



Report to the Secretary of State for Environment, Food and Rural Affairs

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email: enquiries@pins.gsi.
gov.uk

by Heidi Cruickshank BSc MSc MIPROW

an Inspector appointed by the Secretary of State
for Environment, Food and Rural Affairs

Date: 13 November
2007

WILDLIFE AND COUNTRYSIDE ACT 1981

REPORT INTO AN APPEAL BY

MR A GERRARD ON BEHALF OF

THE TRAIL RIDERS FELLOWSHIP

AGAINST THE DECISION OF

BUCKINGHAMSHIRE COUNTY COUNCIL

NOT TO MAKE AN ORDER UNDER SECTION 53(2)

IN RESPECT OF THE UPGRADE OF PUBLIC BRIDLEWAYS NOS. 10, EAST CLAYDON,

19 AND 20 MIDDLE CLAYDON, 33, GRENDON UNDERWOOD AND 42, QUANTON

(KNOWN AS THREE POINTS LANE)

TO BYWAY OPEN TO ALL TRAFFIC

Case Details

- This appeal is made by Mr A Gerrard on behalf of the Trail Riders Fellowship under Schedule 14, Paragraph 4(1) of the Wildlife and Countryside Act 1981 against the decision of Buckinghamshire County Council not to make a modification order under section 53(2) of that Act.
- The application dated 12 July 2003 was refused by a letter dated 11 December 2006.
- The appellant claims that the route currently recorded as Bridleways Nos. 10, East Claydon, 19 and 20 Middle Claydon, 33, Grendon Underwood and 42, Quainton (known as Three Points Lane) should be recorded with the status of byway open to all traffic.

Recommendation: I recommend that the appeal is dismissed.

Preliminary Matters

1. I have been appointed to report to the Secretary of State for Environment, Food and Rural Affairs on the above mentioned appeal made in accordance with Paragraph 4 of Schedule 14 to the Wildlife and Countryside Act 1981 ("the 1981 Act").
2. All the evidence in this case is documentary. I have not visited the site but am satisfied that I can make a recommendation without the need to do so.
3. This report consists of the material points made in the submissions, an assessment of the evidence against the relevant criteria and my conclusions and recommendation.

Description of the Route

4. The application relates to a route running generally south-south-west from the road running west from Botolph Claydon and passing through Runt's Wood, before turning generally north-westerly, on the edge of Greatsea Wood and Romer Wood, and then north to finish south-west of Knowhill Farm¹, at the edge of Sheephouse Wood. Beyond this point a bridleway, which has not been claimed, and then a highway lead back to the road from Botolph Claydon, near Catherine Farm. From the north of Runt's Wood a short spur leads south-south-east to Coppice Lowhill Farm. The route is currently recorded as a bridleway with different reference numbers as it passes through four parishes.
5. The bridleway is metalled from the road to Coppice Lowhill Farm and then surfaced with planings through Runt's Wood, crossing a field with rough surfacing and then an unsurfaced field. From Romer Wood it is surfaced with planings. There are four gates according to the plan attached to the Buckinghamshire County Council ("the County Council") committee report.

The Case for the Appellant

6. The County Council have looked at each piece of evidence in isolation and then rejected each part as not conclusive rather than making a decision based on the balance of probabilities as required. Appropriate weight has not been given to the documentary evidence and the case of *Commission for New Towns v JJ*

¹ Shown on some maps as 'Knowhill Farm'

