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# Order Decision

Inquiry opened on 23 July 2013

by **Michael R Lowe** BSc (Hons)

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

Decision date: 20 November 2013

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## Order Ref: FPS/Q3060/7/1

- This Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Nottingham City Council (Park Road, Lenton Footpath No. 344) Definitive Map Modification Order 2009 (MO 9050).
  - The Order is dated 2 February 2009 and proposes to modify the Definitive Map and Statement by adding a footpath over land known as Park road and Lenton Road, Nottingham, as detailed in the Order map and schedule.
  - There were 25 objections outstanding when Nottingham City Council (the Council) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
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## Decision

1. I confirm the Order.

## Preliminary Matters

2. I held a public local inquiry into the Order at the Loxley House, Nottingham between 23 and 25 July 2013. I visited the site, unaccompanied, on 22 July, no party having requested an accompanied site visit.
3. At the Inquiry, Nottingham Park Estate Ltd. made an application for costs against Nottingham City Council. This application is the subject of a separate decision.

## Main Issue

4. The Order has been made under section 53(2)(b) of the 1981 Act relying on the occurrence of events specified in section 53(3)(c)(i). The main issue is therefore whether the evidence is sufficient to show, on the balance of probability, that a public footpath which is not shown in the map and statement subsists on the route in question such that the definitive map and statement require modification. I will consider this matter under both the statutory provisions of the Highways Act 1980 (the 1980 Act) and at common law.
5. The requirements of section 31 of the 1980 Act are namely;
  - a) the date on which the right of the public to use the claimed footpath was brought into question;
  - b) whether the claimed route was of such character that its use could not give rise at common law to any presumption of dedication; and
  - c) whether the claimed footpath was actually enjoyed by the public 'as of right' (without force, secrecy or permission) and without interruption for a full

- period of 20 years ending on the date on which their right to do so was brought into question; and if so
- d) whether there is sufficient evidence that there was, during this period, no intention to dedicate the claimed footpath.
6. A highway may be created at common law by the dedication of the owner with the acceptance and use by the public. Dedication may be express or implied. Dedication is inferred where the acts of the owner point to an intention to dedicate. The evidence would need to be cogent to discharge the burden of proof that rests upon those seeking to establish the rights. The evidence would need to be sufficient, on the balance of probability, to demonstrate that the claimed route had been dedicated and accepted by the public in the past. Long uninterrupted user of a way by the public gives rise to a strong presumption of dedication without the need to inquire into the actual intention of the owner of the land. However, the presumption is not to be drawn if the circumstances indicate that the user was likely to have been permissive.
7. Section 32 of the 1980 Act, requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.

### **Background & Reasons**

8. The Order route runs between the western end of Park Road and a point along Lenton Road and Friar Lane near Nottingham Castle. The claimed footpath crosses land known as Nottingham Park or The Park until the early-mid 19C when development commenced on The Park for allotments and a residential housing estate, now known as Nottingham Park Estate. The land was owned by the Dukes of Newcastle from 1662 to 1938 and then by the University of Oxford until 1986, after which it became the property of Nottingham Park Estates Limited. The Park's development was described as follows in 1856 (Rambles Round Nottingham) "for the long period of a century, now rapidly nearing its close, been freely used and is commonly regarded as a pleasure ground for the people" and "first as an orchard, next as a rabbit warren, then as a deer park to the castle".
9. Between November 2003 and April 2004 the Council received nine applications for a public right of way along the Order route. Six of the applications claimed a public footpath and three claimed a public bridleway. In February 2009 the Council made the Order to add a public footpath to the definitive map and statement of public rights of way following its investigation of the matters detailed in the applications and its own research.

### ***Implied Dedication of a footpath under common law***

10. An extract from a book *Highways and Byways in Nottinghamshire* by Firth & Griggs (17, 1916) refers to a manuscript by the Rev. John Lambe in which the location of Mortimer's Hole is described. The description says "*The place was always showed for Mortimer's Hole when I was a boy was on the left side of the way to Lenton in a narrow bottom between two hilly rocks, upon one of which, almost over against the great yard of the Castle to the north, there stands a poor cottage, sometime an alehouse. It is a little way before the entrance to the park along the footway to Lenton*". The Rev. Lambe was born in 1685, such that the time to which he is referring would be likely to be before 1700.

