

BEDFORD BOROUGH COUNCIL – REPORT TO THE EXECUTIVE DIRECTOR OF ENVIRONMENT & SUSTAINABLE COMMUNITIES

SUBJECT: Wildlife and Countryside Act 1981, s.53. Claimed upgrading of Public Footpath No.24 Clapham to restricted byway.

1 EXECUTIVE SUMMARY

- 1.1 This report sets out the evidence, submitted and discovered, both for and against the contention that Public Footpath No. 24 Clapham (FP24) is wrongly recorded on the Definitive Map of public rights of way as a public footpath. A formal application has been made to have FP24 upgraded to restricted byway on the basis of long user by the public on bicycles.
- 1.2 The report sets out the legal framework in which the evidence must be assessed and the application determined, and applies the relevant legal tests to that evidence. The conclusion is that despite ample evidence that the public have ridden this route on bicycles for many years, the actions taken by various landowners over the last 40 years have been sufficient to show that there had been no intention on the part of the owners to dedicate the way as a highway of greater than public footpath status.

2 RECOMMENDATIONS

- 2.1 For the reasons set out below, I recommend that the application for an order to modify the Definitive Map and Statement for the Former North Bedfordshire Borough by upgrading Public Footpath No. 24 Clapham to restricted byway be refused. For a plan of the claimed restricted byway see appendix 1.

3 REASONS FOR RECOMMENDATIONS

- 3.1 The track or way along which Public Footpath No. 24 Clapham runs is known locally as the Carriage Drive. It first appears in the cartographic record on the Ordnance Survey 1st edition 25 inch to the mile County series map of 1887 (see appendix 2). An earlier west – east route from Green Lane Clapham through Clapham Park Wood ran along a roughly parallel route to the north of the Carriage Drive; see the Clapham Tithe Map of 1839 (appendix 3) and the Russell Estate plan of 1862 at appendix 4.
- 3.2 The route as shown on the 1887 1st edition OS 25” map is also shown on the second edition of 1901 (appendix 5) and the third edition of 1926 (appendix 6). All these depictions represent the route as it is currently constituted and correspond with the route which is the subject of this application.
- 3.3 The Carriage Drive is shown on a 1906 sale plan of Captain Charles Hunter Browning and others to John Howard Esq. It is mentioned in the key to this plan as a ‘Carriage Road’. It is also referred to in the conveyance of sale (for full text see appendix 7). The conveyance mentions that the occupiers of Picketts Close and Crabtree Allotments and

“...all and every person for the benefit of William Long Fitzpatrick ...full and free right and liberty... to pass and repass with horses carts wagons and other carriages... over and along a piece of land of the width of 9 feet 6 inches leading from Picketts Close ... on to the said road or carriage drive at the point marked C on the said plan and eastward gate post of which said

gate is distant five hundred and twenty nine feet from the point marked B on the said plan and thence along such part of the said road or carriage drive as is coloured yellow on the said plan from and to the highway at Clapham Green.”.

For an extract from the conveyance plan see appendix 8.

- 3.4 On the surveyor’s valuation map drawn up as part of the assessment carried out under the terms of the Finance Act 1910, the Carriage Drive is shown shaded as an integral part of the surrounding hereditaments. This indicates that the surveyor at the time did not consider that the way was a public road or, indeed, that it should be omitted from the valuation for any other reason. See plan at appendix 9.
- 3.5 The Carriage Drive was included on the Draft Definitive Map of 1953 as a public footpath, and was consistently shown as such through all the subsequent stages of review up to and including the publication of the first Definitive Map of 1982 and beyond.
- 3.6 The omission of the Carriage Drive from the cartographic record prior to 1887, along with the consistent depiction of a different west – east route north of the present route, suggests that it was created to serve Clapham Park. The fact that it was not in existence in 1835 means that it can have no claim to the status of ‘ancient highway’, that is highway in existence prior to the 1835 Highways Act; a status still explicitly recognised by the 1980 Highways Act. The Victoria County History of Bedfordshire (volume 3) records:

