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**RE: THE NOTTINGHAMSHIRE COUNTY COUNCIL  
(GREASLEY FOOTPATH NO.32 AND NO.40) DIVERSION ORDER 2019**

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**STATEMENT OF CASE FOR  
THE NOTTINGHAMSHIRE COUNTY COUNCIL  
(THE LOCAL HIGHWAY AUTHORITY)**

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**Background**

1. Greasley Footpath Nos. 40 and 32 are two linked footpaths in the parish of Greasley; with the latter being a recently obstructed but previously very popular and well-used historic route dating back to before 1938 and claimed under the original 1949 procedures. **DOCUMENT 1** shows the line of both routes, as originally claimed in the Parish Schedule in 1953, with Greasley Footpath No.32 running along the lane leading to the fields.
2. A large number of complaints were made to the Highway Authority as a result of the landowner obstructing Greasley Footpath No.32 in 2013. In response, the Highway Authority served notice upon the owner of the land seeking that the footpath be reopened. In response, the landowner challenged the Highway Authority's view as to the precise line of the footpath, seeking an injunction restraining the Highway Authority from taking further enforcement action. Notwithstanding that, until obstructed, it was understood that the public had been using the line claimed in 1953, the Highway Authority nevertheless undertook extensive historical research with a view to satisfying all parties as to the precise location of the line claimed in 1953.

3. What this historical investigation revealed was that, at some time since the definitive legal lines of these paths were entered onto the Definitive Map and Statement following their inclusion in the Parish Schedule in 1953, part of the lines actually used by the public have changed very slightly from their original line. This is now understood to be due to obstructions which encroached onto the legal (1953) comprising or otherwise linked to the construction of the sole objector's dwellinghouse in 1965. In the case of Greasley Footpath No. 32 this appears to have included the extending of the lane; the act of which had the effect of straightening the lane and therefore the walked route, leading, as a result, more directly to the field edge, at a point where it previously veered off slightly, away from the previous field edge. The attached **DOCUMENT 2** shows, in yellow, the tracks over which the Highway Authority concluded that the definitive legal footpaths actually ran, as a result of the extensive historical research.
  
4. The Highway Authority disclosed the aforementioned plan, clarifying the formal legal lines, to the landowner, seeking that the paths be reopened. The accuracy of this plan was challenged and was ultimately put before the Courts seeking a Declaration as to the legal lines of the two subject footpaths. On 21<sup>st</sup> July, 2015 the Nottingham County Court ordered (see **DOCUMENT 3**) that:
  - a) *the route of Greasley Footpath No. 32 identified and described in the Definitive Map and Statement prepared and maintained by Nottinghamshire County Council pursuant to the provisions of the Wildlife and Countryside Act 1981 as it affects the property 199A Main Street, Newthorpe Nottingham, title to which is registered at the Land Registry under Title No. NT230541, is as marked on the plan attached hereto marked Plan 'B' and coloured in yellow; [see **DOCUMENT 4**]*
  - b) *the route of Greasley Footpath No. 40 identified in the Definitive Map and Statement prepared and maintained by Nottinghamshire County Council pursuant to the provisions of the Wildlife and Countryside Act 1981 as it affects 199A Main Street, Newthorpe, Nottingham, title to which is registered at the Land Registry under Title No. NT230541, is as marked on the plan attached hereto marked Plan 'B' and coloured in yellow. [See **DOCUMENT 5**].*

5. The effect of all this is that not only have the definitive legal (1953) lines of Greasley Footpath No.32 been inadvertently partially obstructed, but also that the more modern lines used since 1965 to avoid those obstructions, have now (from 2013) also been intentionally wholly obstructed preventing local residents and walkers from farther afield from using this direct route between the village and the church.
6. Looking at the position on the ground in 2013, it remained clear to the Highway Authority that, in relation to Greasley Footpath No. 32, the best route for the public was the line which the public had used for nearly 50 years up to that point (i.e. until 2013) along the extended lane, before resuming the definitive legal line over the subsequent fields.
7. While it also became clear as a result of that historical research that there were a number of obstructions over the legal line of the adjoining Greasley Footpath No. 40, where it crossed over adjoining landholdings, it was possible with the co-operation of those landowners to restore public access over the adjoining landholdings. The continuation portion of this route which runs over land in the ownership of the objector, is considered by the Highway Authority to be more problematic. As can be seen from **DOCUMENT 2**, the line and extent of Greasley Footpath No.40, as Declared by the Court, has, since 1965, run through a corner of the occupier's house and close to the rear windows of their property. Following the undertaking of a variety of landscaping works by the landowner following the approaches of the Highway Authority, it also runs up and over a plateau comprising a 6' sheer drop where the occupier has extended their garden. It appears clear that the definitive legal line here provides very little benefit to the public. A route farther away from the dwelling-house itself would be a more commodious walk for the public to use, and that, given that reopening of the original line would technically require the removal of the corner of the dwelling-house, diversion to a line further away would greatly be in the interests of the landowner. This proposal has received the explicit support of one of the affected landowners over whose land the unaffected continuation would continue to run (see submission of Richard & Sally HIND dated 30<sup>th</sup> November, 2019 (see **DOCUMENT 6**)).