- Gallagher Ltd, 2002* shows that whilst each piece of evidence must initially be considered on its own, it must also be assessed in the light of other aspects.
7. The annotation as 'Three Points Lane' on Bryant's map of Buckinghamshire is indicative of it being a carriageway.
 8. The indication on Jeffrey's County Map as an inclosed road that has existed for over 300 years is indicative of a carriageway.
 9. It was said in the case of *Kent County Council v Loughlin and others, 1975* that tithe maps were of great value in showing roads.
 10. The descriptions used during the drawing up of the Definitive Map and Statement of 'carriage road used as bridleway' and 'road used mainly as a footpath' strongly suggest vehicular rights.
 11. The route is a metalled or surfaced track which is indicative of a carriageway and, as an Unclassified County Road ("UCR"), it was probably metalled at public expense. Its inclusion as a UCR on the List of Streets provides strong evidence that, on the balance of probabilities, the route was vehicular. This is supported by the Trail Riders Fellowship ("the TRF") report on UCRs.
 12. Although part of the route has been diverted this does not preclude the existence of higher rights on either the pre- or post-diverted route, depending on the reasons for the diversion.
 13. At the time of the application motorised user evidence was not considered as it was 'unlawful' and so the applicant produced only evidence of his own use, however, the law has altered following *Bakewell Management Limited v Brandwood and others, 2004* and there is more evidence of motorised use that was not included in the original application.
 14. It is not necessary to prove that the route should be a byway open to all traffic ("BOAT") as the assertion only needs to be reasonably alleged. The application contains very strong hints that the route should be recorded as a BOAT and the County Council should make an Order as there is no evidence to suggest that it is not a BOAT. A case has been made for subsisting vehicular rights and so an order should be made so that the matter can be properly tested at Inquiry.

The Case for Buckinghamshire County Council

15. The County Council has considered the evidence as a whole, giving each piece its appropriate weight, and reached a decision on the balance of probabilities. Case law and Inspectors' decisions have been considered in reaching the decision.
16. The County Maps of Jeffreys and Bryant provide evidence of the existence of a route but not of its status; the representation is based upon the opinion of the surveyor and/or local people. The naming of a route does not indicate anything about its status.
17. It is the view of Professor Kain, an expert on tithe maps, that routes were shown to indicate boundaries and were incidental to the purpose of the map.

The route is marked on the Middle Claydon tithe map but there is nothing to indicate status.

18. The inclusion of a route on the Unclassified County Road Register ("UCRR") and List of Streets means that *prima facie* vehicular rights may exist but investigation may reveal that none exist. This means that routes are publicly maintainable but does not necessarily mean that they are vehicular. Where a route is also recorded on the Definitive Map and Statement as a footpath or bridleway the County Council has taken the view since 1978 that maintenance should be to that status.
19. The presence of metalling on the route to Coppice Lowhill Farm does not provide evidence of carriageway status or that, as a UCR, the metalling was done at public expense. The 1950s parish survey sheet states that this part of the route, Bridleway No. 10, East Claydon, was maintained by 'The Four Claydons Estate Ltd.' Sections of the route have more recently been surfaced with planings by the County Council to improve the surface for horse riders. The physical characteristics of the route are not relevant in determining its status.
20. The descriptions '*carriage road used as bridleway*' and '*road used mainly as a footpath*' may indicate the existence of vehicular rights but the status is far from certain.
21. It is accepted that the diversion does not preclude the existence of higher rights on either the pre or post diverted route.
22. Although the appellant was contacted with regard to supplying further user evidence none has been submitted.
23. Should an Order be made in respect of this route it would need to be made under section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 ("the 1981 Act") relying on the discovery of evidence which shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; the appellant is relying on the wrong test by seeking to import the 'reasonable to allege' test from section 53(3)(c)(i) of the 1981 Act.
24. The evidence is not sufficient to indicate that a Definitive Map Modification Order should be made to show the route as a BOAT.

Comments on behalf of the landowners in support of the County Council

25. There are many different references to the description of the route over the years, e.g. carriageway, road, lane, bridleway and footpath; this is not necessarily indicative of the status, as other routes are described as lanes but have the status of footpath. The descriptions '*carriage road used as bridleway*' and '*road used mainly as a footpath*' describe the use, i.e. footpath and bridleway, and this is significant; the use carries most weight in establishing the status. Some sections of the route have been impassable for many years as far as motor vehicles are concerned.

