



MERTHYR TYDFIL COUNTY BOROUGH COUNCIL

RIGHTS OF WAY COMMITTEE MEETING

10.00 AM MONDAY, 24TH FEBRUARY, 2014

The attached documents have been added as Background Papers to the previously published Agenda for the above mentioned Committee.

Anyone requiring information should contact the Democratic Services Department on (01685) 725203 or democratic@merthyr.gov.uk

16. Vaynor 25

To consider a report of the Director of Customer Services. **(Pages 1 - 14)**

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MERTHYR TYDFIL COUNTY BOROUGH COUNCIL PUBLIC RIGHTS OF WAY ENFORCEMENT POLICY STATEMENT

Introduction

There are a number of Public Rights of Way within Merthyr Tydfil County Borough made up of Public Footpaths, Public Bridleways, Restricted Byways and Byways Open to All Traffic. The Council is under a statutory duty imposed under section 130 of the Highways Act 1980 to “*assert and protect the rights of the public to the use and enjoyment of*”, and “*prevent so far as possible, the unauthorised stopping up or obstruction of*” all these public rights of way.

The aim is to ensure that all public rights of way remain in a condition that is safe and easy for use by the public. The Council carries out practical works to maintain them. When enforcement problems occur, it will use advice, persuasion, direct action and / or prosecution proceedings to resolve them.

To avoid the occurrence of enforcement problems, the Council will give advice, practical assistance and guidance to help landowners and occupiers comply with the law. It will also provide information, education and advice to all those who use or wish to use the public rights of way network in Merthyr Tydfil.

This document gives an explanation of relevant concepts and background and concludes with a formal statement of Policy.

Enforcement action is the general term used in this document to cover the range of options including negotiation and advice, direct action by the Council to remove obstructions itself and the taking of other legal action up to and including prosecution.

1. Principles

There are four basic principles which underlie this policy. These are:

- A. *Proportionality* -relating the enforcement action to the seriousness of the breach. Some incidents have the potential to place the public's health and safety at risk, others interfere with people's enjoyment and rights and the Service's ability to carry out its activities. Enforcement action will be proportionate to the risks posed and to the seriousness of any breach of the law.
- B. *Consistency* -taking a similar approach in similar circumstances. This does not mean uniformity of action. When assessing a breach Officers will need to exercise their professional discretion taking into account all the relevant factors of the case. Such relevant factors might include the seriousness of the breach, the impact or potential impact on the public, the attitude of those responsible for the breach and the history of previous breaches.

- C. *Transparency* -ensures that those against whom enforcement action is taken are aware of the legislative requirements and aware of the likely consequences of non-compliance. Distinction will be made between statutory requirements and what is good practice or desirable but not compulsory. Transparency should aid those being regulated in complying with statutory requirements and minimise the need for further enforcement action. It also helps maintain public confidence in the ability of the Service to fulfil its duties. Where enforcement action is required an explanation (in writing) will be given of why that action is necessary and when it must be carried out. Unless urgent action is required, an opportunity will be provided to discuss what is necessary to comply with the law.
- D. *Targeting* – ensuring that enforcement action is directed primarily to where the risks or impact on the public is greatest. Action will be focused on those directly responsible for the breach and who are best placed to control it. Prioritisation will be based on a number of factors including assessment of risk, impact on the public and complaints from the public.

2. Scope of the Policy

Enforcement will be considered wherever appropriate statutory powers exist to deal with actions or inactions that may lead to risks to the health and safety of the public or to their rights being infringed. The main areas to which this Policy applies are listed below.

- A. Obstruction or unauthorised stopping up of the public right of way;
- B. Restoration of public rights of way lawfully ploughed but not reinstated;
- C. Unlawful ploughing or disturbance of the public right of way;
- D. Crops inconveniencing use of the public right of way;
- E. Unlawful deposit of materials or structures in the public right of way;
- F. Misleading notices on or near to a public right of way;
- G. Vegetation overhanging a public right of way. Barbed wire likely to cause a nuisance to users of a public right of way;
- H. Inadequate or unauthorised stiles and gates on public rights of way;

Other nuisances, obstructions and offences will be dealt with in a comparable manner according to the circumstances of the case.

