

PLANNING COMMITTEE:

17 FEBRUARY 2021

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

**SECTION 53 MODIFICATION ORDER, WILDLIFE AND COUNTRYSIDE ACT
1981 (Whitchurch Meadows)**

1. Reason for this Report

- 1.1 The Planning Application 20/01110/MJR to construct access routes for the approved Velindre Cancer Centre, on the land locally known as 'Whitchurch Northern Meadows', has triggered a Section 53 Modification Order. The public have applied to the Public Rights of Way (PRoW) Team to record historic footpaths crossing the site under Section 53 of the Wildlife and Countryside Act.
- 1.2 The PRoW Officers, as a statutory duty, must determine whether or not the public have established rights of access for 20 years or more in order to record the paths as Public Rights of Way. It is for the Planning Committee to consider the information provided in this report and decide whether or not to approve the recommendation for refusal.

2. Background

- 2.1 The Planning Application 17/01735/MJR for the Velindre Cancer Centre was submitted to Cardiff Council in July 2017 and approved in March 2018. This application includes the primary access from Coryton Interchange, emergency access via the Hollybush Estate, temporary construction accesses, landscape works, pedestrian paths and Maggie's Centre.
- 2.2 The trigger for this Section 53 application from the public to claim the footpaths was the Planning Application 20/01110/MJR, which was submitted June 2020. This was to undertake temporary construction of the access routes for the

construction of the approved Velindre Cancer Centre. The proposal is for works to be undertaken over the next four years and will require the fields to be closed off to the public during certain phases of the construction including the disused railway track. The planning application 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.

2.3 The Section 53 Application was submitted to the PRow Team in July 2020 to request the Definitive Map is amended to record the footpaths crossing the site as Public Rights of Way.

2.4 Section 53 Application Legal Process

- a) Under section 53 of the Wildlife and Countryside Act, The PRow Team, on behalf of the council, have a statutory duty to maintain and update the Definitive Map. This is the official record of the Public's rights of way network.
- b) The act gives the right to a person to apply to the council to amend the Definitive Map to add a path. In this case it is members of the public.
- c) Under Section 31 of the Highways Act, the public have to prove they have used the same path on the same alignment without force, without secrecy and without the oral or written consent of the owner for 20 years or more.
- d) The 20 years usually has a trigger event which brings the public's right into question (such as a locked gate, Private Land no access signage or a planning application).
- e) The 20 years is backdated from the trigger event date.
- f) The landowner and occupier of the land is notified of the application. In cases where the landowner/occupier objects, they will usually submit their own evidence to prove the public did not have rights to use the path. This may include longstanding building works blocking paths being claimed, stock proof fencing/gates to prevent livestock straying or locked gates, or verbally informing walkers they are trespassing, etc.
- g) The PRow Officers upon review of the available relevant evidence must determine whether or not the public have used the path for a minimum of 20 years without force, without secrecy and without the oral or written consent of the owner. Decisions may not consider suitability, desirability or future schemes for the land.

2.5 Initially PRow Officers review the evidence submitted to confirm the public use is a minimum of 20 year. When this is confirmed, consultation is undertaken with landowners, adjacent landowners, ward members and user groups. The landowner is requested to provide evidence that they had taken steps to prevent the public from accessing the site/paths.

2.6 User Evidence

The applicant compiled user evidence forms which shows the public have been using the routes for walking for 20+ years. Information from user evidence forms and additional comments are briefly described below:

- a) The paths always ran over the same route as now being claimed
- b) Path A-B, most walkers stated there were not locked gates or obstructions however a few walkers stated there were gates when horses were grazing.
- c) Paths C-D and E-F path had further statements form path users that there were gates. More specifically, for path E-F, path users stated the gate was locked but you could walk around it and there was a gate and stile between the meadows.
- d) Walkers referenced there was fencing from A to D.
- e) One resident claimed she walked the routes since 1992 to present (28 years usage) and noticed about 12-15yrs ago Private Land (NHS) notices on the locked gate as well as fencing at one time.
- f) Another resident confirmed she had been walking the routes since the 60's and 70's. She has walked the paths since a child and she can remember there being horses in one of the fields which she would avoid since she was nervous around them but her friend didn't mind and would use them anyway. A few residents confirmed there were gates when the horses were grazing.
- g) Some walkers stated they were prevented from walking the paths last year during temporary ground investigation works.
- h) User evidence forms provided statements to confirm part of the land was not accessible while livestock were grazing.
- i) The user evidence demonstrated the footpaths are well walked and very popular leisure routes used by the local community. They provide good strategic links to Whitchurch Village, Forest Farm Nature Reserve and Coryton shopping area.

