

RIGHTS OF WAY REPORT



Date Written	13 th February 2014
Report Author	Cheryl Jones
Service Area	Economic Development
Committee Date	24 th February 2014

To: Chairman, Ladies and Gentlemen

VAYNOR 25

PURPOSE OF THE REPORT:

To consider the options available with regard Vaynor 25

1.0 INTRODUCTION AND BACKGROUND

- 1.1 Vaynor 25 is recorded on the Definitive Map and Statement for Merthyr Tydfil County Borough Council as follows “Map Nos: SO.00 Footpath from the A470 Trunk Road in Cefn Coed leading south to Job’s Lane; approximately 283 metres in length”. It is shown on the plan, Vaynor 25.
- 1.2 No width is given for this footpath.
- 1.3 This footpath was added to the Definitive Map and Statement by the now defunct Vaynor Urban District Council.
- 1.4 The route of Vaynor 25 as depicted by a bold line on the plan, Vaynor 25, attached to this report commences at Point A, Upper High Street, Cefn Coed (the old route of the A470) and proceeds to terminate at Point G, Job’s Lane.
- 1.5 Any obstacle along this route that is not recorded in the Definitive Statement is considered to be an unlawful obstruction and is a nuisance at common law.
- 1.6 Three planning permissions have been granted for development which either directly affect the line of the Public Right of Way or immediately abut the Public Right of Way, see 2.0 – 4.4.

- 1.7 6 obstructions occur along this route, see 5.0 – 11.3.
- 1.8 The right of way has also been interfered with, see 12.0 – 12.3.

2.0 PLANNING PERMISSION 93/0140

- 2.1 On 25th May 1993 outline planning permission was granted to develop the site of the former Petrol Station, Upper High Street, Cefn Coed.
- 2.2 Condition 10 of the permission stated “No works shall commence until such time as details regarding the public right of way known as footpath No. 25 Vaynor before details are submitted for the approval of the Local Planning Authority”.
- 2.3 The reason for imposing this condition was to ensure that the public right of way was dealt with in accordance with the prescribed procedures as laid down under the Town and Country Planning Act 1990.
- 2.4 An informative attached to this permission advised the applicant to consult with the Highway Authority regarding the Public Right of Way before details were submitted to the Local Planning Authority.
- 2.5 The Rights of Way file is silent as to whether or not any communication was received from the developer.
- 2.6 Irrespective of that the outline permission has expired.

3.0 PLANNING PERMISSION 93/0213

- 3.1 On 16th June 1993 full planning permission was granted to develop the site of the former petrol station north of “Ashville” Upper High Street, Cefn Coed, Merthyr Tydfil.
- 3.2 Condition 5 of the permission stated “No works whatsoever shall commence on site until such time as details regarding the public right of way known as Footpath No. 25 (Vaynor) are submitted for the approval of the Local Planning Authority”.
- 3.3 The reason for imposing this condition was to ensure that the public right of way was dealt with in accordance with the prescribed procedures as laid down under the Town and Country Planning Act 1990.
- 3.4 This planning permission was implemented and although the rights of way file is silent as to whether there was any communication with the applicant it is accepted that the right of way was not affected by this development.

4.0 PLANNING PERMISSION 99/0164

- 4.1 On 2nd July 1999 planning permission was granted to develop the site and curtilage of Grawen Cottages, Grawen Lane, Cefn Coed. This permission allowed for the demolition of cottages and the erection of 2 detached houses.
- 4.2 An informative attached to this planning permission stated at informative 2 "The development hereby approved shall not interfere with the adjoining right of way known as Footpath No. 25".
- 4.3 On 12th May 1999 the agent for the owner of the land for which development was subsequently granted on 2nd July 1999 was written to by the Engineering Manager advising him that should planning permission be granted then it would be necessary to apply for a diversion of the right of way.
- 4.4 A response was received from the owner's agent stating that a diversion was not necessary as amendments had been made to the planning application.

5.0 OBSTRUCTION AT POINT A

- 5.1 The public right of way commences at Point A, its junction with the maintainable highway, Upper High Street, Cefn Coed at a stone stile. This stone stile forms part of the dry-stone wall. Although technically an obstruction it is accepted that this stone stile was in situ at the time when the route was recorded in the Definitive Map and Statement. No enforcement action will be taken on this obstruction but when the Definitive Map and Statement requires modification this stile will be recorded in the Statement.

6.0 OBSTRUCTION AT POINT B

- 6.1 A brick wall measuring approximately 4½ metres in height has been erected. It is not known when this brick wall was erected.

7.0 OBSTRUCTION AT POINT C

- 7.1 A post and wire fence has been erected. It is not known when this fence was erected.

