

Penderfyniad ar y Gorchymyn

Order Decision

Ymchwiliad a agorwyd ar 25/10/16

Inquiry opened on 25/10/16

gan Sue M Arnott FIPROW

by Sue M Arnott FIPROW

Arolygydd a benodir gan Weinidogion Cymru

an Inspector appointed by the Welsh Ministers

Dyddiad: 15/11/16

Date: 15/11/16

The Welsh Ministers have transferred the authority to decide this Order to me as the appointed Inspector.

Order Ref: K6920/W/2016/516187

- This Order, dated 25 November 2014, is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Caerphilly County Borough Council (Footpath No. 147 in the Community of Mynyddislwyn) Definitive Map and Statement Modification Order No. 3 2014.
- There were 3 letters of objection and a petition¹ outstanding when Caerphilly County Borough Council submitted the Order for confirmation to the Welsh Ministers.
- The Order proposes to delete from the definitive map and statement the whole of public footpath 147 in the Community of Mynyddislwyn, as shown on the Order plan and described in the Order schedule.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a public local inquiry into the Order on 25 and 26 October 2016 at the offices of Caerphilly County Borough Council (the Council) in Penallta House, Tredomen Park, Ystrad Mynach, Hengoed. In the afternoon of 24 October I visited the site of Footpath 147 near Wyllie (unaccompanied) to familiarise myself with the surroundings. During the second day of the inquiry I adjourned the proceedings so as to make a further inspection of Footpath 147, on this occasion accompanied by both supporters of and objectors to the Order before returning to the Council's Offices to hear final closing submissions.
2. During the course of the inquiry an error on the Order map came to light. Although the Order itself is very clearly made under the Wildlife and Countryside Act 1981 (the 1981 Act), the title of the Order map refers to Section 119 of the Highways Act 1980. However the map is also labelled "Deletion of Footpath No. 147 in the Community of Mynyddislwyn", leaving little room for doubt over the intention of the Order.
3. At the inquiry Mr Llewelyn submitted that few members of the public would be aware that a mistake had in fact been made since only a person who dealt regularly with such matters would know that the wrong legislation had been noted on the map.

¹ Signed by 68 people opposing the Order

4. Whilst I accept the title may lead to some initial confusion for some people, I am satisfied that no one would be misled by this obvious error, nor would any party have been prejudiced in any way by it².
5. Immediately before closing the inquiry, a representation from Ms K Gallimore was presented to me. This had been sent by email to the Council late in the previous evening. Ms Gallimore had attended the first day of the inquiry in what she described as a "totally neutral" capacity but nonetheless drew my attention to a number of issues which caused her to question the validity of the Order.
6. Firstly she submits that the Order is wrongly made under sub-section 53(2)(b) when it should have been made under 53(2)(a) since the relevant period pre-dates the enactment of the 1981 Act. Secondly it is her opinion that the Order has not been made in the form as set out in Schedule 2 and prescribed by Regulation 4 of the Wildlife and Countryside (Definitive Maps and Statements) Regulation 1993 since neither in the title nor the preamble to the Order does it state the relevant date of the definitive map and statement. Thirdly she contends that what had been referred to as the relevant date at the inquiry (1 July 1952) is wrong as this is the date of the draft definitive map, not the definitive map.
7. I agree with the Council that the Order is properly made under sub-section 53(2)(b) of the 1981 Act, the relevant 'event' for this purpose being the discovery of evidence (after the commencement date³) by the surveying authority which prompted the Order. I am also satisfied that the Order has been made substantially in the form required by the Regulations, it not being mandatory for the date of the definitive map and statement to be inserted anywhere in the Order itself. Nevertheless the relevant date of that map is a crucial consideration where deletion of a public right of way is being sought. Consequently I address this issue further below but suffice it to say here that I find nothing to suggest that anything in the drafting of this Order renders it inherently invalid.
8. At the inquiry, two statutory objectors (the Open Spaces Society (OSS) and The Ramblers) were represented by Mr Bland. One other objector (Mr Dudley) was called as a witness by Mr Bland, as was Mrs Holland who was one of the signatories to the petition against the Order. For convenience in this decision I will refer to these organisations and individuals collectively as 'the objectors' unless there is reason to distinguish between their views.

Main Issues

9. The Order was made by the Council relying on the occurrence of events specified in Section 53(3)(c)(iii) of the 1981 Act. The main issue is therefore whether the evidence discovered by the Council, when considered with all other relevant available evidence, is sufficient to show that, on the balance of probability, there is no public right of way along Footpath No 147 in the Community of Mynyddislwyn as shown in the definitive map and statement between the points marked as A and B on the Order map.
10. When considering cases where the removal of rights from the definitive map and statement is proposed by an order, paragraph 5.51 of the Guidance⁴ recently issued by the Welsh Government advises that *"The evidence needed to remove what is*

² I have noted that in a standard letter to the Planning Inspectorate the Council included a statement only applicable in the case of a diversion under Section 119 of the Highways Act 1980. However I accept that was also a mistake.

³ 28 February 1983

⁴ The Guidance to Local Authorities on Public Rights of Way (October 2016) sets out the Welsh Government's policy on public rights of way and its view of the law. It replaces previous guidance found in Welsh Office Circulars 45/90 and 5/93.

shown as a public right from such an authoritative record as the Definitive Map and Statement ... will need to fulfil certain stringent requirements."

