

ADVICE

1. I have been instructed to advise Save Northorpe ('the Client') on the question of whether a verge ('the Verge') outside of Northorpe Hall ('the Hall') and next to Northorpe Lane ('the Lane') adopted highway. The Council currently maintain that the verge is part of the adopted highway.
2. The Verge is located within the hamlet of Northorpe (incorporated into the village of Mirfield) in Yorkshire. The landowner of both the Hall and the majority of the Verge is Northorpe Child & Family Trust ('the Trust').
3. As it will be a key distinction later, I should expressly raise that this Advice considers the status of the elements of the Verge that are owned by the Trust. This forms the majority of the Verge and so unless otherwise stated the term 'Verge' hereon refers to the Trust owned Verge.

Facts

The Lane

4. The Lane runs for a short section from Shill Bank Lane to Jill Lane. The Lane is adopted but Kirklees Council ('the Council') as Highway Authority have not been able to confirm when or how this occurred. The Council's position is that the circumstances of the Lane's adoption are 'lost to the mists of time'.

The Verge

5. The Verge itself sits between the Lane and the wall of the Hall. Its current appearance is grassed with the Trust's sign. The ownership of the Verge falls predominantly within the title of No 53 Northorpe Lane (**Appendix 1**). The Trust currently has a car parking space on the Verge with a sign saying parking is at permission of the Trust.

6. On the non-Trust owned Verge there is a telegraph pole and other street furniture. However, no street furniture sits on the Trust owned Verge.
7. Accounts of residents are that a Garage was on the Verge from at least 1957 until around 1991. I have seen photograph evidence (**Appendix 2**), dated to the relevant period, showing a wooden garage that I am instructed was used by the Trust for parking their vehicles. There is witness evidence that rent was paid to the Trust for use of the Garage by third parties.
8. The Verge is accessed from the Lane by a dropped kerb. No evidence has yet been found of any application to the Council for permission under s.184 of the Highway Act 1980 ('the 1980 Act') or any of its statutory predecessors. Witness evidence suggests the dropped kerb was put in in the 90s. This may have coincided with a kerb being installed on the Lane and next to the Verge.

The Hall

9. The Hall is a Grade II listed house. While there is reference to earlier versions of the house being on the same location the earliest evidence for its presence comes from an original document held at the West Yorkshire Archaeological Service Archive being a 1564 Legal Writ of Robert Fournes, which mentions a '*Northropp Hall*' in Mirfield. This is corroborated by the reference in the Will of one 'Michael Sheard' of 18 December 1635, to Northroppe Hall in Mirfield as follows: "*.....I give devise and bequeath unto Michael Sheard my eldest sonne all my interest, terme and tenant right of in and to the messuage and lands in Mirfield called Northorppe Hall now in my own tenure and occupation....*" The original of the 1635 Will is held at the Borthwick Institute for Archives at the University of York.
10. The best evidence for the history of the Hall comes from a 1993 Historic Building Report ('the 1993 Report) compiled by Mr Thornborrow, Historic Buildings Officer of the West Yorkshire Archaeological Society on the Hall (**Appendix 3**). It sets out in Section 2 that the Hall as it stands today was largely the result of development around 1700.
11. Crucially it also identifies that at the start of the 18th century (1701 – 1704) the Hall went through significant rebuilding when it was divided into two properties. This is reflected by the fact that the Hall building itself is made up of two titles – No 53 and No 51 Northorpe Lane. The Hall would remain divided until around 1979 when the

Trust (who had first been gifted No 53) brought No 51 and re-connected (externally and internally) the two halves. Between 1963 and 1979 the Trust did not own no. 51, and there was no direct vehicular access at the front of no. 53. Between 1979 and 1991 the Trust had direct front vehicular access because of that subsisting in front of newly acquired no. 51, which was joined internally with no 53. However, externally no. 53 was still separated from the road and the forecourt directly in front of no 51 by a section of wall. In 1991 this section of wall was removed leaving a common forecourt in front of no 51 and no 53 finally offering direct front vehicular access to both properties jointly.

