



The Vale of Glamorgan Council

PROW Sub Committee:

Report of the Director of Environmental and Economic Regeneration

**Definitive Map Modification Order
Wildlife and Countryside Act 1981 Section 53(2)
Westbury Close, Barry**

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Vale of Glamorgan Council
Investigation Report

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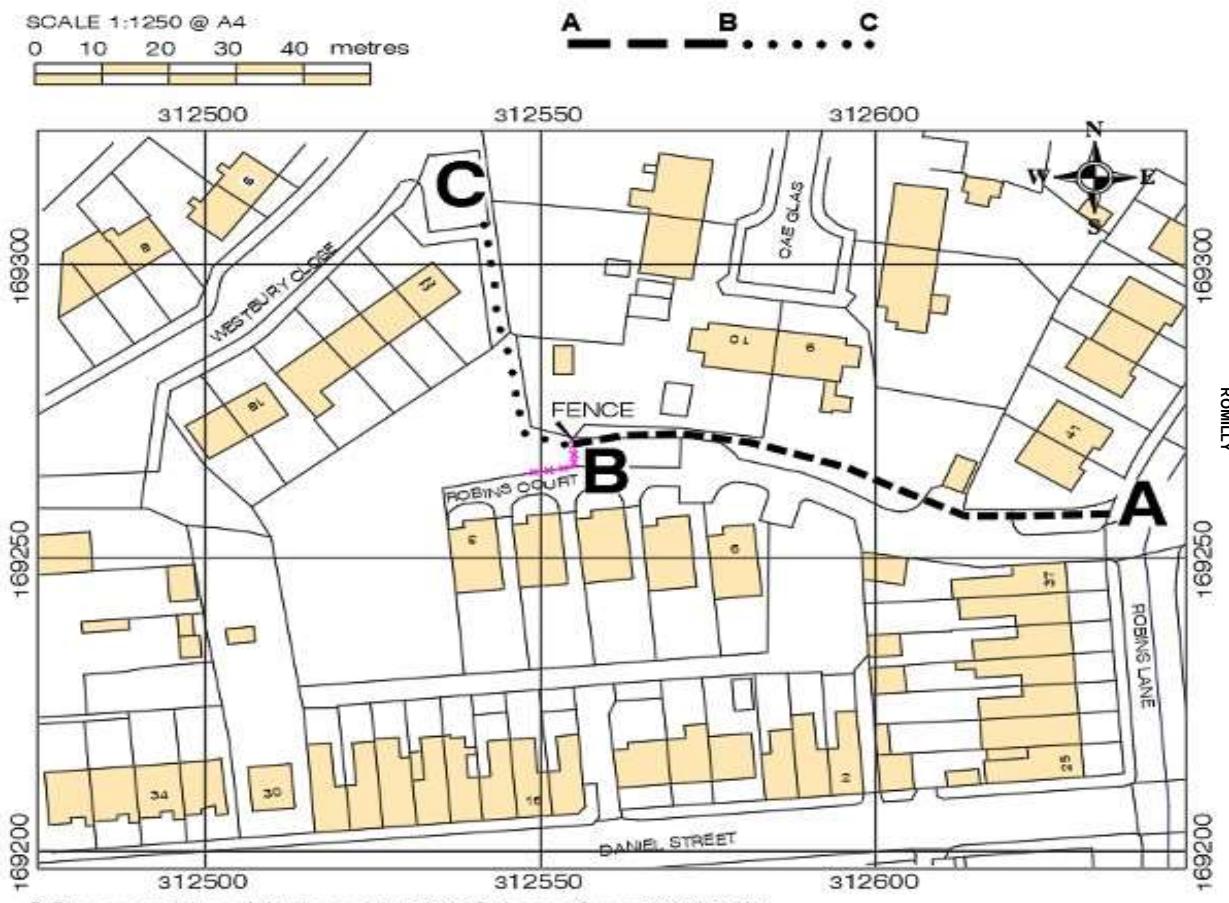
Definitive Map Modification Order

Wildlife and Countryside Act 1981 Section 53(2)

Westbury Close, Barry

1. AIM OF REPORT

- 1.1. This report deals with a claim that a route running from Robins Lane to Westbury Close, Barry should be recorded as a public footpath in the Definitive Map and Statement with a width of 2 meters.
- 1.2. The effect sought by the application, if successful, is therefore to add the footpath A-B-C as shown below (*Note: Indicative only. Full draft plan in Appendix 2 should be referred to for correct scaling etc.*):



- 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 pursuant to informing a determination on whether to make a Definitive Map Modification Order (DMMO).