8. In seeking to address these obstructions and to restore an available route for public use, the Highway Authority has therefore considered whether it would be expedient for the obstructed legal lines to be diverted; such consideration resulting in the subject Order (**DOCUMENT 3**).

### **The Legal Test**

9. Section 119, Highways Act 1980, provides that the Highway Authority can make a 'public path diversion order' where it appears that it is expedient that a footpath (or part of it) should be diverted. This expediency refers to the interests of the owner or occupier of land crossed by the path, or of the public. Section 119 also stipulates that a diversion order shall not alter a termination point of the path in cases where that point is on a highway, otherwise than to another point on the same highway, or a highway connected with it, and which is substantially as convenient to the public.
10. Subsection (6) also states that the Secretary of State shall not confirm an objected order referred to him for determination, and a council shall not confirm an unopposed order, unless he or they are satisfied that the diversion to be effected by the order is expedient, and that the path will not be substantially less convenient to the public in consequence of the diversion.
11. It must also be expedient to confirm the order having regard to the effect 1) which the diversion would have on public enjoyment of the footpath as a whole, 2) which the coming into operation of the order would have as respects other land served by the existing path, and 3) which the new path created by the order would have as respects the land over which it is created.
12. This comparison must be done between the definitive legal line and the proposed line of the footpath in order to judge whether diversion of the definitive legal line is expedient having regard to all of those factors.

### **The Objection**

13. A single objection dated 30<sup>th</sup> November, 2019 (**DOCUMENT 7**) has been received from Mr. Richard James MAHER of 199a Main Street, Newthorpe, NOTTINGHAM,

NG16 2DL. This makes a number of points, not all of which are germane to the issue of diversion order. To the extent that they relate to the relevant legal test (and adopting the Objector's numbering) the Highway Authority would respectfully submit as follows:

- 1) The diversion is not in the interests of the Objector or his property.
  - a. The proposed diversion of FP32 will not expropriate any land from the Objector. The proposed diversion of a small section of the legal line of FP32 reflects that which was used from 1965-2013, running along the lane which the Objector has latterly converted into a gated private drive, preventing the public from continuing their use. The landscaping and other works undertaken by the Objector since 2012 were done in full knowledge of the walked route; the Objector having purchased the property in September, 1994; having tolerated the public's use of the lane for the intervening 18 years (additional to the tolerance of previous landowners for some 30 years before that, it appears). Additionally, the current legal line requires the boundary between the Objector's property and that of his neighbour to be kept open, resulting in a corresponding reduction in privacy to the Objector, as well as to their neighbour, and the Objector's landscaping works mean that further substantial works would be required to make the legal line safe for public use.
  - b. The Authority has no record of any complaints from any landowner or path-user until the paths were obstructed in 2013. The Parish Schedule and Definitive Map have always been clear as to the lines of the route and there is no indication that any walker or landowner considered the legal right to run anywhere other than 'over the lane'. The other points raised are not relevant to the legal test.
2. The property is for sale but blighted: The points raised here are not germane to the relevant legal test under §.119, Highways Act 1980.
3. The Authority now seeks lines other than those it put before the Court: While the points raised here are not, in the main, germane to the relevant legal test under §.119, Highways Act 1980, the Authority considers it may be helpful to the parties to state that the Authority was required to present evidence to the Court as to the true lines of the highways as they existed at law, notwithstanding that these were not the lines that had been used for nearly 50 years. The Authority's role in such matters is neutral and impartial. The Authority cannot and would not seek to have

‘desire lines’ recognised without following due legal process, hence the instant Diversion Order put forward for confirmation.

4. The purpose of and reasons for the Order: While the points raised here are not, in the main, germane to the relevant legal test under §.119, Highways Act 1980, the Authority considers it may be helpful to the parties to confirm that, while it is noted that the Objector disagrees with the legal lines as declared by the Court on 21<sup>st</sup> July, 2015, it is not accepted that there can be any dispute over these. The court’s decision is a decision *in rem*; such determination being *res judicata*.<sup>1</sup>
5. Failure to reopen the legal lines: As indicated by the Objector’s description of the lines of the paths being in dispute, he has not only failed to reopen the legal lines of the footpaths but has removed apparatus installed by this Authority to facilitate use of the current legal lines. Notwithstanding this, the Authority has not had regard to the presence of these temporary obstructions in evaluating the matter of a possible diversion but has looked at the landowners’ use of their land parcels and of the public’s use of the route.
6. Impartiality: While this point is largely a repeat of point 3 above, and is therefore similarly not germane to the relevant legal test under §.119, Highways Act 1980, the Authority considers it may be helpful for the parties to here affirm that it has dealt with this matter neutrally and impartially. It presented the evidence to the Court indicating that the true legal lines did not in fact run wholly over the Objector’s land, but partially over the land of the Objector’s neighbour too, and asked that the Court have regard to this. While the Authority has informed the objector that the Court has confirmed that the legal line does run under the corner of the house, it has continued to seek diversion of that line by consent throughout this matter in order to restore public access in a way most beneficial to public and landowner alike, hence the diversion proposal.
7. The paths’ inclusion on the Definitive Map and Statement: The points raised here are not germane to the relevant legal test under §.119, Highways Act 1980, other than to note that the paths were duly recorded under the original 1949 surveying process and the lines have been included on the Definitive Map and Statement with no complaint from any landowner or otherwise since 1956. The Authority would