11. A map dated 1744 by Bladder & Peat shows the lands north of The Castle. It indicates three tracks giving access to The Park, the most southerly of which corresponds, approximately, with the present day location of Lenton Road.
12. An Inclosure Award of 1768 for land in the Parish of Lenton was made under the Lenton and Radford Inclosure Act 1767. It awarded "*a public footway from the town of Lenton eastward on a lane called Birch Lane and over the respective allotments ... to a foot style in the Fence belonging to Nottingham Park where a footway has usually heretofore been from Lenton to Nottingham*". The award map has not been submitted and was stated by the Council to have been lost.
13. An oil painting dated to c. 1795 depicts The Park from the direction of Nottingham. It shows a clear track and a gate alongside a revetment wall and a wicket gate in the Park fence. The location of the gate is uncertain and it is possibly at a location to the North of the Order route, now known as Park Steps.
14. A manuscript map, probably by Stretton c. 1804 - 1807, shows the Park and indicates the eastern end of the Order route as a track leading into the park with a line across, perhaps indicating a gate entrance. No route is depicted across the Park towards Lenton.
15. A New Plan of the Town of Nottingham by Wild & Smith, 1820 shows only the eastern end of the Order route labelled "Road to the Park".
16. The Ordnance Survey 1" Series First Edition 1824 reprint appears to show the Order route as a track. The date of the reprint is uncertain as railway features are included that postdate 1824. The scale of the map limits the details shown.
17. An 1825 plan of Nottingham by Wood is at a large scale and clearly indicates a way labelled "Footway from Lenton, Beeston &c.". A similar Plan of the Park from 1826, again by Wood, was apparently produced to show the proposed route of a water pipe from Basford to Nottingham. This also shows the same route labelled "Foot path from Beeston".
18. An architect's Plan of Nottingham Park by Robinson dated May 1827 shows the intended lines of buildings on the estate of the Duke of Newcastle and indicates a "Foot Road from Lenton to Nottingham".
19. Three large scale maps by Stavely & Wood 1830, Stavely 1831 and a map of 1832 all show a route labelled "Footway from Beeston, Lenton &c.". These maps appear very similar and Wood and Stavely appear to have been the Nottingham Corporation surveyors.
20. A smaller scale map of the area around Nottingham by Sanderson in 1835 indicates the same route across The Park by dotted lines, distinct from the indication of roads by solid lines. A Plan of Nottingham by Dawson in 1835 indicates Parliamentary boundaries but lacks much detail and does not indicate a route across the Park. A plan by Creighton, 1835 appears to be almost identical.
21. An advertisement in the *Nottingham Review and General Advertiser* of 19 October 1838 for a property in Lenton village refers to "adjoining the footpath leading from Nottingham to Lenton across the Park".

22. An oil painting dated 1837 shows Nottingham Castle and The Park from the north west. The worn track can be seen in the middle ground consistent with the route from Lenton to Nottingham. A later colour print from 1850 shows a similar view, but now Lenton Road is visible with use by pedestrians and a horse and carriage. Both the images indicate the park was grazed by cattle and that the public could roam at will around The Park. An oil painting dated c. 1843-1844 shows a view of Nottingham from the south west. The subject is the newly opened 1840s railway and in the background is The Park with an apparent indication of pedestrians crossing between Lenton and Nottingham.
23. The Plan of the Town of Nottingham published for Deardens in 1844 claims to be "from the best authorities containing all the new Streets and every recent alteration". It indicates the same route across The Park and is labelled "Foot way from Beeston, Lenton &c".
24. A plan of Nottingham Park by Winter in 1847 is a large scale plan of land parcels or proposed parcels and indicates a possible north-south road across the Order route. The eastern end of the Order route is called Castle Road, but no indication is given of the way to Lenton across the Park.
25. A map of the Castle and Park showing the extra parochial property of the Duke of Newcastle, c. 1834-1850 indicates the route across the Park and is labelled "Foot way from Beeston Lenton".
26. *Old and New Nottingham* by Wylie in 1853 is a guide to Nottingham. It mentions Old Lenton being a mile and a half from Nottingham reached by rail or a "pedestrian journey through the park". *Rambles Round Nottingham Vol. 1* dated 1856 refers to "present road through the Park to Lenton".
27. The Map of Nottingham Park by Salmon c. 1861 is a detailed large scale map showing that the eastern end of the Order route had commenced development, with Lenton Road laid out as a road with footways. The 1884 Ordnance Survey map at a scale of 1:2500 shows the same layout of Lenton Road, but with the further construction of houses, and the 1901 edition is similar.
28. A petition by residents of The Park Estate against the bill, which later became the Nottingham Borough Extension Act 1877, states "with the exception of one or two footways, the public have at present no rights of way over the roads and streets within it; and its privacy and exclusion from the limits of the existing borough add a special value and attraction".
29. The minutes of various committees of the Borough of Nottingham in 1878 refer to an obstruction along Lenton Road, although the outcome is not clear. In 1886 the Borough Engineer produced a schedule of streets with the details of the lengths of sewers and paving. This schedule includes Lenton Road, Park.
30. *The History of the Parish and Priory of Lenton in the County of Nottingham* by Godfrey 1884 states "Except for pedestrians, who have acquired a right to cross Nottingham Park, the Derby Road forms the only direct communication between Lenton and Nottingham".
31. A Plan showing Castle Museum and Grounds and the adjoining Gardens 1887 indicates details of the eastern end of the Order route. A line and dots across Lenton Road is shown at the present day location of the gated entrance to the Park Estate. A further plan (c. 1875-1887) indicates plots of land in the vicinity

of Nottingham Castle and similarly shows some structure as detailed in the 1887 plan.