2. LEGAL FRAMEWORK

2.1 Section 56 of the Wildlife and Countryside Act 1981 provides that the Definitive Map and Statement are conclusive evidence of the particulars contained therein to the extent detailed in section 56(1)(a) to 56(1)(e).

2.2 Section 53(2) of the Wildlife and Countryside Act requires the Vale of Glamorgan Council, as a surveying authority, to keep the Definitive Map under continuous review. This process of continuous review is carried out through the investigation of discovered evidence and determination of Modification Order Applications as required.

2.3 Section 53(2) states:

(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 The events giving rise to the need for an order under 53(2) are set out in subsections of 53(3) of the Wildlife and Countryside. The basis for an addition of a way to the Definitive Map events are set out in sections 53(3)(b) & 53(3)(c)(i) of the Wildlife and Countryside Act.

Wildlife and Countryside Act 1981 s53

(3) *The events referred to in subsection (2) are as follows –*

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

(a) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic;...

Addition

- 2.5 The current application has been made based on the discovery of evidence. Discovery of evidence may be documentary or otherwise (including user evidence) and can be considered as an alternative to evidence of continuous use, or considered alongside it.
- 2.6 The council is required to assess whether an event giving rise to the need to modify the map has occurred, by identifying an instance whereby the existence of the right was challenged (i.e. called into question) and applying the statutory tests included in the Highways Act 1980 s31 (HA s31), or by identifying an inference of dedication at common law.

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.

- 2.7 The above section contains numerous considerations that should be applied in determining the application by reference to s53(3)(b). The sub-committee should be guided by the considerations that may be relevant to this application. As such extracts from the section and a brief outline as to their effect 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...

- 2.8 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 (e.g. where use has been criminal as a result of Railway Company ownership).

...actually enjoyed...

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

...by the public...

- 2.10 The use must be shown to have been by the public at large. Private use by employees, tenants or landowners cannot qualify

... as of right...

- 2.11 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...*
- 2.12 Interruption means actual and 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...

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

... no intention during that period to dedicate it.

- 2.14 The intention not to dedicate must be supported by demonstration of overt acts that have been taken and sufficiently communicated to the public 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.
- 2.15 If the criteria under section 31 (above) are not met, the Council should consider whether it can be reasonably alleged that a route has been dedicated under Common Law.
- 2.16 Common Law dedication differs from the statutory provision in so much as it does not require a minimum 20 years to be shown. Instead, the shorter the period under consideration the more compelling the evidence of overt public use and acquiescence of the owner need be shown. Capacity to dedicate must also be shown at Common Law (i.e. a landowner must be identified who was able to dedicate).
- 2.17 Documentary evidence may be useful in determining whether the route was ever previously considered to be public. Section 32 of the Highways Act 1980 states:

Highways Act s32

A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

DMMO Process

- 2.18 It should be noted that the DMMO process seeks to ensure rights are correctly recorded as they exist and is an exercise in modifying the definitive map to reflect such a position. It is not within the remit of the order to give consideration to other factors such as need, nuisance or suitability (though aspects of these factors may assist where they constitute evidence of past use). The effect of amenity, antisocial behavior or other such circumstances relating to the route is also unable to be considered. The process is not deciding whether a footpath is desirable at a given location but whether a footpath has been established by dedication and acceptance by the public.
- 2.19 In determining the current Application, consideration must therefore be given to whether the documentary evidence and user evidence provided is sufficient to show that the way is, or is reasonably alleged to be, a public Right of Way based on the discovery of evidence under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981
- 2.20 In *Todd v Secretary of State for the Environment, Food and Rural Affairs* (2004) it was held that in the case of an Application under Section 53(3)(c)(i) (addition of a way to the map), in deciding whether to make an Order, the test to be applied is not whether the evidence establishes that a right of way exists (on a balance of probability), but whether there is evidence that a right of way can reasonably be alleged to exist. If it can, the Authority must make the Order, i.e. notwithstanding that it may not consider that the evidence is sufficient to establish that the right of way does exist. In which case, if the order is unopposed the Authority will have to revisit the available evidence before confirming the order.