26. A local resident used parts of the route with a motorbike briefly in 2003 but was told that there was no right to do so.
27. The assertions made in the appeal are not reasonably alleged but only indicative. The County Council has correctly assessed the evidence produced and justly refused the original application. The current appeal should also be rejected.

Comments on behalf of the Parish Councils in support of the County Council

28. Middle Claydon Parish Council think that the County Council made the right decision.
29. East Claydon Parish Council do not believe that the grounds put forward by the appellants offer conclusive evidence and have no knowledge of these routes being used by vehicles, other than for access to farms.
30. The appellant suggests that the track through Runt's Wood was probably metalled at public expense; this is correct but it was done at the request of the Ramblers' Association as the use by horses was making it difficult to walk, so this does not support the case.

Conclusions

Introduction

31. In considering the evidence and the submissions, I take account of the relevant part of the 1981 Act and relevant court judgements. References are given (in square brackets) to earlier paragraphs where appropriate.
32. I agree with the County Council that the test to be applied in this case is whether the route subsists on the balance of probabilities and not whether the claim can be reasonably alleged [14 and 23] as it intends to upgrade existing bridleways. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

"(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description."
33. I consider that this is subject to 'Test A' as defined in the case of *R v SSE ex parte Bagshaw and Norton, 1994*: does a right of way subsist on the balance of probabilities? There must be clear evidence in favour of the appellant and no credible evidence to the contrary.
34. Section 66(1) of the 1981 Act gives the definition of a BOAT as:

"A highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used."

35. In May 2006, the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") came into effect and this legislation has the effect of extinguishing unrecorded vehicular rights in certain circumstances. However, in this instance the application to record a BOAT was made prior to the relevant date of 20 January 2005. As a result, extinguishment of any vehicular rights identified as a result of this application are exempt by virtue of section 67(3)(a) of the 2006 Act and so the route could be recorded with the status BOAT.
36. The establishment of public rights at common law requires consideration of three main issues: whether during the relevant period the owner of the land in question had the capacity to dedicate a public right of way; whether there was expressed or implied dedication by the owner; and, whether there is evidence of acceptance of the dedication by the public. The tests must be satisfied is on the balance of probabilities.

Assessment of the evidence

Documentary evidence

37. The 1770 Jeffreys' map indicates a route running generally south-west from the road to the east of Botolph Claydon² and to the west of what appears to be Runt's Wood. Coppice Lowhill Farm seems to be marked as Copstey Hill but no route is shown leading to it on the line of the bridleway marked as ECL/10/5³. Beyond Runt's Wood the route continues on towards a route passing through Great Moor; this section of the route appears to follow a similar alignment to that of the bridleway marked GUN/34/1, although to the east of 'Fine Moor Hill', whilst the recorded bridleway runs to the west of 'Finemerehill House'. 'Nole Hill' is marked in a location that must indicate the current 'Knowlhill Farm' but no route is shown in connection with this property.
38. Nothing can be read from this map except that there was a route in the vicinity of the eastern part of the claimed route [16], however, this was in connection with another route. Although the appellant argues that it was an inclosed road [8] the claimed route as a whole was not shown. The status of the part of the route shown cannot be deduced due to the limitations of the scale of the map and the lack of a key. Although there must have been access to 'Nole Hill' it was not marked and must be presumed not to have been important for the purposes of this map.
39. A route very similar to the claimed route as a whole is shown on the 2" scale drawings for the 1814 OS 1" 1st edition map. From Botolph Claydon the route to Coppice Lowhill Farm is shown in part by pecked lines, suggesting a track through fields, with a short section alongside Runt's Wood hedged, as shown by the solid boundaries. There were a number of gates and the route diverged south-west before reaching the farm, on a route more similar to the diverted footpath ECL/8/2. Other routes were shown in this area, some of which seem to correspond to currently recorded routes.