11. The requirements are that (a) the evidence must be new. An order to remove a right of way cannot be founded simply on a re-examination of evidence known at the time the definitive map was surveyed and made; (b) the evidence must be of sufficient substance to displace the presumption that the definitive map is correct; (c) the evidence must be cogent, and (d) there must be positive evidence of any erroneous recording.
12. Once prepared, and unless and until subsequently revised, the definitive map and statement is regarded as conclusive evidence of the existence, at the relevant date⁵, of the public rights of way it shows. Therefore the deletion of a right of way from this record requires sufficient evidence to show that no right of way existed as at the relevant date of the definitive map on which the way was first shown.
13. The footpath at issue here was first recorded on the definitive map and statement for the former County of Monmouthshire with a relevant date of 1 July 1952⁶. The central question is therefore whether or not it was included in error at that time.
14. The recent Guidance also makes clear that it will be for those who contend that there is no right of way to prove that the map requires modification due to the discovery of evidence which, when considered with all other relevant evidence, shows that the right of way should be deleted. In short, it is not for the objectors to prove that the definitive map is right.
15. In this case both the Council and the applicant submitted that evidence which meets the criteria set out in the new Guidance has indeed been brought forward to indicate a mistake was made when the way was first recorded.
16. In the written submissions and during the inquiry, reference was made by the objectors to 'the Trevelyan Test', most notably in its criticism of the Council's decision-making process and the report which underpinned the decision to make the Order.
17. Mr Bland drew to my attention the advice of Lord Phillips in the case of *Trevelyan v Secretary of State for the Environment, Transport and the Regions* 23 February 2001 *The Times Law Reports* (the *Trevelyan* case): "... evidence of some substance must be put into the balance if it is to outweigh the initial presumption that the right of way exists."
18. I fully recognise that this is what is required if I am to confirm the Order. However it is helpful to put this into the context of the sentences (in paragraph 38) which precede this. Lord Phillips states: *"Where the Secretary of State or an Inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial assumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities."*

⁵ Of the definitive map

⁶ In relation to the submission by Ms Gallimore on this point, I am satisfied that the relevant date in this case is 1 July 1952. The relevant date is the date on which the rights of way recorded are confirmed as being in existence. This date does not alter during the stages of preparation of the definitive map. Other dates mentioned at the inquiry for the draft, provisional and final definitive maps were publication dates.

19. The Order route is currently recorded on the definitive map as a footpath and, according to the advice of Lord Phillips in the *Trevelyan* case, that fact requires me to put a significant amount of weight in favour of that status into the balance at the outset. Although the presumption that the definitive map is correct is a rebuttable one, in analysing the evidence I am acutely aware of Lord Phillips' observation (continuing paragraph 38) that "*Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.*"
20. In his closing submissions, Mr Bland referred also to the words of Lord Denning MR in the 1975 case of *R v Secretary of State for the Environment*, ex parte Hood QB 891 quoted by Lord Phillips in *Trevelyan* (at paragraph 33): "*The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living. Such evidence might well have been lost or forgotten by 1975*".
21. That statement is as true in 2016 as it was in 1975 if not more so. However I have approached the evidence in this case with an open mind, taking account of the recently updated statutory guidance and relevant case-law, including that raised by the parties.

Reasons

Background

22. This Order was made in response to an application to delete the footpath from the definitive map and statement from Mr Thomas-Davies. This application had been prompted by discussions with the Council and the other affected landowners, Mr and Mrs Down, concerning the possibility of a diversion of Footpath 147 at Tyle Gwyn⁷. It is the applicant's earnest belief that the route marked on the definitive map as Footpath 147 is not and has never been a public right of way. Consequently he has chosen to pursue this by challenging its status, initially by requesting the Council make the Order and now by seeking its confirmation.
23. The Council reached its decision following consideration of a report on 15 September 2014 followed by a visit to the site and a final decision on 8 October 2014. The objectors strongly criticised elements of this report and submitted that the decision was not soundly based because of the failure to offer sufficient guidance to Council Members on the relevant law and practice. However, the process by which the Order came to be made is not a matter on which I can comment. At this stage the Order will stand or fall on the basis of sufficiency of the evidence to support the deletion of Footpath 147.
24. As I have set out above, the question is whether or not the inclusion of Footpath 147 on the definitive map for the former County of Monmouthshire was in error. The answer requires a consideration of whether there was, on 1 July 1952, a public right of way on foot over the route which may involve evidence dating from both before and after that period. To put the 'new' evidence into context, I propose to start by setting out the information provided in relation to the preparation of the definitive map and statement by the former Monmouthshire County Council (MCC).

⁷ It is my understanding that the applicant does not oppose diversion of the route in principle but that is not at issue here.