12. The 1701 division also resulted in an external wall being constructed between No 51 and No 53. This wall is reflected in an illustration of the Hall found in ‘A History of Mirfield’ by H.N Pobjoy (‘Pobjoy’) (**Appendix 4**) On page 2 of Pobjoy the following is stated : “A History of Mirfield, A WEST RIDING TOWN Compiled by HAROLD NORMAN POBJOY, M.A. with illustrations drawn by FRANK BREARLEY –1969-” This dividing wall was demolished in 1991 when restoration work was carried out to the Hall. The 1993 Report describes it as follows:

The RCHM(E) record photographs record the existence of a tall Wall attached to the south-west corner of the Porch (see no. 16). This continued at an oblique angle for some distance. Constructed of brick it had an ashlar stone coping which ramped down to the south where there was an entrance into the garden of the Eastern part of the Hall. It is probable that this wall was early 18th century and contemporary with the 1704 alterations, as it formed a distinct division between the two properties. This wall had been demolished prior to the first site visit in 1991 (see no.1); its removal has fundamentally affected the character and setting of the Hall which now has a more open prospect and presents an uninterrupted frontage, perhaps more suited to its present function.

Roads in Mirfield

13. There are two historical written sources for roads which were in the locality of the Hall historically in Mirfield.
14. Pobjoy makes reference to the Mirfield Vestry Minutes for 1743 which talks about ‘Jill Lane’ (**Appendix 4 Pobjoy p113**). It is worth noting here that modern day Jill Lane has a definitive start/end point where it meets the Lane. This start/end point is recorded on Street Gazette.

15. Extracted in ‘Yorkshire Notes and Queries’ is an ‘Account of Mirfield in 1755’ which are the observations of the then Vicar of Mirfield Mr Ismay, who was Vicar of Mirfield between 1739 and his death in 1778 (**Appendix 5, 5.3**). This at page 209 sets out a description of Northorpe Hamlet. It mentions the Hall and other locations before going on to seemingly list the roads found:

The roads are that leading to Nickhouse, Shill Bank Lane, that from Crossley, Dall Lane, Gill Lane etc. Akeroid Lane is only a Bridle Lane and no repaired by any public.

Maps

16. There are a number of historic maps of the area.
17. The 1854 OS Map (**Appendix 6**) is the first map of real clarity and use. It shows Northorpe and the Hall with a line reflecting the dividing wall. It labels a number of the Lanes we know to exist – Jill Lane, Shill Bank Lane, Crossley Lane. It crucially does not show Northorpe Lane. Instead, the area outside of the Hall could be argued to be a non-delineated central space/square.
18. The 1893 OS Map (**Appendix 7**) now shows the Lane which has been added running from Shill Bank Lane through the previously non-delineated space to Jill Lane. Clear boundaries in ‘pecked lines’ have been drawn which do not include the Verge. Two criss-cross access tracks have been shown running from the Lane across to the Hall and other properties. The Lane along with Shill Bank Lane and Crossley Lane is coloured ‘burnt sienna’ which is used to denote ‘roads’ according to the National Library of Scotland. The colouring of the Lane runs out where it meets Jill Lane.
19. The 1907 OS Map (**Appendix 8**) is similar to the 1893 OS Map except it is uncoloured. There is however now an added ‘brace’ connecting the Lane to the Verge. A Brace is used to denote that *‘the spaces are so connected are included in same reference number and area’*. Braces were used (the practice died out in modern OS Maps) to illustrate where land had been included in the same field number or parcel number. This was a tool of measurement for the surveyors who would then provide the size in acres of the parcel underneath. Parcels do not reflect shared ownership or status but instead were used to create a convenient parcel of land for

measurement purposes. It is also noted that the criss-cross accesses have been replaced by a triangular island.

20. The 1922 OS Map (**Appendix 9**) is similar to the 1907 OS Map (including Braces) but now shows no criss-cross or island but instead denotes the modern-day curve of the Verge.
21. The 1933 OS Map (**Appendix 10**) is identical to the 1922 OS Map.
22. The 1993 OS Map (**Appendix 11**) strangely reverts back to the triangular island of the 1907 OS Map.
23. The Council's Definitive Map under the Wildlife and Countryside Act 1981 distinguishes between the Lane and the Verge.
24. The Council's List of Streets under s.36 (6) of the 1980 Act seems to be a coloured in version of a base map which distinguishes between the Lane and the Verge. The coloured in layer joins both Verge and Lane. I am not aware that the Council hold any width data for the Lane.