² Then 'Bottle Claydon'

³ The reference numbers for rights of way are those shown on the map attached to the County Council Report for the Rights of Way Committee, dated 11 December 2006.

40. At the divergence of the routes north of Runt's Wood the continuation is shown by solid lines, suggesting that it was hedged along its length. I believe that the route shown here does correspond to the claimed route, subject to the changes brought about by the diversion in 1990, to which I shall refer later [58].
41. Bryant's map of Buckinghamshire dates from 1825 and shows the route from Botolph Claydon to Coppice Lowhill Farm. The diverging route around 'Rump' Wood is annotated '*Three Points Lane*' to the south-west of the wood where it follows a line similar to that shown by Jeffrey in 1770, although it runs to the west of '*Kinemore Farm*' on an alignment that strongly suggests it relates to the currently recorded bridleway GUN/34/1. Like Jeffrey's map no route is shown leading towards Knowhill Farm, around Balmore and Romer Woods, although the location of the farm is marked; unlike Jeffrey, Bryant indicates the route running north of Knowhill, giving access to the road.
42. The County Council committee report refers to it as being shown in part as a 'lane or bridleway', however, again no key has been provided. The appellant relies upon the naming of the route on this map as indicative of a carriageway [7]. Although this might provide a very small amount of evidence in favour of a claim, in conjunction with other evidence, it is not the claimed route itself that is named, the route as a whole not being indicated. The naming seems to be in connection with the route from the south and then alongside Runt's Wood, however, it is placed at the southern end, which does not suggest that it is meant to apply to the whole of even this section of the claimed route.
43. Whilst I would generally consider that Bryant's map would not assist with regard to status [16] the fact that the route as a whole did physically exist at the time of the survey, as shown by the 1814 OS map, but was not shown on this map, suggests that the parts that were not shown were of less importance and, therefore, less likely to be public. In my opinion Bryant's map does not support the case that the claimed route as a whole was public at that time.
44. The Tithe Commutation Act 1836 (as amended 1837) converted tithes into a fixed money rent and the tithe documents consist of the apportionment, the map and the file, which are concerned with identifying titheable land. Tithe maps have been treated by the courts as good evidence as to whether land was titheable or not, however, they were not made to establish or record rights of way.
45. Only the tithe map for Middle Claydon was available but this does show most of the route; the section from the Botolph Claydon road south to Runt's Wood was not part of the parish, although a line is drawn which seems to indicate the section leading to Coppice Lowhill Farm. It continues on to Knowhill Farm, although from the copy provided it is unclear whether the route leading north was shown. There are at least two points where it is given the same number as the adjoining land and also some bracing showing it to be part of the adjacent landholding, however, the County Council committee report says that the route was not subject to tithe; this might provide some supporting evidence that it was a highway [9], although there are a number of other possible reasons for it being tithe exempt. The weight to be attached to this evidence is light [17].