3. Courses of Action

There are several possible courses of action available to the Council depending upon the nature of the offence.

- A. To Give Advice -Advice may be given when it is considered that the infringement is of a minor nature, and the Council is confident the owner or occupier involved will take the required corrective action. The owner or occupier will be requested to take appropriate remedial action within a given time period depending upon the circumstances of the case.
- B. Enforcement Notices - A formal Notice may be served if an offence has been committed and where a request to take remedial action has failed. Such Notice will include provision for the Council to take direct action to remove obstructions or nuisances or to deal with the appropriate restoration of paths and to recover its costs.
- C. Caution - A formal Caution may be used where there is evidence of an offence having been committed and the person responsible for the offence has admitted it. They may be used where there is reason to believe that remedial works will be carried out. Where a formal caution is issued the offender will be required to sign the caution. As it entails an admission of guilt by the person responsible, it is used only where prosecution proceedings would otherwise be appropriate. A record of the caution will be held on file, and may be referred to if the person is convicted at a later date of a further offence.
- D. Prosecution - In some circumstances the Council will prosecute if it believes it to be in the public interest to do so and this may be undertaken in tandem with the service of Enforcement Notices (as above). Certain offences require the service of a Notice, before an application can be made to the Magistrates Court for an order to remedy the problem.
- E. Common Law Powers of Abatement / Direct Action: In many rights of way cases, direct action should be considered along with other forms of enforcement action. The path is made available to the public without the inevitable delays associated with court action. In all cases where direct action is pursued the full costs of that action will be reclaimed from the person responsible for the infringement.

Whilst the Council would normally commence an Enforcement Action by *Giving Advice* and only escalate to a more severe course of action if that was unsuccessful, it reserves the right to issue an *Enforcement Notice* or instigate *prosecution proceedings* immediately where it is appropriate to do so. This may be considered justified if the breach was particularly serious or the offender had a history of similar offences. In certain limited circumstances only (set out in Policy EP2), a Public Path Order may be considered.

4. Prosecutions

- A. It is the policy of the Rights of Way Department that prosecution will be used as an enforcement option to secure compliance with relevant legislation. The decision to prosecute will be related to risk and/or the nature and severity of the alleged offence(s), and not used merely as a punitive response to minor breaches of legislation, unless the history of non-compliance is serious enough to warrant such action.
- B. The Rights of Way Department is committed to ensuring that only fit and proper cases are brought before the Courts. When circumstances have been identified which may warrant a prosecution, the Rights of Way Department will make an objective decision as to whether to proceed after considering all relevant evidence and information, and this decision making process will be recorded.
- C. Cases will be kept under constant review and the final decision to proceed will be taken by the head of Economic Development in consultation with the Council's Solicitors. Any decision to prosecute will be taken at the earliest opportunity, once sufficient evidence has been gathered to provide for a reasonable prospect of securing a conviction.
- D. The following circumstances have been identified as possible situations in which the prosecution of offenders should be considered. However this list of circumstances is not exhaustive.
 - (i) Where the alleged offence involves a flagrant breach of the law and/or health and safety or the environment or amenity of an area is or has been put at risk;
 - (ii) Where the alleged offence involves dishonesty or fraud, or has been deliberately committed;
 - (iii) Where the alleged offence involves a failure by the offender to correct an identified potential risk, having been given a reasonable opportunity to comply with the lawful requirements of an Authorised Officer;
 - (iv) Where the offence involves a failure by the defendant to comply in full or in part with the requirements of a Statutory Notice;
 - (v) Where there is a history of similar occurrences.
- E. Before the final decision to proceed is taken, regard should be had to the prosecution criteria listed below, and to all relevant Codes of Practice.

- F Before the final decision to proceed is taken the matter will be discussed with the Authorities Legal Department.
- G Once a decision to prosecute has been taken, formal legal proceedings will be instituted as soon as possible and within the relevant statutory time limits.

5 Prosecution Criteria

5.1 The following factors may be taken into consideration prior to deciding whether a prosecution should be taken.

(a) The nature of the offence.