The Council's Position

25. The Council's Position is that the Verge is part of the Highway although the rationale for why has shifted over time. Originally the rationale to this view was best set out in an email from David Reid dated 14 January 2020. Rather than quote in full the following bullet points summarise their view:
 - The Lane is a historic highway which was adopted prior to 1925 but 'lost in the mists of time'
 - The Lane is shown on the 1854 OS Map.
 - The question of whether the Verge is part of the highway is a question of fact.
 - The Council believe it is because:
 - Verge lies outside of the Hall's Wall
 - The Verge abuts and has appearance of a highway verge
 - OS shown verge as a 'highway feature' since 1893

- Verge houses items of street furniture – telegraph pole, road sign, grit bins and public right of way signs.
- Verge cut by Council and charged to Highways department at least since 1996

26. However, the Council's position is now more clearly stated in a detailed letter from David Reid, Senior Registry Officer dated 26 January 2021 (**Appendix 12**). Again, I will not quote in full but summarise that points why the Council maintain the Verge is part of the adopted highway:

- The maintenance of the Verge from at least 1996
- The use of the Verge for highway purposes
- A 1985 stance of the Highway Authority in relation to land near the Verge
- The Definitive Map and Statement in so far as they describe FP No 12.
- The 'Braces' on OS Maps
- The 'hedge to hedge' presumption.

Legal Principles

27. A highway is at common law a way over which members of the public have a right to pass and repass. Unless they are created by statute then highways are created through an act of dedication and acceptance. It is often the case than the origins of a highway can be lost so either the existence of a highway (and its dimensions) are unclear.

28. The question of the correct dimensions of a highway will predominantly be a question of fact rather than of law. The starting point for any question relating to the existence or proportion of a highway is s.32 of the 1980 Act:

A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

Emphasis Added

29. It will often be the case that there is little direct evidence for a highway or its dimensions. In those cases, the approach the Courts have taken in these instances was summarised in **Fortune v Wiltshire Council** [2012] EWCA Civ 334 citing a useful passage in **R v Exall**

In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact-finding tribunal must draw inferences from circumstantial evidence. The nature of the evidence that the fact-finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in R v Exall (1866) 4 F & F 922 , 929:

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.”

30. A Council’s Definitive Map is definitive as to the existence of public rights of way shown on it, and if accompanied by a Statement of Details as to the widths of the various public rights of way. It is only required to show Byways Open to All Traffic, bridleways and footpaths.

31. Highway Authorities are required to maintain a List of Streets under s.36 (6) of the 1980 Act. It must show all the streets that are maintainable at the public expense. However, unlike the Definitive Map a List of Streets is not conclusive but can potentially be reasonable evidence, but which can be rebutted (**Trail Riders Fellowship v SSEFRA** [2017] EWHC 1866).

32. OS Maps are not evidence of the status of a road. Instead, they are evidence of what the surveyor found on the ground when he visited the area (**Attn Gen v Antrobus** [1905] 2 Ch 188.) and so can be evidence of the presence of features at a point in time. It has been found that OS Maps cannot be used as evidence of the boundary of a highway (**Webb v Eastleigh BC** (1958) 56 L.G.R. 124) although this proposition is

slightly doubted in the highly respected practitioner text for this area of law – the Encyclopaedia of Highways Law.

33. In relation to areas which exist between the metalled highway and a wall there has been considerable caselaw which has led to the phrase ‘the hedge to hedge’ presumption arising.
34. There was considerable caselaw at the turn of the 20th century about how the Court should approach a highway bounded on one or both sides by fences. Initially the view was taken that all the land between highway and fence should be presumed to be highway as set out in **Regina v United Kingdom Electric Telegraph Co Ltd** (1862) 26 JP 390:

In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences on each side, the right of passage or way prima facie, unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not confined to the part which may be metalled ...

35. However, this view began to be nuanced and turned away from being treated as a presumption or starting point as was further addressed in **Attorney General v Beynon** [1969] 2 WLR 1447 which involved an irregular verge:

It is clear that the mere fact that a road runs between fences, which of course include hedges, does not per se give rise to any presumption. It is necessary to decide the preliminary question whether those fences were put up by reference to the highway, that is, to separate the adjoining closes from the highway or for some other reason. When that has been decided then a rebuttable presumption of law arises, supplying any lack of evidence of dedication in fact, or inferred from user, that the public right of passage, and therefore the highway, extends to the whole space between the fences and is not confined to such part as may have been made up. It seems clear to me however as the principle has developed, that one is to decide the preliminary question in the sense that the fences do mark the limit of the highway unless there is something in the condition of the road or the circumstances to the contrary.