2.7 Cardiff and Vale UHB contrary evidence

The contrary evidence submitted by Hugh James provided details of steps taken by the landowner and tenant to prevent public access across the fields while the land was used for grazing.

- a) Historically, Whitchurch Hospital has occupied part of the land since 1908 and the Health Authority has owned the land since 1904. The field was used by the Whitchurch Hospital residents as a type of therapy by looking after livestock and garden produce.

- b) The tenant grazier farmed the land from 1972 to 2008 and maintained gates and fencing during that time.
- c) Agricultural Tenancy Agreement provided the requirement for the grazier to put in good and sound stock proof fences or hedges to prevent animals straying off the land. Also to maintain these fences and hedges and to prevent new footpaths or other encroachments or easements from being made in or acquired over any part of the land.
- d) Google Map aerial photos show that from 1945 and 2001 to 2006 there were no features on the ground which represent the walking routes being claimed. Images from 2013 to 2020 clearly show the public were accessing the land (See Appendix 3).
- e) PRoW Officer, Jennifer Nelson (now Griffiths), undertook a site visit with Cardiff and Vale UHB Estates Control Manager in June 2014 to confirm the correct alignment of the PRoW footpaths and carry out some vegetation cutbacks with the assistance of Cardiff Conservation Volunteers.
- f) PROW Officer Notes: It had been identified at that time that there were informal paths crossing the site and the Estates Manager wanted to ensure the formal paths were clearly waymarked and cutback to encourage the public to stay on these routes designated routes.

The Cardiff Conservation Volunteers (CCV) carried out the vegetation clearance on behalf of the PRoW Team as a one off request. CCV utilised the Whitchurch Hospital parking area, walked across through the woods behind the cricket ground to access Point E as the most direct route. The majority of their work was to cutback the adopted footpath and any additional time/resources would be to cutback Whitchurch No.12 Footpath along the inner boundary of field.

2.8 Public Rights of Way Research

Local Development Plan (LDP) Public Consultation Evidence

2.8.1 The Cardiff Council Planning Department undertook a public consultation on the proposed new LDP in 1991. This document included plans of areas of land proposed for development which included the site locally referred to as Whitchurch Northern Meadows. As part of the consultation, the Friends of Forest Farm Group were consulted.

2.8.2 The Friends of Forest Farm Group are a constituted group of active members who work with Cardiff Council Parks Department to enhance and improve the Forest Farm Nature Reserve. The group members have a range of skills from history of the area, conservation and hands on skills which they use to carry out

maintenance tasks on the site. They support the Council through applications for grants to support various projects and are passionate about protecting the nature reserve and surrounding green spaces for ecological and public health benefits.

2.8.3 Friends of Forest Farm objected to the LDP to propose a housing development on the site. In the objection there is reference to the land being used for agricultural grazing and importance for habitats and species but no reference is made regarding existing public access.

2.8.4 A letter was sent from the Friends of Forest Farm to Mr D Hallsworth in support of the Council's decision to retain the land as an open space and object to any proposal to build on the site. Below is a summary of relevant sections relating to Public Footpaths:

- a) 4.4 states the fields are being rented by the farmer for grazing, mainly horses. Ideas of how this site could be improved with animal pens and education visits suggests the area was currently inaccessible.
- b) 4.5 Demonstrates that there were not existing paths crossing the meadows other than the recorded Public rights of Way. The idea of 'New footpaths' was being proposed to improve the accessibility of the overall reserve site if this land were to be included in the Forest Farm Nature Reserve.
- c) 4.6 suggests a viewing platform could be erected to link in with the footpaths.
- d) Appendix A is an extract from a paper by Dr Mary Gillham which was submitted to the Planning Officer on the 15th May 1991 of a habitat survey of the site which was in response to the Local Development Plan Consultation. The number of species and vegetation variation is evident and there is no reference to usage or damage to the site caused by walkers. At this time, the land was being used for non-intensive farming. In section 6.0 of the paper, Dr Gillham refers to current management of hospital fields stating one field is mown for hay in July and the rest grazed by horses.
- e) The annotated map shows the existing PRow Footpaths and suggested improvements to the site which includes one new footpath along the western edge of the meadows field (See Appendix 3).