“A private road near the church leads to Clapham Park, a fine modern building of the Elizabethan type standing on high ground to the south of Clapham Wood. It was built in 1872 by the late John Howard”.
- 3.7 The depiction of the way by the Ordnance Survey is evidence only of what was on the ground at the time of the survey. Its depiction by the OS does not of itself imply a particular status for the way.
- 3.8 The description of the Carriage Drive in the 1906 conveyance is consistent with the way being a private road. The conveyance carefully delineates the rights of passage to be enjoyed by the occupiers of Picketts Close and Crabtree Allotments, and these rights are stated to include part of the Carriage Drive until it reaches the highway at Clapham Green. A conveyance only needs to state private rights up to the point where they connect with the public road, or highway. Hence it can be concluded that the Carriage Drive was not recognised as public highway by the solicitor drawing up the conveyance or those party to it.
- 3.9 There is quite recent case law from the House of Lords which has held that in two particular cases, the lack of shading of ways on the 1910 Finance Act valuer’s plan may reasonably be interpreted as indicating that the way concerned was considered at the time to be public vehicular highway. Conversely, the shading of the way so as to include it within the adjacent hereditaments suggests that the Carriage Drive did not have the reputation of being public highway at that time.

- 3.10 In conclusion, then, the cartographic and documentary evidence gives no reason to suppose that the Carriage Drive has historically carried any public rights other than footpath rights.
- 3.11 Although there is no reason to suppose that the Carriage Drive historically held higher public rights, it is possible that such rights may be deemed to have come into existence more recently through long usage by the public as of right. The criteria for deemed dedication are set out at section 31 of the Highways Act 1980; see paragraph 4.4 below.
- 3.12 The applicant's contention is that the public have used the Carriage Drive on bicycles as of right and without interruption for a full period of 20 years such as to raise a presumption that the way may be deemed to have been dedicated as a public highway of the status of restricted byway.
- 3.13 Restricted byway is a new category of highway introduced by the Countryside and Rights of Way Act 2000. A restricted byway carries a public right of passage for pedestrians, on horseback or leading a horse, and for vehicles other than mechanically propelled vehicles.
- 3.14 The initial application of July 2006 was accompanied by 12 completed rights of way user evidence forms; namely:
- Veronica Brown
 - Ronald Philip Lund
 - David Kenedy Lukes
 - Nicola Lukes
 - Douglas Tony Patrick Mitchell
 - Hazel Mary Mitchell
 - N. Hobday
 - Janet C. Hobday
 - R.H. Marshall
 - Michael John Riley
 - Peter Barrie Frost
 - Peter John Blakeman
- 3.15 Shortly after the application a further two completed forms were submitted, from
- Christopher Proud
 - Trevor Hughes
- 3.16 In the spring of 2009 a further three completed forms were submitted
- Ann-Marie O'Leary
 - Ollie Tyson
 - Rose May Birch
 - Ian Frederick Burns

In June 2010

- Rita Holyoak

In early 2013 (as a result of an appeal in the Brickhill Parish Council newsletter)