- The seriousness of the alleged offence;
- the risk of harm to the general public with regards to health and safety or to the environment or amenity of an area;
- the ability to demonstrate identifiable victims, or harm done to the health and the environment of Merthyr Tydfil County Borough Council and beyond;
- the failure to comply with a statutory notice served for a significant breach of legislation;
- the attitude of the offender;
- disregard of health and safety for financial reward;
- evidence of deliberate dishonesty;
- evidence of persistency and system;
- the number of alleged offences.

(b) The previous history of the party concerned including:

- a history of similar occurrences;
- failure to respond positively to past warnings;
- failure to comply with statutory notices.

- (c) The likelihood of the defendant being able to establish a due diligence /Best Practice defence or to show that they have followed best practice etc.
- (d) Whether there is enough evidence to prove an offence and the likelihood of the success of the prosecution.
- (e) The credibility of witnesses and their willingness to co-operate.
- (f) The willingness of the party to prevent a recurrence of the problem.
- (g) The probable public benefit of a prosecution and the importance of the case e.g. whether prosecution may have a deterrent effect on the offender or others. Generally, the graver the offence, the greater the likelihood that prosecution will be in the public interest.
- (h) Any explanation offered by the offender. Where practicable offenders should be invited to offer an explanation before the decision to prosecute is made.

5.2 Where a decision to prosecute is being considered, any views given by likely defendants during the investigation must be considered. Where a defendant has not had the opportunity to comment on the facts of the case, he/she will usually be given an opportunity to do so.

6. Prioritising Enforcement Work

There are a number of unresolved obstructions to the PROW network. Whilst only a small number seriously impact on the public's enjoyment of the network, it is important that all these issues are addressed so that users and landowners / occupiers have certainty about the extent of the public's rights. As a consequence it is necessary that a system of prioritising the enforcement work of the PROW Team is operated.

Non-seasonal obstructions (those not related to the cultivation of arable crops) coming to the attention of the PROW Team are categorised as follows:

PRIORITY OBSTRUCTIONS	Obstructions where one or more of the criteria set out in Policy EP1 are met. These obstructions will be dealt with as a matter of urgency by the PROW Team.
ROUTINE OBSTRUCTIONS	Obstructions which do not meet the criteria set out in Policy EP1 but which nonetheless may have a negative impact on the public trying to use the path. These obstructions will be added to a "Routine Obstructions" list and dealt with in chronological order of receipt as and when resources allow.
DE MINIMIS OBSTRUCTIONS	Obstructions which appear negligible in their impact on the public. These will be recorded on file but no further specific action proposed. Resolution of the issue will be sought if an opportunity arises, for instance if the obstructed path is identified on a search in the process of the sale of the surrounding land or if development is proposed for the affected land.

In some cases, as time passes it becomes progressively more difficult to secure the removal of an obstruction. Officers retain discretion to deal with "new" obstructions immediately, regardless of the above prioritisation where that is considered an effective use of resources. This applies to all seasonal obstructions. Alternatively, "new" obstructions may be placed at the top of the "Routine Obstructions List" where that is more appropriate.

A list of policies is shown in appendix 1 and a table of main statutes is shown in appendix 2.

APPENDIX 1

Policies

Wherever obstructions or other breaches of relevant legislation are identified, Merthyr Tydfil County Borough Council will utilise its various enforcement powers as set out in this document to remedy the problem.

POLICY EP1

In dealing with enforcement cases, priority will normally be given to cases where, in the view of Officers, one or more of the following criteria are met:

1. Where continuation of the obstruction provides an unacceptable health and safety risk;
2. Where resolution of the obstruction will provide a significantly enhanced PROW network;
3. Where resolution of the obstruction will contribute significantly to other Council objectives;
4. Where the obstruction adversely affects a promoted route;
5. Where a significant number of valid complaints have been received about the obstruction from a variety of independent sources.