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<sup>1</sup> See *Wakefield Corporation -v- Cooke* [1904] A.C. 31; *Armstrong -v- Whitfield* [1974] Q.B. 16; and *R. -v- West Sussex Quarter Sessions ex parte Albert and Maud Johnson Trust Ltd and Others* [1974] Q.B. 24.

therefore respectfully suggest that the “presumption of regularity”<sup>2</sup> applies on this basis. In the alternative, the Authority considers that such rights would have become statutorily eligible for recording on the Definitive Map and Statement in 1985 on the basis of long user in any event.

8. Footpath No.40 should be closed: The points raised here are not germane to the relevant legal test under §.119, Highways Act 1980.
9. Divert Footpath No.32 to a different line: The points raised here are not germane to the relevant legal test under §.119, Highways Act 1980. The legal test requires consideration of whether the diversion is expedient as proposed compared to the current legal lines, having no regard to temporary obstructions. This is the aim of the current diversion order by which the Authority is endeavouring to preserve the original purpose and character of this route as far as possible, balancing the benefits to walkers and to landowners.

### **Evaluation**

14. The Highway Authority considers that it is clear that diverting the portion of Greasley Footpath No. 40 which runs underneath the corner of the occupier’s house is in the interests of the landowner. Given the extensive landscaping works and an apparent desire to increase privacy within the garden it is further clear that it is in any occupier’s interests. However, it is also considered, in the alternative, that diverting the route away from running so close to the living space of the occupier would also be in the interests of the public as, in the Highway Authority’s experience, paths which run through gardens, and particularly those that run very close to dwellinghouses, can dissuade people from using the route due to creating a feeling of entering the private space of another (a point raised in the supporting submission of David HIND & Vicky MOSLEY dated 1<sup>st</sup> December, 2019 (see **DOCUMENT 8**)).
15. As can be seen from the Order plan, it is not proposed to alter the termination point of the highway other than where it meets with Greasley Footpath No. 32. It is considered that simply realigning this portion of the footpath in the manner proposed will present a more natural and coherent line and will certainly not result in provision which is substantially less convenient for the public and it is envisaged that it will beneficially

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<sup>2</sup> See *Micklethwait -v- Vincent* (1893) 69 LT 57

affect public enjoyment of the path. In terms of the effect on land served by the existing route and by the proposed route, this remains contained within the one landownership and will have no detrimental effect thereon.

16. In relation to Greasley Footpath No. 32, it is proposed to divert the legal line of this route onto the line which the public were accustomed to using over the past forty years up to 2013. This diversion would remove part of the legal line from the ownership of one party onto the ownership of another, but in so doing would follow 'the historic lane' which has been the route of choice used by people faced with an obstructed legal line who have necessarily diverted around those obstructions.
17. It is accepted that one landowner would benefit from having the legal line removed from the corner of their land, though it is not considered that the receiving landowner (or the occupier) would suffer an equivalent detriment. Rather, the landowner and occupier were used to the pre-existing use of this lane in any event, and diversion to that used line would result, in the Highway Authority's view, to only a modest disbenefit in terms of placing the legal right to pass and repass on foot to a location where the public and, it appears until recently, the owners and occupiers since 1965 considered it to run anyway.
18. Furthermore, the public would benefit by being able to use the extended lane which, as far as it is possible to following the continuing landscaping and related works being undertaken by the landowner, continues the character and setting of having been set aside for just such a purpose; being a continuation of the original shorter lane. It is considered that, by providing the most naturally direct route along the lane, along a line which the public appear to have been content to use when deviating around the obstructions, it is clear that the diverted line would not be substantially less convenient, and would marginally add to enjoyment of the route as a whole.
19. It is not proposed to alter the termination point of this footpath at all, but simply to divert a portion of the route part way along. There is no land which is served by the current route which would not be accessible by the proposed route, and there is no detriment caused in this respect.



20. In relation to the proposed route, diversion would cause a public right to be created along 'the lane' which now also operates as a driveway and access, but as use has already been made of this route without any complaint, seemingly by belief of the parties that the legal rights actually ran down 'the lane' it is considered by the Highway Authority that *if* there is any detrimental effect, it is negligible.

**Conclusion**

21. The County Council would respectfully request that, in light of the above, the Secretary of State for Environment, Food and Rural Affairs dismiss the objection and confirm the Order as made.

**Friday, 23<sup>rd</sup> October, 2020**  
**The Nottinghamshire County Council**

**In the Matter of The Nottinghamshire County Council**  
**(Greasley Footpath No.32 and No. 40) Diversion Order 2019**

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