- Christine Smith (e-mail statement)
 - Andrew Ingram (e-mail statement)
- 3.17 User evidence is summarised in the attached User Evidence Graph (appendix 10) and table (appendix 11), with write ups of witness interviews at appendix 13 and witness evidence forms at appendix 12.
- 3.18 The owners of much of the Carriage Drive, the Clapham Park Management Company Limited, submitted statements from 7 local residents in support of their contention that the way has not become dedicated as highway of a greater status than public footpath (see appendix 15). These statements were from:
- Grahame Barber
 - Phillip Evans
 - Brian James Harding
 - Nicholas John Mills
 - Joanna Poulton
 - Peter Lambert
 - Gareth Mason
- 3.19 There is no doubt that the Carriage Drive has been used since the 1960s, or earlier, by members of the public on bicycles. Use has continued without a break until the present time. However, it is also clear that at least for part, if not all, of the time that the public has been using the route signs indicating the private nature of the road have been in place and although not all users recall seeing signs, many have seen signs indicating that the route was a private road or similar. It is therefore not possible to automatically conclude that use was “as of right” and the legal effect of the signs must be considered.
- 3.20 Clear independent evidence of the existence of a sign directed against public use of the route on bicycles exists in the Council’s files. The sign was certainly in place in May 1968, but it is not clear how long it existed beyond that time (for a copy of the 1968 letter see appendix 14). The Council files record that the farm manager at the time told the relevant council officer that the sign had been in place for about 8 years in 1968. The sign appears to have been erected in the vicinity of Little Park Farm, by Mr Gale. It is not clear whether Mr Gale was an owner or tenant of the farm or if he owned any of the Carriage Drive. Users who used the route prior to 1968 were asked if they recalled this sign (“the 1968 sign”), none recalled the sign and none were able to assist in identifying how long it was in existence after 1968. This is hardly surprising given the passage of time.
- 3.21 The Clapham Park Management Company (“CPMC”) submitted statements and formal submissions in March 2009. Mr Barber whose statement recalls “Private Land” and “Keep Out” or similar signs at the Green Lane end of the Carriage Drive and besides Beaumont School (sic) and the entrance to the farm during the 1950s, 1960s and 1970s did not respond to a request for interview. Mr Evans was interviewed. He recalls “Keep Out – Private” signs on or near to a gate at Little Park Farm and a “Private Road” sign near Park Farm. He is clear that these existed during the time he regularly ran along the route from 1975 to the early 1990s. Mr Burns, a user witness, recalls a “Private Road” sign at the Green Lane end of the route, but cannot recall

when this was erected (though he is certain that it was present when he last used the route in 2009). Other users also recall signs, though these mostly seem to relate to signs erected more recently. The Council's files also contain a reference to a notice being placed on FP24 by the convent in 1975. The notice read: "Private Land, Trespassers will be Prosecuted". For a copy of the 1975 letter see appendix 18.

- 3.22 The submissions by the CPMC make no claims that any of these signs were erected by or with the permission of owners of the relevant land.
- 3.23 The CPMC submissions state that CPMC has owned the Carriage Drive since 1996 when it purchased Clapham Park and that "Private Road Footpath Only" signs have been erected by or on behalf of CPMC since 1998 at the junction of the Carriage Drive and Hawk Drive. These signs have clearly been erected by the relevant landowner.

The wording of the signs

- 3.24 What constitutes appropriate wording of signs directed at the public to indicate a lack of intention to dedicate the route or to indicate that the public use of the route is being challenged is a difficult area. In cases such as this one where a public footpath runs along a private road, "private road" signs might be seen as being only directed at users with vehicles and not, for example, horse riders. However, in this case the application is based on user evidence with bicycles. As noted below (see paragraph 4.5) a bicycle is legally a vehicle. Despite the fashion in recent years for cyclists to take to the pavements, it has been well known for many years that bicycles have no general right to use pavements and footpaths and that they are, in fact, vehicles. For that reason I consider that it is reasonable to conclude that a reasonable person would understand a notice saying 'private road' to be directed at those using vehicles of any kind, including bicycles.
- 3.25 The 1968 sign specifically prohibited use by cyclists. The 1975 sign appears to have read "Private Road". The 1998 sign is stated to have read "Private Road Public Footpath only." **I consider that all three signs made it clear to varying extents that public use on bicycle was prohibited.**

Bringing the public's right to use the way into question

- 3.26 Unlike actions which may constitute evidence of a lack of intention to dedicate, actions that bring the right of the public to use a way into question for the purposes of Section 31 do not need to have been carried out by or on behalf of the landowner.
- 3.27 The erection of a sign inconsistent with a public right to use a way can be an action that brings into question the right of the public to the use of the way. Such signs are known to have existed from around c1960 to at least 1968, and in 1975. CPMC has produced witness evidence that alleges the existence of signs almost continuously from the 1950s to the early 1990s and state that their own sign was erected in 1998.
- 3.28 Although the action that typically brings the right of the public to the use of the way into question is a one-off action such as, for example, the erection and locking of a gate after a period where no gate has existed, it seems to me that

the erection and continued existence of a sign that makes it clear that no public rights of the relevant status exist can act as a continued action that brings the right of the public to use the way into question. If, as is asserted by the CPMC, such signs have existed almost continuously since the 1950s until the early 1990s that would seem to work to prevent any twenty year period under Section 31 from operating.

3.29 If, however, I am wrong about this then it seems that new signs that brought the right of the public to use the way on cycles were erected or noticed at three points in time, 1968 (as evidenced in the council files), 1975 (as evidenced in the council files) and 1998 (submissions on behalf of CPMC and as noted by Mr Lukes in his user evidence form). Also, the submission of an application to have the way upgraded, in July 2006, may also be an act capable of calling the public's right to use the way into question.

3.30 In order to identify a relevant period of twenty years user for the purposes of Section 31 it is necessary to take these three dates identified when signs were erected 1960, 1975 and 1998 and the application of 2006 in turn.

1960

3.31 No evidence has been submitted of public use on bicycles prior to 1960.

1975

3.32 There is evidence of public use prior to 1975, however there is no twenty year period for the purposes of Section 31, as the existence of a sign in 1968 truncates the period to less than twenty years.

1998

3.33 There is evidence of public use for a twenty-year period immediately prior to 1998. Users 1, 2, 3, 4, 7, 8, 10, 12, 16 and 18 used the route, with User 17 using it at least as far as Footpath 8 on a regular basis. Users 11 and 19 used the route from 1980 onwards, Users 5 and 6 from 1981 onwards, and User 15 from 1985 onwards (see appendix 11). There were locked gates at the junction of Carriage Drive with Green Lane in 1996, with public access only via kissing gate.

2006

3.34 The 20 year period prior to 2006 is truncated by the erection of the "private road" sign by the Clapham Park Management Company in 1998

Does user within the twenty-year period 1978-1998 amount to "actual enjoyment" for the purposes of Section 31?

3.35 See appendix 11. User 18 used the route daily (though some use might be regarded as private use). User 16 used the route at least weekly (though for some use might be regarded as private use). From 1983 User 17 used the route as far as Footpath 8 very frequently, at times daily or nearly daily. Users 1 and 3 used the route approximately monthly. User 9 used the route slightly more than once a month. User 10 used the route about once a week in the 1970s and 1980s, using it less frequently thereafter. User 11 used the route less than once a month. Other users used the route less frequently.

- 3.36 The Planning Inspectorate's Consistency Guidelines at paragraph 5.10 advise that "Use of the way should also have been by a sufficient number of people to show that it was use by the public – representative of the people as a whole, or the community in general and this may well vary from case to case".
- 3.37 The degree of user, either at common law or under Section 31, has never been fully established by case law. However, as noted in Sauvain's *Highway Law* (2009) p.52 "The degree of user that may be sufficient to establish a highway in a remote rural area will not necessarily be sufficient in urban surroundings." In this case the route connects a large satellite village to the nearest urban area. It would therefore be expected that public use would be reasonably extensive.
- 3.38 A further factor in this case is that the route of Footpath 24 co-exists with a private road. The fact that private rights exist over a route does not preclude the acquisition of public rights over it. However, as noted in Halsbury's Laws of England, "Where a limited class of persons is entitled or permitted to use a road evidence of user by other persons is of little value." This is further footnoted: "If there is no way at all, everyone should be recognised as a trespasser, whereas if there is a private way persons not really entitled to use it may easily pass unnoticed."
- 3.38 On balance, even if Section 31 applies for the period of 1978-1998, given the location of the route and its proximity to Bedford I am of the view that the level of public use is in the particular circumstances minimal and given the existence of private rights I am of the view that it is reasonable to conclude that public use may have passed un-noticed by the landowner. However, the evidence of the signs and notices erected and the locked gates in 1996 imply that the owners of the way were aware of potential, if not actual, use by the public and were actively taking steps to prevent or discourage such use. I therefore conclude that the evidenced use does constitute use by the public at large for the purposes of s.31.

