwynedd Council (Footpath No. 40 in the Community of Arthog) Modification Order 2019.
- Cyngor Gwynedd (“Gwynedd Council”) submitted the Order for confirmation to the Welsh Ministers.
- The Order is dated 11 June 2019 and there were 26 objections outstanding at the commencement of the local inquiry.
- The Order proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- An inquiry was held on 14-16 February, 14, 16, 17 March and 17-19 April 2023.
- A site visit was made by the Inspector on 17 February 2023.

**Summary of Decision: I have not confirmed the Order.**

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### Application for Costs

1. At the inquiry an application for costs was made by the owners of properties at Mawddach Crescent against Gwynedd Council. This application is the subject of a separate decision.

### Preliminary Matters

2. An application for a modification order was submitted to Gwynedd Council by Mr Huw Roberts on 2 August 2014. The Order was made by the Council and the Council are supporting the Order.
3. The Order relates to the addition of a public footpath from point A to F on the Order map. The route runs from point A on the registered Footpath FP13 to point B adjacent to the eastern end of Mawddach Crescent (“the Crescent”). From point B, the route proceeds past No. 9 of the Crescent (“The Bungalow”) to point C and thereafter past the front of the Crescent to point D at its western end. From D the route proceeds along the headland to point E which is the sea embankment known as the Cob, along the Cob to F where it meets Barmouth Bridge. During the inquiry, the parties confirmed that the Barmouth Bridge is a permissive path.

4. During the inquiry, a number of items of further and late evidence were introduced. In each instance, the views of the parties were sought prior to them being considered by me. Where late evidence did not cause any prejudice to the position of any party, it was accepted and has been considered. A list of all late evidence is provided in the “documents” section at the end of this decision.
5. Matters such as the methods the applicant used for gathering evidence were raised during the inquiry, however, these are not material to this decision, and I have therefore not had regard to them.
6. The applicant has made submissions on whether FP13 to the rear of the Crescent is incorrectly recorded and whether it should have comprised part of the Order route. The Order was not made on this basis and FP13 is recorded in the Definitive Map and Statement (DMS). Similarly, the condition and desirability of FP13 are not matters which are material to this decision.

### **Historical and Background Information**

7. Much of the land over which the claimed route passes was purchased in 1894 for development by Mr Solomon Andrews (SA) including the land upon which the houses at the Crescent were built. The conveyancing map appears to show that the land purchased did not extend to Barmouth Bridge. SA built the terrace of houses at the Crescent, roads, embankments, and a tramway with the intention of building a holiday resort. Nine houses were constructed from around 1899 and, following their completion in around 1902, he constructed a number of tramlines to operate a network of trams including to both the front and rear of the Crescent houses. The evidence indicates that, within a few years, the tramlines were removed. The development at the Crescent required rock cuttings (described as “blastings”) at both ends to obtain access. It also involved the construction of a sea wall across the bay, with significant backfilling. The houses and promenade to the front of the Crescent and tramline to the front and rear were constructed upon this reclaimed land.
8. SA also constructed an embankment (known locally as “the Cob”) for a tramway from Fegla Fawr to the south end of Barmouth Bridge. It was constructed across a tidal inlet, to connect with the railway over Barmouth Bridge. It included a sluice opening near Barmouth Bridge, with a bridge built over the sluice opening to take the tramway. Construction of the Cob finished in February 1902.
9. At some point, one of the houses (No. 9) collapsed and The Bungalow was constructed in its place.
10. In 1906, the trustees of the late SA entered into a tenancy agreement with Mr William Roberts, the father of Miss Dorothy Roberts (DR), for Fegla Fawr which lies to the south of the Crescent. In 1946, the successors of SA sold numbers 2-8 the Crescent including the frontages and the corresponding section of the sea wall. In 1947, DR’s family purchased Fegla Fawr and the foreshore to the north of the Crescent and the Cob. DR inherited the farm and land from her father, and she remained the owner of Fegla Fawr until her death in 2014. Her successors in title have not given evidence in relation to the Order.
11. During WWII, the Admiralty requisitioned the Crescent (including the land over which the Order route passes between A-D) and surrounding farmland for use as a Royal Marines training camp. In October 1943, the Admiralty requisitioned the Cob (including the land over which the Order route passes between D-F). As of September 1946, as part of the surrounding farmland, the Cob was still requisitioned. During this period, the military removed the field gate to the rear of the Crescent.

## **Main Issues**

12. Section 53(3)(c)(i) of the 1981 Act requires me to consider (at the confirmation stage) whether, on a balance of probabilities, the evidence shows that a public footpath subsists over the Order route. Both documentary and user evidence has been submitted.
13. The burden of proof rests with those who assert the existence of a public footpath. In this case, the Council relies on a presumption of dedication arising under the tests laid down in Section 31 of the 1980 Act. This requires me to establish the date when the public's right to use the Order route was brought into question. I shall then examine the evidence to determine whether use by the public has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, I shall consider whether there is sufficient evidence that there was during this 20-year period no intention on the part of the landowners to dedicate public footpath rights.

## **Reasons**

### *Documentary Evidence.*

14. A series of minutes and memoranda from January and February 1907 have been produced which document exchanges between the Llangenynin Parish Council and SA and his agent. A minute of the Parish Council Meeting on 12<sup>th</sup> January 1907 states that Mr Higgon (SA's agent) attended a meeting where Mr Higgon acknowledged a footpath behind Fegla Fawr. He understood "the course of the footpath ran along the beach opposite the houses" and his stated opinion was that SA would re-open old paths rather than transferring the right to new ones. The Members agreed to write to SA to request new rights. A letter was sent to SA but there is no evidence of any reply, however a memorandum dated 09/02/1907 headed SA and Son from the Estate Office in "Dolgelly" to Head office enclosed a sketch of the path which the Parish Council sought. This plan does not appear to show the Order route or any part of it but rather shows a route falling to the south-east of the houses. In any event, there is no further evidence detailing the outcome of these communications with the Parish Council. This evidence does not assist in demonstrating the presence of a historical route over the Order route.
15. The Council states that the Parish Council Minutes referred to above and later ones from 1932, 1935 and 1944 make "a number of references to a path that passes the Crescent" and assert that this must mean to the front of the Crescent as at that time, the rear had gates and the public would have been less likely to have walked over the sand. However, only the 1932 and 1935 minutes refer to any path in the vicinity of the Crescent and both refer to "past" but with no further detail. I am not persuaded that this evidence relates to the Order route before me.
16. There is no dispute that the ground works for the construction of the Crescent were a substantial engineering operation. It seems clear to me that works of this extent demonstrate that the section of the Order route which passes between the houses and the sea wall did not exist prior to the engineering works for the construction of the houses which required the importation of a considerable volume of infill materials to form the land upon which the houses and area between the houses and sea wall were constructed. If there were footpaths in the area prior to the commencement of works in 1899, they did not follow the claimed route as that did not physically exist at that time. Nothing in the evidence suggests that any path existed on this part of the Order route before SA purchased and developed the land. The Parish Council minutes do not amount to evidence of public rights over paths in the area. All they establish is that some paths had been created as part of the development and these were open to the public at that time

but there was no intention to dedicate these routes to the public. There is no evidence that the Order route formed part of the routes being discussed.

17. A tenancy agreement dated 1906 between SA and DR's late father does not indicate any public rights of way over the land.
18. I have been provided with a letter dated 03/02/1906 from the postmaster requesting consent to fix a post for a lamp letterbox at the eastern end of the Crescent. There is no reply to this letter and no evidence of who the intended users of the post-box were. As such, I am unable to draw any conclusions that the post-box was intended to meet a public demand for this facility due to the proximity of a public right of way.
19. An Indenture, dated 27/12/1920, refers to a requirement for the purchaser to pay a share of the cost of upkeep for the road to the front. However, this does not indicate public rights over the land.
20. The applicant has produced extracts from a series of Ward Lock guidebooks. The 1912/1913 and 1918/19 editions describe a route from Barmouth to Arthog. The 1920s, 1926/27, 1930/31, 1939/40 and 1950 editions all describe the route and include a reference to passing a terrace of red-brick houses in the description. It is the applicant's submission that the terrace referred to is the Crescent. His position is that the description of the route in the guidebooks directs walkers to the front of the terrace between the houses and the sea wall. I am not satisfied that the description of the walk in the extracts are sufficiently clear to be sure that the route described forms all or part of the Order route.
21. When questioned in cross examination, none of the witnesses objecting to the Order stated that if they followed the instructions they would have walked in front of the houses. I agree that, with no knowledge of the local area other than a guidebook, a walker upon reading instructions to continue "past the terrace of houses" would be unlikely to walk to the front of the Crescent without considering a path to the rear from the time when signs for FP13 had been erected. In any event, even if the instructions intended directing people to the front of the Crescent, guidebooks are not determinative of public rights in themselves and do not serve as evidence of actual use of a way. Furthermore, the instructions in the extracts provided are not sufficiently detailed to be sure that the route described forms all or part of the claimed route. For these reasons I can attribute only limited weight to them as evidence.
22. Footpath FP13 was first registered on the 1952 Draft DMS (it was originally recorded as FP 25). There is no record of when the FP signs were first erected, but the applicant's evidence indicates it would have been at some point prior to July 1958. At some point in the late 1960s or early 1970s there was a proposed Review of the DMS although this was abandoned in 1973. There is no record of the Order route having been proposed during the Review process. The review did not include any reference to the Order route.
23. I have seen a letter dated 23 August 1977 from the Council which states DR "is turning people away and claiming that no public footpath exists anywhere on her land.". This letter was not challenged in evidence. I have also seen correspondence to show that between 1977 and 1987, DR sought to divert FP13 along the Fegla Fawr track or along the Cob. It is clear the proposals were not accepted.
24. In approximately 1984/5 an application for planning permission was made by the owner of No. 7 the Crescent to use her front garden for the sale and consumption of tea and snacks. DR, Llangelynin Community Council, and some other residents of the Crescent objected to the proposal. The objections included comments that the land in front of the Crescent was private land and that there was no public right of way to it. The Community Council stated that the approach road leading to the frontage of the Crescent was an

access road only “with no public right of way”. The objections to the planning application suggest that the route was not public and this weighs against the Order. Furthermore, this serves as evidence that landowners did not intend to dedicate public rights over this section of the Order route.

25. On 10 December 2021, Mr Coleman wrote a letter of response in relation to the complaint about the closure of the route between E and F in his capacity as a Council officer. He stated there was no registered public right of way along the Cob and that there were “numerous other difficulties concerning public rights of way in the area, which we have tried to resolve for over 20 years, but the landowner is not prepared to co-operate in the matter.” This indicates that the Council was aware that there was landowner objection to paths in the area including at least part of the Order route.
26. Overall, the historical documentary evidence does not demonstrate the existence of a public footpath prior to the construction of the houses or in the period following their construction. In any event some of the documentary evidence, including that related to the planning application for No.7 referred to above and the correspondence from Mr Coleman in 2001 do not indicate the intention of landowners to dedicate public rights over the route which I consider further below.

### **Statutory Dedication – Section 31 Highways Act 1980**

#### ***When use of the Order route was brought into question***

27. A ‘bringing into question’ arises when at least some of the users are made aware that their right to use a way as a highway has been challenged.
28. Counsel for the objectors made submissions that since the Council made the Order under section 53(3)(b), given the terms of section 53(2)(b) and 53(3)(b), the Council could not have made the Order in consequence of any expiration event prior to 20 March 1984 (that being the date a review of the definitive map was which was ongoing under section 33 of the 1949 Act was advertised as being abandoned). However, the duty imposed on surveying authorities under the 1981 Act to carry out a review of the DMS following an event includes any event that occurred prior to the relevant date of the first DMS. Such an event can result in a modification order.
29. I have considered whether the wartime questioning of the land in 1942 could have amounted to a calling into question giving a 20-year period of 1912-1942. However, it is not clear from the evidence before me that the Royal Navy, who were not landowners, had the capacity to call use into question.
30. The committee report presented to Council Members recommended that the Order be made by reference to the period 1942-1962. Despite that, the Council made it clear at the inquiry that they were unable to identify an event in 1962 which would have called use into question, and it was confirmed that the Council did not wish to proceed with that date.
31. Instead, it is the Council’s position that October 2006 should be taken as the date of calling into question as this corresponds with the year when signs were placed at the eastern and western ends of the Crescent. The signs read “STOP PRIVATE PROPERTY PLEASE USE PUBLIC FOOTPATH TO REAR OF HOUSES. Thank You.” Mr Wyn Williams, the Council’s witness at the inquiry, put forward 6 October 2006 as the date of calling into question in cross examination, that being the date of a letter written by one of the applicant’s witnesses, Mr Young. However, the evidence at the inquiry was that the ‘No Entry’ signs were installed between 30 August 2006 and 6 October 2006. On the evidence before me, I am satisfied that the signs would have been installed at some point between the end of August 2006 and the beginning of October 2006, or Autumn 2006.

32. There is reference throughout the evidence to a number of signs which have been erected at either end of the Crescent dating back to the 1950s. There is also historical evidence of gates at either end of the Crescent. I have detailed these in further detail below where I consider the evidence and actions of landowners. There is no dispute between the parties that these signs and gates existed, however, it is clear that gates were not locked until 2006. Furthermore, the evidence demonstrates that the wording of the pre 2006 signs differed from those erected in 2006 as the earlier signs used the words "private" or "private road". This can be contrasted with the 2006 signs which referred readers to the footpath at the rear of the houses. For these reasons, I have concluded that the signs which were in place before the 2006 ones were erected did not amount to a calling into question in the terms of the statutory test.
33. The applicant has not put forward any dates when the use of the route was called into question and was unable to put forward any date at the inquiry; when pressed on this point in cross examination he suggested 2006 but without explanation.
34. The Council has suggested that the date of the application would be their alternative suggestion and the Objectors originally agreed with this approach, although in closing submissions indicated otherwise. I acknowledge that it is possible to take the date of the application as the relevant date for the purposes of section 31(2) of the 1980 Act where there is no identifiable event calling the public right to use a way into question. However, in this case, I have already identified that the erection of signs in Autumn 2006 called the use into question. I have no evidence that any other event occurred in the period between 2006 and the date the application was made in 2014 which would have called the use into question. This was acknowledged by the applicant.
35. I am mindful of the judgment in *Fairey v Southampton CC [1956] 2 QB 439* where the test was set out as "the landowner must challenge it by some means sufficient to bring it home to the public that he [or she] is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it."
36. Taking all of this into account, I am satisfied that the erection of notices at both ends of the Crescent instructing them to stop and directing them to the footpath at the rear would have made it clear to the public that the landowner was challenging their right to use the right of way such that the user knew or ought to have known that the owner was objecting to the use. The erection of the notices in 2006 would have made it clear to the public that their use of the route was being called into question at that time. Therefore, the relevant period for my consideration is Autumn 1986-Autumn 2006.