8.0 OBSTRUCTION BETWEEN POINT C AND POINT D

- 8.1 Mature vegetation has grown between these two points. These mature trees and shrubs form part of the landscaped garden of the owner of New House. Photographs taken by the rights of way section on 10th July 2007 show this section to be overgrown.

- 8.2 The aerial photographs for 2001, 2003, 2006, 2008 and 2010 have been examined.
- 8.3 The 2001 aerial photograph has a number of trees within this area and the footpath itself is not clearly discernible.
- 8.4 The 2003 aerial photograph shows more trees within this area and the footpath itself is not clearly discernible.
- 8.5 The 2006 aerial photograph shows more trees and the path is not evident.
- 8.6 The 2008 aerial photograph shows more trees and the path is not evident.
- 8.7 The 2010 aerial photograph shows more mature trees and the path is not evident.

9.0 INTERFERENCE WITH RIGHT OF WAY BETWEEN POINT D AND POINT E

- 9.1 Although it is not specifically mentioned within the Definitive Map and Statement the surface of the right of way is earth. Between Point D and Point E the surface has been changed without any communication having been made to the rights of way department.

10.0 OBSTRUCTION AT POINT F

- 10.1 A gate has been erected at Point F. A photograph taken by the rights of way section on 10th July 2007 shows a metal gate on its side at this point.
- 10.2 Between Point F and Point G there are also problems with regard to overhanging vegetation. Overhanging vegetation was present prior to Christmas. This has since been removed.

11.0 OBSTRUCTION AT POINT G

- 11.1 A gate has been erected at Point G. On 22nd April 2007 communication was received from Councillor Tovey that the gate at this point had rusted shut and couldn't be opened and that the path was very overgrown. Councillor Tovey also requested that the gate be released and the pathway cleared.
- 11.2 The owner has stated on many occasions that a gate has always been present at this point.

- 11.3 Two notices have been served on the owner to remove this gate. On each occasion that a notice has been served the gate has been unlocked but not removed. The second of the two notices also required the removal of the gate referred to in 10 above.

12.0 BLOCKAGE OF FOOTPATH

- 12.1 On 22nd June 2001 the owner of New House, Grawen Lane was written to involving a blockage of the footpath. This letter stated "it would seem that you are carrying out repairs to either the footpath or working adjacent to the footpath. If you are carrying out such works then permission should have been sought from this Authority for any possible closure".
- 12.2 In response to this letter the owner of New House, Grawen Lane stated "it is quite correct that I blocked the footpath and I did in fact take Mr. Beynon around and explain everything to him. The main reason being that half a dozen youths were using this as an access to Reservoir House instead of the footpath. They had pushed down a stone wall and huge boulders were laying flat on the right of way. I am sure you are aware that I am responsible for the land and I can see myself facing a financial liability if there were any injuries. I am checking this out with my solicitor. I have also found evidence of drug and solvent abuse on my land, as people are not sticking to the path where they can be seen. During the closure period, I have resolved both issues, and the path is now open. May I ask you to help me to clearly identify to everyone where the path lies, which is right through the centre of the land, and not bordering the house on Cefn High Street, about which residents are objecting".
- 12.3 With regard signage of the path the highway authority is required to erect a sign where a right of way leaves a metalled road. The sign must indicate the status of that way. The sign can also give destination and distance but there is no requirement that it deals with direction. In respect of this route there is a sign at the Cefn High Street end of the route and a sign at the Grawen Road end. The sign gives the status of the route but does not give length or direction.

13.0 SITE VISIT 1st AUGUST 2008

- 13.1 On 1st August 2008 a member of the rights of way division attended the right of way and met with the owner of New House through whose land a section of the right of way passes.
- 13.2 At this meeting the section of the route that passes through this owner's land was discussed. The owner explained that when he purchased the land there was a farm and that there was an old track that he had decided to keep. The owner pointed out the right of way

and explained that he had kept the path where it had always been but that he had erected a wall next to it.

- 13.3 This wall lies immediately to the side of the right of way between Point F and Point G. This wall does not obstruct the right of way.
- 13.4 The owner also explained that he had spoken with Councillor Tovey and explained that the right of way had been cut back on a number of occasions. The owner also expressed his concerns to Councillor Tovey about the users of the route and the risk of people falling into the quarry within his ownership.
- 13.5 As the right of way was overgrown the owner pointed out where the route was. Whilst being shown this route it was evident that there was a heras fence blocking the gate to the rear of the property. The owner explained that the fence was there to prevent his dog from straying and that anyone wishing to pass could do so by moving the fence as it was only leaning and not secured by any means.
- 13.6 Whilst being shown the right of way the owner showed the rights of way officer the quarry and explained his concerns. At the bottom of the quarry the owner pointed out where the right of way ran and then continued to explain that he was concerned that somebody might walk along the path and accidentally fall down the quarry and that he would then face a compensation claim.
- 13.7 It was explained to the owner that there were two options open to him; either to apply for a diversion or to apply for a stopping up of the right of way.
- 13.8 The owner was advised to write in expressing his concerns but said that he had already done so and that nothing had been done.
- 13.9 The owner also stated that the only people who he knew that used the right of way were 2 local men who used the route to go fishing.
- 13.10 At this time the right of way between Point A and Point B on the plan was clear.

