Public Rights of Way and Greens Committee

Agenda

Date: Wednesday, 28 June 2023
Time: 2.00 pm
Venue: City Hall

Distribution:

Councillors: Tessa Fitzjohn (Chair), Jude English, John Goulandris, Jonathan Hucker, Philippa Hulme, Chris Jackson, Tim Rippington, Christine Townsend and Andrew Varney

Copies to: Theo Brumhead, Nancy Rollason (Head of Legal Service), Tom Dunsdon (Solicitor), Duncan Venison (Network Operations Manager) and Eddie Procter

Issued by: Democratic Services
City Hall, College Green, Bristol, BS1 5TR
Tel: 3526162
E-mail: democratic.services@bristol.gov.uk
Date: Tuesday, 20 June 2023

Agenda

1. Welcome, Introductions and Safety Information

(Pages 3 - 5)

2. Apologies for Absence and Substitutions

3. Declarations of Interest

To note any declarations of interest from the Councillors. They are asked to indicate the relevant agenda item, the nature of the interest and in particular whether it is a **disclosable pecuniary interest**.

Any declarations of interest made at the meeting which is not on the register of interests should be notified to the Monitoring Officer for inclusion.

4. Public Forum

Up to 30 minutes is allowed for this item

Any member of the public or Councillor may participate in Public Forum. The detailed arrangements for so doing are set out in the Public Information Sheet at the back of this agenda. Public Forum items should be emailed to democratic.services@bristol.gov.uk and please note that the following deadlines will apply in relation to this meeting:

Questions - In consultation with the Chair of the committee, public questions will not be permitted at this meeting.

Petitions and Statements - Petitions and statements must be received no later than two clear working days prior to the meeting. For this meeting this means that your submission must be received in this office at the latest by 12.00 Monday 26 June 2023.

5. Applications to Register Land at Stoke Lodge as a Town and Village Green under the Commons Act 2006

(Pages 6 - 284)

Public Information Sheet

Inspection of Papers - Local Government (Access to Information) Act 1985

You can find papers for all our meetings on our website at www.bristol.gov.uk.

Public meetings

Public meetings including Cabinet, Full Council, regulatory meetings (where planning and licensing decisions are made) and scrutiny will now be held at City Hall.

Members of the press and public who plan to attend City Hall are advised that you may be asked to watch the meeting on a screen in another room should the numbers attending exceed the maximum occupancy of the meeting venue.

COVID-19 Prevention Measures at City Hall (June 2022)

When attending a meeting at City Hall, the following COVID-19 prevention guidance is advised:

- promotion of good hand hygiene: washing and disinfecting hands frequently
- while face coverings are no longer mandatory, we will continue to recommend their use in venues and workplaces with limited ventilation or large groups of people.
- although legal restrictions have been removed, we should continue to be mindful of others as we navigate this next phase of the pandemic.

COVID-19 Safety Measures for Attendance at Council Meetings (June 2022)

We request that no one attends a Council Meeting if they:

- are required to self-isolate from another country
- are suffering from symptoms of COVID-19 or
- have tested positive for COVID-19

Other formats and languages and assistance for those with hearing impairment

You can get committee papers in other formats (e.g. large print, audio tape, braille etc) or in community languages by contacting the Democratic Services Officer. Please give as much notice as possible. We cannot guarantee re-formatting or translation of papers before the date of a particular meeting.

Committee rooms are fitted with induction loops to assist people with hearing impairment. If you require any assistance with this please speak to the Democratic Services Officer.

Public Forum

Members of the public may make a written statement ask a question or present a petition to most meetings. Your statement or question will be sent to the Committee Members and will be published on the Council's website before the meeting. Please send it to democratic.services@bristol.gov.uk.

The following requirements apply:

- The statement is received no later than **12.00 noon on the working day before the meeting** and is about a matter which is the responsibility of the committee concerned.
- The question is received no later than **5pm three clear working days before the meeting**.

Any statement submitted should be no longer than one side of A4 paper. If the statement is longer than this, then for reasons of cost, it may be that only the first sheet will be copied and made available at the meeting. For copyright reasons, we are unable to reproduce or publish newspaper or magazine articles that may be attached to statements.

By participating in public forum business, we will assume that you have consented to your name and the details of your submission being recorded and circulated to the Committee and published within the minutes. Your statement or question will also be made available to the public via publication on the Council's website and may be provided upon request in response to Freedom of Information Act requests in the future.

We will try to remove personal and identifiable information. However, because of time constraints we cannot guarantee this, and you may therefore wish to consider if your statement contains information that you would prefer not to be in the public domain. Other committee papers may be placed on the council's website and information within them may be searchable on the internet.

During the meeting:

- Public Forum is normally one of the first items on the agenda, although statements and petitions that relate to specific items on the agenda may be taken just before the item concerned.
- There will be no debate on statements or petitions.
- The Chair will call each submission in turn. When you are invited to speak, please make sure that your presentation focuses on the key issues that you would like Members to consider. This will have the greatest impact.
- Your time allocation may have to be strictly limited if there are a lot of submissions. **This may be as short as one minute.**
- If there are a large number of submissions on one matter a representative may be requested to speak on the groups behalf.
- If you do not attend or speak at the meeting at which your public forum submission is being taken your statement will be noted by Members.
- Under our security arrangements, please note that members of the public (and bags) may be searched. This may apply in the interests of helping to ensure a safe meeting environment for all attending.

- As part of the drive to reduce single-use plastics in council-owned buildings, please bring your own water bottle in order to fill up from the water dispenser.

For further information about procedure rules please refer to our Constitution
https://www.bristol.gov.uk/how-council-decisions-are-made/constitution

Webcasting/ Recording of meetings

Members of the public attending meetings or taking part in Public forum are advised that all Full Council and Cabinet meetings and some other committee meetings are now filmed for live or subsequent broadcast via the council's webcasting pages. The whole of the meeting is filmed (except where there are confidential or exempt items). If you ask a question or make a representation, then you are likely to be filmed and will be deemed to have given your consent to this. If you do not wish to be filmed you need to make yourself known to the webcasting staff. However, the Openness of Local Government Bodies Regulations 2014 now means that persons attending meetings may take photographs, film and audio record the proceedings and report on the meeting (Oral commentary is not permitted during the meeting as it would be disruptive). Members of the public should therefore be aware that they may be filmed by others attending and that is not within the council's control.

The privacy notice for Democratic Services can be viewed at www.bristol.gov.uk/about-our-website/privacy-and-processing-notices-for-resource-services

Public Rights of Way and Greens Committee 28th June 2023

Report of: Commons Registration Authority (CRA)

Title: Applications to Register Land at Stoke Lodge as a Town and Village Green under the Commons Act 2006

Ward: Citywide

Presenting Report: Nancy Rollason , Head of Service, Legal Services

Recommendation

To consider and accept the recommendations of the Independent Inspector set out in his report dated 14th March 2023.

Summary

This report concerns the applications by Ms Emma Burgess and Ms Katherine Welham to register a site known as Stoke Lodge Playing Fields, Stoke Bishop, Bristol as a Town or Village Green.

The significant issues in the report are:

As set out in the Report

Policy

1. There are no specific policy implications arising from this report

Consultation

2. Internal
Not applicable

3. External

Mr Philip Petchey was appointed by the Council as Commons Registrations Authority (CRA) as an independent Inspector (the Inspector) to report upon and to make recommendations about the determination of two applications made to the CRA by Ms Emma Burgess and by Ms Katherine Welham (the Applicants). The applications were made pursuant to section 15 of the Commons Act 2006 and sought the registration of land as a town/village green, The Inspector has written a Report dated 14th March 2023 (the Inspector's Report). The Report includes his recommendations.

4. Context

The CRA received two applications under Section 15 of the Commons Act 2006 for registration of land at Stoke Lodge, Stoke Bishop, Bristol (the application land) as a Town/Village Green. The first, dated 13th September 2018 received from Ms Burgess made under Section 15(2) of the Commons Act 2006. The second dated 22nd July 2019 received from Ms Welham made under Section 15(3) of the Commons Act 2006 .

The CRA received objections from Bristol City Council, as landowner, and Cotham School as the leaseholder. Cotham Parent and Carer Group has been joined as a party.

The CRA has responsibility under the Commons Act 2006 to determine the applications and to decide whether the application land should be registered as a Town/Village Green. The decision will be taken by the Council's Public Rights of Way and greens Committee

In his Report **(Appendix 1)** the Inspector has recommended that the applications should be rejected and the land be not registered as a town or village green because in the relevant twenty-year period use by local people has not been *as of right* **.**

Following its receipt, the CRA circulated the Inspector's Report to the parties. The parties were asked to provide submissions on the Report. The CRA received the following submissions

Letter from Harrison Grant Ring to CRA dated 5th April 2023 (on behalf of Cotham School) **- Appendix 2**

Submissions from the Applicants dated 11th April 2023 – **Appendix 3**

Documents for consideration by the PROWG Committee (from Andrew Sharland KC on behalf of the Applicants) **Appendix 4**

Email from Bristol City Council (as landowner) dated 11th April 2023 **Appendix 5**

In response to these further submissions the Inspector provided a supplemental note. The Inspector's Note dated 18th May 2023 is at **Appendix 6**

The Parties were then given the opportunity to make final submissions in respect of the Inspector's note. The CRA received the following Submissions:-

Bristol City Council (as Landowner) dated 9th June 2023 **Appendix 7**
Cotham School **dated 9th June Appendix 8**
The Applicants dated 9th June 2023 **Appendix 9**

In March 2021, the Inspector prepared a Report on the basis of submissions from the parties on issue of statutory incompatibility. A copy of that Report dated 2nd March 2021 is at **Appendix 10.**

Communications between the CRA and the parties have not been included with the papers as this was not considered necessary for the determination of the applications. Communications (by email) can be provided in redacted form to the Committee if it considers that this would assist in the decision-making process.

5. Proposal

This Committee on behalf of the CRA has a statutory duty under the Commons Act 2006 and the regulations made thereunder to determine objectively whether or not the land in question should be registered as a Town or Village Green within the meaning of the Commons Act 2006 by reference to whether the relevant statutory requirements are met.

It is the CRA Officer's view that the Inspector has fully and thoroughly examined the applications and the process under the Commons Act 2006, and that his advice and recommendations are correct in fact and law. Therefore , the recommendation is that the Committee adopt the recommendations of the Inspector and that the land not be registered as a Town or Village Green.

For the avoidance of doubt, Bristol City Council's interest as landowner and as an objector in these applications is wholly separate and independent from its role as CRA . The separation of interests and of functions has been carefully and assiduously maintained throughout the process of consideration of these applications. The CRA is satisfied that a clear separation of functions and interests has at all times been maintained and procedure properly followed.

6. Other Options Considered

The Committee should give its reasons for the decision which it makes on the applications.

If the Committee accepts the Inspector's recommendation for the reasons he has given in his Reports and note then the Committee must make this clear.

If the Committee chooses to reject the Inspector's recommendations they must provide reasons for doing so.

7. Risk Assessment

None

8. Summary of Equalities Impact of the Proposed Decision

Before making a decision, Section 149 Equality Act 2010 requires that each decision-maker considers the need to promote equality for persons with the following "protected characteristics": age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Each decision-maker must, therefore, have due regard to the need to:

i) Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010.

ii) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to --

- remove or minimise disadvantage suffered by persons who share a relevant protected characteristic;

- take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of people who do not share it (in relation to disabled people, this includes, in particular, steps to take account of disabled persons' disabilities);

- encourage persons who share a protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

iii) Foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to –
- tackle prejudice; and
- promote understanding.

9. Legal and Resource Implications

Legal

The City Council in its capacity as CRA has responsibility under the Commons Act 2006 to determine whether the land or a part thereof should be registered as Town or Village Green.

The criteria to be applied for successful registration are provided by the Commons Act 2006. For land to be registered as a town or village green, the statutory qualifying requirements set out in section 15 of the Commons Act 2006 must be met.

The qualifying requirements are:
a) that the land has been used for lawful sports and pastimes;
b) by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;
c) that that use has been carried out *as of right*; and
d) that qualifying use which conforms to the above, has been carried out for the requisite period for the purposes of the particular application under consideration.

With regard to the requisite period, s.15, to the extent relevant to the applications for the Committee provides for two different periods. The first is a period of at least twenty years ending on the date of a town/village green application (see s.15(2) Commons Act 2006). The second is a period of at least twenty years ending on a date not earlier than one year before the date of a town/village green application (s.15(3) Commons Act 2006).

As is recorded in the Inspector's report, Ms. Burgess' application was made under s.15(2) and thus the requisite period is a period of at least twenty years down to 13 September 2018. Ms. Welham's application is made under s.15(3) and was made on the basis that qualifying use ceased on 24 July 2018. The relevant qualifying period for the purposes of Ms. Welham's application is a period of not less than 20 years down to 24 July 2018. The Committee is referred in this respect to the Inspector's report at paragraphs 6 to 8.

The qualifying requirements raise matter of fact and of law. In respect of matters of fact, the burden of proving that the qualifying requirements are met, rests with the Applicants. The standard of proof is the balance of probabilities. Thus, it is for the Applicants to provide on the balance of probabilities that the qualifying requirements are all met. The Inspector has addressed the burden of proof in his report at paras.29-30. The Committee is referred to those paragraphs of the report.

The Inspector, in his report, has set out in some detail the law concerning the qualifying requirements which are most relevant to the applications. The Committee is referred to the Inspector's report in this respect. However, and to assist the Committee a high level summary of the relevant requirements is set out below.

Use of the land for lawful sports and pastimes

Lawful sports and pastimes include normal recreational activities such as walking, dog walking, children's play and formal and informal ball and other games. The Courts have held that the scope of lawful sports and pastimes is wide. In substance, any type of lawful recreational activity which is indulged in on land may, in principle, fall within the scope of lawful sports and pastimes.

Use by a significant number of the inhabitants of a locality or of a neighbourhood within a locality

Use must be shown to be by a significant number of the inhabitants of a locality or of a neighbourhood within a locality.

A locality is required to be a legally recognised administrative area, such as a parish.

A neighbourhood is a flexible concept but must be an area with sufficient identity and cohesiveness to be recognised as such. A housing estate can and often is regarded as a neighbourhood.

Whether there has been use by a significance number of inhabitants of a neighbourhood is a matter of impression for the decision maker. What is required is a sufficient use to allow a conclusion that there has been use by the community rather than use by isolated trespassers.

Use as of Right

Use *as of right* means use without force, stealth or permission.

An issue which arises in respect of the applications before the Committee concerns whether use of the application land for lawful sports and pastime was by force. Use may, in principle, be made forcible and not as of right by the erection on the land by or on behalf of a landowner of an appropriately worded notice which makes clear that this the use of the land is resisted and is thus contentious.

The Inspector has set out in detail in his report the law concerning how use of land may become forcible and not as of right, particularly as a result of the erection of notices. The Committee is referred to those parts of the Inspector's report. The Applicants in particular have made submissions on the law in this (and other) respects, to which the Committee is referred.

Use for the requisite period

The relevant requisite periods are set out above.

Statutory Incompatibility

Where land is held by a body exercising statutory duties and powers, then it has been held by the Courts that such land may not, depending on the circumstances, be capable of being registered as town/village green.

Statutory incompatibility is addressed in the Inspector's Report and also in representations by the parties, to which the Committee is referred.

The outline procedure for how the City Council as CRA deals with TVG applications is at **Appendix 11**

(Legal advice provided by Nancy Rollason, Head of Service, Legal Services)

Land

There are no specific policy implications arising from this report

Personnel

Not applicable

Appendices:

Appendix 1: The Inspector's Report dated 14th March 2023
Appendix 2 : Letter from Harrison Grant Ring to CRA dated 5th April 2023
Appendix 3 : Submissions from the Applicants dated 11th April 2023
Appendix 4 : From the Applicants *Documents for consideration by the PROWG Committee*
Appendix 5: Email from Bristol City Council (as landowner) dated 11th April 2023
Appendix 6: Inspector's Supplemental Note
Appendix 7: Submissions From Bristol City Council (as Landowner) dated 9th June 2023
Appendix 8: Response to Inspector's Note of Counsel for Cotham School dated 9th June 2023
Appendix 9: Submissions from the Applicants dated 9th June 2023
Appendix 10 : The Inspector's Report dated 2nd March 2021
Appendix 11 : TVG Procedure Approved by PROWG 25 June 2012

LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985

Background Papers:

Section 15 Commons Act 2006

Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007

APPLICATIONS BY MS EMMA BURGESS AND MS KATHARINE WELHAM TO REGISTER LAND KNOWN AS STOKE LODGE PLAYING FIELD, SHIREHAMPTON ROAD, BRISTOL, AS A NEW TOWN OR VILLAGE GREEN

REPORT

Summary: An application made in 2011 to register Stoke Lodge Playing Field as a town or village based on 20 years' use in the period 1991 – 2011 was rejected in 2018 by the City Council as registration authority on the basis that notices erected by Avon County Council made the use contentious and not *as of right*. In 2018 and 2019, the City received two fresh applications to register the Playing Field, each based on 20 years' use between the periods 1998 – 2018. Avon County Council was abolished in 1996 but the Inspector takes the view, by reference to the notices, that the use continued to be contentious and not *as of right* after 1996 and into 1998 and beyond; in short, the notice did not cease to be effective when Avon County Council was abolished. The applicants for registration argue by reference to additional material that the original decision was wrong and that throughout the period 1998 – 2018 the use was not contentious. The Inspector considers the additional material does not make a difference. He also takes the view that, whatever the position before 2016, use thereafter was contentious, following the publicity surrounding the public inquiry into registration of the land at which it was clear that Cotham School and the City Council as landowner were objecting to the use of the land by local people. In certain circumstances, land held for statutory purposes is not registrable because registration is incompatible with carrying out those purposes. The original application was not rejected on this basis but since that decision the scope of "statutory incompatibility" has been further clarified by the Supreme Court and the School and City Council as landowner contend that it does apply. The Inspector disagrees. The upshot is that the Inspector recommends that the Playing Field is not registered as a town or village green because use of it was not *as of right* between 1998 and 2018.

Introduction

1. Bristol City Council is the statutory body charged by statute with maintaining the register of village greens. I am a barrister in private practice with expertise in the law of town and village greens. In this capacity, I have often advised registration authorities and have often acted on their behalf as an Inspector, holding a public inquiry into an application before reporting and making a recommendation. I have also often advised and acted for applicants who have sought to register land as a town or village green; and for objectors, who have argued that land should not be registered as a town or village green.

2. I have been appointed as an Inspector by Bristol City Council (acting as registration authority) to consider two applications under section 15 of the Commons Act 2006 which have been received by the Council to register land known as Stoke Lodge Playing Field or Fields[1] and to advise the Council whether that land should be registered as a town or village green. The two applications are:

   (i) dated 13 September 2018 by Ms Emma Burgess; and
   (ii) dated 22 July 2019 by Ms Katharine Welham.

3. The application of Ms Burgess was supported by evidence forms completed by 104 people. There were objections to it by Bristol City Council (as landowner) and Cotham School and by 88 members of the public.

[1] Hereafter I refer to it in the singular.

4. The application of Ms Welham was supported by evidence forms completed by 62 people. There were objections to it by Bristol City Council (as landowner) and Cotham School and by 27 members of the public.

5. I was asked as a preliminary matter to decide whether it was necessary that there should be a public inquiry before I advised the City Council. By a decision dated 2 March 2021[2], I decided that it was not. It is possible that matters might have arisen thereafter which did make it appropriate for there to be a public inquiry but in my view nothing has so arisen. The core facts of this matter are not controversial and there is not therefore a need for evidence to be subject to cross-examination. Accordingly, my advice is on the basis of the extensive written material that has been submitted to me.

6. For land to be registered as a town or village green, the requirements of section 15 of the Commons Act. This[3] provides as follows:

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where–

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

(b) they continue to do so at the time of the application.

(3) This subsection applies where–

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the time of the application but after the commencement of this section; and

(c) the application is made within the relevant period..

(3A) In subsection (3), "the relevant period" means—

(a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b);

(b) in the case of an application relating to land in Wales, the period of two years beginning with that cessation.

(4) This subsection applies (subject to subsection (5)) where–

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the commencement of this section; and

(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

7. The application by Ms Burgess was made under section 15 (2) on 13 September 2018. Accordingly she had to show that

[2] See, further, paragraphs 24 and 26 below.

[3] I set out sub-sections (1) to (4).

- a significant number of the inhabitants of a locality, or neighbourhood within a locality
- had indulged in lawful sports and pastimes on the land
- for a period of at least 20 years down to 13 September 2018; and
- their use was *as of right.*

8. The application by Ms Welham was made under section 15 (3) on 22 July 2019. It was made on the basis that qualifying use had ceased on 24 July 2018[4]. Accordingly she had to show that

    - a significant number of the inhabitants of a locality, or neighbourhood within a locality
    - had indulged in lawful sports and pastimes on the land
    - for a period of at least 20 years down to 24 July 2018; and
    - their use was *as of right.*

Procedural history

9. The consideration of whether Stoke Lodge Playing Field should be registered as a town or village green has a long and somewhat chequered history.

10. On 7 March 2011, David Mayer on behalf of Save Stoke Lodge Parkland made an application to register the Field a town or village green. Objections to the application were received from Bristol City Council in its capacity as landowner, the University of Bristol, Rockleaze Rangers Football Club and Cotham School. Mr Mayer responded to those objections and subsequently there were further exchanges of representations. In its capacity as registration authority the City Council initially considered that it would be necessary for there to be a non-statutory public inquiry and, on this basis, invited me to hold such an inquiry[5]. In August 2012 I issued draft directions for such an inquiry. However, I did observe in those directions that the factual matters in dispute appeared to be limited. This prompted the City Council in its capacity as landowner to suggest that it might not be necessary for there to be a public inquiry or, at least, a full public inquiry and accordingly I explored whether this might indeed be possible.

11. On the basis of a number of concessions made by the objectors as to the issues arising, in particular relating to the effect of prohibitory notices[6], I advised the City Council as registration authority that it would not be necessary for there to be a public inquiry and that the matter could be determined on the basis of written representations. Further representations were made and on 22 May 2013 I issued a report to the City Council ("the 2013 report") recommending that the land be registered as a town or village green because I considered that the statutory criteria had been met. In particular, I considered that use of the land had been *as*

[4] This was because on 24 July 2018 the School had erected notices which arguably had made the use contentious (see paragraphs 142 - 143 below).

[5] Such inquiries are referred to as "non-statutory" because there is no express power in the town and village green legislation providing for them to be held. However such inquiries have long been considered as appropriate in appropriate cases where registration of land as a town or village green is in dispute: see *R v Suffolk County Council, ex parte Steed* (1995) 70 P & CR 487 at p500 (per Carnwath J (as he then was)) and *R (Whitmey) v Commons Commissioners* [2005] QB 282 (CA) (per Arden LJ at paragraphs 26, 28 - 30).

[6] In particular, the City Council at this stage did not seek to rely on notices that had been erected on the land; so that it was not necessary to explore more particularly the surrounding facts relating to the notices.

of right[7]; and that an objection based on statutory incompatibility of registration with the statutory purposes for which the land was held fell away in the light of the decision of the Court of Appeal in *R (Newhaven Port and Properties) Limited v East Sussex County Council*[8]. I suggested that that it would be appropriate to give the parties the opportunity to comment on my report before it was submitted to Committee, and all took the opportunity to do so.

12. Bristol City Council as landowner changed its position on notices and further suggested that there should be a public inquiry in order to hear evidence about that matter; for its part, Cotham School suggested that a public inquiry was needed in order to investigate the extent of the use by schools and by sports clubs. Further, once it became likely that there was going to be an appeal in the *Newhaven* case, the City Council as landowner further suggested that further consideration of the matter be deferred until the outcome of that appeal was known.

13. I decided that it would be appropriate for further consideration of the matter to be deferred. One possible outcome of the appeal in the *Newhaven* case would have been that it became clear that the application should fail. In these circumstances, of course, I would have advised the registration authority to reject the application and there would not have been a need for a public inquiry.

14. The Supreme Court gave its decision on 25 February 2015[9]. Following submissions from the parties, I decided that, on its proper interpretation, the decision did not require the application to be rejected. In all the circumstances, I decided that it was appropriate for there to be a public inquiry. This would enable evidence to be led on the statutory incompatibility point, as well as in respect of the use of the land and as to the notices. I had at an earlier stage reached the view that it would be appropriate to allow the City Council as landowner to alter its position as regards notices.

15. The public inquiry sat on 20 – 24 June 2016, 27 – 28 June 2016 and 13 July 2016.

16. Many issues were in contention at the public inquiry but, in end, it was my judgment that the matter turned upon whether the existence of three prohibitory signs on the land had the effect of making use of the land by local people contentious and not *as of right*. I took the view that they did have this effect; and that accordingly the land should not be registered as a town or village green. In doing so, I relied upon the decision of the Court of Appeal in *Winterburn v Bennett*[10].

17. On the issue of statutory incompatibility, the position was that there had been further relevant litigation in the High Court exploring the scope of Newhaven *Lancashire County Council v Secretary of State*[11] and *R (NHS Property Services) v Surrey County Council* [12]. The case of *Lancashire* was particularly pertinent since it involved land held for educational purposes. In the light of this further guidance, I took the view that the application did not fail because

[7] My report pre-dated the decision of the Court of Appeal in *Winterburn v Bennett* [2017] 1 WLR 646 (CA) which materially affected the application of the law relating to notices.

[8] [2014] QB 186 (CA).

[9] [2015] AC 1547 (SC).

[10] See footnote 7 above.

[11] [2016] EWHC 1238 (Admin).

[12] [2016] 4 WLR 130.

registration was incompatible with the statutory purpose for which the land was held. However, at the time of my report, permission to appeal was being sought in the *Lancashire* case and had been granted in the *Surrey* case. Thus, there existed the possibility that the outcome of those appeals might affect my advice on this point.

18. The Public Rights of Way and Greens Committee of the City Council considered my report and recommendation at a meeting on 12 December 2016. It decided to reject my recommendation and to register the land as a town or village green. That decision was challenged by Cotham School by way of judicial review. As well as taking the point that, in the light of my report, the Committee should have decided to reject the application, the School also argued that the application should have been rejected on the basis of statutory incompatibility. By the time the case came on for hearing before Sir Wyn Williams (sitting as a Deputy Judge of the High Court) on 21 November 2017, the Court of Appeal had recently heard argument on the appeals in the *Lancashire* and *Surrey* cases (the two appeals were heard together) but had not delivered judgment. Sir Wyn postponed delivering his judgment until after the Court of Appeal had given its judgment (which happened on 12 April 2018). This enabled him to take into account written submissions on the question of statutory incompatibility which were submitted to him by the parties after the judgment of the Court of Appeal had been handed down.

19. In his judgment, delivered on 3 May 2018, Sir Wyn upheld the challenge. However, in the light of the Court of Appeal's judgment in *Lancashire/Surrey,* he rejected the argument that the application should be rejected on the basis of statutory incompatibility. He did however accept that the City Council had erred in law in its rejection of my recommendation that the application for registration should be rejected. Accordingly, its decision was quashed.

20. On 25 June 2018, in the light of the guidance of the High Court and my report and recommendations, the City Council resolved to reject the application.

21. On 14 September 2018, Emma Burgess made a fresh application to Bristol City Council as registration authority to register the playing field as a town or village green. The relevant 20 year period in respect of her application was 1998 to 2018 (i.e. the twenty years to the date of her application). She submitted the use of the land was *as of right* on the basis that Avon County Council had been abolished in 1996 and the signs that it had erected on the land had no legal effect after that date.

22. Bristol City Council and Cotham School objected to the application. Among the points that they took was that the School had erected new signs on the land on 24 July 2018 and that, whatever was the position before, after 24 July 2018 the use had been contentious and not *as of right.* Ms Burgess contested that the signs were effective but if they were, then, on the face of it, the objectors had a good point because (i) the application was made under section 15 (2) of the Commons Act 2006 and (ii) by virtue of section 15 (2) (b), in order to qualify for registration, qualifying use has to continue to the date of the application. There is however (also on the face of it) a ready response to this objection: an application can be made under section 15 (3) of the Commons Act 2006. By virtue of section 15 (3) (c) and (d) an application can be made for up to a year after qualifying use has ceased. Thus, if the notices did have effect, one might think that the application could be considered under section 15 (3) instead of 15 (2). However, Ms Burgess could not know that Bristol City Council as registration authority would treat her application in this way. In the light of this, on 22 July 2019, Katharine Welham made a further application to register the land as a town or village green relying on section 15 (3) (c) and (d) of the Commons Act 2006. This explains why Bristol City Council as registration authority have been asked to consider two applications rather than a single one.

23. In the meantime, the *Lancashire/Surrey* cases had gone to the Supreme Court. The Court delivered its decision on 11 December 2019[13]. It allowed the appeals taking the view that the Court of Appeal had taken too narrow a view of the scope of statutory incompatibility.

24. On 2 March 2021, I made a report to the City Council. I advised that it was not necessary that there should be a public inquiry and that the land should not be registered as a town or village green. This was on the basis that the notices that had operated to render use not as of right between 1991 and 2011 continued to be effective after 1996, so that use by local people in 1998 and thereafter was not *as of right*[14].

25. I had thought that in March 2021, I had all the material before me on which to make a recommendation. This proved not to be the case. In the light of my report Ms Burgess and Ms Welham adduced additional arguments and submitted additional material in support of them. The objectors also made further representations.

26. The detailed facts relating to the applications are set out in my report dated 14 October 2016 ("the 2016 report"). As noted, the core facts are not controversial. Some additional evidence has been submitted by the applicants and is set out and considered as appropriate below. I do not consider that this additional material requires there to be a public inquiry.

27. The 2013 and 2016 reports are appended to this report.

28. I now make this report to the City Council as registration authority in the light of all the material which the Applicants and Objectors wish to submit to me.

Matters of law

The burden of proof

29. It is for an applicant to demonstrate that land should be registered as a town or village green. The burden of proof is to the civil standard (the balance of probabilities). In *R (Beresford) v Sunderland City Council*[15], Lord Bingham said:

> *As Pill LJ rightly pointed out in* R v Suffolk County Council, ex p Steed (1996) 75 P & CR 102 ,111: *"it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ..." It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met*[16].

[13] See [2021] AC 194 (SC).

[14] I also advised that the publicity surrounding the 2016 inquiry was such as to make the use thereafter contentious.

[15] [2004] 1 AC 889 (HL).

[16] See paragraph 2 of his speech.

30. The effects of registration or non-registration in this case are clearly very important for both the City Council and School as landowners and also for the local community so Lord Bingham's point is well made. However, it is worth stressing that the intrinsic merits of whether the land can be fenced off or whether it should remain open for use by local people or whether there is some acceptable compromise which might allow both are not matters either for me or, in due course, for Bristol City Council as decision taking registration authority. I am solely concerned with an assessment of whether the legal requirements of section 15 are met.

As of right

31. It is necessary that the use by local people relied upon by the Applicants is as of right. This means that it must be *nec vi, nec clam, nec precario* i.e. not by force, nor stealth, nor the licence of the owner[17].

32. The primary meaning of access that is *vi* or by force is access by physical force e.g. by breaking down a wall or cutting through a fence. However, it is sufficient if use is contentious. In *Smith v Brudenell-Bruce*[18] Pumfrey J defined contentious use as follows:

It seems to me a user ceases to be 'as of right' if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with a dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either with physical obstruction or by legal action.

33. It is obvious from this that a notice may make use contentious. This was explained at the highest level and by reference to its origin in Roman Law by Lord Rodger of Earlsferry in *R (Lewis) v Redcar*[19]. Although a notice may make use contentious what may be less clear is what is the position if a notice is ignored.

34. In analysing the position, it is helpful to begin by taking the example of an open site which is fenced off with a wire fence. Local people mistakenly consider that they have a right to go on the land, and make a hole in the fence with wire cutters. The first to go through will be taking access by force. It is surely the case that those who in succeeding days use the gap that is created will also be taking access by force. But if we imagine that local people continue to use the gap thereafter and no further challenge issues, it is not so easy to describe their continued use as by force or contentious. The obvious analysis is that a challenge was issued, accepted and the landowner has subsequently acquiesced in the continued use: which is intrinsically peaceable. Local people behave as if they have the right.

35. A similarly analysis may be made if, instead of surrounding the land with a wire fence, the landowner puts up lots of notices saying: *Keep out! It is forbidden to trespass on this land.* Initially access will be by force, but the landowner may be viewed as acquiescing if he takes no further action.

36. There are *dicta* of high authority which supports this analysis.

[17] See *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 per Lord Hoffmann at p350.

[18] [2002] 2 P & CR 4.

[19] [2010] 2 AC 70. See paragraphs 88 to 90 of his judgment.

37. In *R (Godmanchester Town Council) v Secretary of State for the Environment*[20], the House of Lords had to construe section 31 of the Highways Act 1980. This provides that land may become a highway if it has been used by the public for twenty years. The relevant use has to be *as of right*; moreover, the claim will fail if the landowner shows that there was *sufficient evidence that there was no intention … to dedicate it* ("the proviso"). In his speech, Lord Hoffmann emphasised the difference between use being as of right and a landowner being able to satisfy the proviso. He said:

… there may be a notice which says "No right of way. Trespassers will be prosecuted". Nevertheless, for upwards of 20 years members of the public may have ignored the notice and used the way, openly and apparently in the assertion of a right to do so. Their user will satisfy section 31(1) but the landowner, even on the most objective test, will have satisfied the proviso[21].

38. By saying that *[t]heir user will have satisfied section 31 (1),* Lord Hoffmann was saying that that use by the public which ignored the notice was *as of right.*

39. In *R (Beresford) v Sunderland City Council*, Lord Walker of Gestingthorpe said:

It has often been pointed out that "as of right" does not mean "of right". It has sometimes been suggested that its meaning is closer to "as if of right" (see for instance Lord Cowie in Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd *1992 SLT 1035, 1043, approving counsel's formulation). This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who puts up a notice stating "Private Land—Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."*

40. This passage contemplates that a landowner may not be able to argue successfully that use by members of the public which ignores a prohibitory sign is not *as of right.*

41. It is these *dicta*, in particular, which led me in the 2013 report to advise the registration authority to conclude that, despite the existence of the Avon County Council signs, use by local people of the land had been *as of right.* As the applicants have pointed out, I recorded at paragraph 70 of that Report that *It seems to me that the present case is a classic one of acquiescence.* This however was before the decision of the Court of Appeal in *Winterburn,* which, it seems to me, changed the legal position as it had previously been understood.

42. Thus, despite the dicta in *Godmanchester* and *Beresford*, the position now is that *Winterburn* is high recent authority which is directly in point and which establishes that use which ignores prohibitory notices is not *as of right.* In his judgment in *Winterburn,* David Richards LJ said:

40 … In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings.

[20] [2008] 1 AC 221.

[21] See paragraph 24.

41. The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land.

43. I note that in *Winterburn* it might have been argued that use was contentious on the basis of protests by the landowner in addition to the signs. However, it is clear that the judgment is on the basis that the signs were sufficient by themselves. I also note that David Richards LJ did not refer to either the *Godmanchester* or *Sunderland* cases. However, although the position is that the Court of Appeal did not have had drawn to its attention relevant authority[22], that authority represents *obiter dicta* and not *ratio decidendi*. Thus, it seems to me that the basis does not exist for Bristol City Council, as registration authority, to do other than loyally follow the judgment of the Court of Appeal as to effect of signs, which is *ratio decidendi*. The applicants suggest that *Winterburn* does not establish any general principle. It seems to me that it does.

44. In *Lancashire/Surrey* in the Supreme Court, Lord Wilson dissented and would have held that land held for educational and health purposes was registrable as a town or village green. That is as may be. At the end of his judgment he observed:

149. It was with complete passivity that, for no less than 20 years, these two public authorities contemplated the recreational use of their land on the part of the public. Their simple erection at some stage during that period of signs permitting (or for that matter prohibiting) public use would have prevented such use of the land being as of right: Winterburn v Bennett *[2017] 1 WLR 646 . In such circumstances it is hardly surprising that they both failed to establish its practical incompatibility with their own proposed use of it.*

45. It seems to me that this *dicta* – articulating what I think is not truly controversial – is high authority for the application of *Winterburn* to cases concerning town or village greens.

46. In the legal challenge to the decision in 2016 of the City Council to register the playing field as a town or village green, Sir Wyn Williams said:

50. In my judgment there can be no doubt that Taylor[23] *and* Winterburn *constitute authority for the proposition that where an owner of land has made his position about its use clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right" – see the paragraphs from* Taylor *quoted at paragraph 40 above and paragraph 40 in* Winterburn *itself. That is so, in my judgment, whether the claim relates to registration of a town or village green or the acquisition of a private right.*

47. Thus, the position is that in principle in the present case the signs may render the use of the land by local people contentious and not *as of right*. I say in principle because the further question arises as to whether the Avon County Council signs were sufficient to render use of the land contentious. I considered the evidence about this in the 2016 report and concluded that they were[24]. There seems to

[22] It is clear from the report that neither *Godmanchester* nor *Sunderland* were referred to.

[23] This is a reference to *Taylor v Betterment Properties (Weymouth) Ltd* [2012] 2 P & CR 3.

[24] See paragraphs 387 – 389.

me no basis now for me to reach a different conclusion in respect of the sufficiency of the notices[25]. Obviously unless anything changed the notices will have gone on making use of the land contentious after that time until there was some material change (or for some other reason they were ineffective).

48. In *Beresford*, the House of Lords held that for a permission to be effective it had to be revocable[26]. This position was overruled by the Supreme Court in *R (Barkas) v North Yorkshire County Council*[27]. In *Barkas*, Lord Neuberger made it clear that if a person is not a trespasser by virtue of a communicated consent, his use is not *as of right*:

... *if the landowner has in some way actually communicated agreement to what would otherwise be a trespass, whether or not gratuitously, then he cannot claim it has been or is unlawful—at least until he lawfully withdraws his agreement to it. For the same reason, even if such an agreed arrangement had continued for 20 years, there can be no question of it giving rise to a prescriptive right because it would clearly have been* precario*, and therefore "by right"*[28].

49. Finally, I need to refer to *R (Mann) v Somerset County Council*[29]. In that case, on part of the land which was the subject of an application for it to be registered as a town or village green occasionally there had been a beer festival and a funfair to which admission had been charged. The Inspector implied from this a permission when access was freely available. The High Court upheld the Inspector's approach. The contrast is with *R (Lewis) v Redcar*, where land was used (on a full time basis) as a golf course. The Supreme Court held (contrary to the view of the Inspector) that this use could co-exist with use by local people and the land be registered as a town or village green. It is fair to say that it was not argued from the golf course use that use by local people was permissive[30] but it would be remarkable to hold that *Lewis* was decided *per incuriam.* I think the answer is to see *Mann* as decided on its own facts, the argument not extending as far as the situation of a golf course in *Lewis.*

Consideration

Introduction

50. It is clear that during the relevant periods Stoke Lodge Playing Field has been used by a significant number of the inhabitants of a neighbourhood within a locality for lawful sports and pastimes. This was the position in respect of the period 1991 – 2001 as set out in the 2016 report and there is no reason to think that the position as regards any periods between 1998 and 2018 would be any different. I note, of course, that each application is supported by a quite a large number of evidence forms. In respect of the period 1991 – 2011, in the 2016 report I advised that I considered that the use was not *as of right.* The objectors contend that this is also the position as regards the periods 1998 – 2018. Their principal argument continues to rely on the signs that were erected on the land. For their part the objectors contend that such reliance was misconceived and that, properly considered by reference to additional material now available, the position is that the use was in those periods never contentious (and thus was, as required for registration, *as of right*).

[25] It is argued by the applicants that the notices were ineffective for other reasons. I consider these arguments in due course.

[26] See per Lord Scott at paragraphs 49 – 50.

[27] See the speech of Lord Neuberger at paragraph 15.

[28] See paragraph 29.

[29] [2017] 4 WLR 170.

[30] *Mann* was not cited to the Supreme Court in *Lewis.*

51. There is a separate issue in respect of *as of right* relating to the effect of the public inquiry in 2016.

52. The objectors also contend that the Playing Field is not registrable as a town or village green by reference to statutory incompatibility as explained by the Supreme Court in the *Newhaven* and cases *Lancashire/Surrey*.

53. In my consideration below I first address the issue relating to statutory incompatibility before turning to the two further issues relating to *as of right.*

54. The arguments set out in detailed submissions to me cover a great deal of ground. In my consideration below I have identified and addressed what I consider to be the key points. In doing so I have sought to take into account all the material and submissions that have been made to me.

Issue 1: statutory incompatibility

55. Registration of land as a town or village green gives the land statutory protection from development and activity harmful to it as a town or village green. Accordingly it is easy to see that, if land is held for statutory purposes, registration would interfere with the purposes for which it is held. The legal implications of this conflict were first considered in *Newhaven* where the conflict was with the statutory duties of a port authority. The Supreme Court held that, in the circumstances, land held which was subject to those duties could not be registered as a town or village green. In that case the land in question had in fact been used by local people for recreation without any conflict having arisen; the point was that there was potential for conflict.

56. On the face of it, the position of a local authority which holds land for a specified statutory purpose is exactly the same as that as a port authority. Thus land held by an education authority for the purposes of education would not be registrable; and this is what the Supreme Court held in *Lancashire/Surrey* It did not matter that the land in question was open and unenclosed and that there were no immediate plans to use the land for educational purposes: what mattered is that the land might be used in future for those purposes, with which registration was incompatible.

57. For the Supreme Court so to hold produces this complication. Local authorities are statutory bodies and most of the land which is vested in them will be held for statutory purposes. There were three cases where the registration of land held by a local authority for statutory purposes had been upheld by the Court of Appeal or House of Lords/Supreme Court. The land that was registered as a town or village green in *New Windsor v Mellor*[31] might be an exception but that in *Oxfordshire County Council v Oxford City Council and Robinson*[32] was held for housing and that in *Lewis v Redcar* for development. Statutory incompatibility was argued in none of these cases, and they were distinguished in *Newhaven* and *Lancashire/Surrey*. It is important to note *Oxfordshire* and *Lewis* and their treatment by the Supreme Court because the Court was recognising that not all land owned by a local authority under statutory powers was registrable.

58. However this may be, one can see that, in the present case, had an application been made to register the land at Stoke Lodge before 2010, it would have been defeated by reference to statutory incompatibility: the land was held by Bristol City Council as education authority for the purposes of education.

59. In 2010, the arrangements changed. Parliament passed the Academies Act 2010. This empowered the Secretary of State for Education to enter into academy arrangements with any person. The arrangements were, in summary, that that person provided education without charge and that the Secretary of State provided funding for that provision. The Act provided that existing maintained

[31] [1975] Ch 380 (CA).

[32] [2006] 2 AC 674 (HL).

schools could convert themselves into academies, and, if they did, the Secretary of State could make a scheme for the transfer of land of the maintained school from the local authority to the Academy. In the present case Cotham School, which before had been a maintained school, turned itself into an academy and the land on which it stood and its playing fields (which are the subject of the application for registration as a town or village green) were transferred to the Academy by way of a 125 year lease. The City Council hold the reversion of the lease. This was by virtue of a scheme made by the Secretary of State under section 8 of the 2010 Act.

60. A simple analysis of the new situation arising is that nothing has essentially changed: the School in effect stand in the shoes of the education authority and that statutory incompatibility continues to apply. On this analysis the relevant incompatibility is that between the powers and duties of the School and registration.

61. It seems to me that such an analysis would not reflect the new circumstances. The statutory provisions in Lancashire upon which County Council relied as showing incompatibility were:

(1) section 8 of the 1944 Education Act which imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character and equipment;

(2) sections 13 and 14 of the Education Act 1996 which require local authorities to contribute to the development of the community by securing efficient primary and secondary education;

(3) section 542 of the 1996 Act which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations (SI 2012/1943)) suitable outside space for physical education and outside play;

(4) section 175 of the Education Act 2002 which requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children".

62. In the new situation (1), (2) and (4) have no direct application.

63. I am of course aware that, as regards academies, by section 94 of the Education and Skills Act 2008, the Secretary of State may by regulations prescribe standards for independent educational institutions, of which academies (specific provision for which is contained in the Academies Act 2010) are one. By regulation 3 of the Education (Independent School Standards) Regulations 2014 (SI 2014 No 3283), the relevant standard is provided by paragraph 29 to Schedule 1 of the Regulations:

(1) The standard in this paragraph is met if the proprietor ensures that suitable outdoor space is provided in order to enable—

(a) physical education to be provided to pupils in accordance with the school curriculum; and
(b) pupils to play outside.

64. Thus if any person is to run an Academy accordingly to law, he or she or it **must** comply with this standard. However, a duty on a proprietor to ensure the availability of outdoor playing space if he

operates an independent school is rather different to the interference with a statutory functions of an education authority. It does not seem to me that the Courts would hold that the land of an independent (private[33]) school could not be registered as a town or village green[34].

65. In its submissions, Cotham School distinguish the position of the School from that of an independent school, established by a charity or private corporation. It points out that by section 10 of the Education Act 1996, the Secretary of State has a duty to promote the education of the people in England and Wales. Further

(1) The Secretary of State shall exercise his powers in respect of those bodies in receipt of public funds which—

...

(b) conduct schools, institutions within the further education sector or 16 to 19 Academies in England and Wales,

for the purpose of promoting primary, secondary and further education in England and Wales.

66. I am very ready to accept that one of the ways in which the Secretary of State carries out her functions to promote the education of people in England and Wales is through the provision of academy schools under the Academies Act 2010. What is less clear and whether and if so how this makes a difference: so that an academy can rely upon statutory incompatibility but a school that is not in receipt of public funds cannot.

67. The point that is made is that the situation is analogous with the Surrey case considered in *Lancashire/Surrey* (which concerned the land of a hospital).

68. In this case, at the time of the application, the land was owned by the Surrey Primary Care Trust which had a statutory duty under section 83 (1) of the National Health Service Act 2006 to provide primary health care in this part of Surrey. If this had remained the position, it is clear that statutory incompatibility would have applied in the same way that it was held to apply in *Lancashire*. What made the situation different is that by the time the registration authority came to consider the matter, the Primary Care Trust had been abolished. A wider duty to provide health care was now imposed upon the Surrey Downs Clinical Commissioning Group by section 3 (1) of the National Health Service Act 2006 (as amended). The land itself was vested in NHS Property Services which was a company established under section 223 (1) to provide facilities or services to persons or bodies exercising functions, or otherwise, providing services under this Act.

69. Gilbart J (whose reasoning was approved by the Supreme Court) said:

... Land could only be acquired or held if done so for the purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use.

[33] Confusingly in this context, one notes that in England private schools are called public schools.

[34] Many such independent schools are charities. It might be argued that the land of a charity could not be registered as a town or village green on the basis of statutory incompatibility but, for a court so to hold, would seem to me to be extending the law as it was held to be in Newhaven and Lancashire.

135. Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used.

70. It will be seen that registration of the land as a town or village green would not have inhibited NHS Property Services making it available to the Commissioning Group; by contrast, the Commissioning Group which had the duty to provide health care did not own the land. I find it hard to escape the view that it is the combination of the two related elements which together gave rise to statutory incompatibility. I note that Lord Carnwath and Lord Sales referred in the context of the *Surrey* case to the statutory regime under which the land was held.

71. I accept that there is an analogy between the NHS Property Services/Commissioning Group relationship and Secretary of State/Academy relationship but it is not exact and does not reflect that the School is not providing education by reference to a statutory function but by its constitution.

72. The School argue that even if it is right that the terms on which the land is vested in the Academy do not mean that statutory incompatibility arises, it still arises by virtue of the fact that the City Council hold the reversion of the lease for education purposes. One sees the point but if land is not to be registered on the basis not of its statutory incompatibility with the any functions which are potentially exercisable as of now in respect of the land but in the future (on the face of it more than a hundred years hence) when the reversion falls in, statutory incompatibility will, it seems to me, be extended significantly further than in *Newhaven* and *Lancashire.*

73. It may be helpful if I summarise my conclusion above. The School, which has immediate possession of the Field by reference to a 125 year lease of it, is not under a statutory duty to provide education in the same way that an education authority does; Bristol City Council, which holds the reversion of the land for the purposes of education, has no immediate entitlement to use the land for those purposes. Any incompatibility looks much less compelling than that arising in *Oxfordshire* or *Lewis.* In these circumstances, to apply statutory incompatibility to the circumstances arising seems to me an extension of the law. I remind myself that there is no provision in statute (particularly the Commons Act 2006) which operates to defeat registration in situations of suggested statutory incompatibility. I think that, asked to rule upon the matter, a Court might hold statutory incompatibility to be applicable in the current circumstances. However, it does not seem to me appropriate for a registration authority so to extend the law.

74. In these circumstances, I do not advise the registration authority to reject the applications on the basis of statutory incompatibility.

Issue 2: the signs

75. Before the Second World War, in Stoke Bishop there was a large house with extensive grounds called Stoke Lodge. After the war it was sold to Bristol City Council. The extensive grounds became school playing fields (with the pitches being used by local sports clubs out of school hours) and the house an adult education centre.

76. Until local government re-organisation in 1974, Bristol City Council was a unitary authority. In 1974 it was abolished and a “two tier” arrangement put in place with some functions being the responsibility of a newly constituted county council and some of a newly constituted district council. The newly constituted county authority was called Avon County Council and the new district council was (somewhat confusingly) called Bristol City Council.

77. Avon County Council succeeded to the education functions of the old Bristol City Council so that in 1974 the whole of the Stoke Lodge land became vested in the County Council. Local government changed again in 1996. Avon County Council was abolished and Bristol City Council became, once

again, a unitary authority. As such it had responsibility for education and the land at Stoke Lodge once again vested in it.

78. The extensive grounds of Stoke Lodge are particularly attractive having a gently rolling character and containing a number of fine trees. Although fenced, the grounds were never fenced off from the public and there was unrestricted access through gates which were not locked. Accordingly, it is not surprising that, following conversion into playing fields, the land was used by local people for informal recreation, including dog walking. This use has never been the subject of a formal permission and, in its inception and for a long time thereafter seems to have been a classic case of use which was acquiesced in. The significance of this is that use which is acquiesced in – tolerated and not the subject of a permission or consent - would have been *as of right*[35]. Such use would have supported an application for registration of a town or village green. (The contrast is with the situation where the use of land is permitted and users enjoy thereby a right to use the land. Such use is not as of right and would not support an application for registration of a town or village green).

79. However in, it would seem, 1985 or 1986[36], Avon County Council put up three notices which made it clear that the Council were contesting the use and no longer acquiescing in it[37]. Accordingly when an application was made to register the playing fields as a town or village green relying on the twenty year period 1991 – 2011, I took the view that the use had ceased to be *as of right* and that there was not qualifying use throughout at least part of the relevant twenty year period, namely the period between 1991 and 1996 during which Avon County Council existed[38]. As I have explained, the law is that sufficient steps have to be taken by a landowner to communicate to users that their use is contentious. In the circumstances I considered that it was. In addition to use being *as of right*, it also has to be significant. It seemed to me clear that it was – users would have been aware of the signs. It also has to be by the inhabitants of a locality or neighbourhood within a locality. I considered that both these requirements had been met. Accordingly the one objection to registration was that the use had not been *as of right*. I advised that this one objection was decisive and, as explained in detail above, in due course the City Council decided to reject the application.

80. The current applications relate to the period 1998 – 2018. Avon County Council had ceased to exist in 1996. If the effect of the abolition was that the notices ceased to be effective in 1996, it would mean that absent some new objection to registration emerging, the land would be now be registrable as a town or village green. On the other hand, if this was not the case and the notices went on being effective into the relevant period, the land would not be registrable.

81. I think that it is helpful to begin with consideration of this issue.

82. By virtue of section 17 of the Local Government Act 1992 and article 5 of the Avon (Structural Change) Order 1995 (SI 1995 No 493) the County of Avon ceased to exist and Avon County Council was abolished on 1 April 1996. Article 5 provides as follows:

5 Existing local government areas

[35] See *Mills v Silver* [1991] Ch 271 (CA).

[36] See paragraph 233 of the 2016 report.

[37] In the 2016 report I rejected an argument that the signs, as a matter of construction, did not make use of the field contentious. In his judgment quashing the decision of the City Council to register the land as a town or village green, Sir Wyn Williams upheld my interpretation of the signs and advice that use in the period 1991 – 2011 had not been *as of right.*

[38] An applicant for registration has to show qualifying use throughout the relevant 20 year period. Accordingly it was not necessary to determine whether use after 1996 was or was not as of right. I did however express a view about this: see paragraph 86 below.

(1) ***The existing county of Avon*** *and the existing Avon districts of Bath, Wansdyke, Kingswood and Northavon* ***shall be abolished****.*

(2) ***The County Council****, Bath City Council, Kingswood Borough Council, Northavon District Council and Wansdyke District Council* ***shall be wound up and dissolved*** (emphasis supplied).

83. Accordingly, at the beginning of the relevant period, Avon County Council did not exist and had not existed for more than two years.

84. As explained above, the applicants submit as regards the Avon County Council signs that they are not relevant to their applications because at the beginning of the 20 year period that applies to the applications (1998), Avon County Council did not exist. They argue that by an operation of law (the abolition of the Council), a necessary fact to render the signs effective (the existence of the Council) had ceased to obtain. If one postulates the signs doing service for the landowner in person attending at the land and warning trespassers off, on the day before the abolition of the Council there was such a person present and warning trespassers off; on the day after, there was no such person but a new owner. That new owner, it may be argued, never contested the use but acquiesced in it.

85. This submission has the merit of simplicity. Further, it will be noted that it is either correct or incorrect; it involves no shades of grey. If it is correct, the existence of the signs and thereafter will be irrelevant and the argument which was decisive in leading to the rejection of the 2011 application will not obtain.

86. In considering the 2011 application, the continuing effect of the signs after 1996 (the abolition of the County Council) was not determinative; it was enough that they had the effect of making the use between 1991 and 1996 contentious. However, the use relied upon by did continue after 1996 and in my *Report* dated 14 September 2016, I did express a view about it. This was as follows:

First, I think that if someone comes across an old and decrepit sign saying "Trespassers Keep Out" he might from all the circumstances consider that it was of no continuing application. Second, although the fact that a sign says "Avon County Council" rather than "Bristol City Council" does not mean that, the day after Bristol City Council takes over from Avon County Council, the notice ceases to have any effect, someone might well wonder, say, ten years after Avon County Council ceased to exist whether any particular sign that it put up had continuing effect.

87. It will be seen that I did not accept that the signs ceased to be of any effect upon the abolition of Avon County Council. Bristol City Council as landowner and Cotham School argue that I was correct to take this view. The City Council add:

14. Avon County Council was abolished and its educational functions were transferred to Bristol City Council as part of a re-organisation of local government on 1 April 1996. There was no suggestion in the statutory provisions that this was anything other than an administrative alteration that was not intended to alter any of the arrangements or decisions made by Avon whilst in existence that related to its statutory functions. Any reasonable local resident would have known that Avon was being abolished and its functions and responsibilities transferred to Bristol. No reasonable person could have concluded that Avon's statement, policies and notices were to cease effect at midnight on 31 March 1996[39].

88. Revisiting this point, I have not changed my mind as to the continuing effect of the notices after 1996. In order to make use contentious by reference to signs, there is no requirement upon the landowner to identify himself. Moreover it is unrealistic to think that any person visiting the land on the first day of its ownership by Bristol City Council would have thought that his legal position had

[39] See p 20.

changed. This, of course, is looking at the matter subjectively. As a matter of objective fact, the position was that the powers and responsibilities had passed to Bristol City Council by operation of law. The effect of this is that Bristol City Council succeeded to the shoes of Avon County Council. I consider that this means that if Avon County Council objected to the use of the land by local people, Bristol City Council continued to do so as its successor. The supersession of the County Council by the City Council was not, of course, a secret matter and all the relevant documentation was in the public domain. A member of the public investigating the position would have appreciated that Bristol City Council had taken over from Avon County Council by operation of legal instrument and that there was no reason for considering that the attitude of the City Council was any different to that of the former County Council: it had not in as a matter of fact altered its position from objection to acquiescence.

89. If the analysis above is correct, then the position as regards the contentiousness of the use of the land by local people did not change in 1996.

90. Further, that analysis would suggest that the notices were still effective in 1998 when the relevant period began on which the applicants rely. Indeed, it seems to me that if, as a matter of law, the notices did not cease to be effective in 1996, there is no basis for suggesting that they would have ceased to be effective in 1998. Nothing changed in the intervening period to 1998 after the abolition of Avon County Council and, in particular, the notices had not become decrepit. If this is correct, on the face of it, this finding is fatal to both applications because neither Ms Burgess nor Ms Welham can have established use which for the relevant 20 years was *as of right;* the use at the beginning of each period relevant period was contentious by reference to the signs (whatever the position at the end of each period).

91. It is my view that that the notices are fatal to the current applications in respect of the period 1998 to 2018 in the same way as they were fatal to the application made by Mr Mayer in respect of the period 1991 to 2011. However, the argument that Ms Burgess and Ms Welham make goes wider than saying that in 1996 the notices ceased to be effective. They say that, in the light of information which has now become available, the position is that notices were not effective before 1996. They argue that the view I took of the matter in my first report was wrong (albeit that this was not a matter of criticism, since I had advised in ignorance of the additional information). I have carefully considered these additional matters but I have concluded, as I explain below, that they do not fundamentally affect the position.

92. The additional matters go back to 1982, a time when there were no signs and use by local people, being acquiesced in, would have been *as of right.* The basic proposition being advanced is in that in the light of all that happened thereafter, use never ceased to be acquiesced in and thus *as of right.* It is further submitted that, if it did cease to be *as of right* by virtue of the erection of signs, then, taking everything that happened thereafter into account, it once again was acquiesced in (and thus, *as of right*) at some point thereafter so that qualifying use continued for more than twenty years down 2018.

93. In 1982, section 40 of the Local Government (Miscellaneous Provisions) Act (1982) was enacted, after debate, to deal with what the Minister described as *relatively minor problems*. He identified the following: *In rural areas, the problem may be one of people exercising horses and dogs on school playing fields which results in the digging up of turf. In urban areas, trouble is more likely to be caused by groups of youths making a noise and disturbing evening classes.* Evidently he thought that control of this sort of activity might facilitate wider community use of school playing fields. The section created an offence in respect of school playing fields of causing or permitting nuisance to the annoyance of lawful users of the playing fields. The enactment of section 40 (which came into force on 13 September 1982) was reported to a meeting on 7 September 1982 of the Education Committee of Avon County Council by the Director of Administration and County Solicitor who observed that *the section will have the effect of widening the powers of the County Council quite significantly in cases of minor nuisance and disturbances on educational premises.*

94. Also September 1982, the Director of Education of Avon County Council prepared a Report for a meeting of an Ad Hoc Committee of the County Council held on 17 September. The Committee was concerned with the community use of County Council premises and comprised members of the Land and Buildings Committee, the Education Committee, the Community Leisure Committee, the Social Services Committee and the Personnel Committee.

95. The first section of the Report was entitled Introduction and Background. It said:

At the last meeting the Committee members asked for a report on the ways in which the community use of buildings could be extended. It was suggested that specific consideration should be given to an increase in the number of multi-let sessions without additional cost, and that consideration also be given to the use of hard play areas and playing fields. This report will outline the possible methods by which increased community use could be encouraged.

96. As one might expect, a lot of the report is taken up with how schemes might be developed with other stakeholders for the authorised use of buildings, hard play areas and playing fields. However, it also touched on wider matters:

4.2 Informal use
The majority of the Authority's larger playing fields are used informally by members of the public, although the extent of use varies from site to site according to local conditions. ***This informal use of playing fields has increased rapidly over the past few years to a point where public use is now customary and readily accepted by the local community and Governing Bodies.*** *Elsewhere the availability of playing fields and hard play areas varies from the total exclusion of the public to a completely open plan approach whereby all the playgrounds and playing fields are used by the community without question. It is evident that the availability of education facilities depends on the location of each establishment, the site conditions and the attitude of the Governing Body and Head Teacher. Some playing fields are now so well used at weekends that it is no longer possible or worthwhile to maintain security fencing ... (emphasis supplied)*

4.3 Vandalism/security problems
The Authority, in recognition of increased public demands for facilities, has for some time tacitly accepted that its playing fields in particular can be utilised by the local community. *However, this approach has to be tempered with the amount of vandalism and misuse of property which can occur; the problem is non-existent in some areas and very prevalent in others. The existing practice normally restricts public access to grassed areas only, as hard play areas are provided next to buildings and to allow hard play areas to be used has generally meant an increase in vandalism to the buildings ... The numbers of complaints received from schools and parents in relation to the fouling of fields by dogs has increased dramatically over the past years (emphasis supplied).*

97. Section 5 contained the following:

There is little doubt that the present "informal" use of fields will continue to increase and the point will be reached when difficulties will occur, unless there is a more positive and defined Authority Policy on the use of external facilities. Some fields are so well used and the community involvement has existed for many years. However, there are instances where public use has been actively discouraged and where, with a little imagination, reasonable access could be provided, if only on a trial basis.

98. Section 6 presented the Director's conclusions. The section began:

The Authority needs to recognise the amount of informal use which now exists in many areas by the creation of a more positive attitude to public use. Although great care has to be taken to avoid an upsurge in misuse and vandalism with its attendant cost implications, there does seem to be scope for a gradual phased programme of increased public access which would form part of a policy statement

on access to facilities. The Director recommended a number of practical ways in which access could be improved. These included the drawing up of a policy document for guidance of members and officers, governing bodies, heads of establishments, voluntary and statutory bodies which would express the Authority's long term objectives.

99. At the meeting itself on 17 September 1982, the Director said that:

... he estimated that up to half the County Council's playing fields were used by the public on an informal basis. In addition there were organised lettings for hockey, rugby, football, cricket. He said adult and youth organisations caused few problems but it was considered that the informal use should be more controlled ...

100. The Chairman said that

... there were a number of playing fields that were not being used to their full extent and suggested that notices could be published locally to improve and encourage their use. There was an impression amongst the public that informal use of playing fields was a right and in some areas, fencing of these areas had been abandoned due to this which, in turn, created the problem of nuisance for homeowners overlooking these fields ...

... if the public considered they had an official entitlement to use facilities, albeit on a casual level, they were more likely to protect those facilities themselves than if they were officially denied all rights of access.

101. The minutes of the Ad Hoc Committee report that the Committee supported the further practical steps identified by the Director in his Report.

102. I do not know if the Ad Hoc Committee met again; if it did, it did not again consider the issue of informal access[40].

103. On 6 April 1983, the Agriculture Working Group of the Land and Buildings Sub-Committee considered the position at Kensington Meadows Playing Fields in Bath. These were playing fields at a distance from the schools that they served.

104. It was reported that

In 1978 the playing fields had been substantially reconstructed to new levels etc at an approximate cost of £8,500 (the land having originally been purchased for use as a controlled tip) ...

During the whole of the time that the land had been in public ownership, various local residents had attempted to establish rights of way and of access but these had not been substantiated. Nevertheless, the fields had been the subject of severe and persistent trespass and vandalism and the cost of reinstatement and repair ran into thousands of pounds over a long period. Repairs to fencing and gates had recently cost £1,600 for example.

The form of public use varied but the principal problems were the unauthorised use of the playing pitches, car parking, people wanting to fish and the flying of model aircraft (to the annoyance of nearby residents).

Officers were taking all reasonable steps to protect the interests of the County Council and local residents, but there was a need to clarify whether the use of the playing fields should be encouraged

[40] If there were any subsequent meetings of the Ad Hoc Committee which considered relevant matters, I would have been supplied with copies of the minutes relating to them.

or controlled in some way because without some decision on the matter of public use it did appear that there was little prospect of an improvement in the present situation.

105. Members were reminded that

... similar situations existed on other playing fields within the County, such as at Stoke Lodge, Bristol, where the main problem was the exercising of dogs.

106. The Committee resolved:

That the Director of Estates Services at the playing field regarding their proper use, and following this the Director of Administration ***post appropriate regulations*** *and County Solicitor, on the recommendation of the Director of Estates Services, take any action necessary, including the institution of legal proceedings of any kind, to protect the County Council's property against unauthorised use* (emphasis supplied).

107. At a meeting of the Group on 21 September 1984, the Group again considered the position at the Kensington Meadows Playing Field. The Report states:

On 6 April 1983, the Working Group had approved a report on the problems arising from the unauthorised use of these playing fields. Since that time, the misuse had continued and considerable annoyance caused to adjoining residents, including damage to property. Whilst the Authority had no legal liability in respect of such damage, it was under some pressure to stop the trespass. However, the general view of local residents, other than those immediately affected, appeared to be that Kensington Meadows was a public open space to which access should be freely available at all times and for all purposes, including local festivals, model plane flying, motor cycling and the exercise of dogs.

To erect a fence to reduce the damage would require some 290 metres run at an estimated cost of £3,950 and there would be no guarantee as to how effective this would be or how long it would last. No specific financial resources were available.

108. It was resolved that no further action be taken. It may be assumed that no fencing was erected at Kensington Meadows at this time; none was erected at the Stoke Lodge Playing Field at this time.

109. These facts supply the background, insofar as it is known, to the erection of the Avon County Council signs at the Stoke Lodge Playing Field. The detailed background is not available, the relevant files having been destroyed[41].

110. In my first report, relying on the oral evidence of somebody who was concerned with their erection, I said that the signs at the Stoke Lodge Playing Field were erected in about 1985/86[42]. The Applicants suggest that it is likely to have been earlier i.e. following the resolution of the Agricultural Working Group on 6 April 1983. One sees the point: if signs were erected at Kensington Meadows it is perhaps likely that they were in the same form as those erected at Stoke Lodge[43]; and that if some signs in the same form were being erected at that time, it is likely that other signs (which we know were erected at some time) were erected at the same time. It seems to me, nonetheless, that the reasoning involves a number of assumptions which may not be correct. However, in the circumstances, I do not think that the precise date of the erection of the signs is significant.

[41] *Ibid* at paragraph 237.

[42] See paragraph 233 of the 2016 report.

[43] I have no information as to whether they were or not.

111. It seems to me that the argument I am presented with is as follows. We have details of what happened at Kensington Meadows. The County Council put up signs there which were in the same or similar form to those at the Stoke Lodge Playing Field. However, it subsequently resolved not to fence Kensington Meadows. In these circumstances, it was acquiescing in the use of Kensington Meadows. If it was acquiescing in the use of Kensington Meadows, it was also acquiescing in the use of the Stoke Lodge Playing Field.

112. As noted, the argument makes a number of assumptions which may not be justified but what is key is that I am not considering an application to register Kensington Meadows as a town or village green and whether use of that land has been *as of right.* I not persuaded that the use in that case was acquiesced in – but I am not called upon to determine that issue. I have to look at the facts as they relate to the Stoke Lodge Playing Field and I do not think that the position at Kensington Meadows assists me.

113. In the 2016 report, I construe the meaning of the signs. As the law requires[44], I did this on an objective basis. On such an objective approach, I took the view that they were forbidding trespass and that the specific activities identified were examples of that ("in particular"). I noted that the signs would not accurately have stated the effect of the act since the exercising of dogs was not *per se* an offence[45]. I have not changed my view as the objective meaning of signs. It is this that is relevant – how they would have been interpreted by a reasonable reader. It was possible that they subjectively put a different meaning upon them – considering perhaps that it was only dog walking to the annoyance of others that was forbidden – but that was an interpretation that what not warranted by the actual words used. In my first report as I have noted I placed emphasis on the words *In particular*; I might also have noted the words *Requests for authorised use should be made to the Director of Education*. The signs envisaged that e.g. requests for the flying of model aircraft would be made to the Director.

114. If I go back to the meeting of the Agriculture Working Group on 6 April 1983, it is possible that the Group did not intend to prevent activities such as dog walking but only activities which caused a nuisance. If so, and if the signs that were erected were the same as those erected at the Stoke Lodge Playing Field, then the signs may have gone further than was warranted by the Group's resolution and, conceivably, this affected the way in which the notices were to be construed. But if that was so (and there are two big "ifs" involved as well as a particular point of construction), it does not mean that the signs in respect of the Stoke Lodge Playing Field are not to be given their objective meaning. Given that objective meaning, I consider that they made use of the Playing Field contentious. Insofar as it is relevant, I think that the County Council must be taken to have intended to make it contentious. The Applicants have shown that in 1983 there was a lot of discussion within the County of dual use of playing fields and, in that context, of informal use by the public. Evidently the County Council wanted to facilitate community use of its playing fields. But the minutes nowhere show that it was deciding to tolerate it[46]; and they do show that it was very alive to the difficulties of informal access. Thus the evidential basis for suggesting (if relevant) that the signs at the Stoke Lodge Playing Field did not reflect what the County Council actually intended does not exist.

115. It is, of course, still necessary to consider what happened after 1985/6[47] to see if, for any reason, at some date thereafter use ceased to be *as of right.*

[44] See paragraph 21 of *Barkas* per Lord Neuberger.

[45] See paragraph 369.

[46] Subject to this: it made a decision not to fence Kensington Fields.

[47] Or 1983, if the signs were erected then.

116. From 1987, Government pursued a policy of giving greater control over school premises to the schools themselves. Thus section 42 of the Education (No 2) Act 1986 provided that school premises were to be under the control of the school's governing body subject to any direction being given by the local education authority. Neither Avon County Council nor (after 1996) Bristol City Council ever gave such a direction.

117. I do not think that this has any bearing upon whether the use of the playing fields was *as of right* between 1987 and 1996 (when the law was changed). I am not entirely sure whether the playing fields were part of the premises of Fairfield Grammar School (who had use of the playing fields at this time) but it has not been argued to the contrary and I am prepared to proceed on this basis. What seems to me to be significant is the fact that neither Fairfield School nor the education authority did anything to affect what might be called the "status" of the land, namely the fact that use of it had been rendered contentious by the erection on it of appropriate signs.

118. In 1990, local management of schools was introduced under the provisions of the Education Reform Act 1988. As I understand it, this was under the framework of the Education (No 2) Act 1986 but provided for schools to be responsible for their own budgets. Avon County Council positively resolved that as part of this process, governing bodies would be free to determine the use to be made of their premises. I do not think that this added to the powers of Fairfield School; the significance of it, such as it is, is that Avon County Council were saying that their policy, for the future, was not to determine the use to be made of school premises[48]. Once again I do not think that this has any bearing upon whether the use of the playing fields was as of right between 1987 and 1996. What seems to me to be significant is the fact that Fairfield School did nothing to affect the "status" of the land, namely the fact that use of it had been rendered contentious by the erection on it of appropriate signs.

119. In 1996, section 149 of the Education Act 1996 came into force, replacing section 42 of the Education Act 1986. It was in similar terms to section 42 although it contained the additional provision that in exercising control of the use of the school premises outside school hours, the governing body should have regard to the desirability of the premises being made available for community use. Similarly, in 1999, section 149 of the Education Act 1996 was replaced by section 40 and Schedule 13 of the School Standards and Framework Act 1998, which was in the same or similar terms. I do not see how these changes affected the status of the land for the same reason that I do not think that the changes to the law in 1987 and 1990 affected it.

120. In 2000, the playing field became the designated playing field for Cotham Grammar School (from 2001, Cotham (Comprehensive) School)). In 2004, the School entered an agreement with the University of Bristol which provided for the University to maintain the playing field. A schedule to the agreement set out the Services and Service Levels that were to be provided and under the heading *Athletics* it was stated

pits etc will be kept as clean as possible, considering the site is open, at present, to the public and dogs[49].

This represents a recognition by the School to a third party that access to the public was occurring and makes practical provision for it. I do not consider that the recording of the facts as to the use of the land can be taken as affecting the quality of whatever on going use there was of the site. If, as I consider, it was contentious by virtue of the Avon County Council signs, it did not cease to be contentious because the fact that it was occurring was recorded in this agreement

[48] The County Council could, of course, thereafter have changed its mind and, at some date in the future, adopted a policy which potentially did impinge upon the powers of governing bodies.

[49] Subsequent agreements were in the same terms.

121. In 2009, Bristol City Council replaced one of the Avon County Council signs[50]. The background evidence about this is set out in my first report:

H4 [an employee of Bristol City Council from about 1985 until 2014] cannot recall the exact dates but it would have been around late 2008/early 2009 that he was given the responsibility of commissioning new signs to be displayed at the entrance to the site. He knew that there were other signs around the site, but he specifically recalls arranging for a new sign to be displayed in the grounds of the adult learning centre. This was a decision of his line manager. This was because this was considered to be the main entrance to the site accessed by members of the public. Its intended purpose was to advise members of the public that they would need to get permission from the Council if they wanted to use it: he said "It is therefore true to say that this sign was put up because the Council did not want members of the public to use the site". He recalled that trespassing was becoming a real concern to CYPS [Children and Young People's Services] *and "the main reason for the new signage was to safeguard the children who were using the site with permission due to a number of issues such as people walking their dogs on the site and failing to clear up after them, acts of vandalism, graffiti and general trespassing". The office had been inundated with calls about dog muck in the grounds and similar. The land was an important educational facility that was regularly used by children, including a school and a football club. It was also considered that as Avon County Council had been abolished in 1996, the existing signs were out of date and needed to be replaced. This was following advice received from a barrister following the "Packers" TVG case. Attached to an e mail dated 26 March 2009 would have been details of the proposal for the Bristol City Council sign and the sign would have been produced after that time. The wording was word for word what had been suggested by the barrister. H4 asked the sign company to replace all the signs on the site; they replaced only one. The reason why all the signs were not replaced was because the sign company did not do what he asked them to do. He saw the old sign before it was replaced and the new sign afterwards; his instruction was to put the new sign on the old posts to save costs and he thought that this is what had happened.*

122. At the public inquiry there had been discussion as to whether this new sign related to the playing fields or to the grounds of Stoke Lodge House. As to this, in the 2016 report I said

It seems to me that the sign is, to a degree, ambiguous. I accept, of course, that I have to construe it in a common sense way and in its context.[51]. It is indeed from the context that the ambiguity arises – placed as it is on the boundary between the grounds of Stoke Lodge House and the playing fields. Thus it seems to me that a reader may not be sure whether it relates to the grounds of the house or the playing fields. The possibility of confusion is enhanced if the sign being mounted on a single pole, it was possible for it to be rotated so that it will not always have been facing those leaving the grounds of Stoke Lodge House. However, on balance, I think that the reasonable landowner would consider that he had put up a sign that would be construed by local people as applying to the playing fields and not the grounds of Stoke Lodge. Thus someone considering the sign, even if it had been re-orientated, would consider that it was likely to apply to the playing fields. That, in its context (whatever its orientation may have been) it was taken as applying to the playing fields by at least one person emerges from the letter set out at paragraph 22 above: the lady must have been referring to the playing fields because she refers to the land on which she walks as being a pleasant and open space, which is not an apt phrase to describe the grounds of Stoke Lodge[52].

[50] Its wording was as follows:

[51] See *Betterment Properties (Weymouth) Ltd v Dorset County Council and Taylor* per Morgan J at paragraph 116.

[52] Following the reply to her letter … this lady's use will have been permissive; but that will not have been the general position [Footnote in the 2016 Report].

123. However the point that is now taken is that, in the light of the fact the playing field were now subject to the direct control of the School, an informed observer would have considered that the sign must relate to Stoke Lodge House rather than the playing fields; because (to spell it out) if the sign related to the playing fields it would have been put up by the School and not the Council. I do see the force of this; but the fact that the school now had a power to put up a sign did not mean that the Council did not have such a power. The possibility that the School would not have wanted the City to contest public access to the playing fields does not arise because it did not take any steps at this time to remove its own signs; it seems to me it should be taken in these circumstances to have adopted the City's sign. Accordingly I consider that, in essence, the position after the replacement of one of the Avon County Council signs by a Bristol City Council sign was the same as before: the use of the land continued to be contentious by reference to three signs.

124. On 22 April 2010 a Briefing Note was prepared for the Informal Cabinet of Bristol City Council about community access to school playing fields. The background was potential investment in improvements to two school playing fields, one of them the Stoke Lodge Playing Field. The report flagged the risk of registration of school playing fields as village green and advised

Landowners now need to proactively take steps to keep people [off] their land to prevent future registration.

125. It made it clear that the Stoke Lodge Playing Field was

... currently unfenced and allows unfettered community access.

126. The decision was taken to continue with the investment and approach Cotham School to see whether it might be willing to allow community access. As I understand the applicants' argument, it is that having had the risk and a remedy pointed out to it, if the City Council did nothing, it was acquiescing in the community access.

127. The reason why Informal Cabinet was briefed that there was a need proactively to take steps to keep people off the land to prevent future registration was in the light of *R (Lewis) v Redcar*, decided earlier in the year. Before that decision, the Council had taken the view, in the light of the advice of leading counsel, that registration of its playing fields would not have been possible by virtue of their dual use[53]. However *Redcar* had rejected that argument. Thus, all other things being equal, there was a risk of any and all of the playing fields of the City Council which were subject to dual use being registered as town or village greens on the basis that the City Council had acquiesced in their use. However the Briefing Note did not take into account the existence and effect of the Avon County Council signs at Stoke Lodge. It seems to me that, if the City Council **had** been acquiescing in use by local people, the Briefing Note could be taken as evidence of the City Council's continued acquiescence. However, if as I consider to be the case, the Avon County Council signs did make the use, the failure of the City Council to do anything following receipt of the Briefing Note in September 2010 is not evidence of continued acquiescence; it is simply a failure to do anything from which, in my judgment, nothing can properly be inferred. It did not affect whatever effect the Avon County Council signs had.

128. On 1 September 2011, Cotham School became an academy and was granted by the City Council a 125 year lease of the playing fields[54]. The terms of the lease provided that it was

[53] See paragraph 4 of Appendix D to the Briefing Note. The advice was that of Nigel Giffin QC dated 14 December 2009. I have not seen a copy of this advice; evidently Mr Giffin took the view that from the exclusion of local people from the playing fields during their use by schools, a permission was to be implied in respect of their use by local people during the rest of the time; so that their use would not have been *as of right.*

[54] See paragraph 58 above.

... subject ... to the existing rights and use of the property including use by the community[55].

129. The insertion of this provision suggests that the City Council thought that the community might have some sort of entitlement to use the land. One may note that the original application to register the land as a town or village green was made in March 2011[56]; it seems to me would have been prudent to recognise in any such lease the possibility of town or village green rights arising. The effect of the provision was that, if there were or are any such rights, the School could not have been able to complain to the City Council about their assertion. But the lease does not tell me anything about the quality of the use of the land by the community (i.e. whether it was or was not *as of right*). Even if, when it entered the lease, the City Council thought that there were or might be town or village green rights, this does not mean that there actually were any rights[57].

130. I now need to note certain evidence as to what happened "on the ground".

131. Cllr Abraham, between 1983 and 2021 the member for the ward of Stoke Bishop on Bristol City Council recalls that at some point in the 1980s a new caretaker started to lock the gates to the playing fields. He says that this caused great concern to many people and the lock out was reversed. It is possible to date this occurrence to 1987 or 1988 by reference to the evidence of Hilary Corfield who also recalls the occasion when the gates were closed, and can date it because she is confident it was an occasion when her first son got rust on his hands from the mesh of the fence. This would also tie in with the known date of the appointment of a new caretaker in 1987.

132. There was another relevant occurrence in 1990.

133. There was evidence before the first inquiry that the employees of the council would block off Cheyne Road access. This action can be dated to after 1987. The principal concern seems to have been motorbikes getting on to the field, The evidence is not entirely clear[58] but it seems that a tree trunk which had fallen nearby was used to obstruct the gap; for a time it may be that this stopped the motorbikes but permitted access to pedestrians. There then came a time when the tree trunk was pushed against the opening. What happened next is described in an article in the Bristol Post for 8 January 1990 entitled '*Guerilla tactics' to clear footpath.*

134. As reported what had happened is that twenty Stoke Bishop people had taken a van to Cheyne Road and loaded the offending wood and debris into it; which was then taken to a tip:

'This access to Stoke Lodge has been in use for at least 40 years until it was filled in by someone during the summer,' said one woman. 'It is a favourite short cut to Stoke Lodge, the shops and the playing fields.'

'I have used it for 35 years since I played on the fields as a little girl and others say it has been in use much longer. There was a stile there.'

---

[55] See clause 2.1.

[56] Although the date for considering whether the land was or was not a village green by reference to that application was thus March 2011, if the application had been made out, the land would not have become a town or village green (and, thus, subject to the rights of local people) until registration: see *Oxfordshire County Council v Oxford City Council and Robinson* (in particular, per Lord Hoffmann at paragraph 50 and Lord Rodger at paragraph 116).

[57] In his judgment, Sir Wyn Williams noted that *It is common ground that the creation of the lease was and is no bar to the registration of the land as a green* (see paragraph 6). It seems to me that this remains the position.

[58] The obstruction of the gap by a tree trunk or branch may have happened on more than one occasion and this account may be a conflation of a number of such occasions.

'We tried to clear it a few weeks ago but it nearly ended in a punch up then. We have seen a solicitor about this but it was taking so long to sort out.'

'Everyone felt so strongly that something had to be done. The police were very good and it was all very civilised.'

'Yesterday there were dozens of people out there walking to make sure it stays open.'

135. A picture is captioned

Victory ... now the protesters must make sure the way stays open.

136. As the report indicates, local people had seen a solicitor about the matter. The solicitor had evidently written to Avon County Council which had replied as follows on 4 January 1990:

Messrs Veale Wasbrough
...

Dear Sir

Access onto Stoke Lodge Playing Field

I refer to your letter dated 28 December 1989 concerning the above.

I am happy to report that the Ground Services Manager of the Property Services Department has advised me that he has placed an order to erect a fence with a gate for pedestrian access and that the work on this will be undertaken within the next four to six weeks.

I have already spoken to one of your clients, a Mr Clarke, advising him of the same when he telephoned this Section on a related matter and he will no doubt, inform his fellow residents.

...

137. The letter is signed on behalf of the Director of Education by an Administrative Assistant (Sites and Accommodation) in the Capital Planning Section.

138. The first thing to say about this letter is that potentially it could be referring simply to access to the field in order to cross it by way of a footpath. However it seems to me that this narrow interpretation would not be justified unless it had been spelled out.

139. The applicants observe:

It is important to note that any restriction of access was partial (one gate only, when many other access points were available) and unofficial and would not have been evident to users generally (only those seeking to enter the land from West Dene)

and

The incidents at the West Dene and Cheyne Road entrances were short-lived, unofficial and did not amount to any more than a minor impediment to access to the land as a whole, since multiple other entry points were available. Only individuals who attempted to use those entry points during the periods of time when they had been blocked would have been aware that anything out of the ordinary had happened, and clearly the matter was rectified shortly afterwards. Many people would have

140. The applicants submit that these matters demonstrate that by 1990 the use by local people was no longer contentious but acquiesced in. Whether or not this is correct seems to me to involve a consideration of the implications of *Winterburn.*

141. David Richards LJ makes it clear that the objecting landowner does not need to go further and prevent the activity to which he objects. Accordingly a landowner can post signs, make the use contentious and leave access to his land unimpeded. He or she does not need to keep gates locked. He or she will not be acquiescing in any use. It seems to me that if following the erection of signs, he or she leaves unlocked gates which were previously locked, he or she will not be acquiescing in the use. This might indeed be rational behaviour; a landowner might not subjectively be concerned whether his land is used or not as long as that use does not ripen into a legal right[59].

142. The position is somewhat different if, having posted the notices, the landowner in some way encourages continuing use. The argument is obvious: if the use is being encouraged, it is not contentious. The notices no longer have any effect.

143. The difficulty with this is that acquiescence is use which is tolerated not encouraged. Thus the combined effect of not locking the gates and facilitating access at Cheyne Road looks to be by way of permission; or, if not the combined effect, then simply the effect of facilitating access at Cheyne Road. As noted, it used to be a requirement that, to be effective as rendering use not as of right, a permission must be revocable (see *Beresford*) but this is no longer a requirement (see *Barkas).* On this basis, use since 1990 would be permitted and not trespass.

144. It does seem to me that so to hold attributes to the occurrences of 1987/8 and 1990 rather more significance than they will bear. By this I have in mind that they would not have been matters known to everybody and thus not of general significance. But if **this** is the correct analysis, the position will be that the signs go on regulating the use of the generality which will be contentious; while the use of others will be permitted. In the somewhat unusual circumstances of this case (and contrary to what I said in the 2016 report) use (albeit by different people) can be both permitted and contentious at the same time.

145. What I think is argued is that by expressly permitting a small category and thus making it clear that it was not objecting to anyone else using the Playing Field, the County Council was making it clear that it was no longer relying on the signs and therefore tolerating/acquiescing in the use of the Playing Field by the majority. It seems to me that this playing fast and loose with the requirement to view the matter objectively. The Council cannot have been **intending** simply to tolerate/acquiesce in the use of the majority; if anyone other than Veale Wasbrough's clients had written to the Administrative Assistant, he would have replied that they, too, could use the field. Viewed objectively, the small category were permitted and the use of the majority was contentious.

146. In 2012 the City installed dog waste bins and that in 2016 it installed a play park with access from the playing fields. I can see the force of the argument that says that the installation of dog waste bins – although a small thing by itself - might suggest to a user of the land that Bristol City Council as landowner was no pursuing a different approach to that of Avon Council (abolished more than 15 years earlier); and that he or she might consider from the availability of the land for use when the School and sports clubs were not using it that the City Council were permitting use[60]. From the

[59] It seems to me that *Winterburn* necessarily opens up the possibility of a discrepancy between what appears to be the case and what (in one sense) actually is the case. It seems to me that in accordance with first principles, it is how the matter appears that is decisive.

[60] It seems to me that while the signs were effective, the argument from *Mann* that permission could be implied from the fact of school use of the playing fields has no application. If one were to say that the signs are of no continuing application, the argument comes into play. I think that, against the background that use for lawful sports and pastimes can co-exist with another use of the land, the facts of the schools usage of the land was not as a matter of fact of a nature to indicate to local people that their use was being permitted.

Applicants' point of view to hold that the use was permissive after 2012 would be fatal to the application. For use to have been *as of right* it needs to be acquiesced in or tolerated. I find the idea of positive acquiescence not amounting to permission a difficult concept. Accordingly, I approach the question of the use after 2012 in this way. One can see an argument that nothing significant changed in 2012 and that the use continued to be contentious. One can also see an argument that the position did change in 2012 and the use was permissive. In either case, use would not be *as of right*. What I find it impossible to hold is that in some way the signs and the litter bins cancelled one another out so that the City Council were now no longer objecting or permitting but (as they were required to do if use was to be *as of right*) **acquiescing.** Accordingly, there was not qualifying use in the period 2012 to 2016. As to the period after 2016, see the discussion of Issue 3 below. Whatever the position down to 2016, it seems to me that use was contentious thereafter[61].

147. On 24 July 2018 the School erected two new signs on the playing field, replacing the old ones. They were as follows:

COTHAM SCHOOL
STOKE LODGE PLAYING FIELD

MEMBERS OF THE PUBLIC ARE WARNED NOT TO TRESPASS ON THIS PLAYING FIELD
In particular the exercising of dogs or horses, parking vehicles, flying model aircraft/drones, playing golf, the use of motorcycles and the carrying on of any activity which causes or permits nuisance or disturbance to the annoyance of persons lawfully using the playing field will render the offender liable to prosecution for an offence under section 547 of the Education Act (1996)[62]

REQUESTS FOR AUTHORISED USE SHOULD BE DIRECTED TO COTHAM SCHOOL
Cotham School accepts no liability to users for any unauthorised use of the playing field.

148. In the light of these signs, it seems to me that after 24 July 2018 the use of the playing field by local people was contentious. I do not think that the terms of the lease by the City Council to the School dated 1 September 2011 prevented the School from erecting this signs or affected what would otherwise be their effect in making the use of the land contentious.

Issue 3: the public inquiry in 2016

149. In its objections to the applications the City Council say:

… between 2011 and 2018 the local inhabitants who supported Mr Mayer's original application were in conflict with the Council as landowner as to whether Mr Mayer was entitled to have the land registered. One of the grounds of objection of the Council and the other objectors was that the use of the land by local inhabitants was not at any time as of right because it was contentious during the relevant period. The Council's view and the inquiry itself was a well-publicised local cause celebre. *Few people who might have been affected by it would not have known of it or the views expressed by*

[61] This may be a convenient place to note an argument made by the School which it says arises if the argument on statutory incompatibility is rejected. It is to the effect that if the land was used under the Education Act 1996 to provide recreational facilities for school children and young people and other categories of user are not excluded, those who are not excluded are permitted. This however has no regard to the signs; and the use of a recreation ground by members of the public when it is only local authority tenants who have an entitlement to go on the land (see *Barkas* at first instance: [2011] EWHC 3653 (Admin)) is a very different factual situation.

[62] By 2018, section 40 of the Local Government (Miscellaneous Provisions) Act 1982 had been replaced by section 547 of the Education Act 1996. They are in the same terms.

the Council, which Mr Mayer and his supporters sought to rebut. If the signage was itself insufficient to render the use contentious, the Council's public stance at the public inquiry did so[63].

150. The School support this objection.

151. As I understand it, the applicants contend that as a matter of law, the matters upon which the objectors seek to rely cannot have made the use of the land contentious. I do not think that this can be right. It is of course correct that what is relied upon involves no physical action in respect of the land, whether by fencing or by the posting of notices. But this cannot be a requirement of making use contentious. If I imagine a situation in which all users and potential users are told orally by the landowner or his agent that their use is contentious, I see no reason why this should not suffice. The School point out that David Richards LJ in *Winterburn* said *[p]rotest against unauthorised use may, of course, take many forms*[64].

152. In support of its objection, the City Council refer to *R v South Gloucestershire Council, ex parte Cheltenham Builders*[65]. The facts in that case were rather different to the facts of the present case. In that case also there were two applications for registration of a town or village green. The first was subject to objection by the owner of the land; not, it may be noted, on the basis that the claimed use had been contentious. In the light of this objection the applicants withdrew their application, later submitting an application in respect of a smaller site. The relied on period of use after the withdrawal of the first application was held to be contentious in the context of the second application. The case is thus authority for the proposition that an objection to a first application may render use in respect of a subsequent application contentious and not *as of right*. It is also authority for the proposition that for use to be contentious there does not have to be a physical act in respect of the land. Contrary to the Applicant's submissions, I do not think that what Sullivan J decided in this regard is in any sense *obiter* and, for that reason, not binding.

153. Nonetheless it is important to note that in *Betterment Properties v Dorset County Council*[66], Morgan J doubted what Sullivan J had held in *Cheltenham Builders*: he said *I am far from certain that I would have reached the same decision as Sullivan J in the* Cheltenham Builders *case*[67]. It seems to me that this this doubt relates to the facts: as in the case before him, nothing had changed on the ground. However in the case before him Morgan J was able to distinguish the facts of *Betterment* from those of *Cheltenham Builders*, so the decision in that case does not directly call *Cheltenham Builders* into question, even if he thought (which he may well not have done) that as a matter of law, there were a requirement for something to change on the ground.

154. It is not open to me, or to the registration authority (unlike Morgan J or another judge of the High Court) to hold that *Cheltenham Builders* was wrongly decided. It seems to me that I have to proceed on the basis that for user to cease to be of as of right does not require as a matter of law something to change on the ground.

155. In support of their proposition that as a matter of law something has to change on the ground, the Applicants also rely on *R (Lewis) v Redcar and Cleveland BC.* This was a case where, as in *Cheltenham Builders* and the present case there were two applications. The first application was rejected after a public inquiry. When it came to consideration of the second application, it was not contended that the circumstances of the first inquiry rendered contentious the use relied upon in respect of the second application. *Lewis* went to the Supreme Court and the applicants urge upon me

[63] See paragraph 17 at p 20.

[64] See paragraph 40.

[65] [2004] 1 EGLR 85.

[66] [2010] EWHC 30

[67] See paragraph 139.

that the effect of the Supreme Court's decision (which was to uphold registration of the land) is that, as a matter of law, objections maintained at a public inquiry cannot render contentious use in respect of a subsequent application. It seems to me that it is not possible to derive such a proposition from circumstances where a point was not argued. However it does seem as though in the particular facts of *Lewis* the argument that the use was rendered contentious by reference to the public inquiry in respect of the first application may not have been available. The inquiry sat between December 2005 and January 2006. The second application was made in June 2007. It would not have been defeated by the fact of use being contentious after December 2005 because of the then two year "grace period" existing by virtue of section 15 (3) (c). The inquiry would have had to have been before June 2005 potentially to render the use relied upon in the second application not as of right.

156. To hold that, as a matter of law, there is no reason why the public inquiry should not render use contentious is not to hold that it actually did.

157. In this regard the applicants say:

… the Council's resistance of the 2011 TVG application does not demonstrate that the use was contentious post 2011. The council's case before the previous Inspector concerned, inter alia, whether the use was "as of right" between 1991 – 2011. Such opposition merely indicated that the Council was of the view that the local inhabitant's use of the land had not been as of right ***during this time****. The fact that the Council's barrister cross-examined some of the applicant's witnesses merely accepts that the use had been as of right between 1991 – 2011. It did not indicate that the use post 2011 was contentious*[68].

158. It seems to me that the applicants' argument is best considered by reference to an example. Consider an application for registration of a town or village green where the landowner accepts that he acquiesced in members of the public entering on his land but disputes that the use has been by a significant number of local people. There is a public inquiry where the landowner makes clear his objection to registration and to the continuance of the use. If I assume that he or she is successful on the basis, a further application might be made seeking to bolster the evidence already given and in any event relying on a period of 20 years terminating at a later date than the 20 years originally relied upon. It seems to me highly arguable that the landowner can say in objection to the second application that his objection to the first rendered use after that date contentious. Local people might not have known about the objection until the inquiry but they would have known thereafter. To say as one might, that the objection only related to the first period of use seems artificial and not reflective of the reality of the situation.

159. It is even more artificial if the case of the landowner at the inquiry was that the use by local people was not *as of right* by reference to signs erected on the land and those signs were still *in situ*. That of course was the position in the present case[69]. In addition, it was clear at the inquiry that the City Council and the School were objecting because they were concerned with the incompatibility, as they saw it, between the use of the land as a town or village green and its use as a school playing field; and based a legal argument upon that suggested incompatibility. Whether or not that argument was correct – a matter, of course, which I have considered above - it made it clear that the continuing use of the land by local people was contentious.

160. Putting the matter broadly, the applicants are saying that the public inquiry made it clear that the registration of the land was contentious; not the use of it for lawful sports and pastimes. Although I accept that this is not a distinction without a difference, it does seem to me that the difference is immaterial in the present context. Local people who knew about the public inquiry would in practice have realised that the City Council as landowner and the School were objecting to the use of the land for lawful sports and pastimes.

---

[68] See paragraph 14 at p 28.

[69] Noting, of course, the replacement of one of the Avon County Council signs in 2009.

161. Thus it seems to me that the applicants' response on the facts – namely that post-objection, the only use that was rendered contentious was 1991 – 2011 – does not reflect the reality of the situation.

162. I accept that even this does not necessarily mean that the use post 2011 was by the public inquiry rendered contentious. It might not have been because very few people knew about the objection. The situation might be that although the owner of the land was objecting to the use at the public inquiry, his objections were insufficient to bring it home to local people that this was the case. However, in my judgment, the City's statement that the inquiry was *a well publicised cause celebre* is correct and I note that the applicants do not assert to the contrary. I heard 28 witnesses and throughout the inquiry there was a high level of public interest. In this context, the Cotham School Parent and Carer Group have submitted to me extensive material reflective of local understanding that the use was contentious at the time of the public inquiry and remained contentious thereafter. I have noticed, for example, an appeal for funds by Save Stoke Lodge Parkland which must date from early 2017. The leaflet is headed *Stoke Lodge – the battle continues* ... The Group have also plotted on a map the eleven locations around the playing field pre-2018 where campaign signs were posted (as well as the addresses of those who have provided evidence questionnaires). It is evident that users of the playing field will have seen them.

163. Accordingly I accept the City's assertion that *Few people who might have been affected by it would not have known of it or the views expressed by the Council…*

164. This being so, it seems to me that few people who would have been affected by it would not have realised that their use of the land was not contentious.

Conclusion and Recommendation

165. When I first advised the City Council on this matter, I took the view that a significant number of the inhabitants of a neighbourhood had indulged in lawful sports and pastimes on the playing field in the period down to 2011. I think that they continued to use the playing field in the same way in the period after 2011 down to September 2018. Accordingly the only reason why the land might not be properly registered on the applications of Ms Burgess or Ms Welham is because the relevant use in the periods applicable to their applications was not *as of right*; or because, by virtue of statutory incompatibility, registration would be incompatible with the statutory purposes for which the land is held.

166. My conclusions on these issues are as follows:

(a) I think that, as constituted, the application of Ms Burgess must fail because, after 24 July 2018, the use relied upon was not *as of right*: use which was as of right did not continue down to 13 September 2018. If necessary, I would, by reference to section 15 (3), have advised the City Council that the application could be appropriately amended to rely on a twenty year period which ended no later than 24 July 2018. However given the scope of Ms Welham's application (which relates to the 20 year period down to 24 July 2018) it is not necessary that the application should be so amended, and I advise that it should be rejected on the basis on which it was made. It should also be rejected, in my view, for the same reasons that Ms Welham's application should be rejected (as to which, see further below).

(b) As regards Ms Welham's application, I consider that the Avon County Council signs continued to be effective after 1996 so that the use of the land by local people in 1998 and down to at least 2012 was contentious and not *as of right;*

(c) If the use was not contentious before 2016, it became contentious at that time as a result of the wide publicity given to the objection to registration of the City Council as landowner and the School by virtue of the public inquiry; if it was contentious already, the public inquiry will have served to emphasise its contentiousness. Thus, use after 2016 was not *as of right*;

(d) The possibility exists that between 2012 and 2016, use of the land was not contentious but by virtue of an implied permission. However if this was the case, use in this period was permissive and not *as of right.* Either way, it was not *as of right*;

(e) I do not consider that either application fails because of statutory incompatibility.

(f) In the event, I consider that both applications should be rejected because, as explained above, the use relied upon in the relevant periods in each case was not throughout *as of right.*

167. I am mindful that in my consideration of the extensive written submissions made to me I have not addressed in terms every argument that has been addressed to me. As noted above, I do however consider that I have identified and addressed the key issues that arise on the facts.

PHILIP PETCHEY

14 March 2023

HARRISON GRANT RING

SOLICITORS

5 Chancery Lane, London, WC2A 1LG
0207 406 7580

www.hgrlaw.co.uk

Tom Dunsdon
Solicitor
Legal Services
Bristol City Council
City Hall
Bristol BS1 9NE

Your ref:
Our ref: COT0016/SR
Email: sring@hgrlaw.co.uk

5 April 2023

Dear Sir,

Applications by Ms Emma Burgess and Ms Katherine Welham to register Stoke Lodge Playing Field, Shirehampton Road, Bristol as a Town or Village Green

We remain instructed by Cotham School.

We are in receipt of the Inspector's Report dated 14 March 2023. At IR,91, the Inspector recommends that the applications be rejected because the use was rendered contentious by signs and therefore all the qualifying criteria at s.15 Commons Act 2006 are not made out.

We endorse the Inspector's reasoning on the signs. Indeed, there is no other lawful conclusion which can be reached on this point. It follows that both applications are bound to be rejected.

We remain of the view that s.15 Commons Act 2006 is not available to either applicant because of the principle of statutory incompatibility. At IR,71, the Inspector accepted there was an analogy between this site and the land found by the Supreme Court not to be registerable in *R (NHS Property Services Ltd) v Surrey County Council* [2021] AC 194 (SC). Moreover, the Inspector recognised that "*a Court might hold statutory incompatibility to be applicable in the current circumstances*". The only basis on which the Inspector distinguished the *Surrey* case was that the School is not providing educational services by reference to a statutory function, rather by its constitution. That is a false distinction because NHS Property Services was under no positive statutory duty to do anything. Rather, the Secretary of State for Health performed his duty (at s.1 National Health Service Act 2006) through NHS Property Services Ltd. That is identical to the Secretary of State for Education performing her duty (at s.10 Education Act 1996) via academy schools such as Cotham School. The School therefore maintains that s.15 Commons Act 2006 is not available to either applicant here and any registration would be clearly unlawful.

We therefore respectfully invite the Registration Authority to reject the applications in line with the recommendations of the Inspector.

Yours faithfully,

Harrison Grant Ring

HARRISON GRANT RING

IN THE MATTER OF TWO APPLICATIONS TO

REGISTER STOKE LODGE PLAYING FIELDS

STOKE BISHOP, BRISTOL AS A TOWN GREEN

UNDER THE COMMONS ACT 2006

REPRESENTATIONS TO THE PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE ON BEHALF OF MS BURGESS AND MS WELHAM

Introduction and summary

1. Bristol City Council's ("the Council") Public Rights of Way and Greens Committee ("the PROWG Committee") is required to determine whether the Land at Stoke Lodge ("the Land") should be registered as a Town and Village Green ("TVG") following the two applications to so register the Land made by Ms Emma Burgess and Ms Katharine Welham. The PROWG Committee has a 167 paragraph report from Mr Petchey, the non-statutory Inspector appointed by the CRA to advice on this matter. The Inspector recommended that the Land should not be registered as a TVG because there was no use "as of right" for the required 20 year period (ie 1998-2018). The PROWG Committee will obviously carefully consider the Inspector's report and recommendation. However, it is important to bear in mind that the Committee is not bound to follow the Inspector's recommendation provided that it has good reasons to depart from his recommendation that the Land should not be registered.

2. In the present case, there are very good reasons for the PROWG Committee to depart from the Inspector's recommendation and register the Land as a TVG. Firstly, the Inspector adopted an unfair and unlawful procedure before making his recommendation which significantly prejudiced the Applicants: he failed to hold a public inquiry as required by both the PROWG Committee's procedure and the rules of procedural fairness. He also ignored or failed to consider key evidence. Further the Inspector has

unlawfully predetermined the matter adopting his earlier "final conclusions" set out in his unlawful March 2021 report in the March 2023 report.

3. In any event, his conclusions on the issue of whether use was "as of right" are legally flawed for the reasons set out below. In fact, properly analysed, the use of the Land was "as of right" throughout the relevant 20 year period and, in such circumstances, the PROWG is required to register the Land as a TVG. Any decision not to so register the Land would be unlawful.

4. The Applicants apologise for the length and complexity of these submissions however, unfortunately, this level of detail is necessary to respond to the many errors in both the Inspector's report and the procedure that led to it.

Factual Background

5. The factual background to this matter, both in relation to the application to register the Land as a TVG and in relation to the use of the Land during the relevant 20 year period is set out in the Applicants' October 2022 submissions. These submissions (together with the December 2022 submissions in reply), are attached to this document. The factual background is therefore not repeated here.

The Procedure adopted was inconsistent with the PROWG's Outline Procedure and was unfair to the Applicants

6. The Inspector was legally required to hold a non-statutory public inquiry with the opportunity for the parties to call live evidence before making his recommendation. Such a public inquiry was required by both the PROWG Committee's Outline Procedure and the duty on the Inspector (and the Council) to ensure that the Applicants have a fair hearing.

7. The mandatory procedure which applies to the consideration of TVG applications is detailed in the Council's Outline Procedure document approved by the PROWG Committee in June 2012. Paragraph 6 of this procedure provides:

All applications will be determined in accordance with the legal test set out in the Commons Act 2006 and as soon as possible after the date by which statements of objection to an application have been required to be submitted (regulation 6(1)).
a) Straight-forward cases where there is no significant conflict of evidence, or no significant objection will be dealt with on the paperwork. The decision will be taken by the delegated officer (strategic director of corporate services) or PROWG as appropriate. Whether or not an independent inspector needs to be appointed prior to determination, particularly where the Council is the landowner, is a matter for PROWG.
b) In other cases there will be a public inquiry, ie. a hearing, open to the public, where both sides are able to present their evidence and make representations. Depending on the circumstances and the nature of the case, the inquiry will be heard by either a council legal officer, PROWG (or a sub-committee of PROWG) with advice from a council legal officer, or an independent legally-qualified inspector. Where the Council is landowner the inquiry will be conducted by an independent legally-qualified inspector otherwise PROWG will decide who is to conduct the inquiry.
….
d) Following an inquiry hearing, there will be a report to PROWG summarising the evidence and facts with a recommendation as to whether or not the application should be accepted.
….
When conducting an inquiry, which is a quasi-judicial process, the CRA will ensure that the rules of natural justice are met.

(emphasis added)

8. The Inspector was not entitled to depart from the requirements of the Outline Procedure (at no point has the PROWG Committee authorised such a departure). Whilst "straight-forward cases" where there is no significant conflict of evidence or no significant objection can be dealt with on the papers, it is hard to conceive of a less straight-forward case than the present one. Further, there were important factual conflicts that the Inspector needed to resolve before reaching his conclusions.

9. The Applicants set out their case on various key factual matters in its submissions to the Inspector dated 13 May 2022. The Applicants stated that the factual position was as follows:

"….
iii) notwithstanding the existence of Avon County Council signs, prior to the relevant period, the totality of the evidence establishes that Avon

County Council was aware of, and acquiesced to, informal community use of the Land for lawful sports and pastimes;

iv) When Avon County Council ceased to exist and was replaced by Bristol City Council in 1996, the totality of the evidence establishes that Bristol City Council continued to acquiesce to informal community use of the Land for lawful sports and pastimes;

v) In relation to the Bristol City Council sign erected in 2009, the evidence including the new evidence included in the five files, makes clear that this sign refers solely to the grounds of Stoke Lodge House and not the Land;

vi) the previous public inquiry was not a "cause celebre" and neither of the Applicants was aware of it at the time. Indeed the vast majority of the members of We Love Stoke Lodge were unaware of the Inquiry, let alone the Council's position before the Inquiry;

vii) use of the Land was not, during any of the relevant period, permitted by the landowner. In particular, when considering the totality of the evidence, the installation by the Council, of the dog waste binds and a play park, outside the playing fields did not give rise to implied permission."

(emphasis in the original)

10. In relation to point iv), the Applicants repeatedly emphasized that the previous inquiry was not, as the Council suggested "a cause celebre". For example, in their May 2021 submissions, the Applicants stated:

> "in relation to the *Cheltenham Builders* issue, the Inspector did not have any evidence on this issue from the previous Inquiry as it was not (and could not) have been raised at that point. His conclusion [in his 2 March 2021 report reached without consideration of the Applicants' evidence] appear to be based on an assumption that the Inquiry was "cause celebre" and that residents in the locality would necessarily been aware. Firstly, the Inspector's assumption is incorrect (as is his suggestion that the Applicants accepted that the inquiry was a cause celebre). The vast majority of members of We Love Stoke Lodge (a Facebook group now comprising over 1400 members) only became aware of the threat to use of the land when, in late November 2018, the School stated that the Council was allowing it to install a fence under permitted development rules…The Applicants will adduce survey and witness evidence (to any future public inquiry) detailing such limited knowledge in the local community."
>
> (emphasis in the original)

11. Similarly, in its July 2021 submissions to the Inspector, the Applicants stated:

> "The Applicants' position on this issue is that, contrary to the Inspector's conclusions, Mr Mayer's application to register the land was not a "cause celebre" and thus not widely known about in the local community. The Inspector's conclusion [in his May 2021 report] on this point appears to have been reached without him considering any evidence from the various parties on this issue (no evidence on this issue was before the Inspector at the first public

inquiry). It appears to be based on the inspector's (erroneous) understanding of the factual position."

(emphasis added)

12. The only lawful basis upon which the Inspector could proceed without a public inquiry was if he accepted the Applicants' case on such key factual matters. What he could not do was reject the Applicants' case on the facts without giving them an opportunity to make their factual case good by way of oral evidence at a public inquiry. Such an approach is inconsistent with the mandatory Outline Procedure and the requirements of procedural fairness. However, this is precisely what the Inspector did.

13. The Inspector ignored the Applicants' submissions on the correct factual position, and asserted, incorrectly, that there was no dispute about the core facts (see paragraph 5 of his report). However, this is simply wrong. As detailed above, the "core facts" were in dispute and the Inspector rejected the Applicants' case on the core facts.

14. At paragraph 162 of his report, the Inspector asserts "the City [Council's] statement that the inquiry was a *well-publicised cause celebre* is correct and I note that the applicants do not assert to the contrary." He thus rejected the Applicants' repeatedly expressed case[1] that the Inquiry was not a "well-publicised *cause celebre*" by simply ignoring it. Such matters appear to have been ignored as they were inconsistent with the views expressed by the Inspector in his March 2021 report (reached without consideration of the evidence) which he clearly wished to maintain (see below on the issue of predetermination).

15. However, this was not the only serious procedural failing. The Inspector failed to consider the 166 witness statements filed in support of the two applications. The Inspector's March 2021 report was reached without consideration of such witness statements. The Applicants raised this, and other issues as to why the March 2021 report was defective and unlawful in their May 2021 submissions.

[1] The bundle before the Inspector included the Applicants' May 2021, July 2021 and May 2022 submissions set out above. He simply ignored such clear submissions. This is particularly surprising given that he accepted in March 2022 directions that "The Applicants for the first time take the point that this was not a *cause celebre* but that lots of people who used the land would not have known about it." See to similar effect, paragraph 14 of the July 2022 directions.

16. In response to the Applicants' May 2021 submissions, the Inspector directed the Commons Registration Authority ("the CRA") to compile a bundle which included "the witness statements accompanying each application." The CRA failed to so provide the Inspector with a bundle containing such witness statements despite this clear direction and despite repeated reminders from the Applicants.[2] The Inspector has confirmed that he was not provided with such witness statements and thus has not considered them. His failure to consider such statements which were clearly relevant and important evidence further undermines his conclusions.

The Inspector unlawfully predetermined the matter

17. On 2 March 2021, the Inspector issued a report. This was said to be the Inspector's conclusions on Ms Welham and Ms Burgess' applications. The Inspector recommended that both applications be refused on the ground that use was not as of right during the relevant period because;

    i) the Avon CC signs rendered use contentious;

    ii) the Council's and School's objection to the earlier TVG application (by Mr Mayer) rendered subsequent use contentious.

18. The Inspector made it very clear in this report that he was setting out his final view on the applications. He stated that he was confident that he was correct. At paragraph 66 of this report (the final paragraph) he stated:

> "As far as I am concerned, the requisite legal basis for rejecting my recommendation does not exist. I am either right or wrong about the law. If I am right, by rejecting my recommendation, the Committee would expose itself to successful challenge by way of judicial review. If the Council were minded to reject my recommendation, I would recommend that it first obtains the advice of a QC."

[2] The Applicants both in their submissions (see 11 May 2021 submissions and chaser emails (see eg emails to the CRA dated 26 August 2021, 12 September 2022, 14 September 2022 and 15 September 2022 and 7 October 2022.)

19. It is now common ground that the Inspector's March 2021 report was legally flawed because it was reached without consideration of the relevant evidence.

20. In their submissions in response to the March 2021 report, the Applicants argued that as the Inspector had reached a final view on the applications, it would not be possible for him to reconsider the matter on the basis of the full evidence as he had unlawfully predetermined the matter. The Applicants' submissions stated:

> 85. If the CRA accepts the Applicants' submissions and concludes that the report is unlawful for the reasons set out above, the next issue for the CRA to consider what steps the CRA take to remedy this illegality. One potential option would be to ask the Inspector (ie Mr Petchey) to reconsider the issues, having given the parties an opportunity to adduce written evidence, oral evidence and further submissions. However, unfortunately, that would not be sufficient to remedy the illegality. As the current Inspector has (strongly) expressed concluded views on the issues that would need to be determined in light such evidence, any future consideration of such matters would be vitiated by the appearance of predetermination, see *Porter v Magill* [2002] 2 AC 357, paras 105, 117 per Lord Hope.

21. Notwithstanding that the Inspector, in his March 2021 report, had made clear that he had reached his final view, the Inspector did not accept that it would be unlawful for him to continue to consider the matter. He stated, in directions dated 17 March 2022 that:

> "I do not think that it is necessary or appropriate that I should recuse myself. With the benefit of hindsight, I can see that I might have anticipated that the Applicants might have wished to adduce additional arguments; and that, rather than move straight from a decision that a public inquiry was not necessary to a decision as to the merits of the case itself, I might have asked for yet further submission. However, conscious of the need to avoid unnecessary costs to all the parties and given the extensive representations on the relevant issues then before me, I did not ask for yet further submissions. Now that I have such further submissions and additional evidence, I will of course consider them. I do not think that my decision on the matter that was before me on 2 March 2021 precludes me from fairly revisiting (if appropriate) that decision in the light of new arguments and additional material. Each case turns on its own facts as perceived by the fair minded and informed observer. It is of course invidious for me to make such an assessment but I think it is clear that my conduct is very different to that of the Tribunal which the Privy Council had consider in *Mitchell v Georges."*

22. It is clear from the Inspector's March 2023 report that the Applicants concerns were correct and that the Inspector's dismissal of them was misplaced. Rather than consider the applications with an open mind, the Inspector started from a "loaded base". He did

not address the issues in dispute with an open mind but started with his previous conclusions and sought to analyse the new evidence in a way that supported his earlier conclusions whether or not, on a fair reading, they supported such a conclusion. The Inspector's strained and, at times, perverse interpretation of the evidence is addressed below. Such predetermination renders the report and the Inspector's recommendation fundamentally flawed and unlawful.

Matters not in dispute

23. It is important to note that the vast majority of matters that the Applicants are required to establish for the Land to be registered are not in dispute. It is common ground that:

    i) a significant number of inhabitants
    ii) of any locality or of any neighbourhood within a locality
    iii) have indulged in lawful sports and pastimes on the land;
    iv) for a period of at least 20 years to September 2018.

24. The only element of the statutory test set out in section 15 of the Commons Act 2006 that is in dispute is whether such use was "as of right" and whether registration would be incompatible with the statutory purposes for which the Land is held (see paragraph 165 of the report). These issues are addressed below.

The Inspector erred in his conclusion as to whether the use was "as of right"

<u>The signs (paras 75-148 of the Inspector's 2023 report)</u>

25. At paragraphs 68-70 of his 2013 report, the Inspector concluded that whilst the Avon CC signs <u>appeared</u> to render use of the Land by local inhabitants contentious the signs had to be considered in context and that bearing in mind the limited number of signs, the fact that a significant number of the residents would not have seen the signs, that the local inhabitants consistently ignored the signs, and that the Council took no steps to restrict use by local inhabitants, this was a "classic case of acquiescence". The Inspector referred to statements in two House of Lords' judgments that supported this analysis (Lord Hoffmann in *Godmanchester Town Council* and Lord Walker in *Beresford*). Neither of these statements have been doubted or overruled. Prior to the 2013 report, neither the

School nor the Council contended that the Avon CC signs had the effect of rendering use contentious and thus not "as of right". The fact that the Council and the School initially adopted this position is, of itself, powerful evidence that the landowner did not think that the erection of three signs on such a large area of land was sufficient, by themselves to render use contentious.

26. However, by 2016 the Inspector had changed his mind on the effect of the signs. He now considered them sufficient to render use contentious and thus not "as of right". The Inspector explained that the sole reason for his change of view was the recent Court of Appeal judgement in *Winterburn v Bennett* [2017] 1 WLR 646. He took the view that as a result of this judgment, if a landowner put signs up prohibiting use of the land this was all that the landowner had to do to render use contentious.

27. This is, with respect, a fundamental misreading of the Court of Appeal's judgment in *Winterburn*. What the Court of Appeal held was that the continuous presence of legible signs may be sufficient to render use contentious, see para 23. It did not hold that erection of prohibitory signs will necessarily be sufficient to render use contentious.

28. At paragraph 40 of *Winterburn*, the Court addressed a point made by the Appellant that the landowner was required to further steps beyond erecting prohibitory signs. The Court stated:

> "In my judgment, there is no warrant in the authorities or in principle for requiring an owner of land to take these steps in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings."
>
> (emphasis added)

29. Whilst the landowner in *Winterburn* had made his position "entirely clear" given the wording of the signs and the fact that they were placed at the sole entrance and thus seen

by everyone who entered the car park, it cannot be sensibly said that the erection of a very small number of signs at a small minority of the entrances to the Land makes the position "entirely clear".

30. The Court's analysis in *Winterburn* was clearly premised on the particular facts of the case which were very different to the present case. The Court stated:

> "On the facts of the present case, the presence of the signs in my judgement clearly indicated the owner's continuing objection to unauthorised parking."

31. The Inspector, both in his 2016 report and his March 2023 report has placed a huge amount of weight on this judgment; however, with respect, the Inspector has misconstrued the judgment and its impact on the present case. Whilst the Applicants accept that prohibitory signs may be sufficient by themselves to render use of land contentious if they are sufficient in number and unambiguous, signs by themselves will not inevitably render use contentious and the wider context, including the actions of the landowner and the views of local inhabitants must be taken into account. The fact that the Inspector's previous decision on the sufficiency of the signs (a) was the sole reason for the PROWG Committee rejecting the Inspector's report in 2016, (b) was contested by the Council at the judicial review and (c) has been accepted by the Council in these applications as a relevant issue for consideration, means that the Inspector cannot lawfully decide not to consider the issue, as he has done at paragraph 47.

32. The facts in the present case are starkly different to those in *Winterburn*. *Winterburn* concerned a small car park approximately 450 metres in size (with space for only 7 cars). There was only one entrance and there were two clear prohibitory signs present ("private car park, for the use of club patrons only") which would inevitably been seen by all persons who entered the car park through that one entrance. The Land is over 200 times larger at 88,110 square metres with more than 14 formal and multiple informal entry points plus back gates giving household access onto the field. Attached to these representations is an aerial photograph of the Land with the car park that was the subject of judgment in *Winterburn* superimposed upon it. It is clear from this aerial photograph how different the sites in question are.

33. Further, unlike the factual situation in *Winterburn*:

i) the wording of the signs was unclear and ambiguous (a warning rather than a prohibition);

ii) the signs were not sufficient in number or appropriately located given the very large area of land in issue (and it was accepted in TVG1 that one of the signs was in a service yard, not a public entrance to the land – so the Inspector's conclusions rested on only two of the three signs);

iii) as a result of the applicable education legislation, the landowner (ie the Council) did not, during any of the relevant period, have the power to regulate the use of Land absent a direction (which it is common ground was never issued);

iv) the School took no positive steps to prohibit use because, as explained by the School's chair of governors, the informal use of the Land by local inhabitants "was satisfactory from the School's point of view";

v) the broader context and the fact that the landowner (ie the Council) and the School contradicted the signs by its day to day inconsistent actions.

34. The Applicants set out their case on signs in detail in the October 2022 submissions (including a 47 page annex on signage) and the December 2022 submissions. The points made therein are not repeated in this document however, the Applicants would ask the Committee to consider these submissions prior to reaching its decision. In the following paragraphs, the Applicants briefly respond to the key factual points made by the Inspector in his March 2023 report and why he has misunderstood the evidence and the law.

35. Before addressing such matters, it is important to respond to an assertion, in footnote 37 of the report, that Sir Wyn Williams' judgement on the judicial review challenge to the Council's decision on Mr Mayer's application to register the Land somehow "upheld my interpretation of the signs and advice that use in the period 1991-2011 had not been *as of right,"* Firstly, as set out in the October and December 2022 submissions, the factual basis upon which the Inspector reached his conclusions in the 2016 report was incomplete and inaccurate. Secondly, and critically, the High Court did not conclude that the Inspector's conclusions on the issue of signage and "as of right" were necessarily correct. The learned judge held that it was open to the Committee to reach a different view on the relevant facts generally and the adequacy of the signs in particular; however, once the

Committee accepted (as they had) that when erected, the Avon CC signs were sufficient to render use contentious and not as of right it was not open to them to conclude that use had been as of right during the relevant 20 year period (1991-2011) without providing clear reasons for such a conclusion.

36. Turning now to the Inspector's analysis of the new evidence, such analysis provides further evidence that the Inspector has predetermined the matter and sought to misconstrue the evidence in a way that does not reflect a fair reading of the evidence.

37. The Inspector considered Avon CCs 1982 report and minutes of the Ad Hoc Committee of the County Council at paragraphs 94-102 of his report. These minutes expressly record that Avon CC had for some years tacitly accepted informal use of playing fields. He draws the conclusion from this documentation that the Council decided in 1982 that as a result of increased vandalism that it would reverse that years' long policy of tacit acceptance of informal use. Such a conclusion is fundamentally inconsistent with the report and minutes of the meeting. It is based on a partial and misleading citation of passages from the report and minutes. In particular, the Committee recorded that the Director said that "little vandalism occurred on playing fields". Further, the Inspector has, in his extensive citation, omitted to make any reference to section 5.3(c) of the report which discussed the need to make physical improvements to <u>improve</u> accessibility by the public, including in some cases "the <u>removal</u> of fencing would be required…" The Inspector's conclusion, based on selective quotes from this documentation, that Avon CC was ending its long term approach of tacitly accepting informal use, is perverse.

38. At paragraph 118 of his report, the Inspector accepts that, from 1990, Avon City Council had no formal policy in relation to informal use of the Land. Thus, he concluded that from this date, Avon City Council did not seek to prohibit use of the Land by local inhabitants. Similarly, the Council, when it came into existence in 1996 had no formal policy in relation to informal use of the Land and thus was not seeking to prohibit such use. The power to regulate use of the Land throughout the relevant period (1998-2018) lay with the relevant school and the school alone (in the absence of a direction from the Council). It is common ground that during the relevant period the Schools (initially Fairfield Grammar and then Cotham School (subsequently Cotham Academy)) took no steps to erect prohibitory signs or otherwise prohibit use. The Inspector seeks to get

around this by concluding, without any evidence, that the schools somehow "adopted" the Avon County Council signs by not removing them and thus it was clear to local inhabitants that the schools were seeking to prohibit their use of the Land. The problem with this analysis is that it is inconsistent with the evidence. Ms Sandra Fryer, Chair of Governors at Cotham Academy gave evidence before the Inspector at the 2016 public inquiry that the informal use of the playing fields "had been satisfactory from the School's point of view". In short, the School had not taken steps to prohibit informal use because it did not find such use problematic.[3] There is significant evidence (detailed in the signage annex to the Applicants' October 2022 submissions) that the School did not adopt the signs. On the ground, the evidence is that School staff such as groundskeepers were frequently present and had regular friendly interactions with local inhabitants demonstrating acquiescence to such use rather than adopting the (ambiguous and limited number of) signs.

39. At paragraphs 121-123, the Inspector addresses the fact that in 2009 the Council replaced one of the Avon CC signs located near Stoke Lodge House. In his 2016 report he concluded that this probably related to the Land rather than the grounds of Stoke Lodge House (which are not part of the Land). The Applicants explained at paragraph 86 of their October 2022 submissions, that such a conclusion cannot be correct given that in 2009 the Council had no power to regulate use of the Land by local inhabitants other than by direction (and no such direction had been issued). This is the clear effect of the Education legislation detailed in the October 2022 submissions and the attached annex. However, the Council did have the legal power to control the grounds of Stoke Lodge House. The Inspector perversely concluded that the Council did somehow have the power to put up a sign regulating the use of the Land in 2009 but failed to articulate what legal power the Court was apparently exercising. Again, this is further evidence of the Inspector's predetermination of matters and his attempt to interpret all of the evidence to support his previous conclusions when no reasonable consideration of the facts and law permits such a conclusion.

[3] There was also evidence before the Inspector that Fairfield School only used approximately one-third of the land, such that Avon CC considered declaring the other two-thirds surplus to education requirements. It is not rational to assume that Fairfield School was concerned about ongoing informal use of the majority, or any, of the Land.

40. At paragraphs 124-127 of his report, the Inspector addresses an April 2010 Cabinet Briefing Note. Again, the Inspector has fundamentally misread/misinterpreted this document in an attempt to construe it in a way that supports his previous conclusion. The 2010 report informed the Cabinet that the Land allowed unfettered access and that there was a potential concern about accruing TVG rights, but that the Council's policy remained one of encouraging schools to accept shared use. This note refers to advice from counsel so it was clearly a carefully considered document. The Inspector rejects the clear terms of the note on the basis that officers had essentially "forgotten" about the signs on the site. The assumption that the signs have somehow been forgotten is wrong. It is clear that the Council did not regard the signs as sufficient to render the use of the Land contentious; the 2010 Briefing Note thus accords with the position taken by the Council in its initial response to Mr Mayer's application. The Council's view is perfectly reasonable and sensible.[4]

41. At paragraphs 130-143, the Inspector purports to address evidence as to what happened "on the ground." Unfortunately, this analysis is inaccurate; for example, in relation to the Cheyne Road entrance, the Inspector conflates several incidents[5]. At paragraph 143, the Inspector bizarrely concludes that the matters on the ground suggest that in 1990 the Council permitted, rather than acquiesced to, access by local inhabitants. Such a conclusion is irrational bearing in mind, inter alia, that this occurred three weeks prior to the Council declaring that it had no policy on informal use and that the Inspector is of the view that in relation to every other entrance to the Land, including entrances located just a few metres away, would be contentious and thus use via such entrances

[4] The Briefing Note was written more than 20 years after the point at which neither Avon CC or the Council had any policy on the informal use of the Land, as the Inspector has acknowledged, Rather than assuming that officers had 'forgotten' about the signs, it is rational to assume that after 20 years of acquiescence they did not consider them to be effective. The Briefing Note, with its reference to unfettered access, also contradicts the Inspector's conclusion about the 2009 sign, erected only 10 months earlier. Clearly the Council did not consider informal use of the Land to be restricted by any sign.

[5] For example, it is clear that the 1990 newspaper report does not refer to the branch that fell off the oak tree at this entrance since that branch is too large to be removed without machinery and is still there, some 30 years later.

would amount to trespass. Attached to these submissions are two short witness statements that address the position at the Cheyne Road entrance.

42. It is open to the PROWG Committee to reach a different view to the Inspector on the effect of the signs if it articulates good reasons for doing so. The Committee is entitled to conclude that the two Avon CC signs on which the Inspector relied (one of which disappeared in around 2007; its posts were used to mount the 2009 Bristol City Council sign) were not sufficient to render use of the Land (a very large area of land with multiple entrances) contentious bearing in mind, inter alia, that:

    i) the contemporaneous evidence indicates that both Avon CC and the Council acquiesced to the use of the Land by local inhabitants both prior to and during the relevant 20 year period. In particular, the Council countermanded any steps taken by caretakers/groundsman on the site to prohibit use of the Land/close a particular access point;

    ii) the fact that from before 1991 neither Avon CC nor its successor, the Council had the power to control the use of the Land in the absence of a direction (and it is common ground that no such direction was made);

    iii) the majority of local inhabitants would not have seen the out of date and ambiguous signage when entering the Land via the multiple access points where no signage was placed. