

# Order Decision

Inquiry held on 19 May 2016

**by Sue Arnott FIPROW**

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

**Decision date: 1 June 2016**

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## **Order Ref: FPS/Y0435/7/3**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Council of the Borough of Milton Keynes (Footpath Carey Way to Footpath 1 near Clifton Bridge – Parish of Olney and Milton Keynes) Definitive Map Modification Order 2013.
- The Order is dated 22 May 2013. It proposes to modify the definitive map and statement for the area by adding a footpath along the western bank of the River Great Ouse at Olney, as shown on the Order map and described in the Order schedule.
- There was 1 objection outstanding when Milton Keynes Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

**Summary of Decision: The Order is not confirmed.**

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## **Procedural Matters**

1. I held a public local inquiry into the Order at the Civic Offices in Milton Keynes on 19 May 2016, having inspected the route in question during the previous afternoon, unaccompanied. At the close of the proceedings, all parties agreed that there was no need to make a further visit to the site.

## **The Main Issues**

2. The Order was made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of an event specified in Section 53(3)(c)(i), namely the discovery of evidence which shows a right of way which is not recorded in the definitive map and statement subsists over land in the area to which the map relates.
  3. Whilst the evidence need only be sufficient to *reasonable allege* the existence of a public right of way to justify an order being made, the standard of proof required to warrant confirmation of an order is higher. In this case and at this stage, evidence is required which shows, *on the balance of probability*, that a right of way subsists along the Order route.
  4. The case in support of the Order is based on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980 (the 1980 Act). For this to have occurred, there must have been use of the claimed route by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public footpath will be deemed to subsist.
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5. In short, the case for the Order requires me to consider whether the evidence shows that in the past the Order route has been used in such a way that a public footpath can be presumed to have been established.
6. Although the matter had not previously been considered on the basis of common law, I explained at the inquiry that, if not satisfied the requirements for dedication under statute have been met, I may consider such an approach in the alternative. In addressing this possibility the issues I would need to examine are whether, during any relevant period, there was express or implied dedication by the owner(s) of the land in question (having the capacity to dedicate a public right of way) and whether there is evidence of acceptance of the claimed right by the public.

## **Reasons**

### ***Background***

7. In this case, support for the footpath shown as A-B-C-D-E-H-J-K-L-M-N on the Order map rests entirely on the evidence of use by the several claimants. In terms of background documents, the order-making authority Milton Keynes Council (MKC) supplied extracts from the definitive map and statement for the Parish of Olney together with associated details.
8. Of particular note is the fact that Footpaths 1 and 4 (now 4a) were first recorded in the 1950s as public rights of way and that Footpath 4, north of the point marked on the present Order map as 'A', was diverted in 1987, ostensibly to allow for the development of new houses on the east side of Carey Way.
9. I note two points from the 1987 diversion order, both of which raise questions: firstly, that the Order schedule recorded a stile at point A, and secondly that the Order map was based on the same 1:2500 scale Ordnance Survey (OS) plan as was used by most of the claimants to mark the route they have used.
10. The present Order route is described as commencing "*at the junction of Austen Road and Public Footpath 4a*". Neither the gate nor the gap that currently exist across Footpath 4a at point A is mentioned. That is not necessarily an error in the Order (indeed Footpath 4a is already recorded on the definitive map) but this is a feature which could easily be confused with the gate from Footpath 4a into the enclosure to the east known as "Doff's Field". When approaching from the north, one must walk a very short distance along Footpath 4a via the gap (or gate) before turning eastwards along the Order route.
11. I heard evidence at the inquiry to confirm that a fence (with a locked gate) had existed for a considerable period of time separating Footpath 4a from Doff's Field. However this fence is not marked on the OS base map used by the claimants which I was informed was surveyed in 1988. Yet if this same map appeared in the 1987 Order, that date cannot be correct; it clearly must be earlier than 1987<sup>1</sup>. I note that Appendix 11 to the Report to the Development Control Committee of MKC dated 11 October 2012 listed a 1:2500 OS Map dated 1974/5 but since no copy was provided I cannot be entirely confident that this is the base map used by the claimants and the 1987 Order although that seems most likely. If so, this map is showing no fence present in the 1970s but that does not preclude one being installed at a later date.

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<sup>1</sup> I heard from Mr Tebby that the Rugby Club moved into its present clubhouse in 1987/88. Since this building does not appear on this OS map, I regard this as further proof the OS map base is earlier than 1988.