14.0 SITE VISIT 17th MARCH 2011

- 14.1 A site visit was conducted. At this date the right of way was impassable due to vegetation and this appeared to have been a problem for a number of years. The gate was also locked.

15.0 SITE VISIT 26th APRIL 2013

- 15.1 On this occasion the owner, the rights of way officer and the rights of way solicitor attended. The path was unable to be walked for any of its length. The section between Point A and Point B was passable but

requiring cutting back. The section between Point B and Point C ran through the rear garden of Ashville. The section between Point C and Point D was completely impassable due to thick vegetation.

16.0 OTHER ISSUES

- 16.1 Numerous complaints about the path have been received; these complaints being received via the local councillor, members of the public and the Rambler's Association.
- 16.2 Whilst it must be noted that these complaints have been received it must also be acknowledged that sections of this path have been impassable for a number of years.
- 16.3 Whilst complaints have been received in relation to locked gates at the Grawen Road end and overgrowth in the same vicinity and complaints have been received about overgrowth on the High Street end no complaint whatsoever has been received in relation to either the overgrowth in the central section of the path or the two fences that are at the rear of Ashville.
- 16.4 It is also evident that if people are walking this route that they are not walking along the line of the right of way. No person walking along the right of way should be anywhere near the top of the quarry face or the Cefn cemetery.
- 16.5 It is clear from the immediately preceding paragraph that members of the public have not been walking the correct route of the footpath for a number of years as the route has either been obstructed or in places become impenetrable. In the section where there is now mature overgrowth there is no evidence that people have diverted in order to walk the entire length of the route. This does not, however, mean that if the route was cleared that no-one would use it.
- 16.6 A request was made by Ward Councillor, Howard Barrett, that a member of the Council attended the Vaynor Forum on 20th May 2013. I attended that meeting; the meeting was also attended by the rights of way solicitor and the owner of New House, Grawen Lane. Discussions ensued in relation to the route.

17.0 THE LEGAL POSITION WITH REGARD OBSTRUCTIONS

Gates and Stiles

- 17.1 A gate or stile erected other than upon dedication or by, or with the consent of, the highway authority is a nuisance at common law and an unlawful obstruction.
- 17.2 The situation here is that no limitation is recorded within the Definitive Statement; i.e. no mention is made of a gate or a stile existing at any point along the route.

- 17.3 Statutory authorisation for a gate or a stile may be given under s147 Highways Act 1980 if certain criteria are met. The circumstances under which new gates and stiles can be authorised by the highway authority are limited and the section applies to land being used for agriculture or being brought into use for agriculture. In this instance the term 'agriculture' includes forestry. The s.147 provision does not apply to any other class of land, for example, residential land or parkland. Use of land for keeping horses which are not used for agricultural purposes was not considered to be 'agricultural' under the Highways Act 80 but this changed by s69 Countryside and Rights of Way Act 2000.
- 17.4 In addition to applying solely to agricultural land, or land being brought into use for agriculture, stiles and gates may only be authorised to control the ingress and egress of animals where it is considered expedient to do so for the efficient use of the agricultural land. The decision of the highway authority is discretionary and there is no right of appeal other than by way of judicial review of the decision in the High Court. There is no power to authorise the erection of a gate on a byway, even if it crosses agricultural land.
- 17.5 It is quite clear from the preceding 2 paragraphs that authorisation for the erection of the gates could not be given under the Highways Act 1980.