3 LANDOWNER NOTIFICATION

- 3.1 The applicant confirms that the requirements of Wildlife and Countryside Act 1981 Schedule 14, Paragraph 2 have been complied with, and that affected landowners have been attempted to be contacted via notices displayed on site. The landowner is unknown in this case for sections A-B.
- 3.2 A certificate confirming that a notice and plan were placed on site to try and identify the landowner is included in appendix 3. No known landowner was identified by the applicant for the section A-B, and it is likely it was left an unregistered strip of land after the development took place. The council own section B-C.

4 BACKGROUND

- 4.1 The claimed route submitted by the applicant on a map is between Point A on Robins Lane to Point B in Robins Court, where currently there is a wooden fence intersecting the route. From a follow up phone call with the applicant and the wording on the user evidence forms, it is clear that the route they are all claiming continues northwards via a partially enclosed alleyway to Point C. It is described on all the user evidence forms as "from Robins Court to Westbury Close". The entire length of the route from A-B-C is 127 meters.
- 4.2 The land over which the claimed route runs was historically much more open and indeed Westbury Close estate to the northwest doesn't appear to have been built until around the 1970s-80s. The applicant, having lived in the area all her life, remembers the site being allotments before development. When interviewed by phone, she stated that the land had been used by local residents for over 100 years. There were also other routes used across this site, such as to Daniel Street to the south, but the one claimed in the application was the main one used and was of importance to the local area.
- 4.3 The section of the route A-B has no known landowner. The section of the route B-C is owned by Vale of Glamorgan Council. The route is currently a mix of tarmac and grass surface. The surface and nature of the claimed route has obviously changed over the years as the area has become more developed.
- 4.4 It is understood that a wooden fence was constructed across the route at Point B by residents of Robins Court in 2021, hence prompting the Definitive Map Modification Order application.
- 4.5 A Definitive Map Modification Order application was submitted in 2021 by Gemma Robertson along with 18 completed user evidence forms. No documentary evidence was submitted. The application was received and accepted as duly made.

5 USER EVIDENCE & STATEMENTS

User Evidence

Submissions

- 5.1 Correspondence identifies that eighteen user evidence statements (which includes one statement submitted by the applicant) were submitted with the application in August 2021. Copies of the statements have been analysed and their evidential value assessed.

User Statement Evidence

- 5.2 The eighteen user evidence forms completed claim a long period of usage dating back to the 1960s, but with most people using the route from the 1990s onwards to 2021 when it appeared to be blocked off by a fence at Point B. Three users do not state how long they have used the route. Use described by users is predominantly on foot (although 3 said they cycled the route and four more on horse). Use has been mainly for the purposes of recreation, dog walking, or as a short cut for visiting friends, going to shops etc. at a high frequency of weekly or greater. All describe the same route, but there is some ambiguity about where the users exited onto a public highway at the western end. A summary timeline of user evidence is provided for reference at appendix 4. Individual forms are also at appendix 5-21.
- 5.3 Users of the claimed route described a mixture of widths, with some identifying the width in feet, as double buggy width, or as a pavement width, but the predominant width mentioned is 2m.
- 5.4 None of the users claim to have ever been stopped from using the route, or sought permission for use. They haven't seen any notices or been told the route is not public prior to 2021. After 2021 a few mention seeing private signs going up. From a recent site inspection, there is currently a private sign at the Robins Court end.
- 5.5 All the users claim not to have noticed any gates or stiles on the route whilst using it, although one user mentions a wooden fence, without being clear where it was – perhaps it is the fence blocking the route recently that users mention.
- 5.6 There is little doubt that none of the users have experienced any obstacles whilst using the claimed route until 2021, when a fence is mentioned blocking the route in the same year that the application was submitted.
- 5.7 Overall, fifteen of the eighteen users claim use of the route for more than a 20-year period, going back as far as the 1960s and 70s. Eight of these users have used the route during the busiest time attested from 2000-2021, when it became interrupted. A few (3) have used it for a very long period, from the 1970s right through to the 2000s. Overall, the period when most people claim to have used the route is since 2000.