36. The lawful position as to the ‘hedge to hedge’ presumption was definitively discussed in **Hale v Norfolk County Council** [2001] Ch. 717. This confirmed that the

‘presumption’ is not a legal presumption but instead a rule of thumb. As set out by Hale L.J at [43]:

Third, 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. Where matters are lost in the mists of time, it must often be possible to draw such an inference from the layout on the ground. In a conventional road running between hedges or fences, even if the verges are of varying widths and shapes, this may well be the obvious conclusion. It is not surprising, therefore, that the cases regarded this as the prima facie position. But that is not the same as elevating this preliminary factual question into a presumption of law.

37. The point was more forcefully put by Chadwick LJ at [33]:

*It seems to me much less clear that there is any foundation for a presumption of law that a fence or hedge which does, in fact, separate land over part of which there is an undoubted public highway from land enjoyed by the landowner has been erected or established for that purpose. It must, in my view, be a question of fact in each case. To take an obvious example: there could be no room for any such presumption unless the highway pre-dated (or was contemporary with) the fence or hedge. If it were unknown which came first, I can see no reason in principle for making an assumption — or adopting a presumption — that the landowner fenced against the highway rather than that the highway followed the line of the existing fence. Whether it is right to infer, as a matter of fact in any particular case, that the landowner has fenced against the highway must depend, as Lord Russell of Killowen, Chief Justice, observed in *Neeld v Hendon Urban District Council* (1899) 81 LT 405, on the nature of the district through which the road passes, the width of the margins, the regularity of the line of hedges, and the levels of the land adjoining the road; and (I would add) anything else known about the circumstances in which the fence was erected. If nothing is known as to the circumstances in which the fences were erected, the fact that the soil of a highway and the adjoining land on each side was once in common ownership and that the highway is separated from the adjoining land by continuous fence lines may well enable a court properly to infer that the landowner has fenced against the highway; that is to say, “that the fences may prima facie be taken to have been originally put up for the purpose of separating land dedicated as highway from land not so dedicated”. But it is, I think, wrong to treat the remarks of Lord Justice Vaughan Williams in the *Neeld* case as authority for a presumption of law that, whenever it is found that a highway runs between fences, the fences were erected for that purpose.*

38. Therefore, crucially the hedge-hedge presumption will not apply if it can be shown that the fence was erected for some other reason than to separate private land from highway – the clearest way to do so being to show the fence pre-dated the highway. And even if it does apply it can be rebutted by other evidence – it is not a presumption of law.
39. In **Benyon** discussion was also had about the claimed acts of ownership over the Verge. Acts of private ownership by the landowner in relation to the land is evidence that the area should not be considered highway (**Neeld v Hendon UDC** (1899) 81 L.T. 405 and **Belmore (Countess) v Kent CC** 1901 1 Ch. 873,).
40. The maintenance of a verge by a highway authority (such as through grass cutting) can be relevant evidence that it is highway but is not conclusive evidence. An owner may allow the highway authority to maintain it due to their limited resources. It was noted in **Fortune** that the maintenance evidence (or evidence of a lack of maintenance) ‘*does not contribute significantly to either side's case.*’

Advice

41. It seems to be that there is no conclusive evidence on whether the Lane includes the Verge or not. The Council have produced no evidence to show how the Lane was created (dedicated, inclosure, statute etc) which could tell us the dimensions of the Lane and whether it included the Verge. We do not have a confirmed date as to when the Lane came into existence and it seems this is lost in the mists of time. This position is accepted by the Council in Mr Reid’s Letter (**Appendix 12 David Reid letter**).
42. We are therefore in the situation recognised in **Fortune** where we must draw inferences from circumstantial evidence to try to determine where the evidence points. To use the phrasing of **Exall** we must examine the ‘cords’ of the evidential rope to see which argument the rope can bear.
43. I will therefore work through the various elements of evidence and analysis to establish if the Client has a strong case. I will also deal with the Council’s Letter points at the appropriate point.