Vegetation

- 17.6 There are two issues with regard vegetation; the first being overhanging vegetation and the second being vegetation growing on the highway.
- 17.7 Where a hedge, tree, shrub or vegetation of any description overhangs a highway, or any other road or footpath to which the public has access, so as to endanger or obstruct passage of vehicles or pedestrians, or the passage of horse-riders, the highway authority has power under s154 Highways Act 1980 to require the owner/occupier by notice to lop or cut back the overgrowth. An owner/occupier may appeal to the magistrates' court to have the notice set aside. If, subject to the appeal, the work is not done within the stated period, the highway authority may do it itself and recover the cost from the owner. S154 Highways Act 1980 only relates to vegetation that overhangs the highway from adjoining land. Where vegetation grows on a highway, s154 Highways Act 1980 has no application.
- 17.8 S41 Highways Act 1980 imposes a duty on the Highway Authority to maintain the highway.
- 17.9 The case of Hereford and Worcester CC v Newman (1975) dealt with the issue of to what extent this power to maintain extended. In this case the Court of Appeal stated "... that a hawthorn hedge in one

case and thick undergrowth in the other is actually rooted in the surface of the paths. With some hesitation I am of the opinion that this did cause the paths to be out of repair..”

17.10 Whether a path is out of repair is a matter to be determined by the court according to the circumstances in each case.

17.11 The fact that a path is out of repair is not in itself a ground for extinguishment of a path.

Can the authority be forced to take action

17.12 The user of a path may bring an action against the council to require the removal of an obstruction in the magistrates’ court. Prior to taking action in the magistrates’ court the highway authority would need to have received notification of the obstruction. The user of the path would then follow a statutory procedure.

18.0 THE LEGAL POSITION WITH REGARD INTERFERENCE WITH RIGHT OF WAY BETWEEN POINT D AND POINT E

18.1 S131 Highways Act 1980 makes it an offence to deposit anything whatsoever on any highway so as to damage it. Property is defined by s10 Criminal Damages Act 1971 as being property of a tangible nature, and as belonging to any person who has control of it or any proprietary right in it. It therefore follows that the surface of a publicly maintainable highway, which is vested in the highway authority under s263 Highways Act 1980, is to be treated as the property of that authority for the purposes of the section.

18.2 Anyone damaging the surface of a publicly maintainable highway would be committing an offence under s1 Criminal Damage Act 1971 unless he is able to rely on the defences contained in s5 of the same Act. These specify that it is a lawful excuse under s1 for a person to have believed that the authority would have agreed to the destruction or damage, or that the act was done in order to protect his property or his right or interest in property where that was in immediate need of protection and that the means of protection adopted were reasonable in the circumstances. It is sufficient in the circumstances to have held the belief honestly, whether or not it is justified.

18.3 It is also possible to take action under s131(1) Highways Act 1980, see 18.1 above.

18.4 Any prosecution under either Act would now be statute barred.

19.0 THE LEGAL POSITION WITH REGARD “SOLVENT ABUSE”

19.1 The owner of New House, Grawen Lane has said that there are issues relating to solvent abuse along this right of way. It is possible that an application could be made to the highway authority for a gating order to be made. Gating orders permit access to be restricted, by means of gates across the highway, to the people and at the time specified in the order, but only for crime reduction grounds and to deal with problems of anti-social behaviour. If an application for a gating order were to be made then the application would need to meet the requirements laid down in the council’s policy.

19.2 The council’s gating order policy is to be found in background papers.

20.0 ENFORCEMENT, DIVERSION OR EXTINGUISHMENT

20.1 There are a number of options available to the council which need to be considered. These are enforcement, extinguishment or diversion.

20.2 The legal background for an extinguishment order is to be found at Agenda Item 4.

20.3 The legal background for a diversion is to be found at Agenda Item 5.

20.4 The council’s enforcement policy is to be found in background papers.

20.5 Whilst a diversion could be looked at this would require an application to be made by the owners due to the issues of compensation that may become payable under s28 Highways Act 1980.

21.0 FINANCIAL IMPLICATIONS

21.1 All three of the options available to the council have financial implications for the council.

21.2 Enforcement action will require the council to issue a notice. This notice may be appealed in the magistrates’ court leading to a hearing.

21.3 If not appealed then the council may have to undertake the work themselves and then reclaim the costs.

21.4 If an extinguishment order is made then there may be an inquiry if objections are received.

21.5 If a diversion application was to be received from the owners or one of the owners there may be an inquiry if objections are received.

22.0 EQUALITY IMPACT ASSESSMENT

22.1 It has been identified that an Equality Impact Assessment (EqIA) is not required for the purpose of this report.

23.0 RECOMMENDATION(S) that

23.1 Enforcement action be taken to clear the right of way against all land owners.

OR

23.2 Discussions be undertaken with landowners as to a possible diversion.

OR

23.3 The necessary pre consultation exercise with regard extinguishment of the footpath is undertaken.

AND

23.4 The matter be returned to the next available rights of way committee.

**GARY THOMAS
DIRECTOR OF CUSTOMER SERVICES**

BACKGROUND PAPERS		
<i>Title of Document(s)</i>	<i>Document(s) Date</i>	<i>Document Location</i>
Vaynor 25	14 th February 2014	Unit 5