#### ***Evidence of Use by the Public (Autumn 1986- Autumn 2006)***

37. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been enjoyed 'as of right', without interruption, and to have continued throughout the full twenty years. Use 'as of right' is interpreted as being use by the public that does not take place in secret, is not by force and is not with permission.
38. In this case, there has been a large amount of user evidence covering many decades. A total of 136 user evidence forms (UEFs) were submitted in support of the Order. These forms relate to the section of the claimed route which runs to the front of the houses from point B to D on the Order plan. A second form was also produced for respondents to confirm that they walked the whole of the claimed route from A to F. Of the 136, 57 also completed the second form. In addition to the 136, seven produced only the second form although I have not given these any weight as they do not contain dates of use. A number of respondents supplemented the UEFs with proofs of evidence. 47 respondents completed both forms and claimed use for the whole of the relevant period.

39. The period of time covered by UEFs spans from the early part of the 20<sup>th</sup> century up to the date of the application (and beyond that date in some instances). Use ranged from daily/weekly/monthly to yearly with some reference to periodically. The evidence indicates that the route was used generally for recreation with some instances of walking to work and accessing goods and services in Barmouth. A small amount of photographic evidence has been produced of use of the route. This generally shows individuals standing or sitting on a bench in or around the Crescent and they provide only a “snapshot” in time rather than regular use over a prolonged period.
40. Some respondents have never lived in the area but visited as holiday makers over the years including during the relevant period. Use of the route in these instances would only have been sporadic over a period of many years, although in some instances holidays were taken regularly. This evidence may not demonstrate frequent use, but it contributes to the overall picture of the nature of use. Similarly, a number of the UEFs state that use was yearly or monthly during adulthood but more frequent during their childhood. In many instances, respondents have not been able to demonstrate regular use throughout the relevant period, but I have taken into account all claimed use to reach a holistic insight into use over the years.
41. Although large numbers of UEFs have been submitted, there were some instances where witnesses at the inquiry gave evidence which was inconsistent with written evidence they had already submitted. To some extent this is to be expected due to the passage of time since completing the forms and because UEFs give limited opportunity for detail. Where the inconsistencies cannot be explained, however, and were revealed after cross-examination or where the inconsistencies were significant, this undermines the quality of the individual’s evidence and I have accordingly attributed less weight.
42. The applicant gave evidence at the inquiry in a personal capacity and also called 20 witnesses. Ten of the witnesses (including the applicant) also completed both forms and claimed use throughout the relevant period. As all of these witnesses agreed to have their evidence tested under cross-examination, I have attached the greatest weight to their evidence in terms of user evidence during the relevant period.
43. A number of those who gave evidence stated that they had not lived in the area for long periods of time and this meant there were gaps in use. For example, the applicant has lived away from the area since 1970 and although he has retained connections with the area, this means that his use of the claimed route has been sporadic for a number of decades. Karen Chapman also lived away from the area for 9 years, three of which she was overseas and did not walk the claimed route at all.
44. There was some discrepancy between the written and oral evidence in terms of the number of years of use, Mrs Holloway stated at the inquiry that she had not used the route since the late 1990s at all whereas her UEF states that she walked the route until 2017. There were some other discrepancies in the frequency of use claimed as a number of people who claimed regular use, did not recall seeing the 2006 signs until some time after they were installed. For example, George White wrote a letter to the Council in March 2018 where he “...found the gate unlocked, a notice on the centre of the gate identifying the nomenclature of the Crescent and claiming it to be a Private Road (where there is no road surface or even a track)”. The letter wording suggests that it was not until 2018 that he discovered the signs indicating a lapse in use of many years.
45. Three of the witnesses in support of the Order (John Thomas, Angela Thomas and David Coleman) had not walked the Order route prior to the making of the application. John Thomas and Angela Thomas had never walked the route and David Coleman in his capacity as a Council officer did not walk the Order route prior to the application being made as he ensures he keeps to registered footpaths.

