



CABINET

THURSDAY, 17TH DECEMBER, 2015

At 7.30 pm

in the

COUNCIL CHAMBER - GUILDHALL, WINDSOR

SUPPLEMENTARY AGENDA

PART I

<u>ITEM</u>	<u>SUBJECT</u>	<u>PAGE NO</u>
i.	Heathfield Avenue, Sunningdale: Review of Highway Conditions	3 - 52

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Report for: ACTION
Item Number: 6i



Contains Confidential or Exempt Information	No – Part I
Title	Heathfield Avenue, Sunningdale – Review of Highway Conditions
Responsible Officer(s)	Ben Smith – Head of Highways and Transport
Contact officer, job title and phone number	Ben Smith – Head of Highways and Transport (01628) 796147
Member reporting	Councillor Rayner, Lead Member for Highways & Transport
For Consideration By	Cabinet
Date to be Considered	Originally scheduled for 29 October 2015 – to be considered (with addendum) on 17 December 2015
Implementation Date if Not Called In	Not Applicable
Affected Wards	Sunningdale
Keywords/Index	Planning; Heathfield Avenue; Sunningdale; highways

Report Summary

1. Woodlands Lodge and Boxwood House are dwellings in Heathfield Avenue, Sunningdale which have been the subject of two separate planning applications to demolish the existing pair of semi-detached houses and in each case create an apartment building with associated car parking.

The first application (planning ref. 12/02854/FULL) was for 10 apartments and was refused planning permission by the Windsor Rural Development Control Panel on 17th December 2012. The second application (planning ref. 13/00731/FULL) was for 8 apartments and was refused on 2nd May 2013 following consideration by the Windsor Rural Development Control Panel.

The applicant ('Millgate Homes') appealed both decisions and planning consent was granted by the Planning Inspector on 25th March 2014.

The Planning Inspector in allowing the two appeals imposed a number of conditions including one that requires the developer to widen Heathfield Avenue to a minimum of 4.8 metres for the first 15 metres from its junction with Kings Road. No development can commence until a scheme has been submitted and approved in writing by the Local Planning Authority.

In order to discharge this condition and widen the road it is necessary to convert

a section of grass verge to carriageway.

Ownership and use of this grass verge is disputed between the developer and residents. An amicable solution cannot be reached.

This report deals with the request from the developer to exercise powers under S.205 of the Highways Act 1980.

2. This report recommends that Cabinet resolves not to exercise their powers under section 205 of the Highways Act 1980.
3. This recommendation is being made as it reflects thorough and robust legal advice which minimises risk and challenge to the Royal Borough.
4. There are no direct financial implications arising from this report.

If recommendations are adopted, how will residents benefit?	
Benefits to residents and reasons why they will benefit	Dates by which they can expect to notice a difference
The risk of challenge and incurring expense of public finances are minimised by agreeing a way forward which reflects legal advice	With immediate effect

1. Details of Recommendations

RECOMMENDED: That Cabinet does not exercise its powers under section 205 of the Highways Act to enable the road widening.

2. Reason for Decision and Options Considered

- 2.1 Woodlands Lodge and Boxwood House are a pair of semi-detached dwellings in Heathfield Avenue, Sunningdale which have been the subject of two planning permissions, both of which were refused planning permission by the Council in its function as Local Planning Authority, and both of which were allowed on appeal.
- 2.2 The first application (planning ref. 12/02854/FULL) was for 10 apartments and was refused planning permission by the Windsor Rural Development Control Panel on 17th December 2012. The second application (planning ref. 13/00731/FULL) was for 8 apartments and was refused on 2nd May 2013 following consideration by the Windsor Rural Development Control Panel.
- 2.3 The planning inspector allowed both appeals and imposed a number of conditions, including one that requires the developer to widen Heathfield Avenue to a minimum of 4.8 metres for the first 15 metres from its junction with Kings Road.

No development can commence until a scheme has been submitted and approved in writing by the Local Planning Authority. The condition was identical in the two appeal decisions (although numbered as Condition 16 in

the decision on the 10-apartment proposal and as Condition 15 for the 8-apartment proposal).

- 2.4 In order to discharge this condition and widen the road it is necessary to convert a section of grass verge to carriageway.
- 2.5 Ownership and use of this grass verge is disputed between the developer and residents. Therefore, development cannot commence.

An amicable solution cannot be reached.

- 2.6 The developer ('Millgate Homes') contends that the grass verges form part of the private street (a private street is not maintainable at public expense but requires public right of way to be maintained).

If this were the case, the Royal Borough has powers under the Highways Act (section 205) which may be appropriate to use to enable the road widening works to take place, thereby allowing development to commence.

- 2.7 The residents contend that the grass verges are in private ownership. Thereby the developer has no control over the land and the Royal Borough has no powers to enable the road widening.

If this were the case, the developer would be unable to discharge the planning condition and the planning consent could not be implemented.

- 2.8 The heart of this dispute is the legal status of the grass verges and whether it is appropriate for the Royal Borough to use its powers under S.205 of the Highways Act 1980.. Evidence has been submitted by both parties to support their respective positions which have been reviewed by Shared Legal Services supported by advice secured from Queens Counsel (QC).

- 2.9 Additionally, the developer has challenged that the planning condition relating to road widening is unreasonable as they are unable to secure a route to discharge the condition, thereby effectively negating the planning consent.

Two planning applications have been submitted seeking to vary / remove this condition from both permissions as granted on appeal. The Royal Borough's Development Control team and the applicant have agreed that decisions on the two applications will be deferred and that determination will be delayed pending the outcome of this Cabinet report.

- 2.10 On the balance of evidence available it is advised that the land does not constitute part of the highway and the Royal Borough has no powers to enable the road widening; thereby the planning condition cannot be discharged in this way and development cannot commence.

Option	Comments
1. Accept legal opinion that the land does not form part of the private street. Acknowledge this	The developer may legally challenge this decision on the grounds that it is unreasonable to impose a planning

<p>position and do not utilise powers under section 205 of the Highways Act to enable the road widening.</p> <p>This option is recommended</p>	<p>condition which cannot be discharged, thereby preventing the planning consent being implemented.</p> <p>The condition was imposed by the Planning Inspectorate, not the Council. The appeal process allows for applicants to challenge conditions in a separate appeal(s) but in this case Millgate Homes did not do so, presumably because the current issue contained in this report was not foreseen.</p>
<p>2. Accept legal opinion that the land forms part of the private street. Acknowledge this position and approve the use of powers under section 205 of the Highways Act to enable the road widening</p>	<p>The residents may legally challenge the basis of the legal opinion and whether use of the S.205 of the Highways Act is applicable in this case</p>
<p>3. Refer a decision on the status of the land to the High Court to secure a legally binding position</p>	<p>This option would enable a legally binding position to be established</p>
<p>4. Seek further independent legal advice with respect to the status of the land and whether use of the powers under S.205 of the Highways Act are appropriate</p>	<p>Extensive legal advice has been secured including Queens Counsel opinion</p>
<p>5. Defer a decision pending consideration of the current planning applications seeking to vary / remove conditions through the regulatory planning process.</p> <p>The outcome may be that consent is granted, thereby enabling development or refusal which retains the existing impasse</p>	<p>At all stages of this planning application, highways comments have recommended that road widening is an essential condition of the development. This position was reinforced by the Planning Inspector at appeal.</p> <p>Officer's recommendation on both applications is for refusal, on the basis of highways advice and the fact that the only issue is whether relaxing or removing the condition would result in danger to highway users and / or hinder the free flow of traffic on the Borough's highway network – in this case, including Kings Road adjacent to the site.</p>

3. Key Implications

Defined Outcomes	Unmet	Met	Exceeded	Significantly Exceeded	Date they should be delivered by
The Council is not successfully judicially reviewed.	No	Yes	N/A	N/A	1 April 2016

4. Financial Details

4.1 Revenue Funding: legal fees incurred by the Royal Borough have been funded from development control and highways development approved revenue budgets.

Costs incurred to date amount to £16,400.

4.2 Capital Funding: there are no capital funding implications arising from this report

5. Legal Implications: a full report from legal officers is attached as Appendix A

6. Value for Money

6.1 Revenue costs on legal and professional fees amounting to £16,400 have been incurred in seeking to resolve this dispute.

A timely decision which binds both parties would offer the best value for money.

7. Sustainability Impact Appraisal – Not applicable in the context of this report

8. Risk Management: There is a risk of challenge by way of judicial review, where any party considers that the Council has misdirected itself in law, exercised its power wrongly, taken irrelevant considerations into account in arriving at its decision or otherwise acted irrationally.

9. Links to Strategic Objectives

Our Strategic Objectives are:

Residents First

- Improve the Environment, Economy and Transport
- Work for safer and stronger communities

Delivering Together

- Strengthen Partnerships

Equipping Ourselves for the Future

- Developing our systems and structures

10. Equalities, Human Rights and Community Cohesion

This report offers a full appraisal of the situation and seeks to provide a balanced approach which respect equalities; human rights and community cohesion

11. Staffing/Workforce and Accommodation implications: not applicable in the context of this report

12. Property and Assets: property and assets implications are embedded throughout the report.

13. Any other implications: None.

14. Consultation

14.1 Royal Borough officers; legal advisors and the Lead Member for Highways and Transport have met with both parties in advance of submitting this report to Cabinet for consideration.

14.2 This report will be considered by members of the Highways, Transport and Environment Overview and Scrutiny Panel and comments reported to Cabinet for consideration.

15. Timetable for Implementation: the recommendations of this report will take immediate effect (subject to Cabinet 'Call-In' procedures)

16. Background Information

The planning history for this site is set out below:

12/02854/FULL	Erection of 10 apartments plus basement parking, access and landscaping following demolition of existing dwellings	Refused 17.12.2012 but subsequently allowed by appeal decision dated 25.03.2014
13/00731/FULL	Erection of 8 apartments with basement parking, alterations to access, entrance gates and landscaping following demolition of existing dwellings	Refused 02.05.2013 but subsequently allowed by appeal decision dated 25.03.2014
14/01863/CONDIT	Details required by conditions 3 (archaeology), 4 (construction management plan), 6 (ecology), 10 (ageing population), 11 (renewable energy), 12 (drainage), 19 (cycle parking), 20 (gates) and 21 (refuse store) of planning permission 12/02854 (allowed on appeal) for the erection of 10 apartments plus basement parking, access and landscaping following demolition of existing dwellings	Details required by conditions 3 (archaeology), 10 (ageing population), 11 (renewable energy), 19 (cycle storage), 20 (gates) and 21 (refuse store) were approved on 13.08.2014 ; further details required in regards to conditions 4 (construction management plan), pond ecology and 12 (sustainable drainage system).
14/02118/CONDIT	Details required by conditions 5 (arboricultural method statement), 7 (external materials), 8 (landscaping), 13 (sustainability), 15 (access) and 16 (road widening) of planning permission 12/02854 (allowed on appeal) for the erection of 10 apartments plus basement parking, access and landscaping following demolition of existing dwellings	Details required by Conditions 7 (Exterior materials), (Landscaping, 13 (Code for Sustainable Homes) and 15 (Access) Were approved on 29.08.2014. The details for the other conditions,

		including condition 16 (road widening) , were not satisfactory and approval was refused.
14/02950/CONDIT	Details required by conditions 4 (construction management plan), 5 (arboriculture method statement), 6 (ecology) and 12 (drainage) of planning permission 12/02854 allowed on appeal for the Erection of 10 apartments plus basement parking, access and landscaping following demolition of existing dwellings	Approved, 27.11.2014
15/01500/VAR	Erection of 8 apartments with basement parking, alterations to access, entrance gates and landscaping following demolition of existing dwellings as approved under planning permission 13/00731/FULL without complying with condition 15 so that the condition is removed.	Pending consideration
15/01501/VAR	Erection of 10 apartments plus basement parking, access and landscaping following demolition of existing dwellings as approved under planning permission 12/02854/FULL without complying with condition 16 so that the condition is removed.	Pending consideration

16.1 Applications with the CONDIT suffix in the above table relate to the submission of details required by planning conditions. Submissions to date relate only to the 10-apartment scheme, and the submission of details related to road widening under ref. 14/02118/CONDIT was refused for the following reason as set out in the decision notice:

'...The submitted details are not acceptable for the purposes of this condition, for the following reasons:

- (i) Section 205 of the Highways Act 1980 is not an appropriate mechanism to instigate a requirement for street works to be undertaken, and the Council therefore has no power to enter into a section 278 agreement for the proposed works.*
- (ii) The works cannot be legitimately required under section 205 of the Highways Act 1980 and there are no appropriate alternative powers to undertake such works have been advanced. The submission has therefore not satisfactorily demonstrated that the proposed arrangements for securing the necessary powers and / or rights to undertake the proposed works are legally robust. With the exception of the road specification noted below, the other details would be acceptable, if it were not for the lack of legal mechanisms required for the implementation of this submission...'*