### ***The case for statutory dedication***

12. Turning next to examine the evidence in relation to Section 31 of the 1980 Act, the first matter to be established is when the public's rights were brought into question.

#### *Bringing into question*

13. It is not disputed that the status of the Order route was challenged in 2002 when ownership of the land changed and the new owners, G & S Fountaine, locked the gate across the way just south of point A, maintained a stock-proof fence and erected notices stating "Under new ownership: Private property". Prior to this, the land had been owned by a local farmer known as "Doff" Kitchener.
14. However it was not until a year or two later, on the sale of the land to Mr R Mason (potentially for development), that Olney Town Council submitted applications to MKC for the registration of four routes across Doff's Field, three of which now comprise part of the Order route. Following investigation by consultants Robin Carr Associates on behalf of MKC, evidence to support the existence of a right of way beyond the claimed path(s) southwards alongside the river to Footpath 1 was discovered. After considering a report assessing this evidence on 17 January 2013, the Council decided to make this Order.
15. There is no evidence of anyone questioning the status of any part of the Order route before 2002. Whilst both the fence and the gate parallel to Footpath 4a could have challenged the public's rights when first installed, I have been unable to ascertain precisely when this occurred (although the OS map information leads me to believe this was after 1974/5); given the distance in time and limits of available evidence, I conclude that neither actually did so.
16. In summary, I am satisfied that the status of the Order route was brought into question in 2002 so will examine the claimed use by the public during the preceding twenty year period, 1982-2002.

#### *Evidence of use by the public 1982-2002*

17. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been enjoyed as of right, without interruption, and to have continued throughout the full twenty years. Use 'as of right' is interpreted as being use by the public that is not by force, does not take place in secret and is not on the basis of 'permission'.
18. In support of the claimed route is evidence of use from a total of 14 people who completed standard forms<sup>2</sup> that were submitted with the application and a further 45 evidence forms from people who were subsequently interviewed by Mr Carr and his associates.
19. These witnesses provide evidence of their use of all or parts of the Order route dating back as far as 1938, although activity seems to have increased from the late 1960s as the development of Austen Avenue and Carey Way progressed. None of these people refer to any notices deterring their use until 2002. Their use did not take place in secret, nor was it said to be by force. However two

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<sup>2</sup> At the inquiry, Mr Fraser drew attention to several evidence forms with missing pages. MKC explained this was due to a failure to copy both sides of the form. Having now checked, the original forms submitted with MKC's statement of reasons for confirming the Order did include both sides of each page.

- walked the route with the express permission of Ms Kitchener, two had helped her with moving stock in the past, and a further seven had used the route as members of the Olney Fishing Association which has long enjoyed an arrangement with the landowner(s) by which they access the riverbank with permission. MKC had discounted the evidence of these 11 people leaving 48 claiming long-standing use as of right.
20. On behalf of objectors Olney Rugby Football Club<sup>3</sup>, Mr Fraser firstly submitted that the claimed usage is not representative of use by the public at large and that the evidence amounts only to use by a small number of individuals.
  21. Responding Ms Ahmed for MKC, disagreed and argued that the 59 people who provided evidence of use could not be considered a small group or that being residents of Olney necessarily precluded them from representing 'the public'.
  22. On this point I agree with the Council. In this location, being so close to the residential areas of the town, it is not surprising to find most of the users of a riverside path such as this being local people. However I see no difficulty in considering these people as 'the public' in this context.
  23. Next Mr Fraser challenged the Council's assertion that the claimed use had not been 'without force' and 'without interruption'. He submitted that evidence from the objectors showed that there had been a fence with a locked gate (with barbed wire across the top) and an electric fence across the Order route near to point A for the majority of the relevant period. Any use that had taken place could only have been by climbing over the gate and/or fences, that is 'by force'. He also argued that use had not been possible whilst the river had been in flood, or when bulls had been kept in Doff's field, so had therefore been interrupted and not continuous.
  24. At the inquiry I heard from 8 witnesses for the objectors who had known the area for the whole of the relevant period and one other who had done so since 1985. Through cross-examination, a reasonably consistent picture emerged from their evidence of a post and wire fence which separated Footpath 4a from Doff's Field; a 5-bar gate which was generally kept locked except when cattle were being moved into and out of the field, and of an electric fence situated within the field alongside its fenced or hedged boundaries.
  25. This arrangement appears to have continued until, in the late-1990s, Ms Kitchener's health declined, the barbed wire along the top of the gate was removed and a hole in the fence appeared. This situation appears to have continued until 2002 when, on the demise of Ms Kitchener, her relatives took over the field and erected the notices which brought into question the status of the Order route.
  26. Ms Ahmed submitted that the claimants' statements show they had not encountered any electric or barbed wire fences across the path or any other barrier that would require forcible entry into Doff's Field. This was confirmed by the evidence forms they completed and through the interviews carried out by Mr Carr<sup>4</sup>. Their passage along the route had not been prevented by any fences or considered to be 'by force' (for example by climbing over the gate).