Signs/gates as interruptions to use

- 3.39 Submissions made on behalf of the CPMC argue that the signs variously erected on the route act as interruptions for the purposes of Section 31 of the Highways Act 1980. This is contrary to the finding in *Merstham Manor Ltd. V Coulsden UDC*, where Hilbery, J found:

"As it is actual enjoyment which must be without interruption, one would suppose that the interruption contemplated must be actual. One can scarcely interrupt acts except by some physical act which stops them. I therefore think that the word 'interruption' in the expression in the Act 'without interruption' is properly to be construed as meaning actual and physical stopping of the enjoyment, and not that the enjoyment has been free of any acts which merely challenged the public right to that enjoyment."

- 3.40 I do not consider that the signs constitute an interruption for the purposes of Section 31.
- 3.41 Mr Harding (see appendix 15) states that when he moved to Clapham Park in 1996 there were gates at the junction of the Carriage Drive with Green Lane.

These gates were padlocked with a chain. Mr Harding had to contact the Park's on-site caretaker to unlock the gates to allow him access. Pedestrian access was provided by means of a kissing gate by the side of the locked vehicle gates, a type of structure designed and suitable only for pedestrian access and not cyclists. The provision of a kissing gate and locking of the adjacent vehicular gate in 1996 are not actions consistent with an intention on the part of the landowner to dedicate any public rights higher than footpath rights.

Signs as evidence of lack of intention to dedicate

- 3.42 Section 31(3) of the Highways Act 1980 gives special status to signs inconsistent with the dedication of a way as a highway that have been erected by the landowner in such a manner as to be visible to members of the public. Such a sign is sufficient to constitute evidence of a lack of intention to dedicate the way to the public.
- 3.43 The sign erected in 1998 by the CPMC was erected by the landowner. It is unclear whether or not the sign erected in 1975 was erected by the landowner, it seems have been erected by the nuns, but this is uncertain. It is also unclear how long this sign remained in place. Possibly the 1968 sign, erected c1960, was erected by the then landowner, but this is unclear. It is unclear how long this sign remained in place. No claim is made that this or any later sign erected before 1998 was erected by landowners. This having been said, it was open to any reasonably observant owner to remove such notices as being inconsistent with their wishes, and to prohibit their re-erection. The longevity of the signs and the consistency of their wording suggest that they were erected and maintained with the blessing of the owners if not actually by them.
- 3.44 On balance because of the uncertainty that any sign was actually erected by the landowner I do not consider that the signs can be taken, on the balance of probabilities, as sufficient evidence of a lack of intention to dedicate.
- 3.45 The signs of 1968, 1975 and 1998, along with the locked gate of 1996 and the evidence from Barber and Evans of similar notices being in place during the 1950s, 1960s and 1970s lead me to conclude that **there is sufficient evidence of a lack of intention during the period 1978 to 1998 such as to defeat the present claim.**

Common law

- 3.46 There is no evidence that the landowner dedicated the route or carried out any actions that would lead a reasonable person to conclude that the landowner intended to dedicate the route. The existence of the signs, even if these were not erected by the owner, tends to militate against dedication at common law.
- 3.47 Given the view of the Court of Appeal in *Whitworth & Ors v Secretary of State for Environment, Food and Rural Affairs* [2010] EWCA heard in December 2010 it is clear that the application for a Definitive Map Modification Order (DMMO) to record restricted byway rights over the existing footpath would be unlikely to succeed on the basis of evidence of user on bicycles alone. See paragraphs 4.14 and 4.15 below.

- 3.48 The question then arises, in the light of both *Whitworth* cases, as to whether or not under s 31 of the Highways Act 1980 an inference of dedication of a bridleway can be drawn.
- 3.49 In the *Whitworth* cases the court heard evidence of use on horseback, by bicycle and by one person with a pony and trap. In this case no evidence of use on horseback has been submitted and no such use has been alleged. I can see no logical reason, however, why the dedication of a public bridleway should be inferred when, on the balance of probabilities, the dedication of a restricted byway cannot be so inferred.