- Appendix A: Legal Report
- Appendix B: Location Plan

17. Consultation (Mandatory)

Name of consultee	Post held and Department	Date sent	Date received	See comments in paragraph:
Internal				

Cllr Rayner	Lead Member for Highways & Transport	25.09.15	09.10.15	Report updated to reflect legal advice
Cllr Wilson	Lead Member for Planning	25.09.15	Response awaited	
Cllr David Burbage	Leader of the Council	02.10.15	09.10.15	Reported updated with legal advice and populated with information previously awaited
Michael Llewelyn	Cabinet Office	25.09.15	09.10.15	Key implications added
Sean O'Connor	Shared Legal Solutions	25.09.15	Legal response received from Laurel Isaacs / Matthew Tucker	
Catherine Woodward / Laurel Issacs / Matthew Tucker	Shared Legal Solutions	25.09.15	08.10.15	Report updated to include legal opinion / full legal report attached as Appendix A – Final draft of legal report received on 19/10/15 attached as Appendix A
Simon Rowberry	Development Control Manager	25.09.15	Response awaited	
Alastair de Joux / Sarah Smith	Development Control	25.09.15	25.09.15	Planning history added and narrative updated accordingly
Mark Lampard	Finance Partner	25.09.15	Response awaited	
Melvin Andrews	Highways Development Control	25.09.15		Comments included in report

Report History

Decision type:	Urgency item?
	No

Full name of report author	Job title	Full contact no:
Ben Smith	Strategic Assets – Service Lead	01628 796147

Appendix A

Prepared by: Matthew Tucker, Shared Legal Solutions

Prepared for: Cabinet (29th October 2015)

Re: Heathfield Avenue

Context

- 1.1 A formal request has been received requesting that the Council exercise their powers as street works authority in respect of carrying out works to a private street. The context of the planning permissions and appeal process are set out in the Officer Report.
- 1.2 The applicant in respect of the sites at Woodlands Lodge and Boxwood House has formally requested that the Council, acting in their capacity as the relevant street works authority, exercise their powers under section 205 of the *Highways Act 1980*.
- 1.3 This request is contained in a letter from Osborne Clarke, acting on behalf of the applicant, dated 06 May 2015. The opening paragraph of the accompanying statement sets out:

“1. This is a formal request for the Royal Borough of Windsor and Maidenhead to utilise its powers under Section 205 of the Highways Act to carry out minor widening works to the verge of Heathfield Avenue as required by the Inspector in allowing two Appeals ref 12/02854 and 13/00731 for 10 or 8 apartments respectively, relating to Woodlands Lodge and Boxwood House’.
- 1.4 The subsequent paragraphs 2 and 3 of this statement set out the history and what is then required of the Council reasonably objectively, and for the benefit of Members we will reproduce these here:

“2. The Inspector imposed conditions on both decisions [No 15 on the 8 unit scheme and No 16 on the 10 unit scheme) requiring the existing carriageway to be widened to 4.8m wide for 15 metres back from Kings Road. The proposed widening is 15 metres long by a maximum of 800mm wide to assist the passage of vehicles in opposite directions immediately inside the Kings Road junction. As part of these works it is proposed to relocate the wooden shrubbery immediately behind the widened carriageway to maintain the same character (see attached drawing).

3. *There has been considerable discussion and correspondence between Millgate and the Royal Borough first whether the verges form part of the highway and if so whether the Council has the powers under the Highways Act to carry out such works. We believe that the verges are part of the Highway on the balance of probability (the appropriate test) and that the Council has both the power and the responsibility to carry out the works following the positive Appeal decision.*”

- 1.5 Members will see from the Proposed Carriageway Widening Plan that the proposal requires widening (indicated by stripes) to the east of Heathfield Avenue, on the grass verge adjoining the site known as ‘Heatherlands’.
- 1.6 In order to assist Members in reaching a decision on whether to exercise the Council’s powers, Shared Legal Solutions have prepared this report. The report will assess:
- a) Whether the verges constitute part of the highway, on the balance of probabilities, and
 - b) Whether the Council has the power to carry out the works requested of it.

Extent of the highway

- 1.7 A highway is defined, at common law, as a common route along which people can pass and re-pass as frequently as they wish, without hindrance and without charge. The use must be of right, and not on sufferance or alternatively by license.
- 1.8 There is a distinction between the right of way, and the way over which there is a right. The legal definition of a highway, factoring in caselaw to date, can broadly be summarised as follows:
- a) A highway must be open to the public.
 - b) The public must have the right to use the highway; as distinct from using it under license or permission. This right is permanent; the creation of a highway involves the permanent surrender by a landowner of a significant part of his ownership rights.
 - c) The nature of that right is one of passage.
 - d) In order to be defined, there must be a known and identifiable route over which the right of passage is exercisable by the public.
- 1.9 There is a highway in operation at Heathfield Avenue, but there remains a dispute over to what extent the adjoining land (specifically the verges) constitute part of the highway.
- 1.10 Counsel’s view has been sought on ascertaining the extent of the width of the highway, and it is considered that his comments on this topic may assist Members:

“(i) The width of a street is a matter of fact to be determined from all the circumstances;

(ii) It cannot be necessary for that width to be the same as the width that the public may have used to pass and re-pass, as the definition of the street can include other areas;

(iii) In general where a public right of way exists over a street with defined physical boundaries (fences and hedges) which appear to have been erected to separate the area covered by the public right of way from the private properties adjoining it, that public right of way will be taken to extend to the full width of the street (Hale v Norfolk CC [2001] Ch.717). Equally, where a public right of way has grown up over an existing private street the public right of way will, in the absence of any evidence suggesting that it had been confined physically to a particular width of the street, extend to the full width of the street.

(iv) On the other hand, if land has always been treated by the adjoining landowner as part of their garden rather than as part of the street then this land is unlikely to be part of the street unless a public right of way has been acquired over the land in question.”

- 1.11 One way in which land can constitute part of a highway is for it to form part of an area which has been dedicated. There are two mechanisms for land to be dedicated; either expressly, or by way of presumed dedication. Presumed dedication can take place either by operation of common law, or alternatively by statute under section 31(1) of the *Highways Act 1980*. Both possibilities will be assessed in this report.

Presumed dedication at common law

- 1.12 The common law presumption is that land has been dedicated as highway if it has been used by the public as of right and without interruption. The common law presumption can be rebutted by demonstrating that the landowner had no intention of dedicating the land to the public. Broadly, the landowner must show one of the following:
- It has stopped people using the land, either by turning people away or by putting obstacles in their way.
 - It has restricted use of the highway to a particular section of the public, or
 - It lacked the capacity to dedicate the land.

Presumed dedication under the *Highways Act 1980*

- 1.13 Under section 31(1) of the *Highways Act 1980*, a way is presumed to be dedicated if both of the following apply:
- It has been actually enjoyed by the public as of right, and without interruption, for 20 years, and
 - It is not of a character that public use cannot give rise to a common law presumption of dedication.
- 1.14 The presumption applies unless there is sufficient evidence to show that there was no intention to dedicate during the 20-year period (calculated from the date on which the existence of the highway is brought into question).

- 1.15 Dedication alone will not create a highway; in addition, the public must accept the highway.

The Definitive Map

- 1.16 We have had sight of advice prepared by Jonathan Small QC, Leading Counsel advising the applicant, dated June 2014. This advice reviews the role of the Definitive Map in assessing the extent of the highway:

“I have been sent a copy of (what I assume is) the definitive map produced by the Royal Borough of Windsor and Maidenhead dated 23rd December 2011. A definitive map and statement is deemed to be “conclusive evidence as to the particulars contained therein”: section 56(1) of the Wildlife and Countryside Act 1981. The map in my possession shows the whole of Heathfield Avenue coloured blue as an unadopted highway. There are lines shown along its length. Having been to the site myself it seems most likely (and I assume) that the lines demarcate the verges. Thus the verge between the carriageway and Heatherlands (which is relatively wide) is clearly shown.”

- 1.17 Following this comment, I am instructed that the Council’s Rights of Way Officer has reviewed the Definitive Map, and Heathfield Avenue is not included.
- 1.18 Although the Definitive Map can be conclusive as to the existence of a public right of way, it is possible for there to be uncertainty arising as to the precise route of a public right of way, where the underlying evidence is similarly unclear. It is also possible for additional public rights of way to exist which are not recorded on the Definitive Map.

Assessment of evidence received

2. Shared Legal Solutions have considered all available evidence in order to assess whether the grass verge constitutes part of the highway.

- 2.1 Because of the large number of documents examined in this case, it was considered that the clearest way in which these documents could be described was in the form of a table, which appears below.

2.2

Document	Date
The Definitive Map	
Ordnance survey maps x3	1880-1970
Historic enclosure maps	
Historic planning applications	Various
Title documents	Various
Parish claims map	March 1951
Report of Stuart Michael Associates	03 October 2014
Letter from representatives of the applicant	20 July 2015, 06 May 2015, 29 October 2014, 28

	October 2014, 16 October 2014, 07 July 2014, 01 April 2014
Letter from adjoining landowners	04 October 2015, 19 April 2015, 23 February 2015, 10 February 2015, 09 February 2015, 06 December 2014, 14 July 2014, 16 April 2014, 03 April 2014
Letter from Dermot McCaffery	01 May 2015, 04 April 2014
Report of Dermot McCaffery	28 October 2014
Legal statement from applicant	01 July 2014
Inspector's decision letter (APP/T0355/A/13/2198658)	25 March 2014
Statement: Heathfield Avenue (w/enclosures) from applicant	06 May 2015
Opinion of Jonathan Small QC	June 2014
Proposed Carriageway Widening Plan	06 May 2015
Summary document on behalf of residents	25 September 2015

Historic documentary evidence

- 2.3 A review of the historical documentary evidence has been carried out. Ordnance Survey maps show that Heathfield Avenue was created as a track or road initially in the 1880s.
- 2.4 Heathfield Avenue is not shown on any Enclosure Awards or Maps, and no public rights of way were claimed along Heathfield Avenue as part of the Parish claims submitted under the *National Parks and Access to the Countryside Act 1949*. There are also no historic planning applications which make reference to the verges.

Evidence supplied by the applicant

- 2.5 A legal statement was supplied by the applicant on 01 July 2014. It includes the following passage relating to the verge:

“6.1 The status of the road and verge:

According to the definitive map and statement of the Royal Borough of Windsor and Maidenhead (“the Council”) dated 23 December 2011, the whole of Heathfield Avenue, including verges, is an unadopted highway. The recent erection of bollards and planting by local residents will not have altered the status of the verges.”

- 2.6 The applicants' highways consultant has provided the Council with a report, dated 28 October 2014. This letter advances four main points which the consultant considers 'establish[...]*beyond reasonable doubt that the verges*

have always been regarded as part of the highway'. For completeness, I have included all three points below.

*"1) **Investigations with RBWM Highways Department** – attached at Appendix 2 are e-mail exchanges, photographs and plans provided by John Stewart in the Highways Department, which shows that the highway was regarded as including the verges and extending from boundary to boundary in 1975. This is a much longer period than required under the 20 year rule (S31 Highways Act 1980).*

*2) **Historic Ordnance Survey Plans** – Attached at Appendix 3 are a number of historic ordnance survey plans showing the extent of the road being very similar to that which exists at present i.e. extending to the property boundaries on either side and including the verges.*

*3) **Infrastructure and Street Furniture** – We have undertaken a Survey of items of infrastructure and street furniture within Heathfield Avenue, which shows a variety of such items within the verges shown in photographs and a plan at Appendix 4. It is usually assumed that Statutory Undertakers' plant and equipment will be located within the Highway although this can take place on private land with wayleave agreements.*

Conclusion

My conclusion following the review of this additional information and the plan issued by RBWM to Millgate prior to their acquisition of the properties is that the extent of highway in Heathfield Avenue does indeed include the verges beyond reasonable doubt and certainly on the balance of probabilities, which I understand to be the appropriate test in this instance."

2.7 The e-mail referred to in the first paragraph is from a Council Highway Assets Engineer, sent on 23 October 2014. It states:

"Yes, as with almost all streets in the borough, the extents are from boundary to boundary and would therefore include the verges."

2.8 In relation to the e-mail from the Council's Highway Assets Engineer dated 23 October 2014, the comments made at that time reflect the information which was available at that time.

2.9 In relation to the Ordnance Survey plans, Appendix 3 contains plans from 1971 and 1984. The 1971 plan appears to delineate the verges with a dotted line. The 1971 plan would appear to support the proposition advanced by the applicants, but no context is provided for what the 1984 plan is asserted to show.

2.10 Ordnance Survey maps should generally be treated with caution. The Planning Inspectorate guidance "Definitive Maps Orders: Consistency Guidelines" (last revised in July 2013) sets out the position succinctly:

12.31. Later OS surveys and maps, especially the larger scale plans, provide an accurate representation of routes on the ground at the time of the survey.