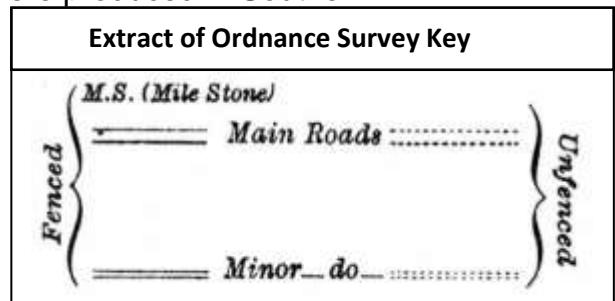
Submissions Following Consultation

- 5.8 No consultation has been carried out on this application to date, but this is due shortly, and it may shed some more light on the case.

6 DOCUMENTARY EVIDENCE

Ordnance Survey 1st Edition Maps 1885 (1:10560) & 1890 (1:2500)

- 6.1 Nationally, the first Ordnance Survey plans were produced in Southern England to meet military needs in anticipation of the Napoleonic wars. Later, this exercise was extended to the whole of the UK, giving rise to the County Series maps that were, in turn, refined and updated to meet National Grid standards during the mid- late 1800s.
- 6.2 In conducting the surveying exercise surveyors were charged by legislation to record all features on the ground. Whereroads and tracks were observed they were represented by parallel dashed or solid lines. Solid lines would typically represent fencing, walls or hedges and dashed lines delineated features other than a physical structure or boundary.
- 6.3 In the current case, Ordnance Survey mapping published in 1885 and 1890 shows the claimed route following a roadway, leading generally westwards towards Gibbonsdown Farm and beyond. The roadway enclosure appears to include both road and watercourse (The Cold Brook), with a separate parallel footpath marked just the other side of the boundary in the fields to the south. The claimed route follows the roadway enclosure on the north side of the watercourse. The maps note the existence of steppingstones, although it is unclear exactly where they are located.
- 6.4 The claimed footpath is thus following a road of unknown status, which may or may not be a vehicular highway.



Ordnance Survey 2nd Edition Maps 1900 (1:2500) & 1901 (1:10560)

- 6.5 Following the Ordnance Survey plans of the late 1800s, revised editions were produced in 1901 and 1921. In producing these plans surveyors were similarly charged by legislation to record features as observed on the ground.
- 6.6 There were, however, important distinctions between the later and earlier series particularly concerning the public extent of routes observed. Instructions for Field Examiners issued around 1905 stated that 'The OS does not concern itself with rights of way, and survey employees are not to inquire into them.' However, in the same paragraph a note states that 'A clearly marked track on the ground is not in itself sufficient to justify showing a path, unless it is in obvious use by the public'. As such surveyors compiling the later editions were provided with instruction, albeit somewhat ambiguously, on annotating routes where they believed them to be public.
- 6.7 The 1900 and 1901 maps show essentially the same information as the preceding editions, with the road and watercourse sharing the same alignment, and the claimed route following the same enclosure. The footpath in the field to the south is very clearly shown leading to a footbridge across the watercourse, to the west of the claimed route. Housing development is beginning

to encroach on the farmland adjacent to the claimed route, with Daniel Street built parallel, to the south, and houses along Robins Lane between the latter and the claimed route.

Ordnance Survey Maps 1920 (1:2500), 1921 (1:10560)

- 6.8 Ordnance Survey Mapping published in 1920 and 1921 shows that more housing development has occurred between the claimed route and Daniel Street, with the result that the field and footpath to the south have gone.
- 6.9 The roadway enclosure (followed by the claimed route) leading west to Gibbonsdown Farm is still present, with the road and watercourse co-existing.