POLICY EP2

A Public Path Order (PPO) will be considered as an acceptable alternative to enforcement action only where all of the following criteria are met:

1. The obstruction does not appear to have been a deliberate attempt to interfere with the public's use of the route;
2. The obstruction is not of recent origin (the use of PPOs to deal with obstructions placed after the date of adoption of this policy will only be considered in exceptional circumstances);
3. In the opinion of an Officer of the Rights of Way Team, an alternative route exists that will fulfil the requirements of the relevant PPO legislation.

APPENDIX 2

Table of the main statutes requiring enforcement by the Economic Development Rights of Way division

National Parks and Access to the Countryside Act 1949
Highways Act 1980
Wildlife and Countryside Act 1981
Rights of Way Act 1990
Countryside and Rights of Way Act 2000

MERTHYR TYDFIL COUNTY BOROUGH COUNCIL STRATEGY ON ALLEY GATING SCHEMES

POLICY OBJECTIVES

POLICY AG 1: Merthyr Tydfil County Borough Council will only encourage and support the lawful implementation of alley gating schemes where crime and/or anti-social behaviour reduction can be demonstrated.

- 1.1 The overall policy objective is the speedy and lawful implementation of alley gating schemes in the County Borough through a simplified process and rational use of resources, where crime and/or anti-social behaviour reduction and neighbourhood renewal benefits can be demonstrated.
- 1.2 Alley gating schemes can contribute towards the delivery of this pledge through the co-ordination of alleyways which are shown to be adversely impacted by crime and/or anti-social behaviour which can be intelligence-led.
- 1.3 The closing off of alleyways can be achieved through use of a stopping up order under s116 Highways Act 1980. This legislation is still available to local authorities, but includes the permanent extinguishments of rights of way. In April 2005 the Clean Neighbourhoods and Environment Act 2005 was brought in to try and address these difficulties by introducing “Gating Orders”. These can be applied in areas where there are problems of crime or anti-social behaviour.

THE HIGHWAY AUTHORITY’S DUTIES

- 2.1 The Council has a statutory duty to protect all public highways, whether registered on the Definitive Map and Statement and/or the List of Streets Maintainable at Public Expense or otherwise, and failure to undertake this duty could result in the Council acting unlawfully. The council must therefore exercise caution before embarking upon any proposals that may adversely effect or interfere with the rights of the public to pass and re-pass along any public highway, or potential highway.
- 2.2 The Council also has a duty, along with the police and other “responsible authorities” to reduce and prevent crime within their administrative area under s17 Crime and Disorder Act 1998. This may mean that these two duties conflict with, or contradict each other and therefore this conflict or contradiction must be minimised.

Authorisation of gates or similar structures on highways

- 2.3 All gates or similar structures, if installed on a public highway, constitute an obstruction. However, under certain circumstances, these obstructions may be legitimised, after which they may be referred to as “lawful obstructions”. A structure will only constitute a lawful obstruction if it is authorised by the relevant Highway Authority, who may only grant such permission if an Act of Parliament specifies that it may do so.

- 2.4 The circumstances under which gates or other structures can normally be installed on public highways are strictly controlled by the provisions of the Highways Act 1980, and even if lawfully installed, such gates or structures cannot be locked or used to prevent free passage by any legitimate user. The criteria for the authorisation of these gates or structures are clear and unambiguous.

IDENTIFICATION AND PRIORITISATION FOR ALLEY GATING AREAS

Policy AG 2: The Council will prioritise gating, closure or diversion activity, giving due regard to priorities that may be drawn up by the Council within the established regeneration areas.

- 3.1 Requests for alley gating schemes are to be made to the Director of Customer Services in the first instance.
- 3.2 This policy does not restrict the right of individuals or groups to make closure applications without recourse to resources available to the Council.
- 3.3 A study will be undertaken to enable a decision to be made on any alley gating scheme proposal. The report will be carried out by the Council and will include, although not exclusively, the following,
- Consultation with local residents and land owners
 - Consultation with Highways
 - Consultation with local ward members
 - Consultation with the police
 - Consultation with emergency services
 - Consultation with utility companies
 - Consultation with other interested parties
 - An assessment of whether any legal orders are required and if so, the most appropriate legislation to use
 - An assessment of the physical works required
 - Estimated cost

DETERMINATION OF HIGHWAY STATUS

Routes shown on the Highway Records

- 4.1 Many public rights of way or highways are already recorded on documents known as the Definitive Map and Statement and/or List of Streets Maintainable at Public Expense. These are the Council's formal records of public highways. If a route is shown on either of these documents, then with few exceptions, it is undisputedly a public highway.