The inaccuracies of the earlier projection were virtually eliminated by the development of an alternative form of map projection. However, it should be emphasised that the depiction of a way on an OS map is not, of itself, evidence of a highway. The courts have treated Ordnance Survey maps as not being evidence of the status of a way. For example, in the case of Attorney-General v Antrobus [1905] 2 Ch 188 at 203, Farwell J stated in relation to an Ordnance map of 1874:

“Such maps are not evidence on questions of title, or questions whether a road is public or private, but they are prepared by officers appointed under the provisions of the Ordnance Survey Acts, and set out every track visible on the face of the ground, and are in my opinion admissible on the question whether or not there was in fact a visible track at the time of the survey”.

2.11 We generally agree with the points made in relation to infrastructure and street furniture. The existence and positioning of equipment in the absence of wayleaves is normally considered a reasonable indicator of the status of a highway, and this must be weighed in the balance with the other available evidence. This evidence is not conclusive unto itself, and it is possible that individual residents have given oral consent for this access.

2.12 This evidence was supported by a further statement on behalf of the applicants, supplied with the formal request for a decision on 06 May 2015. At paragraph 5, the statement sets out:

“5. The carriageway and verges in Heathfield Avenue do not form part of any registered Title. The properties either side including Heatherlands, Rusland, Woodlands Lodge and Boxwood House all exclude the verges. The owners of Heatherlands and Rusland have claimed ownership of the verges, but the evidence provided is not definitive. In any event the verges can still be part of the highway for the purpose of Part XI of the Highways Act 1980 and can be used even if land is privately owned.”

2.13 This paragraph highlights an important distinction. It is possible for a verge to constitute part of a highway irrespective of the ownership status of the underlying land. The position in relation to title does not necessarily reflect the factual reality on the land. We would advise Members not to focus on ownership rights, and instead to assess whether the verge in question forms part of the highway as a matter of fact.

2.14 A letter from the applicants’ representatives dated 20 July 2015 comments further on these points.

2.15 Firstly, there is some narrative discussion about the position in relation to two houses built at Pinewood, and it is asserted that Millgate own that land considered in other correspondence to be a verge. Once again, we would encourage Members to assess the extent to which the verge constitutes part of the highway as a matter of fact. Arguments relating to other land ownership can only provide limited assistance to this assessment.

2.16 At paragraph 1 of the letter, the position is summarised as follows:

“Having reviewed the documents released under the Freedom of Information Act request, it is my clear opinion that no information has been disclosed which rebuts the information previously provided by my client to the Council on 29 October 2014 that the extent of the unadopted highway in Heathfield Avenue does include the verges.”

2.17 Paragraphs 2(b) and (c) make further points in support of this position:

(b) At point 5 of [a letter from Mr Ryder-Richardson to Suki Coe dated 23 February 2015], I note that the existence of “equipment” and “statutory undertaking” within the verge is “indicative of highway status”. I agree with this point as, if the verges were not unadopted public highway, there would need to be agreements in place with the actual owners of the verge to allow the equipment and statutory undertaking to be constructed within the verge”.

(c) You [Shared Legal Solutions] advised the adjoining residents in your letter dated 21 November 2014 that “all the available evidence shows that the verge has been used without interruption by the public for many years. It is therefore not unreasonable to presume that the grass verge has been dedicated to the public and that it is now part of the adjoining highway”. In our view, nothing has changed since this letter to change that conclusion.

2.18 In summary, the applicants have advanced the following broad contentions in support of their view that the verge constitutes part of the highway:

- The view put forward by a Council Highway Engineer, supported by plans and photographs, in October 2014.
- The depiction of the highway in Ordnance Survey maps.
- The Definitive Map depiction of Heathfield Avenue.
- The existence of equipment and street furniture on grass verges in the locality.
- That the recent erection of methods intending to prevent access will not change the status of the verge.

Evidence supplied by third parties

2.19 We have been supplied with a document purporting to encompass the overarching view of local residents, dated 25 September 2015, which brings together the arguments advanced to date. We will set out and assess the arguments in the same order that they are advanced.

2.20 The first point addressed in this submission is headed “Ownership of verges”. This point addresses the position at Millgate’s site known as ‘Pinewood’, and provides a plan indicating that there is “*no difference between the verge at Pinewood and any other verge*”.

2.21 As indicated previously, ownership is not a determinative factor in assessing what constitutes highway. A landowner should be ascertained for the purposes of assessing whether the land was intended to be dedicated, but beyond that point, arguments about the extent of ownership of other verges are very limited in their ability to assist.

- 2.22 A significant amount of evidence has been placed before the Council as to the ownership status of grass verges. It is nevertheless legally possible for a grass verge to both be privately owned and constitute part of the highway.

Ownership of the grass verge

- 2.23 To the extent that it assists the Council in making a decision, we have received information from local residents about the ownership position. An e-mail from Mr Ryder-Richardson dated 10 February 2015 appends the title entry BK260516. The associated plan does not distinguish between verge and highway in any appreciable way.
- 2.24 The register also lists a covenant on the schedule of restrictive covenants requiring ‘... *heirs and assigns will keep in repair all roads for the time being subsisting on the premises and also one half of Heatherfield Avenue co-extensive with the land comprised herein...*’
- 2.25 A letter from the Company Secretary of Heatherlands Management Company Ltd, dated 16 April 2014, sets out their position as follows:
- “The deeds of Heatherlands clearly show that all the land along the boundary of the property, up to the edge of the tarmacadam surface, belongs to the Company and the Directors are absolutely opposed to giving permission for any widening to be carried out”*
- 2.26 As indicated previously, the applicants argue that the evidence provided is “*not definitive*”. The normal presumption is that adjoining landowners own up to the middle of the road.
- 2.27 While we are minded to agree that this is not definitive, given that the plans associated with the relevant titles do not specifically demarcate the grass verge, on balance the evidence provided is more likely to indicate that the land is within Heatherlands’ ownership. The plan appended to BK260516 does indicate a notably thin highway, and our view is that the position in respect of ownership set out in the letter dated 16 April 2014 is most likely correct. This is a reasonable interpretation of the title documents.
- 2.28 The Council’s role is not to determine ownership of the land, but it is reasonable to conclude that for the Council’s purposes, on the balance of probabilities, the verge in question is most likely to fall within the ownership of the Heatherlands Management Company Ltd. No substantive evidence has been provided to undermine or otherwise contradict this proposition.

Evidence supplied by third parties (cont.)

- 2.29 The second part of the summary document dated 25 September 2015 addresses “Equipment and Statutory Undertaking”:

“As stated in a letter to Mrs Suki Coe, dated 23rd February 2015 (see Appendix B), the existence of equipment and the absence of wayleaves are irrelevant to the question of dedication. Dedication depends on use by the

public. Acquiescing in the placing of utility equipment does not amount to dedication. By way of illustration, it would be absurd to suggest that a pipe, running across a field without a wayleave, converts the route of the pipe into a public right of way.

[...]

The existence of equipment at both locations is the same and neither of the titles shows wayleave agreements. Millgate have confirmed the verge at Pinewood belongs so they cannot point to the exact same status at Heatherlands and claim that due to the existence of equipment, the verge there does not belong.”

- 2.30 We understand the analogy being drawn in this section, but the legal position is that the existence of equipment and the absence of wayleaves are relevant considerations in assessing the extent of highway. It is not being asserted that this amounts to dedication, but it is a valid technical consideration in its own right. Certainly it was not cited by the applicants as evidence of whether or not there was an intention to dedicate.
- 2.31 Briefly, statutory undertakers have rights under their respective constituent statutes to place items on highway land. The extent of the exercisable right is clear and confined to statutory provisions. However, this does not preclude the possibility of an agreement being in place between authorised individuals at that time, and the aforementioned statutory undertakers.
- 2.32 In this case, the Council has received a significant amount of information indicating that there has been no intention to dedicate the areas of grass verges as part of the highway.
- 2.33 In relation to the use of the verge, for clarity I will reproduce the position outlined in full:

“Whilst Millgate produced a submission on this subject it contained no evidence to support the presumption of dedication. That is because the submission did not address the condition necessary for the presumption of dedication to arise. In other words, there is no evidence that the verges have been used by the public as a right of way. The evidence shows the contrary as it is clear from the photographs of 1975 (provided by Millgate) which show that the public could not have used the verges as they were obstructed by vegetation.

It is impossible to walk the length of Heathfield Avenue without using the tarmac surface for a considerable portion because there are many significant obstructions. There could never be any consideration in anyone’s mind that the verge represented a path of any description and it is clear to any passer by that the verges are not part of the highway.

The onus of proof is on Millgate; it is not up to the residents to prove the contrary. However, if it were necessary for us to provide evidence of the landowners’ contrary intention we can do so. We say this because current

and former owners are willing to provide statements that they have, over decades, taken the steps necessary to make it abundantly clear that the verges were not intended to be used by the public. If any member of the public had been using the verges, they would have known that they were:-

On private land;

Not using the verges “as of right”.

- 2.34 It is agreed that the 1975 photograph asserted does show a verge which is, practically, unlikely to be used in a manner consistent with use as a highway. Two photographs dated 13 February 1975 are included in the report of Dermot McCaffery dated 28 October 2014.
- 2.35 It is asserted that there is no presumption of dedication. Accordingly, it cannot be right to say that the onus of proof is on the applicants; the function of the common law presumption is precisely that, that dedication is *presumed* subject to conditions. The onus is on relevant landowners to rebut this presumption.
- 2.36 You will recall from 1.13-1.15 of this report that the presumption of dedication can be rebutted, both in respect of the common law and *Highways Act* frameworks, by sufficient evidence that there was no intention to dedicate. In *Re (Godmanchester Town Council) v Secretary of State for the Environment, Food and Affairs [2007] UKHL 28*) consideration was given to what constitutes ‘sufficient evidence’ – it was considered that the landowner must communicate its lack of intention to dedicate through overt acts so that the relevant audience, namely the users of the way, would reasonably have understood their intention.
- 2.37 As per Hobhouse LJ in *Secretary of State for the Environment v Beresford [1996] N.P.C. 128*, the test of intention is objective; not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood what the owner was intending.

Evidence of intention

- 2.38 The Council has received information which purports to evidence intention. Firstly, in a letter dated 19 April 2015, Mr Ryder-Richardson highlights a developer’s planting of the verge:

“Given that the presumption has not even arisen, there is no need for the householders to demonstrate a contrary intention. Nevertheless, the householders have been demonstrating a contrary intention over decades, as I have mentioned in previous correspondence. Moreover a contrary intention is still being demonstrated to this day. Recent examples are not only Millgate’s incorporation of the verge and infrastructure (telegraph pole) into their own registered plot at Pinewood but also another developer’s planting of the verge outside their house elsewhere in the road.”

- 2.39 This does demonstrate an intention to separate out the alleged verge from the highway, which can be used to give Members a general overview of the approach taken to verges in this street generally. However, we would remind

Members that this request specifically requires a determination in respect of one specific verge.

- 2.40 In a letter dated 10 February 2015, Mr Ryder-Richardson goes into further detail on this point:

“If anyone was to walk on the verge they would be told that the road is private that the verges are part of Heatherlands’ garden and the public have no right of way. I have to ask why anyone would choose to walk on a grassed and planted verge in preference to the tarmac of the road. In terms of evidence of attempts to prevent the verge being used by the public, I would refer you to the current posts as the latest incarnation of this. Previously there were logs on the verge.”

- 2.41 Firstly, this evidence covers an unspecific timeframe, and as such it is limited in its usefulness. Also, while it is useful to have a contextual indication of intention in the area generally, in order to be considered ‘sufficient’ it is reasonable to expect evidence of intention to be provided by the actual landowner in question.

- 2.42 Further supporting evidence was provided by the Company Secretary to Heatherlands Management Company Ltd on 09 February 2015:

“It may help you to know that I have lived at 3 Heatherlands for thirty-five years. In that time either I or Heatherlands Management Company Limited have been responsible for caring for the boundary land in Heathfield Avenue, mowing the grass and planting shrubs etc. At no time has anyone ever questioned our right to do so, neither has anyone else made any attempt to use the land or to maintain it. I should point out that the developer of the newest house in the Avenue has planted the boundary land of that property, obviously believing that it belongs to the new house.”

- 2.43 As indicated previously (see 2.25) the Management Company believe that the verge is included within their ownership.

- 2.44 This evidence is clear and specific. It identifies clear and specific intention not to dedicate on the part of the landowner. It identifies a period of 35 years during which the land was maintained and used in a way consistent with use as private land.

- 2.45 In a covering e-mail dated 10 February 2015, the Company Secretary provides additional evidence:

*“1. As you will see from the letter to Mr Smith, to my certain knowledge our verges have been maintained by Heatherlands Management Company Limited and by me personally for the last thirty-five years. We have installed posts and large rocks to discourage use of the land and have planted many shrubs to prevent use of the area. These are the latest incarnation of edging, installed when the previous barriers began to rot.
2. There is a paved path to the edge of the tarmacadam surface to enable residents of Heatherlands to put out their bins.*

3. *We have no evidence of the public trying to walk along the verge and, indeed, if I have ever seen anyone allowing their dogs to use the verge to defecate, I have always pointed out that the verge is private property and asked them to remove the dogs immediately.*”

- 2.46 The use of ‘posts and large rocks’ is clear evidence of an objective intention to restrict access to the land, and indeed it is expressly described as intended to discourage use of the land. The evidence before the Council is that there has been a history of barriers being installed at Heatherlands in order to discourage public use, and that the verge has not in fact been in use as a public highway.

