
HIGHWAY STOPPING UP APPLICATION SUPPORTING STATEMENT

**relating to proposed downgrade of the highway known as CYH/19 at Mynydd y
Gaer Common in the County Borough of Bridgend from a Byway Open to All
Traffic (BOAT) to a Restricted Byway (RB) pursuant to sections 247 & 253 of the
Town and Country Planning Act 1990**

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1 INTRODUCTION

1.1 This Statement has been produced by HCR Legal on behalf of Cenin Renewables Ltd (**"the Applicant"**).

1.2 The Applicant applies to the Welsh Minister for planning permission of a development of national significance (**"the DNS Application"**) in accordance with Section 62D of the Town and Country Planning Act 1990 (as amended) (**"the 1990 Act"**). The proposed development comprises:

‘the construction and operation of up to 11 wind turbines and associated infrastructure including substation switches, access tracks and turning heads, borrow pits, temporary construction compounds (including holding bays), crane pads, underground cabling, drainage works and biodiversity proposals including creation, enhancement and restoration’ (**"the Wind Turbine DNS"**).

1.3 The DNS Application includes a request for secondary consents of the Welsh Minister under Section 62F of the 1990 Act including a request that an order is made downgrading a byway open to all traffic (**"BOAT"**) to a restricted byway (**"RB"**) under Section 247 of the said Act (**"the S247 Order"**). Further details of proposed downgrade together with the grounds for making the order are set out below.

2 BACKGROUND

2.1 The site of the Wind Turbine DNS is located at Mynydd y Gaer Common which is north-east of Bridgend (**"the Site"**). The Site is a registered common under the Commons Act 2006 (**"the 2006 Act"**).

2.2 The Site is owned by Dunraven Estates Unlimited Company (incorporated in Ireland under company number OE026124) and who the Applicant is working with on the DNS Application and the proposed Wind Turbine DNS. The Site is free from any encumbrances and charges material to the S247 Order.

Highways and public rights of way across the Site

2.3 Bridgend County Borough Council (“**BCBC**”) is the local highway authority for the area of the Site within the meaning of Section 1 of the Highways Act 1980 (“**the 1980 Act**”).

2.4 The Site is crossed by several public rights of way (including public footpaths (“**FP**”), public bridleways (“**BW**”), and a BOAT) as recorded on the definitive map and statement for the County Borough of Bridgend as prepared in accordance with Section 53 of the Wildlife and Countryside Act 1981 (“**the 1981 Act**”). These include the following key routes:

- Coychurch Higher BOAT 19 – From Coychurch Higher Footpath 22 to Minffrwd Road (B4280) (“**BOAT19**”);
- Coychurch Higher Footpath 22 – From Coychurch Higher BOAT 19 to Coychurch Higher Footpath 17A (“**FP22**”);
- Coychurch Higher Footpath 18 – From Coychurch Higher BOAT 19 to Minffrwd Road (B4280) (“**FP18**”); and
- Coychurch Higher Bridleway 17 – From Minffrwd Road (B4280) (and Coychurch Higher BOAT 19) to Coychurch Higher Footpath 16 (“**BW17**”)

2.5 All of the above public rights of way are highways maintainable at public expense as defined in the 1980 Act.

2.6 Section 66 of the 1981 Act provides the following interpretations to the types of public rights of way recorded on the definitive map (such as those described above):

- “footpath” means a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road.
- “bridleway” means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway.

- “restricted byway” means a highway over which the public have a right of way on foot, a right of way on horseback or leading a horse, and a right of way for vehicles other than mechanically propelled vehicles, with or without a right to drive animals of any description along the highway, but no other rights of way.
- “byway open to all traffic” means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used.

2.7 An extract copy of the working definitive map (“**the Working DM**”) for the area of the Site held by BCBC is produced at **Appendix 1**. The purple lines depicted on the working definitive map are FPs, the green lines are BWs, and the orange lines are BOATs.