Ordnance Survey Maps 1931, 1949 & 1938-54 (1:10560)

- 6.10 Throughout the mid-20th century housing development gradually expands to the south of the claimed route, and to the south of the roadway to Gibbonsdown Farm. The roadway itself is still shown in the same manner – with road and watercourse sharing the same enclosure at the eastern end. On the 1949 map a ford is shown to the west of the claimed route.

Ordnance Survey Map 1965 (1:10000)

- 6.11 The houses to the north of the claimed route (Cae-glas), have been built by 1965, together with more housing to the north-west. However, the roadway leading west to Gibbonsdown Farm is still present at this time and shown in the same manner as preceding maps. The claimed route is still within this old roadway, just to the south of the new Cae-glas development.

Ordnance Survey Map 1972-75 (1:10000)

- 6.12 Ordnance survey mapping published in the 1970s shows a significant change in the landscape, affecting the claimed route. Gibbonsdown Farm has been demolished and replaced by a big expansion of housing developments and new roads. The old roadway leading west past Gibbonsdown Farm has disappeared beneath the new housing estates, although for the length of the claimed route and a little further westward it still exists as a ground feature together with the Cold Brook.

Ordnance Survey Drawing 1811 (2 inches to the mile)

- 6.13 This very early OS map shows the old roadway followed by the claimed route, leading to Gibbonsdown Farm and on to the parish boundary further west. The status of the road cannot be determined, but it shows that it existed as a landscape feature over 200 years ago.

Summary of OS editions:

- 6.14 The claimed route leading westwards from Robins Lane towards Westbury Close follows the alignment of a former roadway, which once led past Gibbonsdown Farm and further west to the parish boundary (see 6.13). That the claimed route is within the boundaries of this old roadway is seen when the Cae-glas estate was built on the north side of it (by the mid-1960s) – the new properties butted up against the northern boundary of the still-existing roadway (see 6.11).

- 6.15 The roadway carried on in existence, depicted in broadly the same manner right up until about the 1960s, although increasingly surrounded by housing developments. By the 1970s a large housing estate had been built over the former Gibbonsdown Farm site, which resulted in the roadway becoming truncated at a point just to the west of the claimed route, near the end of the present Westbury Close (see 6.12).
- 6.16 That part of the old roadway remaining near Robins Lane continued to exist as a feature alongside the Cold Brook, until a recent housing development (Robins Court) encroached further upon it. OS map editions can be viewed at Appendices 22-32.

Tithe Map (Cadoxton- juxta- Barry parish)

- 6.17 The Tithe Map of 1845 with accompanying apportionment of 1844 shows the claimed route clearly running east to west and marked as a road, bounded by solid lines and shaded brown. Significantly, the route continues westwards on the Tithe Map past the former Gibbonsdown Farm site to the parish boundary. The status of the road is uncertain from this map, but its physical depiction and the fact that it leads to (and across) the parish boundary, ties in with what was shown on Ordnance Survey mapping at this time. See appendix 33.

1910 Finance Act Land Valuation Map

- 6.18 The Finance Act map sheets for this location were not available at Glamorgan Archives, however copies of the original finance act map sheets XLVII.13 and the area to the west on sheet XLVI.16 have been obtained from the National Archives and can be viewed at Appendix 34.
- 6.19 Sheet XLVII.13 shows the area of the claimed route; but does not add any information. The land valuation information for this part of the map sheet has been recorded on a larger scale plan, probably because of the housing developments gathering pace from the early 20th century. The larger scale plan is not listed in the National Archives, so may not have survived.
- 6.20 Sheet XLVI.16 shows the land to the west of the claimed route, including the roadway leading to Gibbonsdown Farm and beyond to Merthyr Dyfan. Unlike the Tithe Map, this map provides no evidence that this route was a public road in 1910.

7. CONSULTATIONS

No consultations have been completed to date, but this is in motion shortly before any report is finalised.