The first definitive record

25. In addition to the overview provided by the Council, the OSS supplied a detailed account of the process and the documents from this period which survive.
26. The National Parks and Access to the Countryside Act 1949 placed a duty on county councils to prepare maps and statements as a definitive record of public rights of way in their area. Guidance was issued by the Ministry of Town and Country Planning in Circular 81/1950; this made reference to a booklet prepared by the Commons, Open Spaces and Footpaths Preservation Society entitled "Survey of Rights of Way" (dated January 1950), copies of which were to be distributed to parish and district councils via the county councils.
27. The minutes of Mynyddislwyn Urban District Council (MUDC) confirm that it had received notification of the intended survey as the minutes of a meeting on 2 May 1950 record it resolving "*that the Surveyor supply the information as soon as possible*".
28. Thereafter minutes of meetings of both MUDC and MCC record activity which eventually led to a report to the latter on 15 January 1952 that the "*Draft Map and Survey had been completed*" and arrangements were being made for copies to be deposited at various locations throughout the county.
29. The completed survey schedule for Mynyddislwyn included 281 paths and ran to 31 pages. Footpath 147 at Wyllie was described as follows: "*Leaves Heolddu Lane at gateway east of Penheolddu, east then south-east skirting Tyla⁸ Gwyn Farm to lane*". In the column headed "Brief reasons for belief that way is public" the survey states "*Right not disputed. 1880 O.S.*"⁹.
30. The production of the draft map and statement was subsequently advertised on 16 December 1952 in the local press (the South Wales Argus) and in the London Gazette and a period of four months allowed for objections and representations to be submitted. In fact MCC advertised the map twice so that the public had until 13 May 1953 to respond.
31. No objection to the inclusion of Footpath 147 is recorded but paths at nearby Castell Cwrw, Pen-y-cwarel and Bedwas Uchaf were challenged. In due course these objections were considered by the Clerk and Deputy Clerk of the Council and the draft map was modified to take account of the resulting changes. This Modified Draft Map was again advertised (on 19 January 1962) and further objections invited.
32. This was followed by a provisional definitive map which reflected the changes proposed by the modified draft. This provisional map was advertised on 17 September 1965. At this stage only persons with an interest in land could register objection to paths included on the map with any objection being heard by the Quarter Sessions.
33. Although records of cases challenged through the Court could not be produced, Footpath 147 clearly remained on the map when production of the final 'Definitive Map and Statement for the County of Monmouthshire' was advertised on 3 November 1967.
34. Although subsequently several reviews of the map took place for some districts, none of these have any impact on the present case.

⁸ Sic

⁹ 'O.S.' is a reference to the Ordnance Survey (OS)

35. Throughout this process the relevant date of the definitive map and statement covering Mynyddislwyn remained 1 July 1952.
36. No evidence has been produced to suggest that the statutory requirements associated with the draft, provisional and final stages of the process of preparing the definitive map and statement in terms of press advertisement, the deposit of documents for inspection and the opportunity to lodge objections were not fulfilled by MCC. Indeed this aspect of the procedure has not been challenged.

New evidence submitted in support of deletion

37. However, both the Council and the applicant drew attention to failings which, it was argued, cast doubt on the veracity of the records underpinning the definitive map.

Quality of the definitive statement

38. Firstly, the Council criticises the quality of the survey document initially produced by MUDC which now forms the definitive statement. The descriptions of each path generally, and especially in case of Footpath 147 are at best described as scant or, to use Mr Llewelyn's word, 'threadbare'. They describe starting and finishing points but vary in the degree of detail of the path between.
39. This led Mr Llewelyn to question whether or not the MUDC surveyor had actually walked the path on the ground as was advocated by the booklet accompanying the 1951 Circular. For example the description for Footpath 147 makes no reference to the buildings at Tyle Gwyn Farm nor to the point at which the path joins the lane. These are important details necessary to define the alignment of the footpath. He argued that this flaw, together with the lack of clarity in the minutes of MUDC meetings, tended to suggest that no proper or competent survey had been undertaken.
40. Responding to this point the objectors submit that the lack of detail is not evidence that the path was not surveyed, nor does it indicate that a mistake was made.
41. I have to agree. The level of detail in definitive statements varies enormously between authorities but paucity of detail cannot in itself contribute to any conclusion that a route is wrongly included. Here it is not suggested that the description of Footpath 147 is incorrect; indeed it tallies with the draft definitive map which was drawn up at the same time as the survey schedule was prepared. I therefore give no credence to the argument that the quality of the statement lends weight to the claim that Footpath 147 was wrongly recorded.

Reasons for belief that the way is public

42. As I noted at paragraph 29 above, the survey noted the reasons for believing Footpath 147 to be a public path were two-fold: "Right not disputed" and "1880 O.S.". This differs from numerous other entries which refer only to the relevant OS map. Some record "Ancient right of way", some "Undisputed" and many note maintenance or repairs "by L.A."¹⁰ Several record more detail about specific events such as "attempts to close, but other farmers insist on way being kept open" or similar.
43. For the Council Mr Llewelyn argued that there is no evidence to indicate where the comment "Right not disputed" came from, who made that judgement or whether it arose as a result from discussion with the landowner. He contrasted the words used

¹⁰ Local Authority

with those for Footpath 38: "Admitted by Colliery Co", this being a positive admission of the right of way as opposed to the negative statement for Footpath 147.