2.9 Historic Maps and Google Map Aerial Photos (See Appendix 3)

- a) Historic Ordinance Survey maps (1940 and 1968) do not show any surveyed features of walking routes other than the PRow Footpaths as recorded on the Definitive Map.

- b) The Google Map aerial photos from 2001 shows the land being split into sections with fencing. It is visible to see where the farmer's access around and into the site was at location A, D and possibly F. This confirms the information provided by Dr Gillham's paper (Referenced in point 2.8.4 of this report) that the land was managed in sections for grazing and mowing.
- c) Once the Grazier Tenancy ended in 2008, the land was no longer used for farming. You can visibly see features on the ground from Google Map Aerial Photos 2009 onwards that match the walking routes being claimed.

2.10 Planning Consultation for Velindre Cancer Centre

In 2016, PRow Officer, Jennifer Griffiths, contacted the Officer of The Urbanist as part of the planning application process to highlight the number of well used informal footpaths across the site. It was clear at the time that there would be concerns from the public if this site were to be developed and that they may wish to record these paths as Footpaths to retain this area of land from development. A map of the formal and informal routes was provided along with a brief explanation of the S53 process. At this time, members of the public had not come forward to apply for a S53 but it was obvious how popular the site was for walkers and dog walkers.

2.11 Land Management of Forest Farm Nature Reserve

Parks Officers manage the nature reserve site which surrounds the meadows and they are familiar with the area as part of their day to day work. On August 14, 2020, a Parks Officer confirmed the field had no public access during the time the land was used for grazing livestock (i.e. grazier tenancy ended in 2008). The fields were always fenced off until the proposal for a housing planning application was submitted. At that point, access was open across the fields and was no longer used for grazing.

2.12 PRow Site Survey Results

On the 24th September 2020, a site survey was undertaken by the PRow Officer Jennifer Griffiths and a member of the public who is knowledgeable of the history of the land and site. Field gates and fencing around the site are still visible and along the outer boundaries mostly still intact preventing access.

- a) Location F: There is a locked gate with a gap between the gate posts walkers use.
- b) Adopted Footpath from A – E – D: The fencing is substantial but sections are missing/damaged and has deteriorated over time.
- c) Point A: Old fence posts are visible and the access is currently open.

- d) Point D: The farm gate with chain and lock has been pushed to the side and no longer used (See Appendix 2: Whitchurch Hospital Meadows site visit results).

3. Issues

- 3.1 Due to COVID restrictions during the investigation of this case, the PRow Officers based their decision on the information and evidence submitted by all interested parties. Further information was gathered through web based research and historic PRow files. No interviews or site visits were able to be undertaken with the public who submitted user evidence. In normal circumstances this would have taken place.
- 3.2 Hugh James, solicitor representing the landowner, Cardiff and Vale UHB, explained the Estates Manager who is well informed of the history of the site and management is on long term sick leave. Officers of UHB have provided contrary evidence however there may be additional information the Estates Manager would have been able to provide. There is no known return date of the Manager at this time.
- 3.3 Based on the evidence provided by all parties, the public's access across the fields has been interrupted by the grazier's land management of the site until 2008. This has been affirmed by the Council's Parks Officer who also stated the land was fenced off until the tenancy ended. In law, if a gate is locked across the footpath but people continue to use the path regardless, that is sufficient evidence of interrupted usage as the gate was intended to prevent access. After 2008, it appears the land became more accessible to the public and are now very popular leisure routes for the community. It is considered the public have been using the footpaths for 20 years or more but not as of right.
- 3.4 Despite the recommendation to refuse this application to formally record the footpaths, the Public Rights of Way Team and Parks Officers are working with the developer to create a network of footpaths across the site and improve surfacing of the existing PRow paths. In response, the developer has incorporated a network of leisure and active travel routes across the site and to connect to Whitchurch, Forest Farm Nature Reserve and Coryton shops as part of their planning application.