2.8 The Site is also crossed by the highway maintainable at public expense known as Minffrwd Road (B4280). Minffrwd Road is an unclassified road. It is a metalled (ie. surfaced) road. The Taff Ely Ridgeway Car Park within Mynydd y Gaer Common is located off Minffrwd Road.

The Wind Turbine DNS and S247 Order

2.9 The Wind Turbine DNS, as detailed in paragraph 1.2 above, includes biodiversity proposals to the Site (ie. Mynydd y Gaer Common) including creation, enhancement and restoration (“**the Biodiversity Proposals**”). Full details of the Biodiversity Proposals are set out in the Planning Statement in support of the DNS Application.

2.10 As identified above, and relevant to the requested secondary consent for the S247 Order, the Biodiversity Proposals for which planning permission is sought under the DNS Application includes the proposed downgrade of the highway rights for part of the route of BOAT19 to an RB (ie. a restricted byway) (“**the RB Downgrade**”). In other words, remove the public rights of way for mechanically propelled vehicles over the route. The RB Downgrade is illustrated on the plan produced at **Appendix 2**.

2.11 The part of BOAT19 marked CYH/19/1 on the Working DM is not including in the RB Downgrade. It remains unaffected. The remainder of BOAT19 marked CYH/19/2-5 on the Working DM forms the RB Downgrade.

- 2.12 The RB Downgrade is unmetalled (ie. unsurfaced). It is 1,665 metres in length and has an unrecorded minimum and maximum width of 3-5 metres for its length.
- 2.13 The RB Downgrade and the resultant removal of damaging motor vehicular use across the common forms a key part of the Biodiversity Proposals and their sustained long term deliverability of the wider biodiversity creation, improvements and restoration across the Site.

3 LEGISLATION AND CASE LAW

- 3.1 The legal tests and required considerations for the Welsh Minister in determining whether to make the S247 Order are contained within Section 247(1) of the 1990 Act. It provides that:

“The [Welsh Minister] may by order authorise the stopping up or diversion of any highway ... if he is satisfied that it is necessary to do so in order to enable development to be carried out—

- (a) in accordance with planning permission granted under Part III or section 293A, or*
- (b) by a government department”. [emphasis added]*

- 3.2 Planning permission for nationally significant developments granted by the Welsh Minister is a permission under the abovementioned Part III of the 1990 Act.
- 3.3 The S247 Order is a secondary consent and therefore the procedures set out in Section 253 of the 1990 Act applies in the determination as to whether to make the order. This section allows statutory notification to occur in anticipation of planning permission.

Legal Tests

- 3.4 The courts have identified two separate and distinct legal tests for determination of the decision maker (the Welsh Minister) before exercising the powers for the stopping up or diversion of any highway pursuant to a planning permission. These two legal tests were

described by the High Court in the *Network Rail case*¹ as: (i) the necessity test; and (ii) the merits test.

- 3.5 Each of these legal tests are explained below. However, there are two preliminary issues relevant to both legal tests.
- 3.6 Firstly, the decision maker must consider both the ‘necessity test’ and the ‘merits test’ separately alongside each other. In other words, one is not conditional upon, or influenced by, the other one first being satisfied².
- 3.7 Secondly, and crucially, Section 247 is a standalone statutory procedure and power distinct and separate to that of the grant of planning permission under Part III of the 1990 Act. They are mutually exclusive procedures, and each decision is unfettered within their specific statutory functions and role. In other words, the Section 247 procedure is not a re-opening of the planning merits but similarly the planning decision doesn’t pre-empt the section 247 merits. Where a S247 Order is a secondary consent, and thus considered alongside the planning application by the same decision maker, this distinction may be less defined in practice.

Necessity Test

- 3.8 The ‘necessity test’ in simple terms requires the decision maker to answer the following question:

Is it necessary to stop up and/or divert a highway to enable the carrying out of the development authorised by planning permission?