32. *A History of Nottinghamshire* by Brown 1896 refers to Lenton Road "it could never have been more than a footpath or possibly a bridle road and today it is a public right of way and cannot be closed on one day each year as are the other roads in the park. This is the reason for the well-known 'posts' at the Lenton exit of the park - there is a public footway but no thoroughfare for wheeled traffic". *An itinerary of Nottingham* by Walker 1930 repeats this description.
33. An account of the *Old Road into the Park* is provided by Foulds in Vol. 108 of *Thornton Society*, 2004. The article details the history of the land west of Nottingham Castle and the development of the eastern end of Lenton Road. This indicates that the present vertical alignment of Lenton Road was the result of works in the early 19C and was undertaken by "piecemeal widening, levelling and alteration over a number of years in response to the development of the Park for superior housing". The map by Badder & Peat of 1744 and other evidence led the author to conclude that there were two routes from the Castle into the Park with gateways. The second of which followed the line of the Outer Bailey north curtain along the alignment of the present day Lenton Road. The account casts doubt upon the accuracy of Smith & Wild's map of 1820.

#### *Assessment of the Evidence*

34. In summary, I find that the various maps, plans, paintings and accounts indicate that an ancient pedestrian route has existed between Lenton and Nottingham from at least the late 17C. Lenton and Beeston are recorded in the Domesday Book and it is plausible that the route has existed long before the 18C. The Order route, Lenton Road, has its origins in the early 19C and was extended along the route of the ancient footpath.
35. I find that the evidence of the Inclosure Award of 1768 is cogent evidence that a public footpath from Lenton to Nottingham was clearly established by 1768. The account of the Rev. Lambe indicated that it existed before 1700. Various maps and plans made during the 19C label a 'footway', 'Foot Road' or 'foot path' and indicate a direct route across The Park, more or less along the line of the Order route. Not all maps and plans show this way. The small scale maps would not necessarily be expected to show detailed features and the plan by Winter of 1847 appears to have been only intended to indicate the division of land into parcels. In my view the indication of a path on the Ordnance Survey map of 1824 and contemporary large scale maps by Wood in 1825 and 1826, maps by Stavely and Stavely & Wood between 1830 and 1831 and the plan by Robinson of 1827 are good evidence for the existence of a footpath from Lenton to Nottingham along the Order route at this time.
36. Whilst different terms, such as footway, are used on different maps I consider that this is consistent with the fluid terminology in use at the time, with the term 'footpath' becoming more frequent in the 20C. I am satisfied that the footpath from Lenton to Nottingham, along the Order route, was used by the public. The path was a direct link between the settlement of Lenton and Nottingham and apart from the various paintings made during the 19C indicating pedestrian user, the 1838 advertisement of property in Lenton

referring to the footpath is logically referring to a public footpath. There is no indication in any documentary evidence that the use was by permission.

37. I am satisfied that the above evidence, assessed as a whole, is clear evidence of the public's use of a footpath along the Order route by the early 19C. There is substantial evidence of the continuing use by the public of the way as a footpath from maps, plans and accounts during the mid and late 19C onwards to the present day and that Lenton Road was constructed along the alignment of the earlier footpath.

#### *Settled Land*

38. I am satisfied that the abstract of title of the Nottingham Park Estate Ltd. is good evidence that between 1711 to 1807 and from at least 1856 to 1939 the land crossed by the Order route, The Park, was held subject to strict settlement and that in such circumstances there may have been an incapacity to dedicate. However, in my view the evidence considered above indicates that the origin of the claimed footpath along the Order route predates the earliest date of 1711. In any event, it would appear to have been open to the Duke of Newcastle between 1807 and 1856 to challenge the public use of the footpath from Lenton to Nottingham across the Park. The evidence considered above clearly indicates that there was no such challenge.

#### *Width*

39. I accept the submission by the Council that the case of Attorney General v Esher Linoleum Company Ltd [1901] 2 Ch 647 is good authority for a presumption that following the laying out of Lenton Road the full width became a public footpath, with the exception of the part that was gated at the eastern end. The judgement of Buckley J reads "*Where there is a public footway, and adjacent land along the same line as the footway, but increasing the width, is laid out by the owner of the soil as a way for carriage traffic, even for private carriage traffic, the presumption of law, in the absence of evidence to the contrary, is that the owner has dedicated to the public use as a footway all the space that he has devoted to traffic in fact*". It is clear that the whole of Lenton Road had been laid out before 1861 and I see no reason to doubt that the Duke was capable of the presumed dedication when Lenton Road was set out.