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<sup>3</sup> And including statutory objector Mr N Smith

<sup>4</sup> I note that none of the claimants had been asked specifically about these fences or the gate.

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27. MKC had concluded that if the path had been accessible for anglers (who had a private arrangement allowing them access to the riverbank) then it must also have been physically passable by members of the public.
28. However, at the inquiry Mr Smith (a former member of the Fishing Association) explained that he (and others) had always approached the river bank (C-D on the Order map) from the recreation ground to the south. Consequently I find the Council's reliance on the Order route A-B-C as the means of private access to the riverbank to be questionable.
29. The clear evidence presented in writing and orally to the inquiry of two physical barriers between Footpath 4a and Doff's Field for the majority of the relevant period appears to be in direct conflict with the written evidence from the claimants including the record of their interviews.
30. Mr Fraser highlighted the evidence of one of his witnesses, Mr Wells, who recalled a bull regularly grazing in the field in the 1970s (before the relevant period). Others recalled bulls being there too in later years although dates were difficult to pin down.
31. Ms Ahmed pointed out that there is no evidence from users that bulls were ever kept in the field or that (if any were ever present) they were a deterrent to public use. Further, any temporary interruption to use caused by flooding does not amount to an interruption for the purposes of Section 31 of the 1980 Act.
32. Whilst I agree that, at most, occasional flooding might amount to a limitation on public use of the route rather than constituting an interruption in law, the evidence presented at the inquiry by the objector's witnesses does point to a bull (or bulls) occasionally being in the field. Some people suggest this was mostly whilst Mr Croxford was renting Doff's Field, others say that it ceased when he took over around 2000<sup>5</sup>.
33. At the inquiry, Mr Carr acknowledged the limitations of the standard evidence forms and that these are of limited value unless supplemented by witness interview records. He recognised that the evidence of claimants that were interviewed should be given greater weight than those that were not.
34. Indeed when weighing the evidence I cannot ignore the fact that none of the claimants were called as witnesses by MKC and none attended the inquiry of their own volition. As a result the many questions which arose in relation to the practicalities of using the route at certain times could not be answered through cross-examination leaving several doubts about the veracity of the information provided and the conflicts within it unresolved. Evidence delivered verbally at the inquiry always has the potential to carry more weight than that provided merely in writing.
35. Consequently, despite putting into the balance the many statements from users, I find these are outweighed by the strength of the evidence given on behalf of the objectors, albeit that the witnesses for the latter were fewer in number.

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<sup>5</sup> A letter records the letting arrangement between Mr G Fountaine and Mr Croxford in June 2003 but according to the objector's witness, Mr G Wilson, Mr Croxford leased the field from Ms Kitchener before she died. However Mr Wilson was not present at the inquiry to verify this.

36. Whilst I agree with the Council that there is no direct evidence of challenges made by the owner (Ms Kitchener) during the period (1982- 2002) or on her behalf, or of any other specific action by her to inform the public that the Order route was *not* being dedicated as a right of way, I find the evidence to demonstrate use by the public continuously throughout the relevant twenty year period 'as of right' and continuously without interruption, is not sufficiently robust to raise a presumption of dedication as a public path.
37. Having reached this conclusion, there is no need for me to consider further the submissions made in relation to actions taken by the landowner(s), including Ms Kitchener's reputation and general approach to trespassers on her land; the intention behind keeping bulls in Doff's Field, the use of barbed wire on the gate or repairing holes in the fence; the effect of the notices erected at point D and elsewhere by the Fishing Association or the temporary removal of footbridges. Nevertheless these have been noted.

### ***Implied dedication at common law***

38. I have also considered whether dedication of a public right of way might have been established under the common law. The relevant issues are set out in my paragraph 6 above. In this case there is no evidence of express dedication and the burden of proof lies with those that assert the existence of a public path.
39. In her submissions on this point, Ms Ahmed relied on the evidence of the claimants' use back to the early 1960s as a demonstration of the owners' acceptance of a public right of way. However the same unanswered questions which have prevented the case being made out under the statutory approach are raised again here. Consequently I am not satisfied that the claimed use was 'as of right', uninterrupted and continued for a sufficient period to support implied dedication at common law either.