4 IMPLICATIONS

(a) Legal

- 4.1 This application has been made under the terms of s.53 of the Wildlife and Countryside Act 1981. That Act allows any member of the public to apply to have the Definitive Map and Statement modified if they submit evidence that it is wrong.
- 4.2 Section 53(3)(c)(ii) requires the Council to modify the Definitive Map and Statement by order upon:
- “...the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) 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...”
- 4.3 Section 32 of the Highways Act sets out how the Council must approach the question of whether or not a way has been dedicated as a highway, or as in this case, a highway of a different status:
- “A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances...”
- 4.4 Section 31 of the Highways Act sets out the mechanism by which a path or way may be dedicated as public highway by means of presumed dedication after public use for 20 years:
- “(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(1A) Subsection (1) –

(a) is subject to section 66 of the natural Environment and Rural Communities Act 2006 (dedication by virtue of use for mechanically propelled vehicles no longer possible), but
(b) applies in relation to the dedication of a restricted byway by virtue of use for non-mechanically propelled vehicles as it applies in relation to the dedication of any other description of highway which does not include a public right of way for mechanically propelled vehicles.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such as aforesaid passes –

(a) has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.”

- 4.5 The user evidence in support of the application is that of alleged public use of the route on bicycle. Since 1888 bicycles have been regarded by the law as vehicles, therefore the acquisition of public rights for bicycles would result in the acquisition of public vehicular rights. The operation of the Natural Environment and Rural Communities Act 2006 (“NERC”) prevents the registration of public vehicular rights on the Definitive Map and Statement and operates to remove those rights, subject to specific exemptions (none of which apply in the case of this application). In cases where public vehicular rights are shown to exist but cannot now by virtue of NERC be recorded on the Definitive Map and Statement the appropriate classification is that of restricted byway. Therefore, if having considered all the relevant available evidence and on a balance of probabilities public vehicular rights are shown to exist over the route, the Authority would be obliged to make a Definitive Map Modification Order to “upgrade” the footpath to restricted byway or, in line with the judgment in the *Whitworth* case (see paragraph 4.14 below), as a public bridleway.
- 4.6 Highways may also be established under Common Law. At Common Law, a landowner must be shown to have intended to dedicate the right of way over his land. The question of dedication is purely one of fact and public user is no more than evidence, which has to be considered in the light of all available evidence. Public use will not, therefore, raise the inference of dedication where the evidence in its totality shows that the public right of way status was not intended.
- 4.7 At Common Law, there is no specified period of user which must have passed before an inference of dedication may be drawn. It is necessary to show, in order that there may be a right of way established, that the route has been used openly, “as of right”, and for so long a time that it

must have come to the knowledge of the owners of the fee simple that the public were so using it as of right.

- 4.8 If the landowner has done exactly what would be expected from any owner who intended to dedicate a new highway, the time may be comparatively short. However, as a matter of proof at Common Law, the greater the length of user that can be demonstrated, the stronger the inference of dedication will (usually) be.

The implications of the *Whitworth* cases

The inference to be drawn from user of a route on bicycle

- 4.9 In *Whitworth & Ors v Secretary of State for Environment, Food and Rural Affairs* [2010] EWCA heard in the Court of Appeal in December 2010, the Court allowed an appeal against a decision of an Inspector appointed by the Secretary of State to confirm a DMMO with modifications proposed by the Inspector that upgraded a footpath to restricted byway.

- 4.10 The appeal specifically considered the issue of the inference to be drawn, in respect of deemed dedication under s 31 of the Highways Act 1980, from user of a route by the public on bicycles and considered the correctness of paragraph 5.47 of the Planning Inspectorate's "Consistency Guidelines".

- 4.11 Paragraph 5.47 of the Planning Inspectorate's Consistency Guidelines (October 2010) state:

"Use of bicycles in a public bridleway after 3rd August 1968 (the date on which section 30 of the [1968 Act] came into force) cannot give rise to a claim or be used to support a claim for vehicular rights."