44. The objectors made the point that the statement "Rights not disputed" must have had some basis in fact, otherwise the entry would simply refer to the OS map, as in the case of roughly one third of the 281 paths listed.
45. Again, I find myself in agreement with this analysis. I accept there is no evidence to support this statement as the truth but neither is there any evidence to show it was untrue at the time. The applicant submits that there are reasons why the then landowner, his father, did not dispute the recording of Footpath 147 (and I shall address this below), but there is nothing before me to show that the inclusion of this path was challenged at any time during the various stages of preparation leading to final publication of the definitive map in 1967.
46. The second item listed as a reason for believing the path to be public in 1952 was its depiction on the OS map of 1880.
47. Before considering the submissions made by Mr Thomas-Davies and the Council, I put this into the context of the guidance offered in the 1950 booklet. In paragraph 2 advising on "HOW to PREPARE for a RIGHTS OF WAY MAP", sub-paragraph (iii) states:
- "If any of the earlier Ordnance maps are available they should be examined and compared with the latest edition. It will often be found that tracks which used to exist and are described by old witnesses as public are no longer in use and are not shown on the later edition, but if a path has once become public, mere disuse does not extinguish the public right. Ordnance maps do not distinguish between public and private paths, but mark all visible tracks. Where they describe a path as "BR" the surveyors found a path apparently used as a bridleway; or if "FP" as a footpath; but the use of such letters does not necessarily mean that such paths are public, nor does the omission of the letters signify that they are not public.*
- By consulting the maps referred to, much information will be gained as to the location and antiquity of many tracks."*
48. The 1880 25" to one mile map shows the Order route as a track leading from point A on Heolddu Lane across fields to a point to the west of the farm buildings where it enters the farm yard. The OS shows tracks within the farm enclosure including one which continues broadly along the line of the Order route as far as a building referred to by Mr Thomas-Davies as 'the old dairy'. From here there is a narrow enclosure leading south-westwards to join Managers Lane¹¹ but there is no track of path of any kind shown directly southwards from the old dairy towards point B in the lane on the definitive line.
49. Nowhere along this track, either across the fields or around the farm, does the OS use the annotations "BR" or "FP". Neither is the track labelled on the subsequent editions published between 1900-1904 or 1919-1921 but on the 1965 1:2500 map it is marked as "Track" or "Tk" on the 1:10,560 map.
50. Mr Thomas-Davies submitted that Footpath 147 is just that - a farm track first created for the ordinary business of the farm rather than being a footpath. He relies on advice provided to him by the Ordnance Survey in a letter dated 14 November 2012. This letter explains that:

¹¹ This forms part of the old road, explained at paragraph 62 below.

"... a surveyor would have visited the site and observed that the area in question was a track rather than a footpath and recorded it as such. ... A footpath would usually be associated with a path that is open to the public to walk and a track would represent a path without a specific use. All our mapping does carry a disclaimer that these are not necessarily rights of way."

51. Consequently Mr Thomas-Davies submits that registration of Footpath 147 in the definitive statement was flawed insofar as its reliance on the 1880 OS map was "the product of a misapplication of the information to be found on the Ordnance Survey Map".
52. The Council takes a different view, acknowledging that the OS has never purported to show public rights of way over the paths and tracks it surveyed. Indeed the 1950 booklet also made that clear. Mr Llewelyn went further, submitting that if I were to treat the OS map(s) as neutral evidence, drawing no conclusion from the obvious existence of a track that a public right of way existed over it, then the reference to the 1880 map by the survey schedule could not at the same time offer positive support for the Order route.
53. My interpretation of the many references in the survey schedule to OS maps being the reason for believing paths to be public is that these would have been taken as evidence *"as to the location and antiquity of many tracks"* as advised by the booklet, not necessarily as direct evidence of a public right of way. In the case of the Order route, this was plainly not the only reason for its inclusion; it was accompanied by the additional statement that the right of way was not disputed which implies an additional source of information.
54. Even if Footpath 147 had relied solely on its depiction as a track on the 1880 OS map, as the 1950 booklet points out, that would not have precluded the co-existence of a public right of way over it although it would be no direct evidence of such a right. To that extent I do regard the OS evidence as neutral. Nevertheless, it does show that the track has physically existed on the same alignment since 1880 (at least) although I recognise that there is a question over the route at its southern end.
55. Despite Mr Thomas-Davies' submissions on this point, I do not consider the reference to the 1880 OS map to be evidence that Footpath 147 was wrongly recorded. Indeed reading through the various reasons given for listing the paths in the survey schedule, it becomes apparent that MUDC actively managed the public rights of way in its area in the period leading up to the survey. Steps, bridges, stiles, re-surfacing and culverts are all mentioned as are some previous disputes over the public's rights¹². This leads me to conclude that the information recorded by MUDC is most likely to have been based on a long-standing knowledge of paths in the area. That is not to assume that mistakes could not have been made but simply that it seems improbable that the survey schedule was compiled without care and attention or was without foundation.

The definitive route at the junction with Managers Lane

56. The map which is regarded by the Council as the definitive record is at a scale of 1:10,560 (6" to one mile). The sheet covering Wyllie was published by the OS in 1965. Black dashes superimposed on the underlying track shown by the OS record the definitive line of Footpath 147. Once it enters the farm complex, the dashes appear to the west of the buildings and to the east of the old dairy. At this point, the dashes stop. This is easily put down to there being insufficient space for an additional

¹² For example, Footpath 212 which notes "Repaired by L.A. Attempts made to close path by Colliery Co. for extension of tipping, successfully disputed by Council. Path crosses land of four estates; admitted by 3 out of 4. 1880 O.S."

dash to connect with the road (and poor drafting). Given that the statement clearly indicates the footpath reaches the lane, there is no doubt that the right of way does continue beyond the last dash near the old dairy; the question is on what line?