### ***Summary***

40. To summarise, I repeat my conclusions in paragraphs 36 and 39 that despite the use claimed by the many people who completed forms or were interviewed to confirm their use of the Order route, taken together with that supplied by and presented to the inquiry by the objectors, the evidence as a whole is not sufficient to show, on a balance of probability, that a public footpath subsists over the Order route, either under the common law approach or the terms of Section 31 of the 1980 Act.
41. I therefore conclude that, even though the evidence provided by the applicant and subsequently gathered through investigation, may have been enough to reasonably allege the existence of a public right of way under the statutory scheme, it is not sufficient to show that, on the balance of probability, a public footpath subsists over the Order route.

### **Other matters**

42. I have noted a letter dated 29 May 2015 written on behalf of Messrs T & J Frost who are owners of a large section of the land affected by the Order route. In this letter Messrs Frost advance practical reasons for objecting to a public right of way through their fields. However I made clear at the inquiry that neither the benefits nor the disadvantages of public access along the Order route are at issue here. Only those matters which relate in my paragraphs 2 to 6 above are relevant to my determination of this Order.

43. At the close of the inquiry I invited submissions from both Ms Ahmed and Mr Fraser in relation to the question of whether the Order route between points D and N could stand alone and be confirmed (since no evidence was produced to challenge this section) even if I were to conclude that, on balance, the case for a public path between A and D was not made out.
44. Having considered these submissions and having now concluded that the evidence is not sufficient to support A-D, I find I do not have before me reliable information to show either that a public path continues from point D to another highway (most probably Footpath 4a) or that the legal status of the recreation ground is such that it might be considered an area with public access so that a cul-de-sac route (D-N) might be justified.
45. I therefore do not consider it would be appropriate, or supported by the evidence that is before me, to propose to confirm this Order only in respect of D-N.

### **Conclusion**

46. 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**

47. I do not confirm the Order.

*Sue Arnott*

**Inspector**

## **APPEARANCES**

### **In support of the Order**

Ms N Ahmed                      Senior Solicitor; Milton Keynes Council

*Who called*

Mr R Carr                      Consultant representing Milton Keynes Council

### **Opposing the Order**

Mr M Fraser                      Of Counsel, Landmark Chambers, London; representing Olney  
Rugby Football Club