Routes not shown on the Highway Records

- 4.2 In common with many Authorities throughout the country, there are a significant number of routes that exist, but are not shown in the Council's records. This does not mean that highway rights do not exist; simply that they are unrecorded and that legal records may need to be amended.

- 4.3 In general terms, if a route, path, or way runs between two highways, is used as a through route and has existed as such for a number of years (usually at least 20 years), then in the absence of any evidence to the contrary, there may be a reasonable presumption that highway rights exist or have been established (under s31 Highways Act 1980).
- 4.4 Public Highway rights may be established either under the provisions of the Highways Act 1980, or at Common Law. In either instance the evidential test is one of “balance of probability” and in making a decision as to whether or not public highway rights exist, the Council must act in a “quasi-judicial” manner. This means that the council must act in the manner of a court of law and make its decision based upon evidential fact. Issues such as desirability, privacy and security, cannot lawfully be taken into account.

LEGISLATION

Policy AG 3: Cabinet will decide any application for an alley gating order on a highway that is shown on the List of Streets Maintainable at Public Expense or that relates to a public right of way recorded on the Definitive Map and Statement.

Policy AG4: The Council will use Gating Orders as the primary legislation tool to implement alley gating schemes. However, the Council will where necessary use any other legislative route when a Gating Order is not appropriate. The Council will decide the most appropriate legislation to use to carry out alley gating schemes, through a project group set up for this purpose.

- 5.1 The Council will use Gating Orders under s129A Highways Act 1980 as the primary legislative tool to deliver alley gating schemes. However, the gating/closure of alleyways can be implemented in a number of different ways, including:
- By extinguishing the right of way that exists over the alleyway using s116 Highways Act 1980
 - By stopping up a highway through s247 and s257 Town and Country Planning Act 1990 to allow development to take place.
- 5.2 All procedures for dealing with the closure of problem alleyways will remain open to the Council.
- 5.3 An “alley gating” scheme is a very simple crime prevention method involving the installation of lockable gates to the end of alleyways or rights of way that exhibit problems of crime and anti-social behaviour. The purpose of alley gating is to prevent the access to such alleyways or public rights of way by unauthorised persons, in order to reduce the opportunity to commit crime and/or anti-social behaviour.
- 5.4 Alley gating schemes seek to tackle these issues through the use of gating orders. These are not meant to be permanent and should be reviewed on an annual basis (according to Welsh Government Guidance). Gating orders involve restriction of access over a relevant highway rather than extinguishing the highway status and/or public rights of way. This restriction will still allow free access for legitimate users through the installation of a lockable gate. Legitimate users and statutory authorities will be offered keys as a means to gain access.

- 5.5 A Gating Order under s129A allows a Local Authority to restrict access to a public right of way without changing its status, either as highway or public right of way. The gating order will be in effect for a period of time as stated under the order. During any time the order may be varied so as to increase the length of time the order is in effect or to revoke the order as required. Before any legal orders are processed under these powers the Council must be satisfied that the following conditions are met:-
- Premises adjoining or adjacent to the highway are affected by crime and/or anti-social behaviour
 - The existence of the highway is facilitating the persistent commission of criminal offences and/or anti-social behaviour
 - It is in all cases expedient to make the order for the purposes of reducing crime and/or anti-social behaviour.
- The circumstances referred to here should include:
- The likely effect of making the order on the occupiers of premises adjoining or adjacent to the highway
 - The likely effect of making the order on other persons in the locality; and in a case where the highway constitutes a through route, the availability of a reasonably convenient alternative route.
- 5.6 All requests, recommendations and considerations relating to alley gating schemes will be referred to an Alley Gating Project Group for a decision. The Project Group will consist of a member of Legal Services, Town Planning and Highways together with a member of the Traffic Section or Rights of Way Section. This group will make a recommendation to Cabinet.
- 5.7 The Highways Act 1980 (Gating Orders) (Wales) Regulations 2007 which underpin the relevant provisions of the Clean Neighbourhoods and Environment Act 2005, came into force on 19th February 2007. These regulations give the council powers to restrict access to paths and alleyways during certain times of the day, or at all times, through a gating order. This allows more flexibility in closing alley ways where a permanent closure is not appropriate. The process for overcoming objections is dealt with internally
- 5.8 Gating Orders are not permanent, nor do they change the status of the highway or public rights of way. Merthyr Tydfil County Borough Council will retain responsibility for the affected alley way (where the highway is adopted) and the gates.