57. I will firstly express my doubts over whether this map is truly the legal record, especially since it carried no certification. In my experience it has the traits of a working map, produced for practical reasons to keep track of changes made by definitive map modification orders until such time as a new consolidated map can be prepared under the procedure set out in the 1981 Act.
58. Examination of the provisional map at the inquiry revealed the key had initially identified the map as the "Provisional Map for the County of Monmouth", yet the word "Provisional" had been struck through and the word "Definitive" added in its place. It seems to me most likely that, as happened in authorities elsewhere, the map which had been through the provisional stage without alteration was simply re-labelled as the final version, thus ensuring there was no room for error due to re-drafting. In the circumstances, I am inclined to accord more weight to the line shown on what has been called the "Provisional Map" than might otherwise have been the case.
59. This map shows Footpath 147 marked in pink ink with a continuous line following the same track from Heolddu Lane to Tyle Gwyn. Once it reaches the farm, the line passes to the west of the farm buildings, then to the east of the old dairy and on to join the lane at point B, broadly (but not directly) opposite the path marked on the OS base map on the south side of the lane¹³. The difficulty with this is that once past the old dairy building, the line of the path passes through a low stone wall with no stile or gate then drops down to the lane descending a bank with a gradient of around 1:4 – 1:5. There is no sign of any steps having been in place here. The same route appears on the draft map marked in blue.
60. In his closing statement, Mr Thomas-Davies submitted that this uncertainty around the junction of Footpath 147 with Managers Lane adds further to his case. He contends that the poor job done in drafting the definitive map must lead to the conclusion that the information it shows is unreliable.
61. I have some sympathy with this argument, at least insofar as the accuracy of the definitive map is concerned and in particular with respect to the southern end of Footpath 147. Whilst there is no unsurmountable barrier that would prevent the definitive line being used, neither is there any obvious route for it to take to point B south of the old dairy, either on the ground or on any OS map.
62. There is, however, the route of the old road which extends from the old dairy to a point south west of B, higher up Managers Lane.
63. During the course of its investigations, the OSS discovered that the lane was shown on a different alignment on the OS 1" to 1 mile map of 1833 and the 1813 OS drawing which preceded it. This same route can be seen on the Tithe Map for Mynyddislwyn dated 1841 where the accompanying apportionment identifies this lane (as parcels 975 and 981) as a "Road"¹⁴.
64. By 1859 when plans were deposited for the nearby London and North Western Railway, Managers Lane was identified as a "Parish Road" in the ownership of the "Surveyor of Highways" and marked as leading "To Caerphilly" although the extent of

¹³ This is not the line of Footpath 213 as marked on either the definitive or provisional maps but does tally with the path in existence on the ground on the day of my site visit. (This anomaly lies on the Estate of Mr Thomas-Davies' late father.)

¹⁴ "Roads" were distinguished from "occupation roads" and arguably may be presumed to have been public ways.

the plan does not reveal whether the lane continued along the old alignment or had been diverted to its present more direct route. Certainly by 1880 the OS surveyor recorded the present route, with remnants of the old road still plotted, leading to and from an enlarged Tyle Gwyn, so that the farmstead had effectively been by-passed.

65. Thus it seems that at some time between 1841 and 1880 the route of what appears to have been a public road was diverted. Yet despite extensive searching in the relevant archives, the OSS had not found any order made under the Highway Act 1835 to formalise this.
66. Mr Thomas-Davies submitted that his great-grandfather (who acquired ownership of Tyle Gwyn in 1865) was not the type of man to make such a change illegally. Evidence from Who's Who in Wales in 1921 showed that in later life Edmund Thomas was a well-respected JP and Colliery Proprietor.
67. Mr Llewellyn urged me not to make any finding on the status of the old road and I am not inclined to do so since I recognise that the full facts are not necessarily before me in relation to this particular route. I note that the highway authority recently confirmed that Managers Lane, on its present line, is a publicly maintainable highway although the extent of the public's rights over it was not stated. No public rights over the old road are recorded, either in the highway authority's 'list of streets' or the definitive map (other than the part of the Order route which coincides with it).
68. Whether or not the correct procedures were followed to divert the old road in the middle of the nineteenth century, the fact remains that the re-alignment happened in practice. Since there is no evidence to indicate whether Footpath 147 came into existence before or after this took place, it is not possible to draw any conclusions as to how the road diversion may have affected the path. However it seems to have been physically possible to walk from the old dairy to Managers Lane along the old road.
69. In summary, I give some weight to the uncertainty over the accuracy of the definitive line between the old road and the present line of Managers Lane. Yet without knowledge of the full history of the road diversion and its impact on Footpath 147, I am reluctant to regard this as evidence that the path as a whole was wrongly recorded as a public right of way rather than simply an error in drafting its line on the map.