44. The starting point is the relevant map that carries the strongest evidential weight – the Council’s List of Streets. If the List of Streets had a clear measurement of the Lane which included the Verge then this would-be hard evidence to rebut (although legally possible). However, the List of Streets produced by the Council seems to be a baseline map showing the boundary of the Lane excluding the Verge with a hand coloured in layer showing both the Lane and the Verge as being adopted.
45. I have doubts about whether a Court would accept the Council’s colouring in as strong evidence. Instead, they would want to know the justification for it – which brings us onto the points discussed below. It seems to me that at best the List of Streets is silent as to the width of the Lane.
46. The most important map is the 1854 OS Map (*Appendix 6*). This is the map the Council initially claimed shows the Lane although I note they have resiled from this argument in Mr Reid’s Letter (*Appendix 12*). This is understandable as on the copy I have seen I cannot agree with their interpretation. The 1854 Map clearly labels a number of Lanes (Jill, Crossley etc). It does not label Northorpe Lane. I therefore think it could be argued that in 1854 Northorpe Lane does not yet exist. It seems odd that the surveyor would annotate every other lane name onto the map in the vicinity but not Northorpe Lane itself.
47. This point is corroborated by the historical evidence we have. The 1755 detailed list of streets of Northorpe by Ismay (**Appendix 5 p209**) does not list Northorpe Lane but does list the streets we can see on the 1854 Map (Crossley, Shill Bank). I further believe the reference to ‘Gill’ Lane is likely to be ‘Jill’ Lane in 1854 because we know from Pobjoy that Jill Lane existed in 1743 (**Appendix 4 p113**) .
48. The 1854 OS Map (**Appendix 6**) arguably shows that in the centre of Northorpe there was no Lane or road running through – instead there was a general informal hamlet square out of which ran a number of lanes. I note that on the 1854 Map the start of ‘Jill Lane’ begins roughly where we know Jill Lane begins in modern day (and where present Northorpe Lane ends) which could be the beginning of the ‘local road network’.
49. Furthermore, it is important to note that the 1854 OS Map shows the Hall and the curve of the Wall.

50. This argument is further supported by the 1893 OS Map (**Appendix 7**) because it now shows a labelled and delineated Northorpe Lane. This could be used to argue that the Lane has been created between 1854 and 1893. Furthermore, the Lane expressly excludes the Verge and has colouring which seems to suggest the boundaries of the road (although per **Webb** this may not carry significant weight). It is interesting to note that the 1893 OS Map shows uncoloured criss-cross separate accesses from the coloured Lane to private properties. This suggesting that the surveyor was of the view that private access tracks (across private land) were required from the Lane.
51. The 1907 and 1933 OS Maps all broadly help or are neutral to the Client's case in that they separate out the Lane from the Verge.
52. However, the Council seemingly rely on the fact that from 1907 onwards a 'brace' is seen connecting the Lane to the Verge. They argue that this associates '*the verge with the adjoining highway*' with the inference (albeit the point is not expressly stated) that this is evidence of the Verge being part of the adopted highway.
53. If that argument is being run by the Council then it is a weak one which ignores the context of 'braces.' The Council have stated that a brace associates two pieces of land together. This is technically correct but ignores what this association was for.
54. A brace was used to link land into one parcel that was convenient for **measurement purposes**. It was a tool of convenience for the surveyor rather than any indication of a link in ownership or status. In fact, it was common that land parcels would group together land from various ownerships.
55. The Council's inference therefore goes no further on a proper understanding of the function of braces. But if need be the Council should be directed to the Planning Inspectorate's Definitive Map Orders: Consistency Guidelines. Although they have not been updated since 2016 they remain extant and the guidance on this point remains correct and pertinent.
56. The Guidelines expressly look at the relevance of braces on OS maps at 12.31 and 12.32:

The areas of each field were published on 1:2500 maps, with a parcel number to identify the particular field. Bracing indicates parcels that were measured together. A road braced with a private field may be suggestive of private status. But this would

be no more than the surveyor's perception and would carry little evidential weight.

Public roads depicted on 1:2500 maps will invariably have a dedicated parcel number and acreage. It has been argued that all parcels which have the shape of a way and are so numbered and measured are therefore highways. This argument has not been substantiated. Such depiction is far from conclusive for the confirmation of highway status.

57. The Council seem to be trying to argue the same point in 12.31 in reverse. But just as a brace linking a private field with a road does not suggest private status equally the link of a public road with a private verge does not suggest public status. The point carries little evidential weight.