Conclusion

- 2.47 Taken together, this evidence is considered sufficient to satisfy the objective test of intention in *Beresford*. The evidence before the Council states that the landowner had no intention to dedicate the verge as highway, at least over the last 35 years. There is evidence of attempts to put obstacles in the way of the public, and we consider that those methods would be understood by a reasonable user of the highway. There is also no forthcoming evidence that the verge has actually been enjoyed by the public, as of right and without interruption, for 20 years.
- 2.48 Having assessed the factual evidence provided, we consider that it is not possible to presume the dedication of the grass verge in question either at common law or under the statutory framework of s.31(1) of the *Highways Act 1980*. The conduct of the individuals who have given evidence is not consistent with dedication.
- 2.49 On the balance of probabilities, the available documentary evidence does not show that public rights exist. Evidence of actions taken by the landowners show that any presumption of dedication of public rights would have been rebutted by their actions. Therefore, on the overall balance of probabilities, it is considered that public rights of access do not exist over the verges along Heathfield Avenue.
- 2.50 For those reasons, in consideration of whether to exercise the Council’s powers under the street works code, we would recommend that Members do not resolve that the verge is considered part of the highway.

Exercise of the Council’s private street works powers

3. The applicants’ legal statement dated 01 July 2014 encapsulates the power available to the Council succinctly:

“The Council has the power under the [Private Street Works] Code to carry out the works required pursuant to Condition 16 of appeal reference APP/T0355/A/13/2198658. For this power to arrive, the Council must resolve that the relevant part of Heathfield Avenue is not metalled and levelled to its satisfaction. The imposition of Condition 16 in itself indicated that this is indeed the case.”

- 3.1 To put this in context, the Inspector's decision set out as follows:
- "...Again these are matters of law, but I note that the Council did not dispute them in principle. It accepted that a pragmatic approach should be taken to provision of a safe route. In the light of that I consider that there is a reasonable prospect of the condition being fulfilled, with or without exercise of powers under Part XI."*
- 3.2 The Inspector clearly contemplated that this condition could be fulfilled either within or without the Private Street Works framework.
- 3.3 The proposed works are the widening of the existing metalled carriageway and a corresponding foreshortening of the verge. The proposal also suggests a levelling and metalling of that part of the verge which is to be incorporated into the newly-widened carriageway.
- 3.4 Street works can be carried out by persons having the lawful authority to do so. The framework at s.205 of the Act can provide lawful authority to carry out works which would not otherwise be permitted on private land, without the consent of the landowner.
- 3.5 There are two stages to exercising s.205 powers. Firstly, the Council must consider whether the street is not *'sewered, levelled, paved, metalled, flagged, channelled, made good and lighted'* to the Council's satisfaction. This requires a consideration of the street's present condition and function at the point when the decision to exercise these powers is taken.
- 3.6 If the Council concludes that any of these aspects of the street are not satisfactory, a resolution can be made requiring the proper officer of the Council to prepare specifications, plans, sections and a provisional apportionment. The second resolution would then approve these documents, and that approval may be given either with or without modification.
- 3.7 The rights of the affected landowners under Article 1 of the First Protocol of the European Convention of Human Rights must also be evaluated by the Council. Article 1 is the right to the peaceful enjoyment of property. Any interference with this right must be subject to the conditions provided for by law, and must achieve a fair balance between the general public interest and the protection of an individual's property rights.
- 3.8 It is considered that there would be a justified interference with this right (and as such no violation of Article 1) if the Council were to resolve to exercise their section 205 powers, because that exercise would be carried out in accordance with the law and in the public interest.
- 3.9 If Members agree with the advice presented above, indicating that the grass verge does not constitute part of the highway, we would then advise that it is not possible for the Council to exercise its powers in the way requested.
- 3.10 This is because the area to which works are proposed does not constitute part of the private street. Private street is defined at s.203 as: *"2) In this Part of this Act "private street" means a street that is not a highway maintainable*

at the public expense [...]. It is not correct to identify the grass verge as falling within this definition.

- 3.11 By way of analogy, often a fence or a wall forms part of a private street and in order to carry out works the wall or fence must be removed. Authorities are unable to include the fence or wall as part of the street works, since the site of the proposed works is not strictly part of the street.

Power to widen a private street

- 3.12 If Members disagree with the advice presented above, and conclude that the grass verge does constitute part of the highway, we must then assess whether it is open to the Council to exercise their powers as requested.
- 3.13 Section 227 of the *Highways Act 1980* provides that a street works authority may use its powers, as found in Part V, to widen a private street, *'in the course of the execution of street works'* under s.205.
- 3.14 One of the Part V powers is the section 72 power which allows an authority to widen a highway. However, a highway cannot be widened in this way unless the authority has the legal right to extend the highway onto private land.
- 3.15 There is no power under section 227 to enter onto land or carry out works, except in case of agreement or otherwise acquisition.
- 3.16 Section 226 allows a street works authority to vary width where there is also a footway in the street, and as such is not applicable.
- 3.17 Those instructed consider that the power contained at s.205 of the Act may not be used solely for the purpose of widening a private street. In statute, the power required to vary width is not freestanding.

Present condition of the street

- 3.18 The Council has also been supplied with a report prepared by Stuart Michael Associates in October 2014, concluding that the carriageway is in generally in a good state of repair.
- 3.19 The advice of Jonathan Small QC, dated April 2014, argues that:
- "... it is clear that it is not open to the Council to be other than dissatisfied with the condition of Heathfield Avenue, taking into account my client's intention to implement their planning permission."*
- 3.20 We consider that the Council could act reasonably in determining not to exercise their section 205 powers. It has not been demonstrated that there is no other reasonable course of action available to the Council as street works authority.

Other representations received

- 3.21 The summary document dated 25 September 2015 on behalf of residents makes the following representation in respect of the Council's powers:

"Section 205 only addresses the need to repair a road. It does not permit the Council to upgrade or widen the road.

To take action under Section 205 the highways authority must consider that Heathfield Avenue in its present state is not in a satisfactory condition for the present conditions. The test is not whether the condition of the road would become unsatisfactory in the future after the construction of flats.

Heathfield Avenue is in excellent condition and at no stage during the many discussions over the status of Heathfield Avenue has the Highways Authority suggested that it was unhappy with the state of the road. In fact the reverse is true. In defending a decision to allow another development in Heathfield Road the Highways Authority confirmed it was happy with the condition and width of the road. The other development in question was land at Grangewood and Maple House, Larch Avenue but with frontage and access to Heathfield Avenue – Application reference: 13/00949.

*Having provided this written confirmation the Council cannot now pretend the road is not satisfactory in order to bend the regulations in support of a Section 205. To do so would be to act outside its powers (*ultra vires*)."*

- 3.22 We do not agree that it would be *ultra vires* to conclude that the Council is not satisfied with one of the listed considerations. Previous assessments do not necessarily bind future assessments, and a decision would be based on a consideration of the evidence by Members.
- 3.23 Section 203(3) of the Highways Act 1980 defines 'metalling': "*paving, metalling and flagging*" includes all methods of making a carriageway or footway". It is correct to say that the makeup of a road generally could be considered within this section.

Recommendation

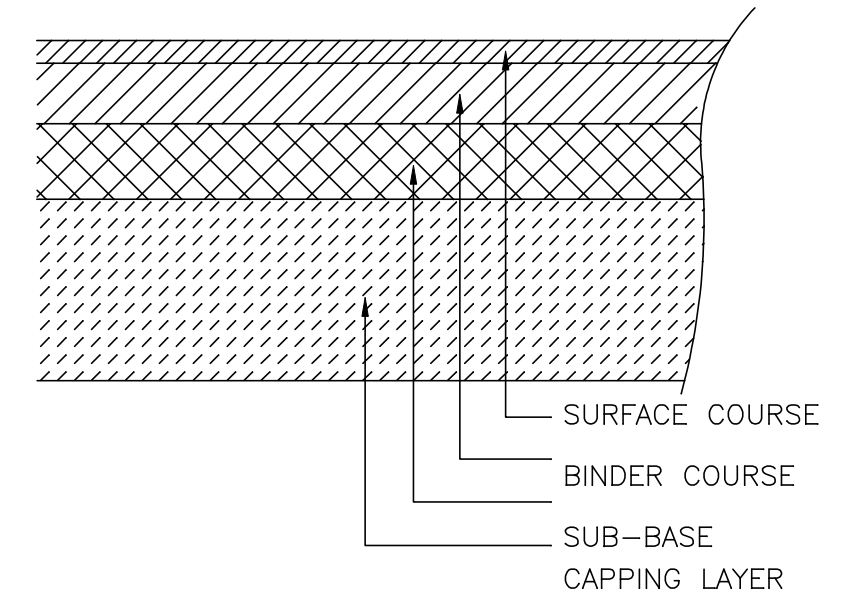
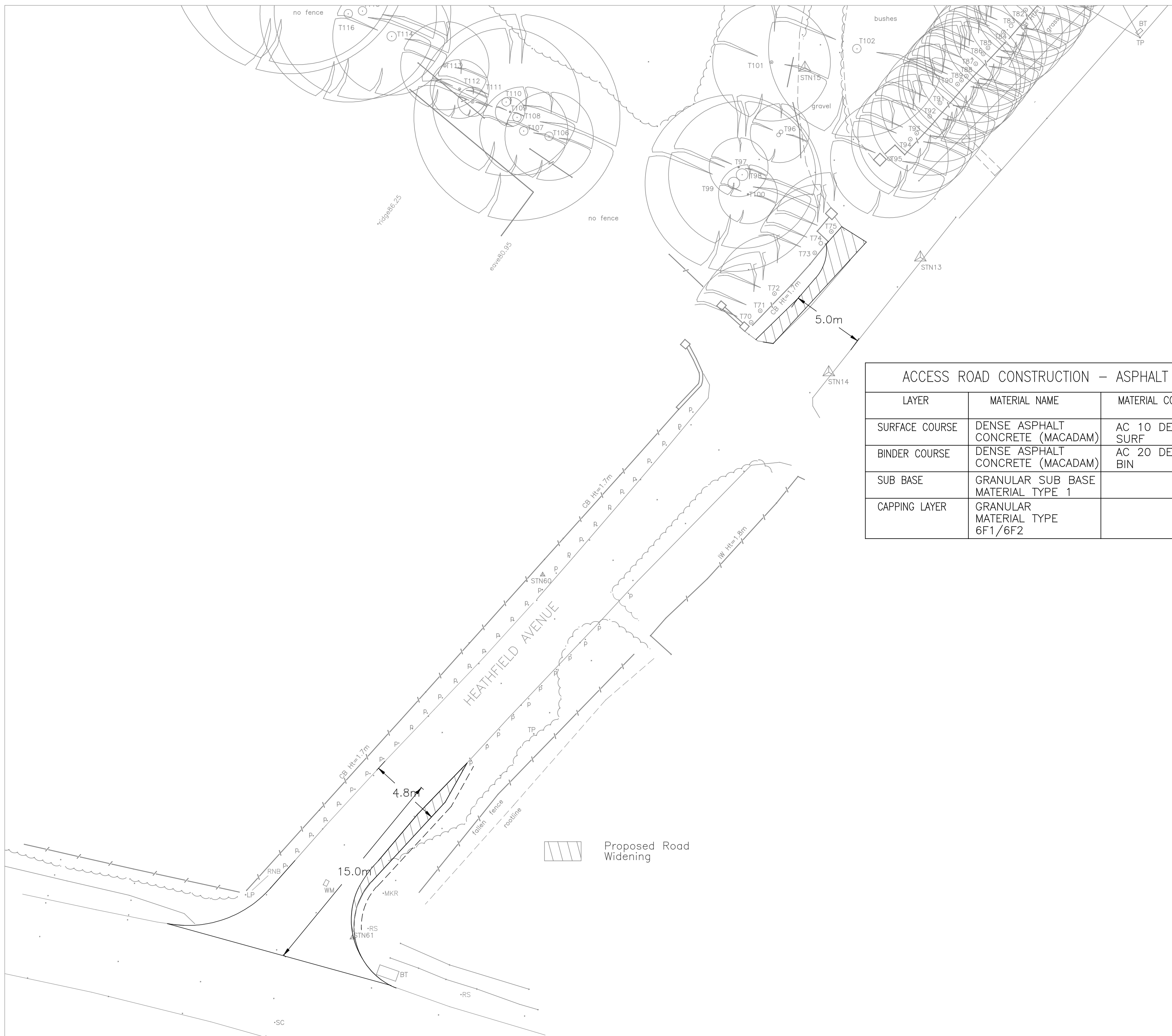
- 3.24 If Members conclude that the grass verge constitutes part of the highway, we would not recommend that Members exercise their power to make a resolution in respect of street works under section 205(1). It is considered that it is not possible to exercise these powers solely to achieve widening under the framework of section 205 of the *Highways Act 1980*. Limited evidence has been supplied which would enable the Council to be satisfied of the statutory requirements under s205.
- 3.25 Where the width of the street is the only concern of the street works authority, and it is otherwise satisfied that the road is sufficient for the purposes of serving the frontagers, we would advise that the Council is not entitled to use its powers under section 205 of the Act only to achieve the widening of the highway.