Statutory declarations

70. The substantive evidence put forward by the applicant in support of deletion took the form of statutory declarations from 10 people (including himself), signed statements from a further 9 people and letters from 3 people offering evidence to demonstrate there was no public right of way along Footpath 147.
71. This includes evidence from current owners Mr and Mrs Down and Mr and Mrs Tiley (who moved to Tyle Gwyn in 2004 and 2003 respectively), Mr and Mrs Marsh¹⁵ (who moved to Tyle Gwyn in 1989), current farm tenants Mr D Coonick and Mr J Coonick (who took the farm tenancy in 1984), Mr and Mrs Fletcher (who have lived nearby by since 1967), and Cllr Jones (who has lived in the area since the early 1980s).
72. The clear message from these declarations and statements is that none of these people believed there to be a public right of way along Footpath 147, and/or they were not aware of anyone using the route from the late 1960s to the present. Whilst this is challenged by the objectors (and Mr Dudley in particular), it offers little assistance to the question I must address: was a mistake made in 1952.

¹⁵ Mrs Marsh was born in the area in 1957 and has no knowledge of Footpath 147

73. Statutory declarations and statements are submitted from three members of the Watkins family: Mr S Watkins JP, Mr P Watkins and Mrs J Gibbons. All three grew up at Tyle Gwyn after their parents moved there in 1938-1940¹⁶. Their father, Mr Matthew Watkins farmed there until his death in 1983 and his wife continued the tenancy until 1988. Their statements indicate that Mrs J Gibbons lived at Tyle Gwyn until 1960, Mr S Watkins left in 1965 and Mr P Watkins in 1975. Each states they were never aware of a public footpath across the land or ever saw members of the public walking the route of Footpath 147.
74. Mr S Watkins states that it was only ever a farm track. He also comments that the path was unlikely to have been used by workers heading for the nearby colliery as the house at Tyle Gwyn was occupied by the colliery manager and *"in these days of equality, it may be thought an oddity but (he was) quite certain that the manager of a colliery would never have permitted working men and colliers to pass so close to his house."*¹⁷
75. On this point it would have been useful to question Mr Watkins. I find his comment curious given that he lived at the farm for 23 years (1942-1965) during a period in which colliery managers were still residing at Tyle Gwyn as tenants.
76. Indeed in his statutory declaration, Mr Beddoe states that as his father was appointed Under-Manager for Wyllie Colliery in 1961 the family moved to a house backing onto Managers Lane (which he knew as "the Back Lane"). In 1962 the family moved to Tyle Gwyn when his father was promoted and left there in 1965 to go to a new colliery house. As a child he recalls playing with the children at Tyle Gwyn – presumably the Watkins family. He has lived locally ever since and from 1979 until 1998, as police dog handler, he exercised dogs in the lane passing Tyle Gwyn on a daily basis. He confirmed that he never saw or was otherwise aware of people using Footpath 147. In addition, a statement from his wife (now deceased) explained she had lived in Wyllie all her life; she knew of villagers walking via a stile onto the old road to collect milk from Tyle Gwyn Farm but had no knowledge of Footpath 147.
77. The evidence of the Watkins family is in conflict with that of Mr Peart who described using the route (from the age of 4) with his grandfather who was walking to work at the colliery. Despite Mr Llewelyn's submissions on this point, I am prepared to believe that he did so, but I found his description of the precise route used between the Tyle Gwyn farmyard and Managers Lane to be rather vague.
78. However in other respects Mr Peart seems to have an unusually clear memory of his early use of the route in the mid-1940s and 1950s. He described a small kissing gate alongside a field gate at the Heolddu Lane end of the path (which has not been corroborated by any other witness) and, at the inquiry, appeared to describe the route entering the farmyard, turning past the front of what would have been the colliery manager's residence and down the line of the present access drive, mentioning a small handgate onto Managers Lane. This differed from his written statement which suggested the route followed the line of the old road past the old dairy¹⁸.
79. Mr Peart stated that in later life he became friendly with Mr Matthew Watkins and believed that *"he never had any problem with people using the public path across the land, whether they were miners or other members of the public"*. Yet other witnesses from this period say the path was never used.

¹⁶ The dates differ on each statement but I attach little weight to the differences.

¹⁷ Mr Watkins uses the same wording as Mr Ruff. This raises an element of doubt over the veracity of these statements.

¹⁸ Mrs Holland lived in the area as a child between 1946 and 1965. She recalled an old iron gate on the line of the old road here but never walked this route herself. Neither did she use the Order route although she said was aware of it.