58. The Council have also raised a further point in relation to the Definitive Map and Statement in their Letter (**Appendix 12.0 p3pp4**). They rely on the description of Mirfield 12 in the Statement which says the footpath commences at its junction with the Lane coupled with the fact that they claim the Map showing the footpath starting '*from the back of the verge*'.

59. However, this point is misconceived. Mirfield 12 does not cross over the Verge and instead runs below it meeting the Lane to the South of the Verge. It is also the case that if the old 1952 version of the Definitive Map is unclear then the current version of the Definitive Map is crystal clear in showing that Mirfield 12 runs to the back of the carriageway. It is strange that the Council have ignored their current version of the Definitive Map to revert back to an old version. The point carries no evidential weight.

60. Overall, nothing in the Map evidence conclusively determines the matter either way. But the Maps evidentially assist the Client over the Council. I disagree with the Council's interpretation that the 1854 OS Map shows the Lane. In my view it doesn't and instead evidences that the Lane did not exist in 1854 instead being dedicated or created between 1854 to 1893.

Hedge to Hedge Presumption

61. A main cord of the Council's case seems to be the hedge-to-hedge presumption on the basis that the Verge is located between the Hall's wall and the Lane.

62. As set out above the caselaw is clear that there is a preliminary question that needs to be answered before the presumption will apply. This was expressly discussed in **Hale**:

It must, in my view, be a question of fact in each case. To take an obvious example: there could be no room for any such presumption unless the highway pre-dated (or was contemporary with) the fence or hedge.

....

Third, 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.

63. If it can be shown that the Hall's wall was not erected by reference to the highway then this will prevent the presumption from even arising.

64. On that basis considerable research has been undertaken into establishing the date of the Wall. The evidence found supports the wall being erected in the early 1700s.

65. This is because the wall would have been erected around the same time as the dividing wall was erected between No 51 and No 53 (both of the Hall). The element of the wall that was demolished in 1991 was part of the same curving wall that started at the Hall and curves around and runs along the verge. I am supported in that view by the multiple OS maps that seems to show the curved wall as a continuous feature around No 53 and dividing it from No 51.

66. Reliance can therefore be placed on the findings in the 1991 Report that '*this wall was early 18th century and contemporary with the 1704 alterations.*' This supports the wall being erected around 1704. I have certainly seen no alternative date or evidence put forward by the Council.

67. The question then is what date was the Lane created?

68. If the Council (or a Court) accepted that the 1854 OS Map established (by not having marked any "Northorpe Lane" on the map) that Northorpe Lane did not exist in 1854 then the hedge-to-hedge presumption would not arise merely because in 1854 the map shows the wall next to the Verge. The relevance is their comparative dates rather than simply their co-existence. This is crucial for the hedge-hedge presumption

which requires the wall (or hedge) to be contemporary or post-date the highway (per **Hale**). Here the highway later known as “Northorpe Lane” was not yet in existence when the wall was shown as already built in 1854. If the landowner is alleged to be deemed to have dedicated the verge as highway land by virtue of the position in which he chose to build the wall, the concept intrinsically relies on the highway *having already been here when the wall was built*. It is impossible to imply any act of dedication under the hedge-hedge presumption if the wall pre-dated the highway. The 1854 OS map shows on its face that Northorpe Lane was not there in 1854, but the wall was i.e. it shows that the wall predates the Lane. And yet the Council’s case on deemed dedication relies entirely on the highway existing at the same time (or even earlier) than the date of construction of the wall (i.e. the Lane first, then the wall later), which it plainly did not.

69. The Council (or a Court) would not have to accept the 1704 date for construction of the wall to reach this conclusion – but any acceptance of 1704 as the date of wall construction would surely reinforce any conclusion by of the Council (or the Court) that (as above) the correct conclusion to draw from the face of the 1854 map is that (as above) the failure to name Northorpe Lane shows that there can have been no dedication at that time (1854) against that highway, as it did not yet exist, even though the wall already did. Acceptance of the 1704 date for wall construction would be logically consistent with the interpretation of the 1854 map offered above.

70. Overall, on the evidence I have seen the Client would have a strong response if the Council were to maintain that the hedge-hedge presumption applied. We can point to the Hall being in its current form around 1704, we have a reference at the same time to a wall being erected, and we have evidence that the Lane was not created until after 1854. If the Council (or a Court) accepted those propositions then the hedge-hedge presumption would not arise.

