

# **CYNGOR CAERDYDD CARDIFF COUNCIL**

**PLANNING COMMITTEE:**

**27 JANUARY 2021**

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## **REPORT OF: DIRECTOR - PLANNING, TRANSPORT & ENVIRONMENT**

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### **SECTION 53 MODIFICATION ORDER, WILDLIFE AND COUNTRYSIDE ACT 1981 (Whitchurch Disused Railway Line)**

#### **Reason for this Report**

1. An application was submitted to the Public Rights of Way Team from the public to record historic usage along the disused railway line by walkers and dog walkers. Their right had been brought into question due to the planning application to construct the new bridge across the railway cutting to access the proposed Velindre Hospital site. The construction of this new access would require the temporary closure of the footpath to undertake works.
2. The historic user evidence proves the public have had unhindered access for over 20 years + to walk the footpath along the disused railway track. The landowner, Cardiff Council Parks Department has confirmed the public have had access and does not object. It is evident the path should be recorded on the Definitive Map as a Public Right of Way Footpath.

#### **Background**

3. The Planning Application 17/01735/MJR for the Velindre Cancer Centre was submitted to Cardiff Council in July 2017 and approved in March 2018.
4. The trigger for this Section 53 application, to claim the footpath, was the Planning Application 20/01110/MJR which was submitted June 2020. This was to undertake temporary construction of the access routes for the Velindre Cancer Centre. The works would be undertaken over the next

- four years and will require the closure of the disused railway track for a period of time.
5. This has triggered opposition locally and highlighted a number of footpaths that are currently well walked by residents and visitors to the area, which includes the disused railway track.
  6. As part of the initial consultation for the Section 53 application, PRow Officers undertake consultation with landowners and adjacent landowners. If the landowners object to the application, they must provide contrary evidence to prove they have taken steps to prevent the public from accessing the site/path. This may include the landowner putting up notices, fencing off the area to prevent public access, locked gates, etc.
  7. In this case the landowner is Cardiff Council Parks Department and Parks Officers have confirmed the track has been open and accessible for the public to use and enjoy. They have no intentions of preventing public access to this footpath.
  8. Historically, the disused railway land was sold by British Railways Board to Cardiff Council in 1973. The Conveyance of Land Purchase does not include any restrictions regarding public access (Reference: Background Papers, Conveyance of Land Purchase).

## Issues

9. Senior Officers for Transportation have raised concerns that if this footpath is recorded as a PRow it may cause an issue as the land needs to be safeguarded for the proposed metro link as noted in [Policy T9 of the Adopted Local Development Plan 2006-2026](#), Cardiff City Region Metro Network
10. Currently the metro route is aspirational and does not affect the validity of this S53 Application which, in order to be successful, merely needs to prove that the disused railway line has historical usage by the public as a footpath.
11. To address these concerns, in the future if planning consent is granted for the metro to be constructed, a legal order to divert or stop up the public footpath would be required. Such an order would be processed under the appropriate legislation namely the Town and Country Planning Act 1990.
12. This occurs across all planning consented land that has a Public Right of Way which will be built upon. As part of the planning application process, PRow Officers are consulted and able to advise what is necessary to retain the public's right of access, improved diversions within green corridors or stopping up if no alternative is deemed necessary. Even

though the landowner receives planning consent to construct houses or new transport links, etc. they are still required to apply to the Council to stop up or divert the PRow path.

13. It should be noted that any future diversion or stopping up order that may be required to be made must comply with the procedure set out in the legislation. This process involves at statutory consultation exercise, with associated rights of objection. If objections are received to the order, then the order must be submitted to the Welsh Government for confirmation. The Welsh Government may then hold a public inquiry and it should be noted that the potential exists that the orders may be confirmed as made, but could be confirmed with modifications or not confirmed at all. The stopping up or diversion applications must be determined before the construction of the development is substantially completed.

### **Local Member consultation**

There are no formal objections at this stage, only raised concerns over the future aspiration of the Metro to utilise this track, as addressed in the Issues section of this report. Below lists the ward members, statutory consultees and Council Officers consulted:

#### Local Members & Community Councils

- Cllr Mike Jones-Pritchard
- Cllr Linda Morgan
- Cllr Mike Phillips
- Cllr Mia Rees
- Tongwynlais Community Council

#### Landowners

- Parks Services
- Cardiff and Vale UHB-Capital Estates & Facilities
- Mr Mark Farrar, Planning Application Agent for Velindre Hospital

#### Associations/Organisations

- Ramblers
- Auto Cycle Union
- British Horse Society
- Byways and Bridleways Trust
- Open Spaces Society
- Cycling UK
- Welsh Trail Riders Association

## Utilities

- Welsh Water
- Virgin Media
- Wales and West Utilities
- Western Power
- BT Openreach