80. In particular, the statutory declarations of Mr and Mrs Ruff state that neither saw the route being used by walkers. Mr Ruff was born in 1922 at nearby Heolddu Farm and lived there all his life, marrying in 1957. He was well aware of other public footpaths in the area and was familiar with the land surrounding his own farm including Tyle Gwyn. He was of the firm opinion that Footpath 147 had been wrongly designated as a public right of way. Mrs Ruff could see the route from their farm house and stated she had never seen anyone use what they both believed to be a farm track, other than relatives at Bedwas Uchaf who used it to get to chapel in Wyllie. This was with the consent of the owner of Tyle Gwyn Farm.
81. Since it is not clear in which period this permitted use took place, or precisely who authorised it, I cannot establish whether there is any possibility it might have been mistaken as use by the public during the period when the definitive map was being compiled.
82. Mr Ruff makes a comment very similar to Mr S Watkins about the likelihood of the colliery manager permitting workers to walk past his house. In the absence of any evidence to substantiate this assertion, I place little weight on this argument, particularly as the definitive line of Footpath 147 does not intrude on the privacy of Tyle Gwyn House in any substantive way.
83. Nevertheless I do give weight to the Ruff's evidence, and to a lesser extent to that of Mr Symons who lived at another farm in the area and whose knowledge extends back to the 1930s, his view also being that there has never been a public right of way along the Order route. I give less weight to the evidence of Mr Oliver who had permission to shoot vermin on Tyle Gwyn land; he does not give any dates for his association with the farm and I cannot establish whether this was before, around or long after 1952.
84. In summary, it is difficult to reconcile the opposing views of Mr M Watkins' knowledge of and attitude to Footpath 147.
85. Mr and Mrs Ruff's evidence (and to a lesser extent that of Mr Symons) supports the applicant's case that the route in question was not in use as a public path in the period leading up to the preparation of the definitive map and statement. Likewise members of the Watkins family state they do not recall seeing people walking across the farm land and through the farm yard between the 1940s and 1960s. Mr Llewelyn submitted that the Watkins knew the land best and that I should therefore prefer their evidence over all others. However none of these people were available to answer questions which might have clarified aspects of their evidence so as to present a fuller picture that might be relied upon.
86. Whilst Mr Peart gave his evidence verbally and submitted to cross-examination, some aspects of his recollections appeared more reliable than others. I have also considered Mr Llewelyn's submission that Mr Peart may be considered to have used the path with permission on account of his friendship with Mr Watkins but I reject this; Mr Peart's evidence was that they became friends at a later date, not during his use as a child with his grandfather.
87. Yet, it is not necessary for the objectors to make a case sufficient to demonstrate a public right of way did exist, but Mr Peart's evidence does raise doubts over the reliability of drawing a conclusion that simply because several witnesses did not see members of the public using Footpath 147 that they did not do so, or that a public right of way did not exist even if little used.

88. However before reaching my final conclusions I will address the evidence provided by the applicant of his own recollections and family research which, as Mr Llewelyn acknowledged, provide a contextual background.

The applicant's family history

89. Tyle Gwyn has been owned by the applicant's family since 1865. Mr Thomas-Davies was able to give a fascinating account of the people associated with the property since then including farm tenants and occupiers as well as relatives. He first visited Tyle Gwyn with his father in 1945 and came to know Mr and Mrs Watkins, then the farm tenants.
90. His grand-father died in 1955 but from 1945 until his father's death in 1984, Mr Thomas-Davies was often involved in his father's business at the farm. He joined the Navy from 1952 until 1954 then attended university but visited Tyle Gwyn often.
91. Mr Thomas-Davies' father initially trained as a lawyer and was a practising solicitor until he was called up on the outbreak of hostilities in 1939. After the war, he chose not to continue in the legal profession but instead acquired a small farm in Sussex with which he was primarily occupied for the remainder of his life.
92. Mr Thomas-Davies knew Mr Matthew Watkins to be a hard-working and diligent man, as was his own father. He has no direct knowledge of how either man may have reacted to a notice in the local press to the effect that a definitive map and statement was being prepared or even if they were aware of the process. However he submits that since they would have been fully occupied in their day to day lives as working farmers it would not be surprising if they had not known that Footpath 147 was proposed to be recorded.
93. During discussions about the farm business over many years, he does not recall ever having spoken to his father explicitly about Footpath 147 but earnestly believes that the latter was not aware of any public right of way across the property. Mr Thomas-Davies himself did not become aware that it was shown on the definitive map until 1995. From discussions with the Watkins family members, he is certain that Mr Matthew Watkins was not aware of the footpath either.
94. In response to his evidence the objectors point to the fact that Mr Thomas-Davies' father was legally trained and would have been aware of the significance of formal notices in the local press. These were published on several occasions at each of the draft, modified and provisional stages with lengthy periods for the receipt of objections. If advertisements were not spotted in the South Wales Argus for the Mynyddislwyn area, he would have been aware of the process taking place in England and Wales from the local press in Sussex. It is inconceivable that a man with his training would have been unaware of the implications of failing to check the draft map to see how his land at Tyle Gwyn would be affected.
95. Mr Bland submitted that it also seems unlikely that Mr Watkins could have failed to hear about the process from friends in agricultural circles, especially when there is evidence to show that routes over farms in the neighbourhood were challenged and in some cases the map modified.
96. It seems to me there are two possible scenarios here: either Messrs Thomas-Davies (senior) and/or Watkins were not aware of the process at all or they knew of it but chose not to object to the inclusion of Footpath 147.
97. From initial notice of the draft map published on 16 December 1952 through to the notice of the provisional map on 17 September 1965 and the final map on 3 December

1967 some 15 years elapsed. Although it remains a possibility that neither man became aware of the definitive map process, in the circumstances I consider it more likely than not that they did know.