71. Even if the presumption did arise then it is not conclusive or un-rebuttable. The Court would then turn to look to other evidence to suggest there was no intention to dedicate the verge which I will turn to next.

Acts of ownership

72. Acts of ownership on the Verge can be strong evidence that it is not highway (per **Neeld**). It is right to say that the private ownership and highways are not incompatible

– a highway is often created through the owner dedicating rights over land he retains formal ownership of. But it is different when an owner carries out actions which are contrary to the public use of the land.

73. In this case it seems to me that the strongest evidence that the Verge is not highway is the use of it for the stationing of a garage between the 1950s and 1991 (**Appendix 2**). I have seen numerous photos and the existence is well recorded. These can be corroborated by resident's accounts if needed. The Garage also appears on a 1993 OS Map (**Appendix 11**).

74. Furthermore, the Trust confirms that it was used as a Garage for vehicular parking from 1963, when the Trust was given No 53. This reflects the fact that there was no direct vehicular access to the front of No 53 until after both (a) No 51 had been acquired in 1979 and (b) the dividing wall [at the front of no. 51/no.53] was demolished in 1991. There was use of the front vehicular access to no. 51 after 1979, and people could walk into no.51 internally from no.53 and vice-versa from 1979 onwards. But there was no direct vehicular access at the front of no. 53 between 1963 and 1991 as it was blocked by the wall demolished in 1991. Hence the garage on the Verge was needed for parking (as well as storage), especially between 1963 and 1979, but also between 1979 and 1991. Regarding the garage's position on the Verge, it is also worth noting that the Verge is part of the ownership of the title of No 53, which was the first plot owned by the Trust (in 1963).

75. All this points to continued use of the Verge for private purposes i.e.parking. I have seen no evidence of any permission granted by the Council nor rent paid to them. In fact, there is witness evidence of the Trust receiving rent for the use of the Garage. The rent was received by the Trust directly from a private third-party tenant for some years. The witness is the son of the garage-tenant father, and the son used to help his father retrieve and install items in the garage on the Verge, which he says his father rented from the Trust.

76. Even post the removal of the Garage I am instructed that a dropped kerb was incorporated when the Lane was kerbed to allow vehicular access (though no evidence of an application has been found so far since the Council have declined to offer records prior to 2007) and the Trust now has a formal parking spot with signage.

77. In my view this strongly points towards the Verge not being part of the Lane. Especially given the failure of the Council to take any action against the above which, if the Verge were highway, would seem to be a criminal offence under s.148 of the **1980 Act** as it would obstruct the highway.
78. It is worth addressing the Council's argument about street furniture and the telegraph pole. While this could be used to argue that the Verge is public highway it is very important to distinguish the differently owned parts of the Verge.
79. This Advice, when talking about the Verge, has looked at the majority of the Verge, namely that part of it which falls under the Trust's title to No 53, and comprises the greater part of the overall geographical feature or "overall Verge" (i.e. the latter comprising both Trust-owned and non-Trust-owned Verge." A very small part of the overall Verge falls outside of the Trust's title to No 53 and I believe into non-Trust ownership. From my understanding it is on that non-Trust tip of verge that the telegraph pole, road narrows sign, grit bin, and public right of way sign all sit.
80. If I am correct about the placing of the 'street furniture' on the non-Trust Verge then this would both discount the Council's argument but also support the Clients as it reflects a tacit acceptance from the Council that they cannot place Council property on the Trusts Verge.
81. I will for completeness also deal here with the Council's reliance on the 'stance of West Yorkshire County Council' which found that a '*small area at the northern tip of the verge*' to be within highway limits.
82. However, having examined the Council Letter's Appendix C (**Appendix 12C**) I do not see the relevance of this point. The area shaded pink sits beyond the Verge (the blue dotted line of the Verge is clear on the picture) when compared to any of OS Maps the Council have provided at their Appendix E (**Appendix 12E**). This pink patch of land today is surfaced like the Lane and is used for vehicular access to various properties. I don't believe it is any part of the Client's case that this pink area is not adopted highway.
83. Furthermore, even if some of the pink area unincorporated the northern tip of the verge (which is strongly disputed) the Client is concerned with the Trust owned Verge which the Title Plan to No 53 shows is clearly separate from the pink shaded area.

