



## Report of the Chief Legal Officer

Planning Committee – 14 June 2022

# Public Rights of Way – Application for Modification Order to Add a Footpath Running From Herbert Thomas Way (Trunk Road) to Herbert Thomas Way (Loop Road) Community of Birchgrove

<b>Purpose:</b>	To consider whether to accept or reject an application made to this Authority to make a Modification Order to add a footpath running from Herbert Thomas Way (Trunk Road) to Herbert Thomas Way (Loop Road) and thus recording as such on the Council's Definitive Map of Public Rights of Way.
<b>Policy Framework:</b>	Public rights of way statutory function.
<b>Consultations:</b>	Legal, Finance and Access to Services and all the statutory consultees, including local members, landowners and the prescribed organisations.
<b>Recommendation:</b>	It is recommended that the application be refused and that no Modification Order is made to add a footpath as requested.
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<b>Finance Officer:</b>	Adele Harris
<b>Legal Officer:</b>	Jonathan Wills
<b>Access to Services Officer:</b>	Rhian Millar

## 1. Introduction

- 1.1 An application was made to this Authority dated 5<sup>th</sup> September 2012 for a Modification Order under Section 53 Wildlife and Countryside Act 1981 to add a footpath running from Herbert Thomas Way (Trunk Road) to Herbert Thomas Way (Loop Road). A plan showing the route of the claimed footpath can be viewed on the map attached to this report. (See Appendix 1)

- 1.2 Three evidence questionnaires were submitted with the application showing use between five and six years.
- 1.3 The purpose of this report is to establish whether there is sufficient evidence to show whether the footpath in question can be deemed to have been dedicated as a public path under either statutory dedication or common law dedication (see section 2 of this report).
- 1.4 There is an existing highway which provides access to the same start and end points which is approximately 35m longer than the proposed footpath.

## **2. The Law**

- 2.1 The application was made under the provisions of the Wildlife and Countryside Act 1981. Section 53(3)(b) requires the Council to modify the Definitive Map and Statement following the expiration of any period such that the enjoyment by the public of a way raises a presumption that the way has been dedicated as a public path.
- 2.2 Section 31 of the Highways Act 1980 raises the presumption that a way has been dedicated as a highway if the route has been used by the public “as of right” (not by force nor stealth nor permission) and without interruption for a period of 20 years unless there is sufficient evidence that there was no intention during that period to dedicate it. This is known as “statutory dedication”.
- 2.3 If the tests for “statutory dedication” are not satisfied, it may be appropriate to consider whether there has been “common law dedication”. This would require consideration of three issues; whether any current or previous owners of the land had the capacity to dedicate, whether there was express or implied dedication and whether there was acceptance of the highway by the public.
- 2.4 For “common law dedication” the landowner would need to have not just acquiesced to public use but also in some way facilitated or encouraged that use and a lesser period than twenty years may be sufficient. Evidence of use by the public ‘as of right’ may support an inference of dedication and may also show acceptance by the public.

## **3. Consultations**

- 3.1 All of the usual consultees were approached about the proposed addition of the footpath to the Council’s Definitive Map including the owners/occupiers of the affected properties which have subsequently been built upon the land of the proposed footpath, the owners of the land and those with a registered legal interest in that land, the local representative of the Ramblers Association, The Ramblers Association, the local representative for the British Horse Society, The British Horse

Society, the Green Open Spaces and Heritage Alliance, Natural Resources Wales, the Byways and Bridleway Trust, The Open Spaces Society, the local members for the relevant electoral ward and the Gower Commons Association. No responses were received to the informal consultation.

#### **4. Evidence for Statutory Dedication**

- 4.1 Due to the age of the housing estate it is not possible to show uninterrupted use of the alleged footpath for twenty years and as a result the tests for statutory dedication cannot be satisfied.
- 4.2 The applicant and the three others who have submitted user evidence are all residents of the housing estate in question and therefore the evidence submitted does not show evidence of use by the public at large but only evidence of use by a limited number of people who live in close proximity to the footpath.

#### **5. Evidence of Common Law Dedication**

- 5.1 In respect of common law dedication no evidence has been received that the landowner facilitated use of the footpath or made any efforts to dedicate the footpath as a public one.

#### **6. Conclusion**

- 6.1 Due to the age of the housing estate (commenced building in 2002) and the age of the houses now built across the claimed route (completed by 2013 – see appendix 2) it is not possible to show uninterrupted use of the claimed footpath for twenty years and as a result the application does not satisfy the legal test under Section 31 of the Highways Act 1980.
- 6.2 As it is recognised that statutory dedication has not occurred, it is necessary to consider whether dedication has occurred under common law.
- 6.3 Common law dedication cannot be deemed to have occurred in this case as the landowner has not set out a path for use and has not encouraged the public to use the path. There is insufficient evidence to show use by the public at large ‘as of right’.
- 6.4 Therefore it is recommended that the claim be rejected.

#### **7. Financial Implications**

- 7.1 There are no financial implications to this report.

#### **8. Legal Implications**

8.1 The legal implications are set out in the body of the report.

## **9. Integrated Impact Assessment**

9.1 The Council is subject to the Equality Act (Public Sector Equality Duty and the socio-economic duty), the Well-being of Future Generations (Wales) Act 2015 and the Welsh Language (Wales) Measure, and must in the exercise of their functions, have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Acts.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.
- Deliver better outcomes for those people who experience socio-economic disadvantage
- Consider opportunities for people to use the Welsh language
- Treat the Welsh language no less favourably than English.
- Ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.

9.2 The Well-being of Future Generations (Wales) Act 2005 mandates that public bodies in Wales must carry out sustainable development. Sustainable development means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the 'well-being goals'.

9.3 Our Integrated Impact Assessment (IIA) process ensures we have paid due regard to the above. It also takes into account other key issues and priorities, such as poverty and social exclusion, community cohesion, carers, the United Nations Convention on the Rights of the Child (UNCRC) and Welsh language.

9.4 The Integrated Impact Assessment (IIA) process has been applied to the subject of this report. No implications have been identified. An IIA Screening Form has been completed with the agreed outcome that a full IIA report was not required for the reasons given in paragraph 9.3 below.

9.5 It is recommended that the application made to this Authority dated 5th September 2012 for a Modification Order under Section 53 Wildlife and Countryside Act 1981 to add a footpath running from Herbert Thomas Way (Trunk Road) to Herbert Thomas Way (Loop Road) be rejected. The Council is under a duty to investigate and determine the application. Due to the age of the housing estate it is not possible to show uninterrupted use of the claimed footpath for twenty years and as a result the application does not satisfy the legal test under Section 31 of the

Highways Act 1980 to meet statutory dedication. As a result the footpath network will remain unaltered. There is an existing highway which provides access to the same start and end point. There are no impacts on any persons or community groups as a result of the application.

9.6 The IIA Screening Form is appended to this report for reference.

**Background Papers:** None

**Appendices:**

Appendix 1	Plan showing the route of the claimed footpath.
Appendix 2	Plan showing route in 2013 after footpath claimed
Appendix 3	IIA Screening Form