#### *Private Streets*

40. In my view the term "Private Street" as used in the Public Health Act 1875 and subsequent legislation up to the 1980 Act is a reference to a way that is not maintainable at public expense. Such a private street may or may not be a public highway. It is not unknown for a private street to include a public footpath or as demonstrated in the Esher Linoleum case for a public footpath to co-exist along a carriageway that is private. Indeed, schedule 23 of the 1980 Act consolidates earlier provisions allowing the application of the private street works code to streets notwithstanding the fact that such a street may include a public footpath that is publicly maintainable by virtue of the National Parks and Access to the Countryside Act 1949.
41. I therefore do not consider that the Nottingham Borough Extension Act 1877, which declared Lenton Road to be a private street for the purposes of the Public Health Act 1875, has any bearing upon the existence of a public footpath at that time. Similarly, I do not consider that the Nottingham Park Estate Act

1990 has any application to the question of the existence of public rights of way or the capacity of the Estate to dedicate such rights.

*Conclusion on Implied dedication at common law*

42. In conclusion, I consider that a public footpath from Lenton to Nottingham, across The Park, has an ancient origin and had come into existence by the end of the 17C. The route was accepted by the public by that time and there is no indication at that time, or subsequently until 1999, that the owner of The Park treated the public user as permissive or challenged the public use. By the mid 19C Lenton Road had been constructed along the alignment of the ancient footpath and I consider that the presumption that the whole of the road was then dedicated as a footpath is the correct presumption and cannot be rebutted. I therefore conclude that the Order route, and the details of the extent and width set out in the Order, is established as a public footpath by implied dedication at common law.
43. That is sufficient to conclude all the matters before me, but I will briefly comment upon the question of presumed dedication of a footpath under the provisions of the 1980 Act.

***Presumed Dedication of a footpath under the Highways Act***

44. It is common ground between the Council and Nottingham Park Estate Ltd. that the public had extensive use of the Order route on foot before 1999 and that the twenty year period before 1999 is the time to be assessed. During this period the Estate would from time to time close the gate at the eastern end of Lenton Road to vehicular traffic. However, there is no evidence that pedestrians were prevented from walking along the footway alongside the gate. A sign at the gate entrance indicated 'Private Road'. In my view the sign is not a sufficient indication of a lack of intention to dedicate a footpath and the actions of the Estate in periodically prevent vehicle access along Lenton Road does not imply permissive user on foot or indicate any lack of intention to dedicate a footpath. The matter is academic, but had I not concluded implied dedication at common law by the end of the 17C, I would have found in favour of presumed dedication under the 1980 Act and that the width specified in the Order was the width that had been used by the public. Although some of the witness evidence indicated use by cyclists, I accept the evidence of the Estate and the Council that such use was insufficient and that the periodic closure of the gate at the eastern end of Lenton Road would have prevented use by cyclists.

**Other matters**

45. I appreciate the concerns of Mr Torres and other views expressed concerning the need to regulate and police public behaviour along Lenton Road. Whilst I understand these concerns, I am unable to have regard to such matters as the sole issue before me is the existence or otherwise of a public right of way.

**Conclusion**

46. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed.

*Michael R Lowe*  
INSPECTOR

## APPEARANCES

### Nottingham City Council

*represented by*

Noémi Byrd

of Counsel

*who called*

John Lee

Senior Rights of Way Officer

John Trevelyan

Rights of Way consultant

Gale Hill

David Rose

Frances Betty Tomlinson

Wolf Liebeschuetz

Margaret Rosa Liebeschuetz

Jonathan Wickens

Christopher Richardson

Lawrence Tony Ashford

Clifford Williams

David John Lipman

Tom Huggon

Kathleen Price

Christopher Thompson

### In support of the Order

Paul Sladen

*who called*

Jeremy Clough

Robert Howard

### The Objectors

Nottingham Park Estates Ltd

*represented by*

James Howlett

of Counsel

*who called*

Barry Hill

Simon Torres

## DOCUMENTS (submitted at the inquiry)

- 1 Addendum Statement of Nottingham Park Estate Ltd (NEPL)
- 2 Letter from Simon Torres dated 18 July 2013
- 3 Statement of Common Ground between Nottingham City Council and NEPL
- 4 Addendum to Robert Howard evidence (RH11)
- 5 Jeremy Clough statement on Lenton Road, The Park Estate on OpenStreetMap
- 6 Bundle from Paul Sladen
- 7 Statement of Simon Torres dated 14 July 2013
- 8 Copy of oil painting by John Knight of Nottingham Castle 1878
- 9 Copy of painting 'view of the footpath to Lenton across Nottingham Park c. 1795 (SLA 1)