46. The copy provided of the OS 1:2500 first edition map, circa 1879, is of poor quality, however, it appears that the route to Coppice Lowhill Farm was only shown in part and there do not even seem to be pecked lines marking a track through the fields. The section running to the south-west from the north of Runt's Wood was still bounded by solid lines, suggesting it was hedged, although separated from the eastern section of the route; there were gates at other points along its length. The later 1898 map shows the entire route, with pecked lines indicating tracks at some points, although with some variations: at the points where the 1990 diversion order took effect [58] the 'old' route seems to be overgrown; and, at the point to the north of Runt's Wood the route shown is further to the south-east than in earlier map. The route is annotated Three Points Lane in two locations, with the route north of Knowlhill Farm similarly named. The value of this map is slightly compromised by the fact that additions were apparently made in 1950.
47. The Finance (1909 – 1910) Act 1910 ("the 1910 Act") provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and, broadly speaking, its subsequent sale or other transfer. There was a complex system for calculating the 'assessable site value' of land, which allowed for deductions for the amount by which the gross value would be diminished if the land were sold subject to, among other things, any public rights of way. Routes shown on the base plans which correspond to known public highways, usually vehicular, will normally not be included in the hereditaments, i.e. they will be shown uncoloured and unnumbered.
48. The route is coloured and included within several hereditaments and deductions for public rights of way or user have apparently been made in all but one of the plots. Even if the deductions related to the claimed route this would not support it as a public vehicular route.
49. Reference was made to a sale catalogue and plan affecting land near Finemere Hill House, however, no copy was provided of this and so it is not considered.
50. Under the National Parks and Access to the Countryside Act 1949 the County Council needed to map all rights of way in their area and this led to the production of the Definitive Map and Statement. Buckinghamshire carried out parish surveys in the 1950s and the surveys relating to this route appear to have been carried out in 1951 and 1952. For clarity I note that the Quanton and East Claydon Survey maps have been labelled the wrong way around in the committee report.
51. From Botolph Claydon the section to Coppice Lowhill Farm has been marked and described by East Claydon Parish Council as a 'C.R.B.', that is a '*carriage road used as a bridleway*', leading to the farm. The surface is noted to be maintained by the landlord, The Four Claydons Estate, and the gates in good order. It was said to be '*frequently used by villagers visiting the woods.*' The section to the north-west and west of Runt's Wood was numbered 19 and identified as a bridleway by Middle Claydon Parish Council. Also in this parish another bridleway, numbered 20, was identified from point A, at one end of the claimed route, leading north-east to Knowlhill Farm.

52. Grendon Underwood Parish Council claimed the middle section as a bridleway, numbered 33, with Quainton Parish Council showing part to the south-west of Runt's Wood as a '*Road used mainly as a footpath*' ("C.R.F."). It is referred to as a wide hedged earth and grass track of about 25 feet, around 7.6 metres, and '*well defined*'.
53. Two of the Parish Councils claimed the route as a bridleway whilst the others claimed a privately maintained C.R.B. and a C.R.F. I agree that these descriptions may indicate vehicular rights [10 and 20] because the terms were set out in the 1950 Memorandum on Surveys and Maps of Public Rights of Way, which was issued to Parish and Town Councils to assist in the preparation of the Definitive Map and Statement. This referred to them as "*Highways which the public are entitled to use with vehicles but which, in practice, are mainly used by them as footpaths or bridleways...*" Although identifying the use [25] the Memorandum makes it clear that these terms include public vehicular rights; routes with private vehicular rights and an overlying public right of way on foot or horse were to be marked only as footpaths or bridleways.
54. It might be significant that the two parishes covering the majority of the part of the route shown on the Jeffreys' map identified it with 'higher' status than bridleway, although it should be remembered that the section north-west of Runt's Wood was part of Middle Claydon and, therefore, bridleway.
55. The 'County Road Map Northern Division', thought to date from around 1950, shows part of the route numbered 419, although also including a route to the west, which is not shown in full on the map extract provided. The accompanying schedule refers to 419 as 4.25 miles of unmetalled road named '*Brackley and Three Points Lane*' and the description is '*From jn.C.37 Nr. Calvert Stn. via Sheephouse Wood, Knowl Hill Farm to Rd.C.37 west of Bernwood Farm Botolph Claydon...*' Although not drawn on the map the description suggests that it is the whole length to the Botolph Claydon Road that is included, this road being identified on the map as the 'C37'. The other section known as Three Points Lane, to the north of Knowlhill Farm, is numbered 403 but that part of the road schedule was not included.
56. The road schedule arises as a result of the maintenance duty of the County Council as the highway authority and so inclusion on this list cannot be taken on its own to show that any route had a particular status, although higher level maintenance duties would not be undertaken lightly. Although the Appellant argued that metalling of the route provided evidence of a carriageway [11] there is a clear indication of private maintenance and maintenance for the purposes for which the route is already recorded [18, 19 and 30].
57. Reference was made to a report on UCRs prepared by the TRF [11], however, no copy of this was provided.
58. A diversion was undertaken and confirmed as an unopposed order in June 1990. This had the effect of leaving the current bridleway to Coppice Lowhill Farm as a cul-de-sac route, as well as diverting two short sections in Runt's Wood. The diversion would not affect any pre-existing higher public rights and so these would remain on the undiverted lines [12 and 21].