## Internal Council Teams/Officers

- Giles Parks (Head of Property, Estates)
- Jason Dixon (OM Transport Development & Network Management)
- Matt Wakelam (Assistant Director Street Scene)
- Andrew Gregory (Director Planning Transport & Environment)
- Paul Carter (Head of Transport)
- Jon Maidment (OM Parks Sport & Harbour Authority)
- Justin Jones, Planning Officer
- Transportation and Highways Officers

## **Reason for Recommendations**

The Section 53 Application is based on historic evidence rather than the desirability of a route therefore it has been proven the public have had unhindered use along the disused railway line for a minimum of 20 years. If Planning Committee approve the application, the Legal Order will be undertaken in order to confirm and record the footpath on the Definitive Map and Statement.

## **Financial Implications**

Formal advice not required.

## **Legal Implications (including Equality Impact Assessment where appropriate)**

An excerpt of the Legal Implications relating to s.53 of the Wildlife & Countryside Act 1981 are provided below. Full details are provided in the Officer Decision Report, section 8b. Equality Impact Assessment has not raised any issues as this is an administrative process to record existing usage by the public.

'Under s.53 of the Wildlife & Countryside Act 1981 (WCA) the Council has a statutory duty to prepare and maintain the definitive map as an official record of the public's rights of way in an area. The Council are responsible for keeping the definitive map up to date and must follow a legal process in order to make any changes to it. The WCA gives the right to any person to apply to the Council to make changes to the Definitive Map, by way of a Definitive Map Modification Order (DMMO).

There are two main ways that a right of way can be added to the Definitive Map:

- If the owner of the land has dedicated the right of way

- If the public have used a path for twenty or more years as a public right without interruption.

Section 53(3)(c)(i) (W&CA) provides that a modification order shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a right of way is alleged to subsist over land to which the map relates. If a right of way has been enjoyed by the public as a right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence to the contrary.

Therefore the question here to be determined by the Council when considering a modification order is whether the evidence shows that a highway exists because dedication has occurred at common law or is deemed by operation of section 31 of the Highways Act 1980. Once public rights are dedicated over a way, that way becomes a highway and exists in perpetuity unless stopped up or diverted by statutory order. The highway does not cease to exist because it is not used, hence the maxim 'once a highway, always a highway'.

In considering the evidence, the Council is acting as a tribunal of fact and must meet the following requirements.

The decision makers must objectively consider all the available relevant evidence, taking advice as to application of legal principles where necessary, and come to a conclusion, on balance of probability, on matters relating to the existence of a public rights of way in order to determine whether a modification of the Definitive Map and Statement is required.

Such matters may include whether a presumption of dedication is raised, whether such a presumption is negated, whether a right of way subsists, details relating to position and width, or to limits or conditions on a dedication.

The fact which has to be found is the existence of a highway and/or details relating to its dedication. The decision makers must disregard all views which are not relevant to this question. Such views may concern for example the effect or desirability of the right of way should it be found to exist.

As soon as practicable after specified events are found to have occurred, e.g. as set out in Section 53(3)(c)(i) (W&CA) specified above the Council needs to make a modification to the map and statement by formal orders in consequence of the occurrence of those events.

The procedure for making an order under section 53 of the Wildlife & Countryside Act 1981 is governed by Schedule 15 to that Act and involves the Council giving various notices in the prescribed form stating the general effect of the order. Notices must be served on every owner and occupier of land affected. If no representations or objections are duly made, or if any so made are withdrawn, the Council may confirm the order (but without any modification). Where any representation or objection which has been duly made is not withdrawn the matter is referred to the Planning Inspectorate who are an executive agency that reports to the Welsh Government. Before confirming the order the Planning Inspectorate may cause a local public inquiry to be held; or they may give any person by whom any representation or objection has been made an opportunity

of being heard by a person appointed by them. After considering the report of the person appointed to hold the inquiry or hearing, the Planning Inspectorate on behalf of the Welsh Government may confirm the order, with or without modifications. An order made under section 53 of the Wildlife & Countryside Act 1981 is not effective until it is confirmed.'

## **RECOMMENDATIONS**

It is recommended that the Planning Committee approves this application to modify the definitive map and statement and that the Director of Legal, Governance and Monitoring Officer be instructed to process the appropriate legal orders.

**ANDREW GREGORY**  
**DIRECTOR, TRANSPORT, PLANNING & ENVIRONMENT**  
**14 January 2021**

*The following appendices are attached:*

Appendix 1 - Location photos of the Disused Railway Path & Map

Appendix 2 – Officer Decision Report

Appendix 3 - User Evidence compiled data collected

*The following background papers have been taken into account*

- S53 Application
- User Evidence Forms
- Location Plan
- Conveyance of land purchase