84. In short, the stance of the highway authority in 1985 to a separate piece of land is irrelevant to the status of the Verge.

85. On that basis I therefore think the acts of ownership by both the Client and in fact the Council strongly support the case that the Verge is not highway.

Grass mowing

86. This seems to be treated by the Council as their primary argument through the use of the phrase '*First and foremost*'. It is correct that maintenance can be used as evidence that the Verge could be considered to be part of the highway. But it is not conclusive evidence and can be countered by the evidence above – for example the ownership acts contrary to dedication.

87. Furthermore it has long been recognised by the Courts that there can be a multitude of reasons for the Council maintaining a verge which do not equate to the Verge being part of the adopted highway. It is often the case that landowners can enter into agreements (formal or informal) with the Council to take the burden of maintaining their land where it has some relevance to the Council's functions. For various reasons it can be in a local authority's best interests that a verge adjoining public highway is kept tidy – including from an amenity and highway safety perspective.

88. Here taking into account that the landowner is a charitable body this increases the chances of some agreement being entered into. Or at the very least dilutes the weight that should be given to this evidence.

89. In my view the grass cutting evidence here, like in **Fortune**, does not contribute significantly to the resolution of the status of the Verge.

Overall View on the Status of the Verge

90. Without knowing the exact circumstances of the dedication/creation of the Lane the status of the Verge is a question of fact that must be decided on the various sources of evidence.

91. To return to the analogy of the rope it seems that the Client's cords are much stronger than those of the Council.
92. Our strongest cord is the acts of ownership. It seems to me that the Garage is a clear private use and one that has logic given the circumstances – the occupants of No 53 needed to park on the Verge in lieu of any vehicular access. Following on from this while the map evidence favours the Client. The absence of the Lane from the 1853 OS Map is supported by the historical sources making no mention of the Lane which suggests it came about later than the Council contend.
93. This fact, coupled with the history of the house and its wall, becomes the central part of the Client's resistance to the Council's cord – the hedge-to-hedge presumption. The evidence all points to the fact that the wall would have been built around 1704 with the Lane following sometime after. On this basis the Council's main cord frays.
94. The Council have raised a number of disparate points which go nowhere. The braces point misunderstands the role of braces (and what they do and do not signify). Their lack of evidential weight is recognised by PINS. The 1985 view of West Yorkshire County Council relates to land entirely separate from the Verge. The description of Mirfield 12 compared to an old 1952 Definitive Map is incorrect, based on an old version of the Map and irrelevant anyway as it does not interact with the Verge.
95. This only leaves the Council with one cord – the grass cutting of the Verge since 1996. However while this is a valid cord I do not view it as having conclusive or even strong evidential weight for the reasons set out above.
96. Looked at as a whole the Client's rope is composed of multiple strong 'cords' - the evidenced acts of ownership, historic maps and historical record.. Against that the Council's rope is composed of a single cord – the cutting of grass.
97. In my view (again reflecting the language of **Exall**) our rope is of sufficient strength to support the weight of the Verge not being part of the highway. The Council's is clearly insufficient to support their contention that the Verge is part of the highway.
98. On that basis I advise that the Client has a strong to very strong case that the Verge is not part of Northorpe Lane.

Conclusion and Next Steps

99. On the basis of the above I have found that there would, on current evidence, be a very good case that the Verge is not part of the Lane and so not highway. This should form the basis of an application to the County Court for a Declaration to that effect.

100. However, it is important to bear in mind that a Declaration is not necessary to establish the Verge is not highway. It is first a question for the Council as Highway Authority. They recognise that it is a question of fact based on the evidence and there is nothing preventing a reasonable Highway Authority from coming to a revised view following consideration of new evidence.

101. On this basis I would first write to the Council setting out in detail the evidence and reasoning why the Verge is not part of the Lane. Then give them an opportunity to reconsider and agree in writing that the Verge is not part of the highway.

102. There is nothing preventing the Council from doing this, and it would avoid the need for formal proceedings (and the associated costs). In my view a rational local authority acting reasonably would on consideration of the evidence I have seen agree with the Client and not wish to endure costly proceedings.

103. However, if the Council do not agree to this then it is my strong advice that a Declaration is sought from the County Court.

104. I advise accordingly.

3rd FEBURARY 2021
KINGS CHAMBERS
MANCHESTER, LEEDS, AND BIRMINGHAM