46. Some of the UEFs refer only to the section from B-D in front of the Crescent. This is suggestive that some of the user evidence does not relate to the whole route but rather to access to the front of the houses alone. For example, when John Ivor Howard Jones worked from his sub office in Dolgellau, he would walk to the front of the Crescent to have his sandwiches. A letter he wrote which was published in *The Daily Post* confirmed that he had knee problems from around 2000 and he confirmed in evidence that from that year he would have driven there and would just walk to the front of the Crescent. There have also been some other examples where the whole route has not been used, such as to gain access to the foreshore, to sit in front of the Crescent or to go fishing. Use of this nature gives an insight to the way the route has been used and demonstrates that not all public use has been for the entirety of the route.
47. Accounts of children playing on the Cob or playing to the front of the Crescent and the surrounding area do not demonstrate qualifying use as children would have been unlikely to have walked the route from A to F. If they did, it is less likely that they would have followed the alignment of the claimed route as they would have wandered freely where possible.
48. Despite some of the shortcomings in the user evidence presented, a number of witnesses provided clear and cogent evidence of use of the Order route during the relevant period. Given the volume of user evidence claiming use over several decades including the relevant period, it is clear to me that there has been use of the Order route during the relevant period. I now must consider whether the use was as of right and whether there were any interruptions in that use.

#### ***Whether use was by the public***

49. To satisfy the requirements of Section 31, use must be by those who can reasonably be regarded as 'the public'. The Order route is located in a relatively isolated area but point F on the Order plan is adjacent to Barmouth Bridge. The route is therefore accessible to surrounding settlements including Barmouth and Arthog. Many of those who provided user evidence reside in those settlements and many come from further afield and use those settlements as a holiday base. I am satisfied that users can be regarded as the public.

#### ***As of right***

50. Use must be 'as of right', that is without force, secrecy or permission.
51. There is no suggestion in the evidence that any of the use claimed has been carried out in secrecy.
52. There is some indication that use has taken place in defiance of signs and notices and that users have climbed over locked gates to walk the section from B-D. Many of these instances occurred after the relevant period. There are also examples where witnesses gave evidence at the inquiry that they had seen the private signs which were in place prior to 2006 but had chosen to ignore them as they believed they had a right to walk to the front of the Crescent. This is evidence that some use of the route was by right.
53. Turning to permissive use, the applicant states that to suggest some use of the route between B-D was permissive is disingenuous. I agree that accounts from user evidence of childhood walks with parents where residents of the Crescent would give sweets to children walking would not amount to a permissive use. However, there are a number of accounts from witnesses which are suggestive of permissive use. These are generally where the users of the route between B-D would have received an invitation of some sort from landowners. These include where residents of the Crescent invited people to enjoy refreshments, where walkers were *encouraged* to walk in front of the Crescent to view art



displayed in the windows possibly to purchase artwork, where locals were providing paid or unpaid help to DR on the farm, where people were visiting friends or family who were residing at the Crescent, where children accompanied their parents on such visits, where people went to stay at the Crescent as tenants or house guests or when providing services such as work to property or sale of goods. All of these instances are by invitation and therefore use of the Order route would have been by right in these instances. In each of these cases, the permission may not have been individually or expressly given but could have been implied by the nature of the invitation or acceptance of their presence for a perceived benefit to the landowner.

54. Some of the comments suggest DR would “turn a blind eye” to some locals walking the route including the area to the front of the Crescent. This indicates tolerance rather than permission. For example, Mr Anthony Jeffs stated he never had permission from DR but, he saw her so often, sometimes she would say hello to him, and he felt she had no issue with locals walking on her land.
55. Some of the supporters had lived at the Crescent for a period of time including John I H Jones and David Sherringham. Use of the route by residents would not have been as of right.
56. I also note that many of those who claimed regular use over a prolonged period of time were well known in the community or to DR and residents of the Crescent. For example, Derek Morgan knew DR as a friend, John I H Jones stayed with friends who lived at the Crescent until the 1960s and John Ashton Jones’ mother would visit his mother’s friend who lived at No.6. These examples indicate use of the Order route by right.
57. Taking all of this into account, I consider that some of the user evidence relates to use which has taken place by right.

#### ***Whether use was without interruption***

58. For an interruption to use to be effective it must be carried out by the landowner, or someone acting on their behalf, and there must be an interference with the enjoyment of the right to pass. Further, the intention of the interruption must be to prevent use of the way by the public, rather than for other purposes such as building works or parking vehicles. Provided that use is sufficient to demonstrate actual enjoyment of the way, it does not have to be constant during the 20-year period: there may well be periods when, for a variety of reasons, a way has not been used.
59. From approximately October 1943 – September 1946, part or all of the Order route was requisitioned by the military. A right of way cannot arise under section 31 of the Highways Act 1980 if at some point during the relevant period no person would have the legal right to create a public right of way. (*Jaques v Secretary of State [1995] JPL 1031*). This falls outside the relevant period but has the effect that it would not have been possible to establish a 20-year period if that period fell wholly or partially within the requisition period.
60. There was previously a bridge over the Cob but this deteriorated over time and by 1957 a notice was published in Y Dydd publication to state the bridge was unsafe and not passable. The Council’s evidence is that at some point after that the bridge deteriorated until it eventually fell into the sea. There is some evidence suggesting that from that time that walkers may have had trouble navigating the gap during high tide, however, the user evidence is consistent that access was possible at all times. I was able to walk the entirety of the route and there is no dispute that at some point, after the bridge collapsed, that tidal changes meant that the route was passable throughout the year. As such, I do not consider that the demise of the bridge over the Cob would have resulted in an interruption in use of the Order route.