8. CASE ASSESSMENT

- 8.1 On the face of it the claimed route is clearly defined, heading first in a westerly direction into Robins Court, before turning sharply north via an alleyway to Westbury Close.
- 8.2 Use of the claimed route has been for well in excess of 20 years, but with most usage being in more recent times, and with 15 of the 18 users having used the route from the 1970s onwards. The period from the 1990s onwards appears to have been the time of busiest claimed usage, judging by the evidence forms.
- 8.3 The erection of the fence in Robins Court in 2021 is a clear point of interruption and challenge to use. Therefore, the relevant 20-year period for deemed dedication to have occurred is 2001-2021.
- 8.3 It appears from the user evidence that the application meets all the tests listed in Section 31 of the Highways Act 1980, outlined in detail in Section 2 (Legal Framework) of this report. For a claim to be successful it must meet all the requirements of these tests: ***use by the public, as of right, without permission and for a full period of 20 years.***
- 8.4 There must also be no evidence that the landowner or landowners took any action to prevent or dissuade the public from using the route in the 20-year period leading up to the challenge date. At this stage, no such evidence is known.

9 CONCLUSIONS

- 9.1 There appears to be sufficient user evidence to meet all the tests of Section 31 of the Highways Act 1980, which have been discussed in more detail in the Case Assessment in section 8 of this report. The application thereby supports the existence of a public footpath.
- 9.2 Ordnance Survey mapping shows various changes in the land use and housing development over the years from the 1800s onwards. It is clear that a roadway existed for many years along the same alignment of the claimed route A-B. The roadway extended further westwards to the Gibbonsdown estate, but eventually this western section disappeared with further housing development. It was from the 1960s that the area became more developed with the building of the adjacent Cae Glas and Westbury Close estates. At some time around then, the more modern route B-C was constructed and became the main through route east to north-west through the estate.
- 9.3 Whilst the majority of users who have submitted user evidence forms live in Westbury Close or Cae Glas, immediately surrounding the route, this is a densely populated area forming part of a wider housing region in north Barry, so it is still deemed that this route has been used by the public more widely especially as many mentioned visiting friends etc.
- 9.4 The user evidence from the 18 users who submitted forms is clear that use was undertaken by the public, as of right without interruption for at least 20 years preceding the 2021 challenge

10 RECOMMENDATION

That the Vale of Glamorgan Council make a Definitive Map Modification Order to record the application route A-B-C as a public footpath.

11 DOCUMENT LIST

- 1) Application
- 2) Draft Map
- 3) Certificate of landownership notification
- 4) User Evidence Timeline
- 5) User 1
- 6) User 2
- 7) User 3
- 8) User 4
- 9) User 5
- 10) User 6
- 11) User 7
- 12) User 8
- 13) User 9
- 14) User 10
- 15) User 11
- 16) User 12
- 17) User 13
- 18) User 14
- 19) User 15
- 20) User 16
- 21) User 17
- 22) OS 1:31680 original drawing pub.1811 (para. 6.13)
- 23) OS 1:2500 plan 1st edition pub.1890 (para. 6.1)
- 24) OS 1:10560 map 1st edition pub.1885 (para. 6.1)
- 25) OS 1:2500 plan 2nd edition pub.1900 (para. 6.5)
- 26) OS 1:10560 map 2nd edition pub.1901 (para. 6.5)
- 27) OS 1:2500 plan revised edition pub.1920 (para. 6.8)
- 28) OS 1:10560 map revised edition pub.1922 (para. 6.8)
- 29) OS 1:10560 map pub.1931 (para. 6.10)
- 30) OS 1:10560 map edition pub.1949 (para. 6.10)
- 31) OS 1:10000 map pub.1965 (para. 6.11)
- 32) OS 1:10000 map pub.1972-75 (para. 6.12)
- 33) Tithe Map Cadoxton-juxta-Barry Parish 1845 (para. 6.17)
- 34) 1910 Finance Act Land Valuation Maps from National Archives (OS sheets:
XLVII.13 & OS sheet XLVI.16)