- 3.9 This test was the primary issue in the *Network Rail case*. The facts of which in brief concerned the interpretation of a Grampian planning condition restricting the development on terms related to the possible outcomes of a mandatory application for the stopping up of an off-site

¹In the first instance before the High Court in *Network Rail Infrastructure Ltd, R (On the Application Of) v The Secretary of State for the Environment, Food And Rural Affairs* [2017] EWHC 2259 (Admin)

In the second instance on appeal before the Court of Appeal in *Network Rail Infrastructure Ltd, R (On the Application Of) v Secretary of State for Environment, Food And Rural Affairs* [2018] EWCA Civ 2069

² *Ibid.*

footpath railway crossing. The Grampian condition was imposed as the new development would intensify public use of the crossing and increase the associated safety risks.

3.10 The Court of Appeal in the *Network Rail case* confirmed that the requirement of "necessity" under Section 247 (or the similar Section 257 as was the case) may be satisfied by the existence of either of the following obstacles arising from the permitted development:

(i) a physical obstacle - some practical impediment to the development proceeding. By example, a highway running across a development site that would make it impossible for the proposed development to be carried out and completed without it being stopped-up or diverted; or

(ii) a legal obstacle - a "Grampian" or negative planning condition or planning condition or obligation preventing the development being carried out, in whole or in part, until an order stopping-up and/or diverting a highway had been made and confirmed, and the highway had then been stopped-up and/or diverted.

3.11 Both the High Court and the Court of Appeal found that the subject Grampian condition in the *Network Rail case* was, when read in the context of the permission, a legal obstacle which satisfied the 'necessity test'.

3.12 Additionally, and as importantly, when considering the 'necessity test' and whether there exists any physical or legal obstacle to the implementation and completion of the associated planning permission, the High Court in the *Calder case*³ confirmed that it is not for the decision maker to postulate other development if they are satisfied of the necessity of the stopping up and/or diversion to allow the permitted development to be carried out.

Merits Test

3.13 The 'merits test' in simple terms is the discretionary power of the decision maker to not make an order under Section 247 stopping up and/or diverting a highway notwithstanding whether the 'necessity test' is satisfied. It requires the decision maker to answer the following question:

³ *Calder v Secretary of State for the Environment* [1995] E.G.C.S. 43

Are the disadvantages and losses, if any, flowing directly from a stopping up and/or diversion order of such significance that they ought to refuse to make the closure or diversion order?

- 3.14 The Court of Appeal decision in the *Vasiliou case*⁴ is the leading case on the 'merits test'. Such case concerned a proposed stopping up of highway application under Section 209 of the Town and Country Planning Act 1971 (the predecessor to Section 247 of the 1990 Act). If the highway was stopped up it would have converted the remaining highway to a cul-de-sac. The claimant operated a restaurant and contended that the resulted cul-de-sac of the highway, for which his business would be situated within, would reduce local footfall and adversely affect the viability and profit of his business.
- 3.15 The Court of Appeal found that such issue, a relevant material consideration on the decision to grant the planning permission, was also a relevant consideration under the 'merits test' and therefore required re-determination. In particular, the Court of Appeal stated the following guidance on the requirements and limits of the 'merits test':

"[the decision maker] must approach the exercise of his discretion under section [247] on the footing that that issue has been resolved, in favour of the development being allowed to proceed. It is on that basis that he must determine whether the disadvantages and losses, if any, flowing directly from a closure order are of such significance that he ought to refuse to make the closure order. In some instances there will be no significant disadvantages or losses, either (a) to members of the public generally or (b) to the persons whose properties adjoin the highway being stopped up or are sufficiently near to it that, in the absence of a closure order, they could bring proceedings in respect of the proposed obstruction. In such instances the task of the [decision maker] will be comparatively straightforward. In other cases there will be significant disadvantages or losses under head (a) or under head (b) or under both heads. In those cases, the [decision maker] must decide whether, having regard to the nature of the proposed development, the disadvantages and losses are sufficiently serious for him to refuse to make the closure order sought. That is a matter for his judgment. In reaching his decision he will, of course, also take into account any advantages under heads (a) or (b) flowing directly from a closure order: for example,