61. Within the 20-year period from Autumn 1986-2006 there is only one potential interruption in use.
62. In 2001 fencing was erected between E-F on the Order map. As part of the 2001 measures to control the outbreak of Foot and Mouth Disease, Barmouth Bridge was closed to pedestrians. David Coleman stated that there was public demand to re-open it and the fencing was necessary for this to keep DRs sheep away from pedestrians. DR permitted the Council to erect a fence but this prevented access to the Cob. Mr Coleman confirmed at the inquiry that the fence was not erected pursuant to an Order but with DR's consent. Mr Coleman stated the fence was erected after he met with her on 27<sup>th</sup> April 2001 and a letter of complaint from a walking group was written to the Council in November 2001 stating that in September of that year, they had been unable to gain access. This means that use of the Order route between E-F would have been interrupted for a period of at least five months. Mr Coleman confirmed at the inquiry that he received no other complaints about the closure of the route during that time. The fencing was left in place at the request of DR and Mr Coleman confirmed to the inquiry that a stile was added by the Council later. There is no record of the purpose of the stile although one of the residents of the Crescent previously stated that it was to allow Crescent residents to reach Barmouth via the Toll Bridge.
63. In this case, the erection of the fence amounts to a physical interruption which would have prevented access to the route and thereby would have prevented the enjoyment of a route during the relevant period. I have been referred to the *Roxlena* judgment, however, David Coleman confirmed at the inquiry that the erection of the fence was not *the implementation of a measure under the Foot and Mouth Disease Order 1983* and although its purpose was to keep sheep away from the bridge it was still a physical barrier which would have prevented use of the route at that time. This was an interruption, albeit one not intended by a landowner.

### ***Conclusion on the user evidence***

64. I have found that there is evidence of use of the Order route during the relevant period, however, a proportion of that use has been by right as opposed to as of right. I have also found that there was an interruption in use in 2001, albeit for a period of approximately five months. Taken as a proportion of the claimed period of use I consider this period insufficient to amount to an interruption of use. Therefore, I find that there has been evidence of use of the Order route but some of that use has been by right. In any event, for the reasons I have set out below, I find that landowners have adequately demonstrated contrary intent.

### ***The evidence and actions of the landowners***

#### *Gates*

65. There was previously a wooden field gate on the western side of the Crescent with an adjacent wooden pedestrian gate on the seaward side. The date of installation is unknown, but the parties agree they were in situ by 22 July 1936 at the latest. They were still in situ in Easter 1964 and the field gate at least was still in situ in or around 1986, however by 1999, it appears that only the gate post remained. There was also a wooden field gate with an adjacent wooden pedestrian gate on the eastern end of the Crescent although by 1969/70 only a gate post remained so the gates would not have been in place during the relevant period. There was also formerly, to the rear of the Crescent at the eastern end, a wooden field gate across the track. It was in situ by 1938 at the latest. It is not possible to tell from the photographic evidence available whether there was a pedestrian gate adjacent to this field gate. During WWII the military removed the gate to the rear of the Crescent and so it was not in place during the relevant period. There is no

evidence that these gates were ever locked so they would not have prevented access to the front of the Crescent.

66. Between June and September 1999 fencing was erected at both ends of the Crescent, a cattle grid was installed at the eastern end with a pedestrian gate next to the garden fence and a metal field gate was placed at the western end. DR owned the land at the time, and she gave her consent for the works to be carried out. I note the objectors' submissions that a pedestrian gate was installed at the eastern end only which suggests it was intended for use of those accessing the houses only. These works were paid for by a group of the residents of the Crescent.
67. The original works included a cattlegrid. Mr John Thomas was the appointed contractor, and he gave evidence of the works he carried out at the inquiry. He said he had been told that the works were to keep DR's sheep away from the front of the Crescent. He said that he saw a number of walkers using that section of the route whilst he was working there although he was only present for a limited time. At some point, the fencing erected at the eastern end of the Crescent was replaced with the white picket fencing which remains in situ to date.
68. Mr Bath stated in his sworn statement that he purchased a lock and chain in 2006 and from that year he would periodically lock the gate, particularly if there was a large group of walkers approaching. I do not have a date for the first event the gate was locked and since the relevant period ended in Autumn 2006 it is possible that the periodic locking of the gate did not occur until after the relevant period had expired so I do not consider the periodic locking of the gate to have been a calling into question.
69. On the evidence before me it is not possible to conclude that there was periodic locking of gates during the relevant period and, as such, I do not consider the presence of gates to amount to an overt act by a landowner to prevent public access. As such, they do not demonstrate contrary intent.