CONSULTATION AND CONSENTS

Policy AG 5: Merthyr Tydfil County Borough Council will only support alley gating schemes that have undergone comprehensive local consultation, and where all reasonable steps have been taken to address any local objections. Schemes will also need to demonstrate positive support from the majority of affected residents and owners.

- 6.1 All property owners and occupiers (within the immediate vicinity of the proposed gating area), any statutory undertakers responsible for any services that may be located in the alleyway, who are affected by the proposals contained within the alley gating scheme will be consulted, irrespective of which legislation is being used to implement the scheme.

- 6.2 In all instances, before making any order the Council will consult with:
- All the occupiers of premises adjacent to or adjoining the affected highway
 - The Chief Officer of Police through whose area the affected highway passes
 - Every fire and rescue authority through whose area the affected highway passes
 - Any local access forum through whose area the affected highway passes
 - Any statutory undertaker who maintains services in the locality in which the affected highway is situated
 - Any communications provider in the locality in which the affected highway is situated
 - Any person who the council reasonably considers might be affected by the proposed order
 - Any person who requests a copy of the notice
 - Any person who has asked to be notified of any proposed orders
 - Local ward members

DELIVERY

Policy AG 6: Merthyr Tydfil County Borough Council will support the most appropriate delivery arrangements for alley gating schemes.

MAINTENANCE

Policy AG 7: Where the Council agrees to make an order under s116 Highways Act 1980, the County Borough Council will not accept responsibility for the ongoing maintenance of the extinguished highway.

- 7.1 Where closure of a highway or public right of way is by means of a stopping up order under s116 Highways Act 1980, residents and owners of adjoining premises will be responsible for the ongoing maintenance of the alley way and the gates.

Policy AG 8: In accordance with s129A Highways Act 1980 the team implementing the gating order must ensure that provisions are made for the maintenance of the alley gates before they are erected.

Gating Orders under s129A Highways Act 1980

- 7.2 As the status of the alley way does not change, residents do not become responsible for the maintenance of the alley way of the gates. The team implementing the gating order will ensure that a maintenance programme is in place for the gates before they are erected.

REGULATIONS

Policy AG 9: The Council will follow the procedures set out in the Highways Act 1980 (Gating Orders) (Wales) Regulations 2007.

- 8.1 s2 Clean Neighbourhoods and Environment Act 2005 insert s129A to s129G into the Highways Act 1980. These sections empower councils to make, vary or revoke orders restricting the public right of way over the highways to which they relate (through “Gating Orders”). Gating orders may be made by councils where they are satisfied that premises adjoining or adjacent to the highway are affected by crime or anti-social behaviour; that existence of the highway is facilitating the commission of criminal offences or anti-social behaviour; and that it is in all the circumstances expedient to make the order for the purposes of reducing crime or anti-social behaviour. Gating orders may be varied by councils where they are satisfied that in all the circumstances it is expedient to do so for the purpose of reducing crime or anti-social behaviour. Procedures in relation to gating orders are set out in the Highways Act 1980 (Gating Orders) (Wales) Regulations 2007.
- 8.2 In particular, these Regulations make provision with respect to
- Publicity relating to a proposal to make, vary or revoke a gating order
 - Representations as to the remaking, varying or revocation of a gating order
 - Public inquiries
 - Content of gating orders
 - Registers of gating orders