⁴ *Vasiliou v Secretary of State for Transport* (1991) 61 P&CR 507

the new road layout may have highway safety advantages. Of course, some proposed developments are of greater importance, from the planning point of view, than others. When making his road closure decision the [decision maker] will also need to take this factor into account."

3.16 From the above comments the following key points are summarised:

- (i) matter of judgement - the 'merits test' will be a matter for the decision maker's judgment subject to the public law principle of *Wednesbury* reasonableness.
- (ii) Presumption in favour of stopping up/diversion – the decision maker is not re-examining the planning merits of the permission. As such, they must approach the exercise of discretion on a presumption in favour of the development being allowed to proceed. It is on that basis that they must determine whether the disadvantages and losses, if any, flowing directly from a closure or diversion order are of such significance that he ought to refuse to make the closure or diversion order.
- (iii) Relevant direct disadvantages or losses – when considering any the losses and inconveniences which will be suffered as a direct consequence of stopping up or diversion of part of the highway, the decision maker is at liberty to consider all reasonable losses arising: (a) to members of the public generally (ie. safety, inconvenience etc); and (b) to properties (and the owners/occupiers) adjoining or near the highway which sustain losses over and above that which will be sustained by the public generally. The 'significance' of any loss or disadvantage should not be interpreted within the context and weighting of any planning policy meaning.
- (iv) Relevant direct benefits - in reaching a decision the decision maker should take account of (a) the planning importance of the development; and (b) any advantages to the public generally and to adjacent or nearby properties flowing directly from a closure or diversion order.

3.17 Noting that many of the above matters referred to as relevant to the 'merits test' may have been considered at the time of the planning application, the Court of Appeal in the *Vasiliou* case recognised that each separate statutory procedure will inevitably give rise to factual and

legal areas of overlap (which is likely more practically evident for secondary consents for nationally significant developments).

- 3.18 Finally, the proposed S247 Order will downgrade a route from a BOAT to an RB. In effect removing the public rights of way for mechanically propelled vehicles. This can most easily be achieved in the order by existing the BOAT and creating the RB.

4 GROUNDS FOR THE S247 ORDER

- 4.1 The Applicant contends that both the necessity test and the merits test are satisfied, and the Welsh Minister should make the S247 Order for the RB Downgrade. Each of the legal tests are examined below.

Necessity Test

- 4.2 The Wind Turbine DNS includes the Biodiversity Proposals of which the RB Downgrade forms part. Therefore, if planning permission inclusive of the Biodiversity Proposals is granted by the Welsh Minister then such proposals will be subject to appropriate planning conditions in relation to their implementation.
- 4.3 On the basis that the RB Downgrade is included within the approved Biodiversity Proposals (and subject to appropriate planning conditions or obligations) then the S247 Order is clearly necessary to enable such part of the Wind Turbine DNS to be complied with and implemented in full accordance with the planning permission. The absence of a S247 Order would be a legal obstacle to implementing the Biodiversity Proposals and compliance with the relevant planning conditions or obligations thereto. Specifically as they relate to the RB Downgrade.
- 4.4 Accordingly, without the requested S247 Order for the RB Downgrade there will be a legal obstacle to the carrying out and full completion of such part of the planning permission for the Wind Turbine DNS. It is therefore clear that the necessity test is satisfied.