98. Consequently the logical conclusion is that if they knew of the process, then they took the decision not to register an objection to Footpath 147.
99. It is possible that, if the path was rarely used in the 1950s as some witnesses attest, neither the owner nor occupier(s) of Tyle Gwyn farm were alerted to the possibility that anyone might claim a public right of way across the property and therefore failed to check. Again, with Mr Thomas-Davies' background as a solicitor the odds weigh against him failing to make a precautionary check.
100. Mr Llewelyn submitted that not everyone in the locality would have read the South Wales Argus, that Mr Thomas-Davies lived away from the area, and that Mr Watkins had not grown up in the local community so may not have socialised with his farming neighbours.
101. I accept that may be true but this is all speculation in the absence of absolute fact. The fact remains that the survey schedule drawn up in the early 1950s relied on more than that Footpath 147 was shown on the OS map of 1880; it noted that the rights over the route were not disputed. There is no evidence to show this was based on any conversation with either the owner or occupier at the time but it was not a standard phrase attributed to all the entries in the schedule. The most obvious conclusion is that it was based on recognition by the owner that such a right did exist.
102. I fully accept that other explanations are possible but, given the information available, I consider this the most likely when judged on a balance of probability. I accept that it is entirely possible that use by the public had dwindled by the 1950s and that the Watkins family, the Ruff's and several other witnesses are correct in saying that they never saw people walking this footpath. I also recognise the applicant's sincere conviction that this was never a public path and that, if he was ever aware of it his father never spoke of a public right of way. However, to quote from the 1950s advisory booklet: *"if a path has once become public, mere disuse does not extinguish the public right."*
103. I recognise that the ambiguity as to where exactly Footpath 147 emerges onto Managers Lane weighs against the accuracy of the definitive map but the accompanying definitive statement explicitly states that the path reaches the lane. It could be that further research into the history of the re-alignment of Managers Lane may shed light on the precise route of Footpath 147 but such evidence is not available to this inquiry.

Summary

104. Returning to the tests set out in the recently published Guidance, it is firstly necessary to supply new information that was not considered in 1952 when the map was being compiled. I have no difficulty in accepting that the relevant statutory declarations, statements and letters offer new evidence.
105. For the reasons I have given in paragraph 53 and 54 above, I do not consider the statement from the OS introduces anything that would not have been known at the time.
106. Secondly the evidence must be of sufficient substance to displace the presumption that the definitive map is correct and thirdly it must be cogent.

107. I recognise the efforts to which Mr Thomas-Davies has gone to collect the evidence from his witnesses but, inevitably, without the opportunity to cross-examine these people so as to clarify various aspects of their statements, the weight I can attach is lessened. Having analysed this evidence I place most weight on the recollections of Mr and Mrs Ruff and Mr Thomas-Davies himself and to a lesser degree on Mr Symons, and the Watkins family members and Mr Beddoes who were all children during the most relevant period.
108. However, when balanced against the initial presumption that the definitive map correctly records Footpath 147 as a public path and my examination of the survey schedule, I am not satisfied that this new evidence is sufficient to tip the scales in favour of a substantive error. Neither am I persuaded that there is positive evidence that shows a mistake was made in recording Footpath 147, even in respect of the anomaly at its southern end.
109. Although my conclusion is without prejudice to any further submissions which may arise if further evidence comes to light, most particularly in relation to the diversion of the old Managers Lane, I find that the evidence before me is not sufficient to support the deletion of Footpath 147 from the definitive map and statement.

Conclusion

110. Having regard to the above and all other matters raised at the inquiry and in the written representations, I conclude that the Order should not be confirmed.

Formal Decision

111. I do not confirm the Order.

Sue Arnott

Inspector

APPEARANCES

In support of the Order

Mr P Llewelyn Of Counsel, instructed by Caerphilly County Borough Council

Who called:

June Piper Countryside and Rights of Way Support Officer for Rights of Way;
Caerphilly County Borough Council

Also supporting the Order

Landowners

Mr J A Thomas-Davies

Mr A Down

Opposing the Order

Mr P Bland Representing Islwyn Ramblers and the Open Spaces Society

Who called

Mr A Dudley

Mr D Evans

Ms E Holland

Mr M Peart

Ms M S Thomas

DOCUMENTS

1. Copies of the statutory objections
2. Caerphilly CBC's Statement of Grounds for seeking confirmation of the Order together with bundle of inquiry documents and comments on the objections
3. Proof of evidence of June Piper
4. Statement of case of John Thomas-Davies dated 29 July 2016
5. Witness statement of Mr John Thomas-Davies dated 28 September 2016
6. Statement of Case on behalf of the Open Spaces Society together with accompanying documents labelled OSS-01 to OSS-23
7. Witness statements of Mr A Dudley, Mr D Evans, Ms E Holland, Mr K O'Hagan, Mr M Parker, Mr M Peart, Ms M Thomas
8. Letters from The Open Spaces Society and The Ramblers authorising Mr Bland to act on behalf of both societies

Submitted at the inquiry

By Caerphilly CBC

9. Press notice of inquiry
10. Copy of the tithe apportionment for the Parish of Mynyddisllwyn dated 22 April 1839
11. Copies of plans referred to as the 'Land Agent Maps'

By the Mr Bland

12. Revised document list and additional documents OSS-01A and OSS-24 to OSS-37
13. OSS Comments on the 6 'Land Agent Maps'
14. Extract from Who's Who in Wales 1920
15. Copies of census data for Mynyddisllwyn in 1861, 1871, 1901 and 1911
16. Extract from 'The Big Pathwatch – the State of Our Paths' published by the Ramblers
17. Statistical data concerning the South Wales Argus
18. Closing statement of the Open Spaces Society and Ramblers' Association

By Mr Thomas-Davies

19. Statement of Mr J Thomas-Davies dated 21 October 2016
20. Statement of Mr J Thomas-Davies dated 24 October 2016
21. Closing statement of Mr J Thomas-Davies and supplementary comments

By other parties

22. Statement of Ms K Gallimore received 26 October 2016