- 4.12 Although the *Whitworth* case concerned a DMMO that, as modified and then confirmed by the Inspector, upgraded a footpath to restricted byway, the guidance in paragraph 5.47 was relevant in that the Inspector had concluded on the basis of documentary evidence that the route in question was a bridleway before 1968.

- 4.13 The successful ground of appeal was that the Inspector had erred in law in concluding that the use of a bicycle was consistent with a finding that the route was anything more than a bridleway, since members of the public had had a right to use bridleways for cycling since the coming into force of the Countryside Act 1968.

- 4.14 In granting the appeal, Carnworth LJ, stated [para 41]:

"In the present case, the Inspector had found that by 1968, and before the relevant 20-year period, the way had the status of a bridleway. After that time, use of the bridleway by cyclists would have been permitted by the 1968 Act. The owner would have had no power to stop it. There would be no justification therefore for inferring acquiescence by him in anything other than bridleway use. It matters not whether the cyclists were aware of the legal position. What matters is the effect of the use as seen by the landowner. It

follows that in considering the extent of the deemed dedication, the use by cyclists should be disregarded. Since the only other evidence of use by vehicles is that of Mr Clegg's pony-trap, which admittedly did not extend for the full 20 years, there is no basis for the order to confer anything more than bridleway rights."

He went on to comment [para 42]:

"In my view, the same conclusion would follow even if there had been no finding of pre-existing bridleway rights, so that the claim had rested solely on use after 1973. One would then be considering the inference to be drawn from the actual use between 1973 and 1993. It is true that regular use by both horse-riders and cyclists over that period would be consistent with an assumed dedication as a restricted byway at the beginning of the period (had that concept then existed). But it is no less consistent with an assumed dedication as a bridleway, of which cyclists have been able to take advantage under the 1968 Act. Since section 30 involves a statutory interference with private property rights, it is appropriate in my view, other things being equal, to infer the form of dedication by the owner which is least burdensome to him."

4.15 Although at the time of writing the Consistency Guidelines have yet to be revised and expanded to reflect the Court of Appeal's decision, this *obiter* comment supports a view that user by the public of a footpath on bicycles **could** give rise to an inference of dedication of bridleway, and not simply of byway or, post the operation of the Natural Environment and Rural Communities Act, 2006, restricted byway. This is because since 1968 cyclists have been lawfully able to use bridleways.

(b) Policy

4.17 Determination of applications under s.53 of the 1981 Act is a statutory duty of the Council and not governed by Council policy.

(c) Resource

4.18 This report has no resource implications beyond those which can be met within existing budget frameworks.

(d) Risk

4.19 If the recommendation to refuse the application is accepted, the applicant will have a right of appeal to the Secretary of State against the Council's decision. There is a risk that the Secretary of State will direct the Council to make the order. In such a case the Council will incur costs of several hundreds of pounds in making and advertising the order, and it is likely that the order would attract objections and fall to be determined by means of a Public Local Inquiry. A Local Public Inquiry is a routine method of determining opposed orders under the 1981 Act, and would require the Council to provide a venue, supporting documentation and legal advocacy. Depending on the availability of in-house legal representation, a Public Local Inquiry would cost anywhere from a few hundred to a few thousand pounds.

4.20 There is a small risk associated with a Public Local Inquiry of the Council becoming responsible for the objectors' costs. The usual procedure is that each side is responsible for its own costs, and the award of costs against the losing party is not automatic as it is in court actions. An award of costs is only made where one party is deemed by the Inspector to have behaved unreasonably.

(e) Environmental

4.21 There are no environmental impacts associated with this report. A Definitive Map Modification order under the 1981 Act does not change anything, but merely seeks to recognise and record the correct legal situation.

(f) Equalities Impact

4.22 There are no equality impacts associated with this report. A Definitive Map Modification order under the 1981 Act does not change anything, but merely seeks to recognise and record the correct legal situation; it does not impose or extinguish any public or private rights.