Drg No.		Rev.
<p>Operations Directorate Highways, Engineering & Transport Town Hall, St. Ives Road, Maidenhead, Berks, SL6 1RF.</p> <p>Tel: 01628 683800 Fax: 01628 796774 http://www.rbwm.gov.uk</p> <p>The Royal Borough  Windsor & Maidenhead</p>		
Rev	Date	Amendments
		By
<p>Project: Location Plan</p> <p>Appendix B</p> <p>Title: Heathfield Avenue Sunningdale</p>		
Drg No.		Rev
Date	Scale	Size
19.10.15	NTS	A3
Drawn By	CAD By	Checked By
HJ	HJ	
Signed Off By		
Drawing Path.		
Y:/Drawings/		
<p>Reproduced from the Ordnance Survey Mapping with the permission of the Controller of Her Majesty's Stationary Office Crown Copyright © Unauthorised reproduction infringes Crown Copyright and may lead to prosecution or civil proceedings, Royal Borough of Windsor and Maidenhead - Licence Number 100018817</p>		



NOTES



ACCESS ROAD CONSTRUCTION – ASPHALT CONCRETE (MACADAM)						
LAYER	MATERIAL NAME	MATERIAL CODE	THICKNESS	NOMINAL SIZE OF AGGREGATE	GRADE OF BINDER	COMMENTS
SURFACE COURSE	DENSE ASPHALT CONCRETE (MACADAM)	AC 10 DENSE SURF	30mm	0/10mm	100/150	TO BS EN 13108
BINDER COURSE	DENSE ASPHALT CONCRETE (MACADAM)	AC 20 DENSE BIN	80mm	0/20mm	100/150	TO BS EN 13108
SUB BASE	GRANULAR SUB BASE MATERIAL TYPE 1		100mm			*
CAPPING LAYER	GRANULAR MATERIAL TYPE 6F1/6F2		240mm			

28

REV	AMENDMENTS	DRAWN	CHKD	DATE	
		HIGHWAY PLANNING 34 West Street Marlow Bucks SL7 2NB 01628 488444			
Job Title: WOODLANDS LODGE, HEATHFIELD AVENUE, ASCOT					
Client: MILLGATE					
Drawing Title: PROPOSED CARRIAGEWAY WIDENING					
Scale	Date	Designed	Drawn	Drawing No	Rev
1:200@A2	16 JUNE 14	DFM	DFM	12.45 - 002	

Addendum Report to Cabinet

Prepared by: Matthew Tucker, Shared Legal Solutions

Prepared for: Cabinet (29th October 2015)

Re: Heathfield Avenue / Powergen

Context

1.1 An e-mail from the applicants' representatives on 27 October 2015 indicates that the applicants are concerned that no analysis of *R v Warwickshire CC ex.p Powergen (CA 31 July 1997)* [*Powergen* hereafter] was contained in the Cabinet report. For clarity, the author has produced this additional note addressing this point, and explaining why that is.

1.2 The applicants' position can best be explaining by the adjoining sentence in that e-mail:

"Since the planning appeal (APP/T0355/A/13/2198658) has been allowed on the condition the road at the junction is widened by the Council it is not possible for the Council to come to the view that it would not be to the benefit of the public to carry out the widening and enter into the S278 agreement with our clients."

Powergen

1.3 LJ Brown at paragraph 264 of the Court of Appeal Judgment in *Powergen*, succinctly describes the issue in dispute in that matter as follows:

"Is it reasonable for a highway authority, whose road safety objections have been fully heard and rejected on appeal, then, quite inconsistently with the inspector's independent factual judgment on the issue, nevertheless to maintain its own original view?"

1.4 In *Powergen* the local planning authority refused permission for a supermarket, partially because the proposed road works would be detrimental to road safety. Planning permission was obtained on appeal subject to a condition that the appellant arranges for the necessary road works to be completed. The appellant successfully sought judicial review of the authority's refusal to enter into a s.278 agreement on the grounds that it considered the proposed works to be unsafe.

- 1.5 The Judgment in *Powergen* made clear that, in those circumstances, a local highway authority had no choice but to facilitate the implementation of planning permission by entering into a s.278 agreement. The Council did not, and could not retain the right to maintain and act upon its original opinion, which ran contrary to the Inspector's judgment on the matter.

Application to Heathfield Avenue

- 1.6 It can be agreed that the Inspector has clearly concluded that it is in the public planning interest that the approved development should go ahead. That decision cannot be questioned by the Council, by way of taking a different view in the context of this request.
- 1.7 However, in the opinion of those instructed, it does not automatically follow that in the circumstances of this case, the Council is bound to operate the private street works code procedure.
- 1.8 The issue which has been raised is whether or not the Council is bound to operate the private street works code procedure, in order to achieve the widening that the condition requires. The Inspector has not come to any conclusion on this issue.
- 1.9 The background in relation to the matter before Cabinet is therefore different from the *Powergen* case. In *Powergen*, there was no issue as to whether the highway authority had the power to carry out the required improvement works.
- 1.10 In this case, it is claimed that there is no proper basis for the Council to be able to resolve to exercise its powers, and it is also claimed that part of the verge required for the road widening works does not form part of the highway. The Inspector made no finding on either of these issues; in fact as part of the Appeal Decision he accepted that he was not in a position to determine whether those powers would be available as a matter of law:

"52. [...] the owner of Rusland claims that he owns the area of verge part of which would be required for widening at the junction, and would not agree to its use. This is a matter of law that I cannot resolve, though I note the Council's indication that the Land Registry plans do not define the owner(s) of the carriageway and verges.

53. The appellant submits that ownership is irrelevant if the verges are part of the highway as the highway authority has powers under the Part XI of the Highways Act 1980 to secure the execution of street works in private streets. As understand the provisions of the Act, it would not be necessary to adopt the road in order to do so as an interested person suggested. Again these are matters of law, but I note that the Council did not dispute them in principle."

- 1.11 The facts in this matter are clearly distinguished from the position in *Powergen*. This is not a case where the local highway authority is attempting to assert or rely upon its original view; considering whether or not the Council can or will exercise private street works powers under s.205 of the *Highways Act 1980* is a separate matter, which the Inspector did not seek to resolve.

Addendum Report to Cabinet

Prepared by: Matthew Tucker, Shared Legal Solutions

Prepared for: Cabinet (17th December 2015)

Re: Heathfield Avenue: additional information

Context

- 1.1 This report is intended to be read in conjunction with the existing Report to Cabinet for 29 October 2015 (“the Report to Cabinet”), and the Addendum Report to Cabinet on the topic of *Powergen*.
- 1.2 Following the Report to Cabinet, additional information has been submitted, both on behalf of the applicants and on behalf of residents. This document has been drafted to update Members on the relevance and effect of those documents.
- 1.3 The updating information received can be summarised by the following table:

Document	Date
Historic Street View images of Heathfield Avenue	October 2008, September 2009, February 2010
Ordnance survey map overlaid with title plan	
Correspondence from adjoining landowners and their representatives	19 November 2015, 12 November 2015, 10 November 2015
Letter from Paul Morrow	14 December 2004
Correspondence from representatives of the applicant	04 December 2015, 04 November 2015, 27 October 2015
Statutory declaration of Mr Paul Morrow	19 October 2015
Statutory declaration of Mr Mike Overton	29 October 2015
Statutory declaration of Rosemary Overton	29 October 2015
Statutory declaration of Penelope A. Winstanley	11 November 2015
Statutory declaration of Christopher Michael Ryder Richardson	11 November 2015

Submissions of Jonathan Karas QC	12 2015	November
Statutory declaration of Christopher Michael Ryder Richardson	17 2015	November
Statutory declaration of Jillian Denise Ryder Richardson	17 2015	November
Statutory declaration of Mary Findler	18 2015	November
Statutory declaration of Paul Frankaland Hepburn	18 2015	November
Statutory declaration of Norman Eric Tetchner	18 2015	November
Statutory declaration of Penelope A. Winstanley	19 2015	November
Submissions in reply of Jonathan Karas QC	04 2015	December

- 1.4 There are also a number of updates and amendments arising to the table found at 2.2 of the Report to Cabinet.
- 1.5 In the column 'Letter from representatives of the applicant', there is an additional letter in respect of s.73 applications received on 22 July 2015, which should be included for completeness. In addition, the letter listed as 29 October 2014 is actually dated 11 November 2014. In the column 'Letter from adjoining landowners', 04 October 2015 should be deleted.
- 1.6 In respect of the Ordnance Survey maps provided from 1880-1970, these in fact number 4 maps, and should be described as 'x4'. Finally, the Report of Stuart Michaels Associates is dated 03 October 2014. However this is supported by a technical note, and a covering letter dated 09 October 2014.

Assessment of additional information submitted by the applicants: status of the verge

- 2.1 The submissions drafted by Jonathan Karas QC dated 12 November 2015 on behalf of the applicants refers to additional evidence which has been submitted, and we will review the points raised in turn.
- 2.2 In assessing the status of the relevant verge, the submissions set out six main points:

"15. First, the records of the local highway authority show Heathfield Avenue including its verges as "Un-Adopted Highway"."

This is noted. Those instructed consider that significant weight should be placed on the Council's mapping.

- 2.3 *"16. Secondly, this has been confirmed by the local highways authority: see email 23rd October 2014, John Stewart). It is highly surprising that having given this confirmation it is now suggested that the local highways authority is mistaken. No basis for such mistake has been disclosed."*

The Report to Cabinet addresses this point at paragraphs 2.7-2.8. The view of the Council's officer will be given some weight.

- 2.4 *“17. Thirdly, Heathfield Avenue provides a route between two adopted highways. In practice it can be used by members of the public. Indeed, it seems to be accepted that the tarmacked area has been so used and is unadopted highway. See Hals. Laws, 5th edn., vol. 55 para 122. I will return to the use of the verges below.”*

This point does appear to be agreed.

- 2.5 *“18. Fourthly, statutory undertakers' plant and equipment has been installed under the verges. No private wayleave agreements have been disclosed. The presence of equipment of statutory undertakers and statutory undertakers is evidence of the status of the land. In this case, for instance, there are, posts with a sign marked “SV” and what appear to be telegraph poles. I “SV” usually stands for “sluice valve” and will have been laid by a water undertaker. If pipes were laid in exercise of the powers under Water Industry Act 1991 s.158 or its statutory predecessors (power to lay pipes in streets) this would be good evidence that the land under which the utilities were laid was highway land: a “street” is defined by reference to the New Road and Street Works Act 1991 and includes unadopted highways: see Water Industry Act 1991 s.219(1).*

There is also a later paragraph in the representations which is critical of the Report to Cabinet's approach to this evidence:

“23. Further, the officer in the report mentions that the existence of statutory undertakers' equipment “does not preclude the possibility of an agreement being in place between authorized individuals” (para 2.31). If there were an agreement in place, the onus would be on those asserting its existence to prove it. There is simply no evidence of any such agreement. The way that the officer dismisses the inferences which can be drawn from the presence of equipment of statutory undertakers is not possible to understand. The relevant corner of Heathfield Avenue manifestly contains the equipment of a water undertaker (see photographs showing “SV” sign). If the owners of Heathfield Avenue had granted wayleaves or licences for such equipment to be installed, they could easily produce them.”

Taking these points together, the existence of equipment is a fair and reasonable point to place reliance upon. It can be agreed that the presence of equipment of statutory undertakers is evidence of the status of the land, and this will also be given weight as part of this assessment.

However, it is simply not correct to state that the inferences which can be drawn from this have been dismissed. Paragraphs 2.11 and 2.30-2.31 of the Report to Cabinet clearly indicate that we agree that the existence and positioning of this equipment is a reasonable indicator of the status of land.

It is also material that no wayleaves or licenses for such equipment have been produced to date.

- 2.6 *“19. Fifthly, historic photographs from 1975 show the verges passable to pedestrians and there would have been nothing to prevent use of the verges as “passing places” for vehicles. There are also photographs and street views consistent with this dating from October 2008, September 2009 and February 2010.”*

Additional Street View evidence has been submitted following the drafting of the previous Report to Cabinet. It is correct to say that this new photographic evidence shows that there is nothing in place which would prevent the passing of vehicles in October 2008, September 2009 and February 2010.

In relation to the 1975 photograph, this is assessed at 2.34 of the Report to Cabinet.