### *Signs*

70. There have been various signs in situ at either end of the Crescent some of which date back many decades and some positioned more recently. There is a general consensus between the parties that some of the signs have been in place since 1962.
71. Public footpath signs have been in situ at each end of the Crescent, directing pedestrians to FP13 since 10 July 1958. An Easter 1964 photograph shows a public footpath sign on a black and white striped pole at the western end of the Crescent.
72. At the eastern end of the Crescent, near point B on the Order map, is a low brick wall (although the evidence indicates that due to a change in ground levels it was once higher). Three notices remain on the wall which have been in situ since before 1962 and I have seen a photograph dated by the objectors as approximately 1986 which shows the signs on the brick wall.
73. One of the signs is a metal rectangular sign which states "PRIVATE ROAD". Some of the evidence indicates it was affixed as early as the 1940s but there is no conclusive evidence of when it was first placed. I was able to observe that the sign remains visible and legible at the date of my visit. The second sign is the word "PRIVATE" which has been painted on the same wall in large white letters adjacent to the metal sign. This is also clearly visible. The third sign is a faded sign painted on the wall which states "PRIVATE ROAD". This sign is partially obscured by the metal sign and has faded to the degree that it is barely legible even at close range inspection. It is reasonable to assume that this sign would not have been visible to walkers for some time.

74. The owners state that at some point during the late 1980s or early 1990s, the word "PRIVATE" was painted in white on the rock face at the eastern end of the Crescent which later faded away. This is not challenged.
75. Between 9 November 1999 and the end of 1999, a notice was erected on a head height pole at the eastern end of the Crescent, and one was affixed to a newly installed new metal field gate at the western end. The notices are rectangular with a green background and in light letters they each read: "MAWDDACH CRESCENT Private Road". These signs were commissioned by a group to residents at the Crescent. These signs remain to the present time.
76. At some point in 2006, Mr Bath erected signs which read: "STOP PRIVATE PROPERTY PLEASE USE PUBLIC FOOTPATH TO REAR OF HOUSES. Thank You". There is also a circular no entry sign on these notices. One was affixed to the fencing at the eastern end of the Crescent, and another was affixed to the metal field gate at the western end on land then owned by Mr Bath near points C and D on the Order Map. These notices remain in place today and I consider these to represent the calling into question.
77. The Council and the applicant assert that none of the signs erected prior to 2006 call into question public rights and that the signs in around 1999 did not meet the standard to comprise a calling into question.
78. I have been referred to caselaw in relation to the signs, *Paterson v Secretary of State for Environment, Food and Rural Affairs 2010 EWHC 394*, however the facts in that case differ from the Order route in that the signs which had been placed long before the relevant period and there was no evidence that the signs remained in place until or during the relevant period.
79. It is the Council's case that the signs at the eastern end of the Crescent asserted property rights and do not comprise an overt act by a landowner to demonstrate a lack of intention to dedicate. It is clear from the user evidence that those who walked to the front of the houses did so either believing that the signs did not prevent them walking to the front of the Crescent or they did so in defiance of the signs. I consider this, together with the different wording of the signs already referred to in this decision, means the presence of the signs would not have been sufficient to amount to a calling into question in the terms of the statutory test but, in terms of assessing the actions and intentions of the landowners, I consider that in this case, the three signs indicated contrary intent.
80. Accordingly, I find that the "PRIVATE" and "PRIVATE ROAD" signs were intended to prevent public access to the section of the Order route near the Crescent, generally around points B-D on the Order map.

### *Challenges*

81. I have been referred to a number of examples of challenges from DR throughout her time as a landowner. The Council considers that these challenges were related to dogs being off leads, misdemeanours on her land and leaving gates open, however the evidence goes beyond this as set out above which demonstrate that she was challenging walkers.
82. Whilst some witness evidence suggests DR was happy for people to walk over her land, there are also accounts that she challenged individuals, particularly if she felt their presence would have caused harm to her animals. I also heard accounts from past and present residents at the inquiry who knew DR personally that she would challenge walkers she encountered on her land.
83. The applicant's closing submissions summarise the evidence of Mr Coleman that he met with DR in the 1980s and from that encounter, he considered her to be relaxed with public use of part of the route west of the Crescent.