Merits Test

- 4.5 As discussed above, the Welsh Minister shall approach the exercise of discretion under the 'merits test' on a presumption in favour of the development for which planning permission has been granted being allowed to proceed. Therefore, the merits test is considered hereafter on the presumption that planning permission is granted for the Wind Turbine DNS with the Biodiversity Proposals inclusive of the RB Downgrade.
- 4.6 In the above context of planning permission having been granted then as a starting point in favour of the S247 Order under the merit test, the Biodiversity Proposals inclusive of the RB Downgrade must clearly be considered of great importance in planning policy terms pursuant to the decision making on the permission. The presumption being, as explain in the *Vasiliou* case, that the S247 Order should only not be made if there are any significant disadvantages or losses that outweigh in the planning importance and general direct benefits for making the order.
- 4.7 The direct benefits more generally of the RB Downgrade are clear given they form part of the Biodiversity Proposals for the creation enhancement and restoration of Mynydd y Gaer Common. The BOAT permits entry of uncontrolled mechanically propelled vehicles (primarily accessible only by off road two-wheel and four-wheel vehicles) onto the Common. Such vehicular use regularly over the decades causes significant tyre damage and disturbance to its surface. Continuous recovery preventing ecological growth across the Common. Likewise, such vehicular use disturbs and discourages growth of natural fauna on the Common.
- 4.8 The RB Downgrade is important to the sustained success of the other aspects of the Biodiversity Proposals. The creation enhancement and restoration of the biodiversity of the Common as assumed to form part of the planning permission for the Wind Turbine DNS cannot be reasonably implemented and maintained without the RB Downgrade.
- 4.9 It is acknowledged that the removal of the public's mechanically propelled vehicular rights along the route of BOAT19 is loss to such category of public users. However, Minffrwd Road is a more commodious and convenient route for motor vehicle users given it is metalled and also provides access to Taff Ely Ridgeway Car Park (such as for walkers). The benefit of BOAT19 is principally therefore to recreational off-road motor vehicle users. Such loss is not significant

nor outweighs the planning importance of the Wind Turbine DNS and specifically the Biodiversity Proposals and the more general benefits identified above.