The photographs are snapshots of particular moments in time, which do not show any of the verges in use by pedestrians or otherwise vehicles passing over the highway. As such they can only be ascribed very limited weight.

- 2.7 *“20. Sixthly, 6 statutory declarations have been obtained from local residents from which the following conclusions can be drawn. The verges were used as an informal passing place for all vehicles between 1991 until 2013 when posts were placed along it to prevent access (Robert Beard and Paul Morrow speak to the period 1994 to 2014; Mike Overton and Rosemarie Overton speaks to period 1991 to 2014; Philip Simpson speaks to the period between 2001 until 2013; Robin Atkins speaks to the period from 1998 to 2013 (he also speaks to the public visiting Boxwood House for open days).*

We have received all six statutory declarations since the drafting of the previous Report to Cabinet.

Assessment of Statutory Declarations submitted by the applicant

- 3.1 Each of the statutory declarations will be appended to this Addendum Report for the benefit of Members.
- 3.2 The analysis of timescales set out by Jonathan Karas QC is an accurate summary of the period which each declaration evidences.
- 3.3 The main points arising from these statutory declarations can be summarised as follows:
- Each property along Heathfield Avenue owns up to their boundaries which are marked by a fence or hedge.
 - The relevant verge does not appear to have ever been landscaped, and no posts or rocks were located on the land until 2013. The posts and plants were erected on 17 April 2013. It is considered that these were erected solely to try and prevent the development from going ahead.
 - The use of the verge was not restricted during the period of the declaration and was used as an informal passing area for all vehicles. No specific instances of passing are described.
- 3.4 The statutory declaration of Philip Simpson expands upon this. Mr Simpson indicates that the use of the verge adjacent to Heatherlands has not been

restricted, has never been landscaped, and no posts or rocks were located on the land between 2001 and 2013. It is said that the verge was used as an informal passing place and for the occasional parking of cars and vans.

- 3.5 Mr Simpson also explains that he parked on “*this land*” on a weekly basis, and that use for the purpose of parking went unchallenged throughout the 12 years he visited Heathfield Avenue.
- 3.6 In the context of the letter, it is fair to say that the phrasing used is open to interpretation, and could be construed as indicating that Mr Simpson parked on Heathfield Avenue on a weekly basis. The evidence of Mr Simpson is not clear on its face, and the ambiguity as to precisely where Mr Simpson parked limits the weight which can be attributed to his evidence.
- 3.7 The statutory declaration of Robert Atkins also provides additional detail. He states that he visited Heathfield Avenue between 1998 and 2013, and that up until 2013 the use of the verge was not restricted. He also states that the verge was used as an informal passing place, and that he often saw cars and vans parked on the land.
- 3.8 Mr Atkins also refers to Open Days at Boxwood House, in which members of the public visited on an annual basis between 2008 and 2011. He states that the relevant verge was ‘*always used on the Open days for parking*’, and he himself had parked cars for people on this land, without challenge.
- 3.9 This would appear to be precise and specific evidence that the verge was being used by a member of the public as of right, and without interruption. However it will later be asserted that this use was actually with permission, rather than as of right, and a more detailed discussion of the extent to which this can be considered ‘as of right’ follows at paragraph 6.16.
- 3.10 The statutory declarations are limited in that they do not identify and distinguish any other usage of the verge by the public, as distinct from use of the verge by visitors. At most, the evidence states that it would be possible for vehicles to use particular stretches of verge at the times specified, but parking is not the same as the use of the verges for passage and re-passage.

Further assessment of evidence submitted: status of the verge

- 4.1 The submissions of Jonathan Karas QC raise a number of additional relevant considerations. In assessing the conclusions he has reached, he sets out:

“c. Contrary to the suggestion by the objectors there is plainly no evidence to establish that the owners of the strip in question did not intend to dedicate the land. It is said that “We say this because the current and former owners are willing to provide statements that they have, over decades, taken the steps necessary to make it abundantly clear that the verges were not intended to be used by the public. If any member of the public had been using the verges, they would have known that they were :- (i) on private land (ii) not using the verges ‘as of right’”. These are no more than assertions

there is no evidence of any objective expression of this prior to 2013 when obstructions were placed on the verges. None appears clearly to have been identified. Indeed, the presence of the posts which the photographs show were installed would not have prevented pedestrian use as of right. There is no evidence of any sign or other overt indication that public use was anything but as of right.”

- 4.2 It is fair to say that the statement referred to (“*We say this...*”) was limited in the extent to which it was substantiated at the time it was made. It is clearly not sufficient to say that individuals are prepared to make statements, and place reliance on that hypothetical scenario. This statement is less helpful than first-hand statements would have been.
- 4.3 It can be agreed that the posts may not have had the practical effect of preventing pedestrian use. However, the test of intention in *Beresford* requires an assessment of what a reasonable user would have understood as the owner’s intention. It is reasonable to conclude that the placing of posts is intended to prevent use – at the very least of vehicles, whether or not it has that effect in practice.
- 4.4 It is also helpful to consider the matter in terms of objective expression. It is not sufficient to simply have an intention not to dedicate – following *Re (Godmanchester Town Council) v Secretary of State* the communication of that intention is clearly a very relevant consideration.
- 4.5 Finally on the topic of the verges, Mr Karas QC goes into some detail assessing the Report to Cabinet:

“22. With the greatest respect, on the evidence so far adduced, the conclusion of the officer of the local highways authority that the evidence disclosed is sufficient to rebut an intention to dedicate the verges as highway is unintelligible and perverse. It is said (para 2.32 of the report for 29th October 2015) that “the Council has received a significant amount of information indicating that there has been no intention to dedicate the areas of grass verges as part of the highway”. The conclusion is that “Evidence of actions taken by the landowners show that any presumption of dedication of public rights would have been rebutted by their actions” (para 2.49). There does not, however, appear to be any significant evidence of any steps taken by the owners of Heathfield Avenue prior to 2013. All that has been provided is undetailed assertion (none supported by any statutory declaration). There is, no evidence of any challenge being made to any member of the public. Subjective intention and evidence of maintenance would not preclude use as of right by the public (see the Godmanchester case, above). Evidence of maintenance by the owners is simply evidence that the land was unadopted not that it was not a highway. Even if at times, parts of the verges were overgrown in part, it appears from at least 1975 until 2013 the relevant parts of the verges were plainly passable (see photographs, street views and statutory declarations). There is no evidence that the land on the corner of Heathfield Avenue and Kings Road was ever overgrown.”

It is said that there is no significant evidence of any steps taken by the owners prior to 2013. It is correct to say at the time of the Report’s drafting

that there no statutory declarations had been submitted by residents, but the Report had to assess the evidence which was before it, and the evidential position has changed significantly since the drafting of that Report.

It is noted that between 1975 and 2013 the applicant contends that the relevant parts of the verges were passable. The evidence provided suggests that there is a period between 2005-2013 when there appears to have been no obstruction to vehicles that might have used the verge, however there is no specific evidence that vehicles did habitually use the verge.

Evidence of maintenance by the owners is said to only constitute evidence that the land was unadopted, not that the land was not a highway. That argues at cross-purposes with the content of the Report to Cabinet. Paragraph 2.44 of the Report to Cabinet clearly states that this is considered to constitute evidence of the land being maintained and used in a way consistent with use as private land.

For the avoidance of doubt, it is not agreed that the conclusions of the report are unintelligible or perverse. On the evidence submitted to the Council at that time, it was reasonable to conclude that the verge adjacent to Heatherlands does not constitute part of the highway.

- 4.6 Mr Karas QC raises additional points in his submissions dated 04 December 2015, which we will address in the order that they are raised.

“2. First, the evidence suggests that the verge was maintained by the residents. This is not a highway maintainable at the public expense. Accordingly, one would expect the residents to maintain the verge if it did have highway status. Accordingly, the evidence of maintenance is neither here nor there.”

We agree that the evidence of maintenance has limited usefulness.

- 4.7 *“3. Secondly, the subjective beliefs of the residents about the status of the verges within their ownership are neither here nor there to the conclusions about the status of the verge. The test is an objective one. “*

We agree that the test of intention is objective.

- 4.8 *“4. Thirdly, none of the evidence undermines the clear photographic evidence that the verge in question was passable on foot over more than two decades. It is sufficient for the verge to acquire highway status if use was by the public on foot. That the objectors suggest that there were obstacles at various places which prevented vehicles parking or passing at those places, takes matters no further at all (though the photographic evidence clearly shows the verge was passable by vehicles too). There is no evidence at all of usual signs indicating that the verge was not a public highway available for pedestrians.”*

We agree that it is a verge can acquire highway status if use was by the public on foot. However, in order to presume dedication that use must

actually have been enjoyed. There is no evidence before the Council of the said pedestrian use.

- 4.9 *“5. Fourthly, none of the evidence can seriously be said to undermine the clear and unequivocal evidence of reputation from the Royal Borough’s own publicly available mapping records which show the whole width of Heathfield Avenue (including the verges) as having highway status. This documentary evidence of reputation is admissible by statute (as already explained in our Submissions). It is wholly unnecessary to adduce statements from any particular individual who may have used the verges at any particular time. This is something which the highway authority will be well familiar with (many historic highways are established by documentary evidence of reputation alone). It would be a matter of grave concern if the Royal Borough’s publicly available documentation misrepresented the position to the public in such an important respect. Accordingly, the Royal Borough’s records are themselves to be given weight.”*

The Royal Borough’s records are assessed in the original Report to Cabinet, and a review of historic documentary evidence has been carried out. It is agreed that documentary evidence is admissible by statute, and the Council’s mapping is considered to carry significant weight.

- 4.10 *“6. Fifthly, this documentary evidence is entirely consistent with the utilities which are plainly present in the verge. The inference which can properly be drawn from these utilities has already been explained. No adequate explanation has been for the presence of these has been proffered by the objectors.”*

We reviewed the position in relation to utilities in detail at 2.11 and 2.30-2.31 of the Report to Cabinet. It is correct to say that there has not been any adequate explanation in relation to utilities from residents in the locality.

Assessment of evidence submitted by third parties: status of the verge

- 5.1 A letter received from Winckworth Sherwoods dated 10 November 2015 sets out the submissions of local residents with a similar structure, and we will refer to each point raised therein, in turn.
- 5.2 In relation to the statutory declarations provided – which at that stage were the statutory declarations of Mr Morrow and Mr and Mrs Overton:

1. In the light of the Statutory Declarations, it is now even clearer that the verges are NOT part of the private street. We say this because:-

1.1 The Statutory Declarations by Mr Morrow and Mr and Mrs Overton overlook the logs which you [Mr Ryder-Richardson] and Miss Winstanley recall. Your evidence cannot be ignored by the Council because you and Miss Winstanley have a clear recollection of the logs which would have prevented the Heatherlands verge from being used as a passing place.’

This is a reference to the statutory declarations provided by Mr Ryder-Richardson and Miss Winstanley, which have also been received following the Report to Cabinet.

Assessment of Statutory Declarations submitted by third parties

- 6.1 Each of the statutory declarations will be appended to the Cabinet Report for the benefit of Members.
- 6.2 The main points arising from Mr Ryder-Richardson's statutory declaration dated 11 November 2015 can be summarised as follows:
- He understands that householders in Heathfield Avenue have regarded the verges as belonging to their houses.
 - He has never seen any cars using the verges as a passing place.
 - Until 2005, logs of wood were in place on the verge of Heatherlands.
 - Those logs which were considered rotten were disposed of in 2005.
 - In 2013, both the verges of Rusland and Heatherlands were used by contractors '*for their vehicles*'. Posts were installed in '*early 2013*' to address this.
 - During development on Heathfield Avenue, '*other neighbours*', including Mr Morrow, have put up posts in the same way and for the same reason.
 - He has seen Miss Winstanley '*attending to the verge belonging to Heatherlands*'. He does not believe that any other resident has ever intended to dedicate their verge.
- 6.3 The main points arising from Miss Winstanley's statutory declaration dated 11 November 2015 can be summarised as follows:
- She has treated the verge as part of Heatherlands' garden, and looked after it in various ways.
 - She has never seen anyone walking on the verge, or seen any cars using it as a passing place.
 - Until 2005, logs of wood were in place on the verge of Heatherlands.
 - Miss Winstanley refers to a letter sent by Paul Morrow in 2004, prior to resurfacing works being carried out, stating that ... "*We will all be responsible for clearing the edges of the road along our boundaries before the work starts ...*".
 - In 2013, contractors were '*attempting to park their vehicles on Heatherland's verge*'. Miss Winstanley says that '*we told contractors not to park there as the verges were private but were concerned that vehicles would simply return. In order to stop this happening, we decided we needed to install posts...*'.
 - No permission was sought to install posts as the verges were considered private land.
 - She did not have any intention of dedicating the verge.
- 6.4 This is clear and specific evidence of an intention not to dedicate on the part of the landowner. The position on the verge since 2013, when the posts have been installed, does not appear to be in dispute.
- 6.5 What remains disputed is the position on the land prior to 2005. The statutory declarations on behalf of third parties indicate that logs of wood

were on the verge. The statutory declarations forwarded by the applicant indicate that the verge was used as a passing place, and that the use of the verge was not restricted. The evidence relating to the existence of the logs, their intended use and whether they restricted use of the land in practice is inconsistent.