84. In February 2005, David Bath purchased No. 1 and the frontage to the property from DR. His evidence is that he started challenging members of the public from that time. A number of individuals giving evidence in support of the Order referred to challenges from Mr Bath. These challenges would have been in the final 18 months of the relevant 20-year period.
85. On 6 October 2006, Nicholas Young sent a complaint letter to David Coleman, referable to the tethering of the metal field gate at the western side of the Crescent and the erection of the 2006 notices. Whilst the locking or tethering of the gate post-dated the relevant period, the response from Mr Coleman on 24 October 2006 demonstrates there had been a history of challenges to public use of the Order route. In his letter he stated the route had been a contentious issue for as long as he could remember, with "regular complaints" that DR "was challenging walkers in the vicinity" of the Crescent. He added that, "in view of the challenges referred to above", it was "highly unlikely" that a 20-year period could be established during which time public rights could be said to have been established.
86. I heard that Louise Oakley and the late Jason Hall purchased No. 8 in 2007. During 2008-09, they filled in the cattle grid at the eastern end of the Crescent and replaced the eastern end fencing erected in 1999 with a white picket fence. Ms Oakley's statutory declaration stated that they periodically closed their end of the Crescent by putting a locked chain across it, in order to prevent walkers trying to claim a public right of way across the front of the Crescent. However, these actions post-date the relevant period.
87. The objectors state that other challenges to public use had taken place prior to the end of the relevant period. At the inquiry, I heard of challenges by a lady known as Patty between 1944 and 1950. Jean Cromarty has owned No. 2 since 1987 and referred to occasional challenges made by her. Maggie Francis spoke of challenges made by her mother and father-in-law who lived at the Crescent from 1962 until 2004 when she and her husband took over the property. Richard Sykes detailed in his proof of evidence that he began to challenge people when he became involved in the management of No. 4, Helen Doig told the inquiry she did not want to have to challenge people and only occasionally had to do so because most people walked the footpath to the rear of the houses. She has lived at the Crescent since 1994. Her partner, David Streatfield states in his proof of evidence that when he went to view the property in 1993, he was challenged by Pat Mallatratt and after he moved to the Crescent, he would challenge people if any walked past. Mary Mallatratt (Pat Mallatratt's daughter-in-law) wrote in her proof of evidence of her friendship with DR from 1977 and told of how the two of them would regularly challenge people in front of the Crescent who were there without permission.
88. There is dispute in the evidence as to DRs attitude towards the public using the Order route or indeed any route across her land. It is not possible to reach any definitive conclusion as the application was not made until after the death of DR and her successors in title have not been involved in the application or inquiry process. My conclusions must be based on the information I have before me, and this includes some documentary evidence which suggest DR was unhappy with public access over her land.
89. To conclude on the actions of landowners, I find that taken together, the use of signs and challenges demonstrate a clear lack of intention to dedicate a public right of way over the Order route during the relevant twenty-year period. The Order therefore fails under statute.

### **Common Law**

90. Although the Council has made no submissions on a common law case, as the Order fails under statute, I will consider the common law case.
91. The applicant was asked to expand upon his common law case at the inquiry. This seems to be based upon the premise that neither DR nor her father before her took any action to prevent the public from walking the route. I have found that the evidence does not demonstrate that DR or her father dedicated any routes over her land. There is no evidence that SA dedicated any public routes in the area at all.
92. There is very little user evidence before the military requisition and it is insufficient to establish common law dedication.
93. The applicant's assertion that the Council intended to include the Order route in the DMS is not claimed by the Council itself and is not borne out by the evidence before me.
94. At common law, the burden of proof to show the intention of the landowner to dedicate along with the acceptance of such dedication by the public lies with the claimant. In this instance that burden has not been discharged.

### **Balance and Conclusion**

95. I have considered the documentary and user evidence submitted. I have concluded that the documentary evidence does not demonstrate public rights over the Order route and that some of the documentary evidence points to contrary intent of landowners. In relation to user evidence, I have established the 20-year period as Autumn 1986 to 2006. I have considered a large volume of user evidence and although this demonstrates public use of the route during the relevant period, some of that use was by right and there was an interruption in that use for a period of five months. These are both factors which weight against the use which has taken place. In any event, I have considered landowner evidence and have found that the presence of signs dating back to the 1950s and verbal challenges made during the relevant period demonstrate that landowners did not intend public rights being established. The landowner evidence covers the period when the supporters claim use and defeat that use. The tests under Section 31 of the 1980 Act have not been met and I am not satisfied that the evidence shows that on the balance of probabilities that a public footpath subsists over the Order route.
96. Having regard to all matters raised in written evidence and at the inquiry I conclude the Order should not be confirmed.

### **Formal Decision**

97. I have not confirmed the Order.

*Janine Townsley*

INSPECTOR

## DOCUMENTS

Proof of Evidence of Huw Roberts in relation to Mr David Francis's statement with 10 attachments

Photograph labelled "exhibit relating to Norma Stockford's proof"

Photograph referred to in proof of John Ashton Jones

Letter from Carreg Dressage

Photograph labelled "Applicant's SOC Plate 3"

Photograph labelled "Applicant's SOC Plate 2"

Exhibit MC1

Exhibit MCDM5

Exhibit MCDM4

Exhibit MCDM3

Statement of Alun Roberts

Letter from Tudor Williams

Photo montage to the front of No.3

Letter from D Bath

Emails from David Coleman 2014

Soloman Andrews Letter and minute 1900

County of Merioneth Statement under s 32 of the 1949 Act.

Gwynedd Council's Document highlighting relevant legal principles and pertinent facts

Confirmation of inquiry notification and advertisement

Legal submissions of Huw Roberts including Roxlena judgment and previous PINS decision

Statement of Common Ground

Closing submissions of three parties including legal submissions on behalf of the Council.