5 SUMMARY OF CONSULTATIONS AND OUTCOME

5.1 The following owners and occupiers were consulted and asked for their comments:

- Clapham Park Management Company Ltd
- Hamilton Lee Ltd
- Brian and Susan Harding
- The former Bedfordshire County Council

5.2 The following user groups were also consulted:

- The Ramblers' Association
- The British Horse Society
- The Cycling Campaign for North Bedfordshire.

5.3 Consultations were also carried out with:

- The Clapham Parish Council
- The Brickhill Parish Council
- Borough Councillor Royden
- Borough Councillor Holland
- Borough Councillor Walker
- Borough Councillor Rider.

User groups

5.4 None of the user group responses raised any issue which is relevant to the determination of the current application.

Owners and Occupiers

- 5.5 The Clapham Park Management Company Ltd has made robust representations against the applicant's contention. They submitted a dossier of information to support their claims to have interrupted and challenged public use and to have erected and maintained signs and notices inconsistent with an intention to dedicate the way as a highway of more than footpath status. For a copy of this dossier see appendix 15.
- 5.6 In January 2009 the former Bedfordshire County Council received an unsolicited letter from a Mrs Lambert, a local resident. For a copy of Mrs Lambert's letter see appendix 16. Mrs Lambert says:

“As a resident living in Clapham Park since July 1998 and using Carriage Drive daily I have not seen much evidence of cyclists using Carriage Drive. When I have seen the very occasional cyclist I have drawn to their attention that Carriage Drive is a private road and should only be used by walkers.”

Councils and Councillors

- 5.7 The Brickhill Parish Council made an appeal in their November 2012 parish newsletter for any users of the Carriage Drive to come forward to them with evidence. The Parish Council submitted this information in the form short paragraphs from each witness. In total there were 24 people represented, though Christine Smith and Trevor Hughes are represented in other, fuller, evidential submissions. For a copy of the Brickhill Parish Council submission see appendix 17.
- 5.8 The evidence in this submission is too fragmentary and anecdotal to be particularly helpful to the applicant's case. However, as the recommendation to refuse the application is based upon the actions of the owners which show a lack of intention to dedicate, these extra statements would not, in my opinion, make a material difference to that recommendation.
- 5.9 The CPMC has made representations that the submissions at appendix 17 should be omitted from this report as being fragmentary, unsigned and anecdotal and so constituting hearsay, and not providing full names and addresses of witnesses. These extracts would not, it is argued, be admissible in any judicial process. In its determination of a s.53 application, however, the Council is acting in a quasi-judicial manner and must take into account all relevant evidence submitted and discovered. It is my contention that the extracts at appendix 17 are relevant and so must be included, but for the reasons out-lined in the CPMC's representation, I am of the opinion that these extracts are of very little, if any, evidential value in their current form and should be viewed very much with this in mind.

6 WARD COUNCILLOR'S VIEW

- 6.1 No representations or comments have been received from the ward councillor.

Title: The determination of an application to upgrade Public Footpath No. 24 Clapham to restricted bridleway under s.53 of the Wildlife and Countryside Act 1981.

<i>Report Contact Officer:</i>	<i>Martyn Brawn</i>
<i>File Reference:</i>	CLA/9
<i>Previous relevant minutes:</i>	<i>Not applicable</i>
<i>Background papers:</i>	<i>Not applicable</i>
<i>Appendices:</i>	<i>Appendix A – Proposal plan File of miscellaneous appendices</i>

Seen (optional)		<i>Signature</i>	<i>Date</i>
Parks and Countryside Manager	Simon Fisher		

Approved:*		<i>Signature</i>	<i>Date</i>
Assistant Director Environment & Communities	Steve Tomlin		
Reason (if other than for reasons set out in report)			

Refused:*		<i>Signature</i>	<i>Date</i>
Assistant Director Environment & Communities	Steve Tomlin		

Reasons for refusal:	
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*** One of these boxes MUST be completed by the decision-maker**