- 6.6 It could be that this contradiction is a function of the language chosen. The statutory declarations on behalf of the applicant do not expressly state that there were no logs, instead stating that there were no posts. Nevertheless the statutory declarations have reached different conclusions on whether or not the use of the verge was restricted prior to 2005.
- 6.7 That point aside, the remainder of this evidence is clear and specific, and should be attributed the appropriate weight.
- 6.8 Six further statutory declarations were submitted to the Council on 19 November 2015. These were submitted in reply to the statutory declarations on behalf of the applicant, and address a number of points arising from those declarations.
- 6.9 The main points arising from Mr Ryder-Richardson's statutory declaration dated 17 November 2015 can be summarised as follows:
- Mr Morrow sought permission to park cars on Mr Ryder-Richardson's verges for the purposes of Open Days.
 - The photograph submitted by Millgate from Street View (dated September 2009) shows Mr Ryder-Richardson's car parked outside Heatherlands. He states that he asked for permission from the owners of Heatherlands to park there.
 - The points asserted in relation to the letter from Mr Morrow are re-asserted.
 - He recollects that there were logs on the verge preventing it from being used as a passing place.
 - He recollects an occasion of his cousin being 'told off' by Miss Winstanley for parking on the verge. No date is given.
- 6.10 The main point arising from Jillian Denise Ryder-Richardson's statutory declaration is that she recalls logs demarking Heatherlands verge, and was always conscious of them, although no period is specified.
- 6.11 The main points arising from Mary Findler's statutory declaration can be summarised as follows:
- In 2004, residents of Heathfield Avenue came to an arrangement to repair the road.
 - She recalls logs being at Heatherlands, although no timescales are given.
 - She outlines a complaint made to Millgate in 2010, in relation to Millgate erecting a fence up to the edge of the road, and including a verge in their garden.
 - She indicates that anyone found parking on the Avenue was asked to move. No specific accounts are mentioned.
- 6.12 The main points arising from Paul Frankaland Hepburn's statutory declaration can be summarised as follows:

- He understands that the verge along the length of the avenue is owned by residents, who are responsible for its upkeep (including the verge outside his property).
- He considers that the verge along Heathfield Avenue has been kept clear, and parked cars were a rare occurrence due to the various obstructions placed on the verges by owners.
- He considers that residents and other passers-through have always used the tarmac for walking and not the verge. He has never seen the verges used as a footpath.
- He does not believe that any resident has ever intended to dedicate their verge.
- He has never used the verge belonging to Heatherlands as a passing place nor has he ever seen anybody doing it.

6.13 The main points arising from the statutory declaration of Norman Eric Tetchner are as follows:

- He has walked the avenue with his dog continuously until April this year, twice a day for 29 years.
- He identifies the logs at Heatherlands as being sourced from fallen trees in the early 1990s.
- Wooden stakes were placed on the edge of the Avenue by various residents in recent years, following damage from contractors.
- He understands that the new stakes and planting at Heatherlands and Rusland were placed because contractors were using the verges in Heathfield Avenue for parking and turning. He understands that it was made clear to them, both verbally and in writing, that this was a private road.
- He cannot recall seeing the Heatherlands verge being used as a passing place for vehicles.
- He can picture the logs on the edge of the Heatherlands verge prior to 2005.
- He does not believe that the Avenue would ever be used as a through route by members of the public because it would be less convenient than alternatives.

6.14 The main points arising from the statutory declaration of Penelope A Winstanley dated 19 November 2015 are as follows:

- Several large trees were felled in 1991/92, and those logs were used to mark the boundary of the Heatherlands verge.
- On the Open Days referred to by Mr Atkins, Mr Morrow and Mr Beard, they would ask for permission to use Heatherlands' verge for cars to be parked. Heatherlands Management Company Ltd gave permission. This was between 2005 and 2013.
- If she ever saw a car parked without permission, she would tell the owners to move it. No specific instances are cited.
- She does not believe that Mr Morrow's gardener would have been parking on Heatherlands' verge on a weekly basis, and she does not recall seeing it.
- She gave permission to Mr Ryder-Richardson to park his car on the verge while he was having an extension to his house. Similarly, residents of Heatherlands would occasionally park their own cars on the verge belonging to Heatherlands, but that was with permission.

- 6.15 A lot of this evidence seeks to contradict evidence submitted by the applicant, but this is often on points which are not material. We would encourage Members to confine their assessment to matters which directly address whether or not the verge constitutes part of the highway.
- 6.16 On the basis of this evidence, some of the use of the verge for parking purposes could not be described as 'by right'. The parking use in relation to the Open Days and Mr Ryder-Richardson's temporarily parked car are now said to be parked with permission. Therefore these do not appear to constitute evidence of use by the public as of right.
- 6.17 This additional evidence does not support the proposition that the verge has been used by the public as of right and without interruption, either on foot or with vehicles. It is consistently said that individual residents cannot recall seeing the verge used as a passing place for vehicles. No additional evidence of pedestrian use of the verge arises from these representations.
- 6.18 The evidence does demonstrate that pedestrian usage was not physically prevented at any time, and that vehicular use would have been possible on the verge between 2005 and 2013. On the basis of this evidence, vehicular use would not have been possible in the period between the early 1990s and 2005, or again after 2013.

Further assessment of evidence submitted (2) : status of the verge

- 7.1 Following the letter from Winckworth Sherwoods dated 10 November 2015, there follows some further analysis of the statutory declarations on behalf of the applicants:

"1.2 Mr Morrow and Mr and Mrs Overton have not referred to a single instance in which they saw anybody using the verges as a passing place. It remains, therefore, the case that nobody is coming forward to say that they have used the verges as a public way; and certainly not for 20 years.

This point emphasises the lack of evidence of actual use, and those instructed would agree with this assertion.

- 7.2 *"1.3 Mr Morrow and Mr and Mrs Overton acknowledge that you put up the posts without seeking permission. (In doing so you were asserting your right to have posts without requiring anyone's permission.) Even though they found it an inconvenience (they called it a 'great' inconvenience) they have never challenged your right to have the posts. Given the 'great inconvenience', they say it caused, one would have expected them to say something if they had considered the verges to be a public right of way. Their silence suggests that they did not consider that to be the case. That is compelling evidence against Millgate's assertions and that cannot be ignored by the Council."*

It is fair to highlight the lack of challenge. Applying the test in *Beresford*, this could be considered evidence that the owner's intention not to dedicate was clearly understood from 2013 onwards.

- 7.3 *“1.4. It is not clear if these declarations are the actual thoughts of Mr Morrow and Mrs Overton. In the case of Mr Morrow, he has overlooked his own letter (referred to by Miss Winstanley) in which he clearly demonstrated that he regarded the verges as private garden rather than part of the road. All of them have also overlooked the logs at Heatherlands. What is clear is that each of the Statutory Declarations is identical. This suggests that the Declarations are not their own words and that they have been written by one person, possibly Millgate’s Solicitors.”*

This is a reference to a separate letter from Mr Morrow, referred to at 6.3 of this report. It is reasonable to conclude that the position adopted by Mr Morrow now is different from his position at that point. This is not necessarily an inconsistency in the evidence forwarded to date. His 2004 letter does not expressly include or exclude Heatherlands, and the central point of his statutory declaration does not relate to ownership; it is instead that the verge was used as a passing area.

- 7.4 *“1.5 The Statutory Declarations from [Mr Ryder-Richardson] and other residents say that they have, at various times, placed obstructions to prevent the verges being used by members of the public and that nobody has ever challenged their right to do so.”*

This is correct. The extent to which this is disputed appears to be the position on the land prior to 2005.

- 7.5 Winckworth Sherwood provided a further letter, dated 19 November 2015, which sets out their position that the presumption of dedication has not arisen. This argues that the evidence supplied by the applicant does not demonstrate highway use for any period, let alone 20 years.

- 7.6 In critique of the evidence supplied on behalf of the applicant, the following points are made.

“7.1 Mr Robin Atkins does not refer to any instance in which he actually used the Heatherlands verge himself or saw anyone actually using the verge as a passing place (The Act requires there to have been “actual use” and, given Mr Atkins does not refer to any actual use his evidence is not sufficient.) ...”

We agree that in order to presume dedication, actual use is required.

“... He also says he saw cars and vans parked on the land but he does not know to whom they belonged, whether they belonged to the residents to Heatherlands or whether they were parked with the permission of Heatherlands (If permission was given the parking would not help because the Act says the use has to be “...as of right...”).”

We agree that parking with the permission of Heatherlands would not constitute use ‘as of right’, and as such could not qualify under the definition of presumed dedication at section 31(1) of the *Highways Act 1980*.

7.7 *“7.2 Mr Robert Beard’s declaration is identical to the ones from Mr Paul Morrow and Mr and Mrs Overton. Similarly, none of those declarations refer to any instance in which any of them actually used the verges (or saw them being actually used) as a passing place. Consequently, they do not provide any evidence to support highway use.”*

“7.3 Mr Philip Simpson does refer to some actual use because he says that he used to park his car in Heathfield Avenue (on a weekly basis). However, we does not say this parking occurred on the Heatherlands verge [...]. Even if he meant to say that he parked on Heatherlands’ verge, his evidence is not enough to create the presumption. There are at least two reasons for this: first, because parking on someone’s land without permission does not convert their land into a public right of way; and, secondly because his use lasted only 12 years rather than 20.”

Those instructed consider that these observations are reasonable. However it should be emphasised that parking on land without permission is material in this case, as it is possible for said parking to represent use as of right. We would also say that the lack of a 20-year period of use is not necessarily fatal, as the common law framework instead requires that the period is long enough to justify an inference that the owner intended to dedicate that land as highway.

7.8 Mention is also made in this letter of the 2009 Google Street View photograph of an Audi constituting a use for which permission was sought, which has been discussed at paragraph 6.16 of this report.

7.9 *“7.5 Millgate seek to rely on the photos at paragraph 21(b) of Osborne Clarke’s submission [...]. However, there are no photographs for the years between 1975 and 2010 and consequently no photographic evidence of when the vegetation shown on the 1975 photo was lost. With all due respect to the writers of that submission they have overstated their case because the photos do not support an assertion that the verge was passable “...between 1975 and 2005”.*

The additional photographs referred to between 1975 and 2010 are the Street View photographs, which evidence the position on the verge in 2008, 2009 and 2010.

7.10 A brief summary of evidence of the intention not to dedicate is also supplied, which is summarised as:

“8.1 The evidence of many people (including the very person who laid the logs) that the Heatherlands verge was demarked by logs over many years until 2005.

8.2 The evidence that other householders demarked their own verges following the loss of vegetation in the 1987 storm until the tarmac surfacing in 2005.

8.3 *The subsequent installation of posts by many householders (including Heatherlands) to prevent contractors' vehicles from trespassing on their verges.*

8.4 *The acceptance by Messrs Morro and Beard and Mr & Mrs Overton that they did not attempt to assert that Heatherlands and Rusland should remove the posts that were installed in 2013.*

8.5 *That Messrs Morrow and Beard sought permission to use the verges (including the Heatherlands verge) before arranging for parking during their open days.*

8.6 *That Mr Morrow reminded everybody to remove their logs prior to the surfacing.*

8.7 *That Miss Winstanley told people to keep off her verge.*

8.8 *That Millgate refused to leave their verged unfenced."*

This is a briefly distilled summary of local residents' position as to their intention to dedicate. Of course, the relevant intention to dedicate relates to the owners of Heatherlands, and we would encourage Members not to conflate this intention with the general intention of residents across the Avenue.

The 'hedge to hedge' presumption and *Hale v Norfolk CC*

8. The 'hedge to hedge' presumption was also raised in previous correspondence. This presumption, which is rebuttable, is that the highway extends to the whole width of the space between hedges or fences on either side of the highway and is not limited to the made-up part of the roadway.
- 8.1 The leading judgment in relation to this is *Hale v Norfolk County Council* [2000] WL 1675235. This case set out that where there is a highway over a road which had clear, physical boundaries, and there is a piece of land which is not physically separated from the area generally used for passage, that area of land may, through usage, have become part of the highway and, where the boundaries appear to be have been created to separate private land from the highway, it may be presumed, in the absence of contrary evidence, that the piece of land has become part of the highway.
- 8.2 LJ Hale held as part of the Judgment that:

'... the presumption of dedication of all the land running between hedges or fences can only arise if there is reason to suppose that the hedge or fence was erected by reference to the highway: that is, to separate the land over which there was to be no public right of way from the land over which there was to be such a right.'
- 8.3 On the information provided to the Council, there is very limited scope for supposing that such a separation was intended. However, one material point arises in relation to the presumption.