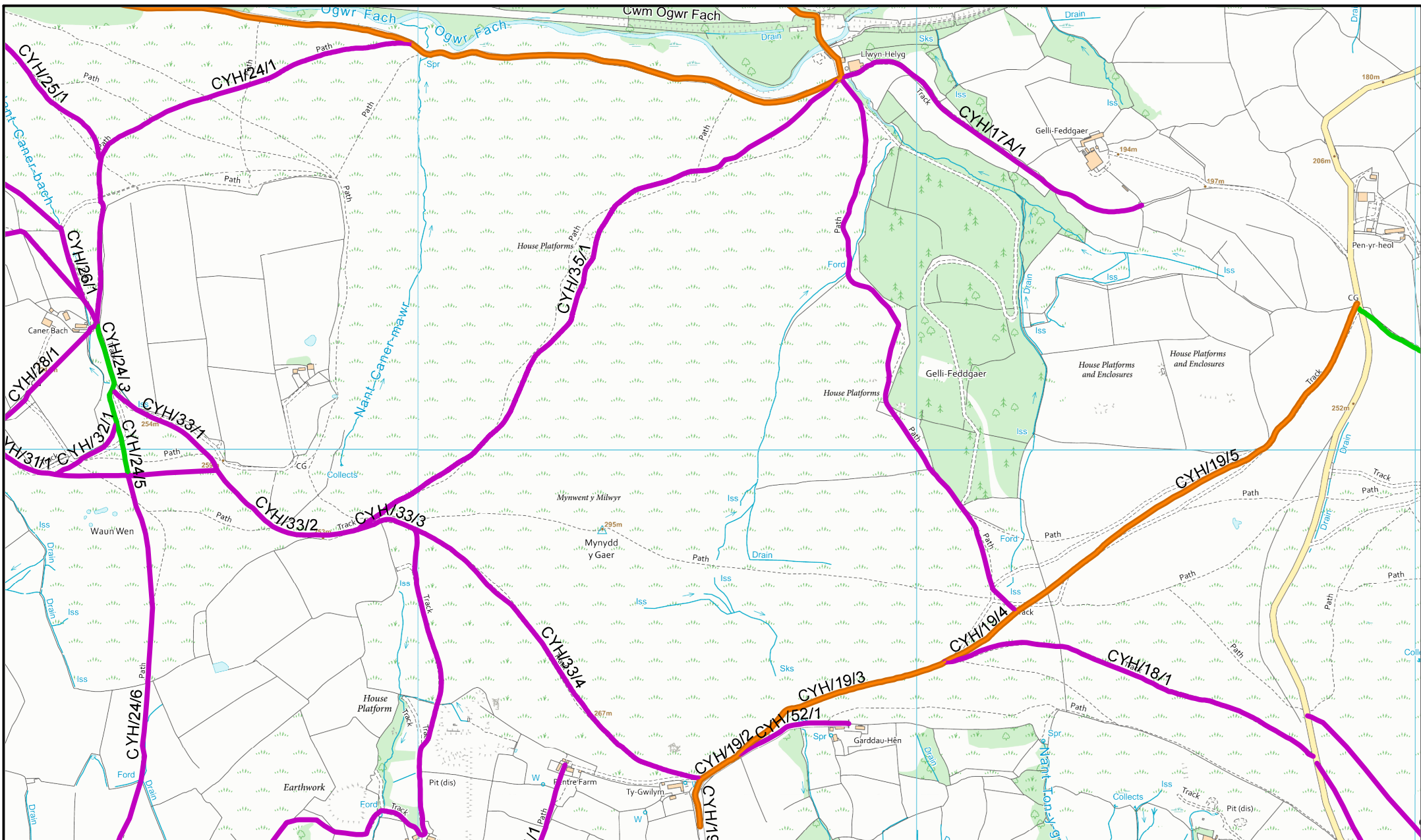
4.10 Finally, and for which such fact should have great weight in the Welsh Minister's judgement on the merits test, it is noted that the CBCB as the relevant local highway authority is supportive of the RB Downgrade and equally the Biodiversity Proposals for the Common as the relevant commons registration authority.

4.11 Accordingly, the importance of the planning permission inclusive of the Biodiversity Proposals together with the general direct benefits arising from the RB Downgrade clearly outweigh any disadvantages or losses to motor vehicle users of BOAT19. It is therefore contended that the merits test is satisfied.

5. SUMMARY AND CONCLUSION

5.1 For the reasons set out above it is submitted that the RB Downgrade, being part of the Biodiversity Proposals and presumed planning permission for the Wind Turbine DNS, satisfies the legal tests for making the S247 Order. Therefore, the Applicant kindly request that the Welsh Minister makes an order under Section 247(1) of the 1990 Act downgrading BOAT19 to an RB (restricted byway).

HCR Legal
January 2025



Cyngor Bwrdeistref Sirol



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Def Map Working Copy

This is not the Definitive Map and cannot be regarded as the legal record of public rights of way within the County Borough. It is guidance for indicative purposes only, therefore no reliance should be placed on it for legal or commercial purposes. If you wish to inspect the Definitive Map, or if you need to undertake a legal search of the public rights of way records or have any other queries about path status or route alignment, please contact the Rights of Way team