59. There was correspondence from the Parish Councils, the current landowner and some other individuals, including local Councillors, to say that there was no local knowledge of vehicular use other than for agricultural purposes [29]. The landowners said that one person had used parts of the route with a motorbike in 2003 but they had been told that they had no right to do so [26].
60. Only one person submitted evidence of use with a vehicle, and this was the appellant with a motorbike, on three occasions in 2003. No additional user evidence has been submitted [13 and 22]. There is a picture on file of someone using part of the route with a horse-drawn vehicle but it is not clear where this was, who it was or under what circumstances. Despite suggestions of other use by horse-drawn vehicles no further evidence has been submitted. The evidence of vehicular use – either motorised or horse-drawn – is insufficient in quality or quantity to support dedication at common law by virtue of use alone.
61. Some correspondence was received raising concerns about safety in relation to allowing vehicular use on this route; this is not a matter that can be taken into account by the primary legislation of the 1981 Act.
62. General environmental concerns were also raised. English Nature referred specifically to the section adjacent to Sheephouse Wood Site of Special Scientific Interest ("SSSI") and the duty under section 28G of the 1981 Act, as amended by the Countryside and Rights of Way Act 2000, to take reasonable steps to further conservation and enhancement of the flora, fauna or geological or physiological features by reason of which the site is of special scientific interest. They have not stated why this site is a SSSI but have said that it would be damaged by the potential for motorised recreational disturbance. I do not consider that the primary legislation to record pre-existing recreational rights can be affected by this matter; the appropriate time to consider such issues would be in relation to any proposed implementation if an order was made and confirmed to record a BOAT.

Summary

63. For the appeal to succeed, it must be shown that public vehicular rights subsist along the bridleway but that the nature of the route is such that it is more likely to be used on foot or horseback.
64. The maps provide good evidence of the existence of a route running generally north/south-west to the west of Runt's Wood from at least the 18th century, although the status at that time is uncertain. The 1814 OS map is the first to show a route on a very similar alignment to the claimed route, although I consider that the lack of depiction of some parts of it on the small scale commercial maps might be indicative of a lower status for these sections.
65. The tithe map for Middle Claydon provides light evidence in support of public status, however, the 1910 Act map includes the route within the surrounding hereditaments and do not support vehicular status. The OS maps show that there have been changes in the exact line of the claimed route over time, with gates at differing points.

66. The four Parish Councils were not consistent in the claimed status of the whole route, although there was some consistency in the claimed 'higher' rights relating to the eastern section.
67. The roads schedule is suggestive of higher rights over part of the route, although it does not include the section to Coppice Lowhill Farm. There is an unexplained difference between what is shown on the map and referred to in the schedule.
68. There is a suggestion that parts of the route have been treated as an all-purpose public vehicular highway at different times but there is no consistency with regard to the route as a whole. The most consistent strand of evidence relates to the route identified on the Jeffreys' map, to the west of Runt's Wood, although even this route seems to have been subject to some variation of line and perceived status over time.
69. Despite a suggestion of higher rights I do not consider that there is clear evidence in favour of the appellant. The evidence as a whole is not sufficient to say, on the balance of probabilities, that there is a vehicular highway over the route claimed, or even in relation to the section alongside Runt's Wood, for which I believe the strongest evidence exists.

Overall Conclusion

70. For the reasons given above, I conclude that the Buckinghamshire County Council was justified in its decision.

Recommendation

71. I recommend that the appeal should be dismissed.

Heidi Cruickshank

Inspector