- 8.4 Ordnance Survey maps can provide important evidence as to the historical presence of physical boundaries, subject to the limitations referred to at paragraphs 2.9-2.10 of the Report to Cabinet.
- 8.5 The Ordnance Survey maps assessed in the Report to Cabinet indicate that the present physical boundaries to the road have been in existence since the road was constructed. In theory, this could be consistent with application of the 'hedge to hedge' principle, as it may indicate that the boundaries may have been intended to separate the road from the adjoining properties.
- 8.6 However, the evidence supplied to the Council indicates that the verge has been used by landowners in a way which is inconsistent with use the application of the 'hedge to hedge' principle. Ms Winstanley has supplied historical evidence of maintenance and other use consistent with treatment of the verge as private land. On the balance of probabilities, the evidence supplied to the Council does not suggest that the boundaries were created in order to separate private land from the highway.
- 8.7 No specific evidence in respect of the circumstances of the creation of boundaries is relied upon, and we therefore cannot recommend that the Council infers from the information provided that the 'hedge to hedge presumption' applies.

The applicable test

9. At the time of drafting the Report to Cabinet, as set out at 2.47 of that Report, the position in relation to evidence of use of the verge was different in a number of respects. There is now significantly more evidence before the Council in relation to the extent to which any deemed dedication arises.

The first point to assess is whether or not the verge qualifies under the criteria for presumed dedication, either at common law or under the *Highways Act 1980*. Before the intention to dedicate falls to be considered, the presumption of dedication must arise.

- 9.1 Section 31 of the *Highways Act 1980* sets out that:

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.

- 9.2 If the conditions of the provision are satisfied, then, as a matter of law, dedication is deemed to have occurred (although the presumption is rebuttable, by evidence that there was no intention during that period to dedicate it). Section 31 has several constituent elements, and we will assess which of these have been demonstrated in the evidence supplied.

- 9.3 The common law test is that land has been dedicated as a highway if it has been used by the public as of right and without interruption. The period of this use does not have to be 20 years, but it must instead be long enough to justify an inference that the owner intended to dedicate the way as a highway.
- 9.4 As established by common law, a highway is a defined route over which the public at large can pass and repass as frequently as they wish, without hindrance and without charge. The use must be of right and not on sufferance or by license.
- 9.5 The first part of the test is whether the way has been 'actually enjoyed'. We consider that there is some evidence of actual enjoyment. Evidence of parking on the verge has been supplied, and there is also evidence which suggests the use of the verge as a passing place, although this is disputed.
- 9.6 The statutory declarations on behalf of the applicant assert that the verge was used as an informal passing place between 1991 and 2013, but statutory declarations on behalf of third parties identify that they have not seen this use, and no specific reference is made to this use on actual instances or occasions.
- 9.7 In terms of the evidence in relation to parking, use of an area for parking rather than for passage does not have the effect of establishing highway rights. Evidence of persons visiting property in Heathfield Avenue is not necessarily evidence of usage of the verge as a highway.
- 9.8 It would be possible for the use of the land on foot, enjoyed by the public as of right and without interruption, to constitute use as a highway. However, use of the land in this way by pedestrians is not made out by the evidence supplied to date.
- 9.9 In this case, the Council has received no specific evidence of use as of right and without interruption. Evidence of the land being 'passable' in practice is not the same as evidence of use as of right and without interruption. The land must actually be enjoyed or used. At most, the evidence supplied to the Council indicates that the verge could have been used in this way.
- 9.10 The utilities evidence, assessed in the Report to Cabinet at 2.11 and 2.30-2.31, is a significant indicator of the status of the land as part of the street, and to date has not been satisfactorily addressed by local residents. This does constitute a form of use, albeit not by the public.
- 9.11 The second part of the test is whether that enjoyment is by the public. There is no evidence identifying specific instances of public use. Instead, the extent to which the enjoyment can be said to relate to the public is the extent to which the use of the verge as a passing place is made out. This remains disputed in the evidence supplied to the Council.
- 9.12 Thirdly, is that enjoyment as of right? The parking use identified in the statements of Mr Simpson and Mr Atkins initially appeared to be as of right, but further evidence before the Council now indicates that the 'Open Days'

parking has proceeded with permission. Similarly, Mr Ryder-Richardson's evidence indicates that for a brief period he parked his car on the verge with permission. Mr Simpson's evidence is not specific as to precisely where the parking took place, and on balance we are not able to rely on his statutory declaration as indicating that his parking was both on the verge and as of right.

- 9.13 Fourthly, is that enjoyment without interruption for a period of 20 years? The 20-year period is calculated backwards from the date on which the existence of the highway is brought into question. The appeal hearing in relation to Woodlands Lodge and Boxwood House, where points were first put to the Inspector in relation to the extent of the highway, was held on 05 November 2013. The Council does not have evidence of use over a 20-year period.
- 9.14 At most, on the evidence submitted to the Council, the evidenced public use of the verge is for a 12-year period (which remains disputed). While posts were not in place between 2005 and 2013, the extent to which the land has been used as an informal passing place is also disputed and cannot accurately be ascertained from the information provided. Evidence of parking arises from the statements of Mr Simpson and Mr Atkins, but the former is not specific as to where said parking took place, and the latter does not expand the period of evidenced use beyond the aforementioned 12 years.
- 9.15 The existence of the posts in 2013 could constitute an interruption, but it is not entirely clear from the evidence whether this falls before or after the appeal hearing on 05 November 2013. The evidence of Miss Winstanley is that the posts were put up in 'early 2013'; on the balance of probabilities this is more likely than not to fall before November.
- 9.16 It is therefore considered that the information supplied does not meet the criteria of either a 20-year period of use, or otherwise a period of use long enough to justify an inference that the owner intended to dedicate the verge for use as highway. The periods of evidenced and undisputed use could best be characterised as intermittent.
- 9.17 It is noted that the common law principle of '*once a highway, always a highway*' applies, but in this case no specific other period has been identified in which a presumption of dedication is said to arise.

Balancing exercise

10. The evidence which suggests that the verge at Heatherlands constitutes part of the highway can be summarised as follows:
- The reputation evidence from the Council's mapping (carries significant weight).
 - The view of the Council's highways officer (carries some weight).
 - The existence of utility apparatus (carries some weight).
 - Statutory declaration evidence indicating that the verge was used as an informal passing place (carries limited weight).
 - Ordnance Survey maps (carries limited weight).
 - Statutory declaration evidence indicating parking use of the verge (carries very limited weight).

- Photographic evidence indicating parking use of the verge (carries very limited weight).
- 10.1 The evidence which suggests that the verge at Heatherlands does not constitute part of the highway can be summarised as follows:
- Statutory declaration evidence indicating that the actual use and enjoyment of the verge has been limited (carries very significant weight).
 - Statutory declaration evidence indicating that the verge has not been enjoyed as of right (carries very significant weight).
 - Statutory declaration evidence indicating action taken and the periods during which action was taken to prevent use of the verge (carries some weight).
 - Statutory declaration evidence of contrary intention, which is only material if a presumption of dedication arises (carries significant weight).
- 10.2 The 'hedge to hedge' presumption is considered not to apply in the present circumstances, based on the information presently known to the Council in relation to the circumstances in which boundaries were established.
- 10.3 The correct procedural approach is to apply the evidence to the statutory and common law frameworks, and the applicable standard of proof is on the balance of probabilities. In terms of the evidential burden, it is for the applicant in asserting that the presumption arises to evidence the same.
- 10.4 When balancing the evidence supplied to the Council, those instructed have attributed the appropriate weight to statutory declarations. The statutory declarations supplied by the applicant evidence use, but that use is either unspecific (as in the case of Mr Simpson) or not as of right (as in the case of Mr Atkins). These therefore are of limited assistance to the Council. In any event, as set out at 9.7 of this Report, it is considered that evidence of parking use does not necessarily constitute evidence of use as a highway.
- 10.5 The evidence which carries the most significant weight supplied on behalf of the applicant is the evidence of the Council's mapping, and the related view of the Council's officer, based on the information available at that time. The Council also attributes some weight to the existence of utility apparatus. However, it is considered that this reputational, professional and physical evidence is outweighed by the persuasive statutory declaration evidence indicating that the verge does not constitute part of the highway, as no presumed dedication has arisen as a matter of fact.

Conclusion in relation to verges

- 11.1 Members will recall from paragraph 2.48 of the Report to Cabinet that it was previously not considered possible to presume the dedication of the grass verge in question, either at common law or under the statutory framework.
- 11.2 On the balance of probabilities, those instructed are not satisfied that the verge at Heatherlands constitutes part of the highway. On balance, the evidence supplied does not support the proposition that the verge has been actually enjoyed by the public as of right and without interruption for a full

period of 20 years, or otherwise for a period which justifies an inference that the owner intended to dedicate that land as highway.

- 11.3 For those reasons, the verge fails to meet the test for presumed dedication of a highway set out at s.31 of the *Highways Act 1980*, or the test at common law. Those instructed therefore consider that, on balance, it is more probable that the verge does not constitute part of the highway.

Assessment of further information relating to exercise of s.205 powers

- 12.1 As set out in paragraphs 3.9-3.11 of the Report to Cabinet, if Members agree that the verge does not constitute part of the highway, it would not be open to the Council to exercise its powers in the way requested. This is acknowledged on behalf of the applicants by the advice of Jonathan Karas QC from 12 November 2015:

“33. Of course, if the dispute were resolved against the verge being part of the highway, then it would not be open to the local highway authority to exercise its powers under Highways Act 1980 s.205 over the verge. This would be a ground for “distinguishing” the present case from the Powergen case. It would be necessary for a solution to be found by private treaty.”

- 12.2 If Members do not agree, and conclude that the verge does constitute part of the highway, then the comments found in the Report to Cabinet on that possibility (at 3.12 onwards) apply.

- 12.3 Two further arguments are advanced on behalf of the applicants. Firstly, Jonathan Karas QC argues that the Council cannot rationally conclude that Heathfield Avenue was satisfactorily metalled, given the conclusion of the Inspector and the basis upon which the condition was imposed:

“34. On the other hand, if the dispute were resolved in favour of Millgate (i.e. the verges formed part of the street) it is impossible to see on what rational basis the local highway authority could conclude that Heathfield Avenue was satisfactorily metalled etc for the purposes of s.205: the Inspector imposed the condition because it was plainly considered necessary in the public interest that Heathfield Avenue be widened to accommodate the development of Woodlands Lodge and Boxwood House when constructed. Since (as explained above) the relevant part of Heathfield Avenue is indeed a highway, it follows that the street works authority should properly conclude that Heathfield Avenue is not satisfactorily metalled.”

- 12.4 It can be agreed that the Inspector’s decision indicates that it is in the public interest that the development takes place. However, it does not follow automatically that the road is not satisfactorily metalled etc. The view of those instructed in respect of the *Powergen* body of caselaw is set out in the separate Addendum Report to Cabinet on the topic of *Powergen*.

- 12.5 Those instructed do not agree that the Council is compelled to exercise the s.205 powers in the way described. The Inspector did not express a view on whether or not s.205 powers could be operated in this way, and that is an

entirely separate issue. We consider that this issue falls within the Council's discretion to determine, as set out in section 205(1) itself.

- 12.6 Secondly, Jonathan Karas QC considers that future circumstances are relevant in the consideration of exercising s.205 powers:

“28. First, the residents suggest that the discretion under s.205 may only be used if the street works authority considers that the street is not in a satisfactory condition in its present state and that it is irrelevant that it may be unsatisfactory after the construction of the flats by Millgate. The Council’s officers appear to disagree with this suggestion (see report for 29th October 2015 para 3.22, first sentence). If that is the position of the Council’s officers, they are correct (but it is not clear from the rest of the report whether this is their position). There is nothing to limit street works authority only to considering circumstances as they exist on the ground at the date of the decision of the street works authority. When deciding whether or not a private street is metalled etc “to the satisfaction of the street works authority”, there is nothing to preclude anticipated use being considered. Indeed, it would be perverse to ignore anticipated use. If the impact of future development would make the state of a private street unsatisfactory, then there is nothing to preclude s.205 being invoked in advance of the development taking place. Indeed, a street works authority could not properly ignore such impact having regard to its general duties as well as its statutory powers under s.205.”

We agree with this view; it would be open to the Council to conclude that it is not satisfied with the metalling etc, with a view to future circumstances. Section 205 is expressed in the present tense, but does not expressly preclude a consideration of future circumstances.

- 12.7 Otherwise, the position in relation to metalling and the practical exercise of s.205 powers remains the same as set out in the Report to Cabinet. As set out at 3.24, it is considered that very limited evidence has been supplied which would enable the Council to be satisfied of the statutory requirements.

Conclusion

- 13.1 Taken together, on the balance of probabilities the information supplied to date is not sufficient to evidence a presumed dedication of the verge either at common law, or under s.31 of the *Highways Act 1980*.
- 13.2 Following from this conclusion, the Council is therefore not able to exercise powers as requested under s.205 of the *Highways Act 1980*.
- 13.3 We would recommend that Cabinet do not resolve to exercise these powers in the way requested.

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