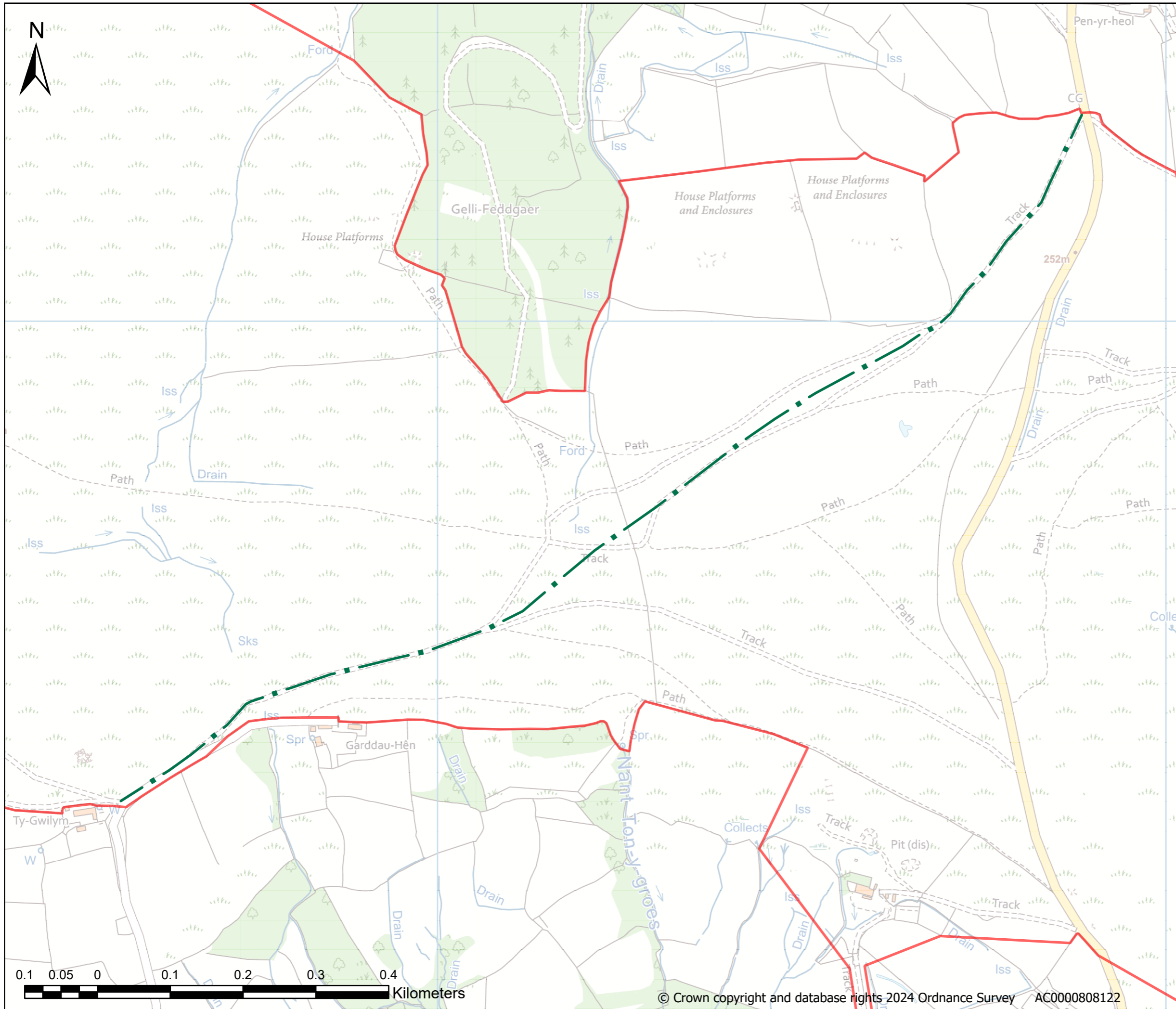


Scale 1:10,000

Date: 10/12/2024

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Proposed Mynydd y Gaer Wind Farm

S247 Stopping Up Plan

Extinguishment of the whole of the exiting highway (BOAT) with the creation of the new highway (Restricted Byway) along the same line.

Length of route: 1665m
Width of route: 3m to 5m

27/1/2025
Scale 1 : 5000 @ A3
Drwg: MG5-1e

- Site boundary
- Extinguishment of the whole of the exiting highway (BOAT) with the creation of the new highway (Restricted Byway) along the same line