4. Local Member Consultation

- 4.1 Although the application is based on historic evidence, Ward Members are consulted upon. As the area is well walked, comments from consultees were provided by Cllr Mia Rees, Cllr Phillips and Ramblers in support of the footpaths

being recorded. Cllr Phillips provided photos from 2018 and a user evidence statement that he had used the paths for 20 years. Ramblers representative confirmed he had walked the routes for 10 years and believed Cardiff Ramblers had led walks utilising these routes.

4.2 No utilities were to be affected or found within the site therefore no concerns or objections were raised.

4.3 The landowner is represented by Hugh James Solicitor who provided a detailed response and compiled contrary evidence for PRoW Officers to examine. Key points have been provided in the Background and Issues sections of this report.

Local Members & Community Councils

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

Landowners

- Cardiff Council 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

5. Financial Implications

There are no financial implications as processing this application is a statutory duty of the Council under the Wildlife and Countryside Act 1981. Highways revenue budget is allocated for resources necessary to undertake this duty.

6. Legal Implications

6.1 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 (*i.e. without force, without secrecy and without the oral or written consent of the owner*) 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.

6.2 Under the Highways Act 1980 s.31(1) there could only be "sufficient evidence" to the contrary if the landowner performed overt acts so that the users of the way, would have understood that he had no intention to dedicate the path as a public way. This may include putting up notices, fencing off the area, locked gates etc. Case law shows that it is not sufficient for the landowner merely to feel opposed to the idea of the public crossing the land.

Orders are not made automatically each time someone applies, the Council will need to make a judgment on any conflicting points of view about the application or proposal. Changes can only be made for one or other of the reasons provided for in the legislation. Before making an order the Council has to be certain that the various tests imposed by the Acts can be satisfied. There is a right of appeal against the Council's refusal to make a definitive map modification order which has been the subject of a formal application.

6.3 Other Considerations

As the Section 53 application is based on historical evidence, desirability, suitability and safety may not be considered. Separate to this Section 53 Application, which is recommended for refusal, the PRow Team will continue to work with the developer to create leisure and active travel routes across the site as part of the Velindre Cancer Centre Planning Application.

- Equality Act - In considering this matter the decision maker must have regard to the Council's duties under the Equality Act 2010. Pursuant to these legal duties Councils must, in making decisions, have due regard for the need to:
 - eliminate unlawful discrimination
 - advance equality of opportunity
 - foster good relations on the basis of protected characteristics
- Section 17 of the Crime and Disorder Act 1998 - This imposes a duty on the Council, when exercising its functions, to take account of community safety dimension, with a view to reduce local crime and disorder in its area.
- The Active Travel (Wales) Act 2013 - Before exercising its functions under the 1984 Act, the Council must have regard to its duties under The Active Travel (Wales) Act 2013, the Welsh Language (Wales) Measure 2011.
- Well Being of Future Generations (Wales) Act 2015 - The Act places a 'well-being duty' on public bodies aimed at achieving 7 national well-being goals for Wales - a Wales that is prosperous, resilient, healthier, more equal, has cohesive communities, a vibrant culture and thriving Welsh language, and is globally responsible. The well being duty also requires the Council to act in accordance with a 'sustainable development principle'. This means that

Council decision makers must take account of the impact of their decisions on people living their lives in Wales in the future.

7. RECOMMENDATIONS

The recommendation is to refuse the application based on the evidence demonstrating the public have used the paths for 20+years but not as of right.

ANDREW GREGORY
DIRECTOR, TRANSPORT, PLANNING & ENVIRONMENT
17 February 2021

The following appendices are attached:

- Appendix 1: Whitchurch Hospital Meadows site visit results
- Appendix 2: Whitchurch Meadows Section 53 Map
- Appendix 3: Historic Maps and Aerial Photos

The following background papers have been taken into account

- Application Form with site photos of notices posted
- User Evidence Forms
- Hugh James Solicitor evidence on behalf of Cardiff and Vale UHB
- Whitchurch Hospital website research
- Google aerial photos 2001 and 2009
- Officer Decision Report and recommendation for refusal approved by Matt Wakelam, Assistant Director, Transport, Planning & Environment