*Who called*

Mr J Brock

Mr M Rawlings

Ms S Hargreaves

Mr R M Taylor

Mr A Tebby

Mr N Smith                      Statutory objector

Mr C Wells

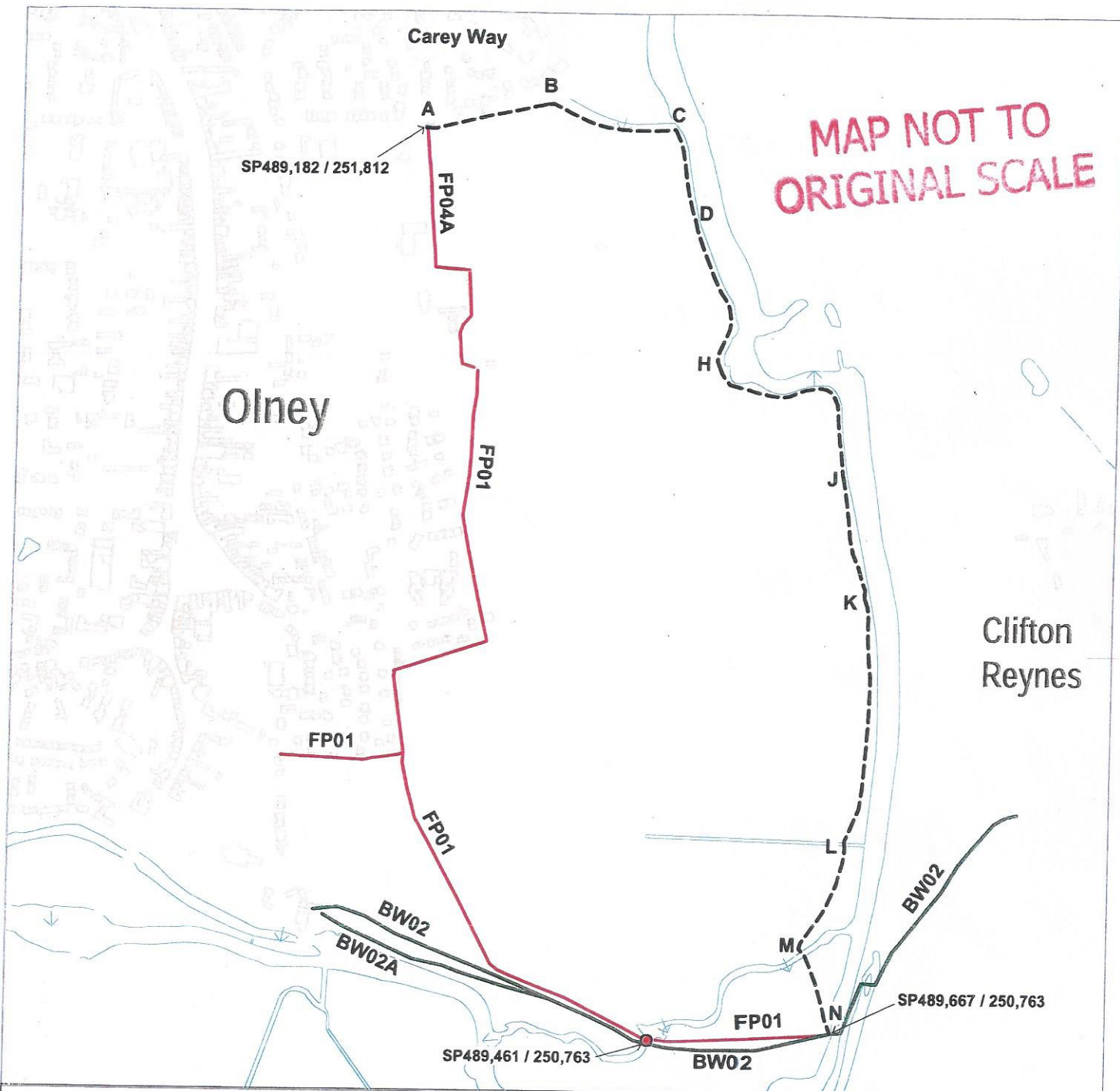
Mr M Harris

Mr J Swallow

## **DOCUMENTS**

1. Copy of the statutory objection
2. Statement of grounds/statement of case on which it is considered the Order should be confirmed and comments on the objections submitted by Milton Keynes Council together with bundle of relevant case documents
3. Proof of Evidence of Mr R Carr on behalf of Milton Keynes Council
4. Statement of case on behalf of Olney Rugby Football Club
5. Proofs of Evidence of Mr J Brock, Mr R M Taylor, Mr A Tebby, Mr N Smith, Mr C Wells, Mr M Rawlings, Mr M Harris, Mr J Swallow and Mr G Wilson
6. Statements from Mr A Tebby (19/07/15); Mrs B Tebby (19/07/15); Ms S Hargreaves (17/07/15); Mr J Brock (15/07/15); Mr C Wells (17/07/15); Mrs V Wells (17/07/15); Mr R M Taylor (18/07/15); Mr E Dix (19/07/15); Mr D Smith (17/07/15); Mrs S Marsh (received 13/07/15); Mr M Rutherford (9/07/15); Mr M Rawlings (received 3/07/15); Mr C Day (25/06/15); Mr J Swallow (20/06/15) and Mr J W Sealy (29/05/15)
7. Statements from Mr BH Lintern (19/07/15); Mrs A McCallum (18/07/15) and Mr C M W Kempson (3/06/15)
8. Further statements from Mr J Swallow (5/08/15) and Mr R Taylor (16/08/15)
9. Extracts from the definitive map and statement and associated documents





Map referred to in the Council of the Borough of Milton Keynes  
(Olney) Public Path Order 2013

The common seal of the Council of the Borough of Milton Keynes  
was hereunto affixed in the presence of:

*[Signature]*

PRINCIPAL SOLICITOR – LAW AND GOVERNANCE

21215



**Key:**

- RoW Footpath
- RoW Bridleway
- Claimed Footpath
- Denotes Clifton Bridge

**Application for Footpath Carey Way  
to Footpath 1 near Clifton Bridge**



Scale 1: 6,500



Research and  
Intelligence -  
GIS Team

Plan by N Kingsley

Tel: MK 25 4813

19/04/2013

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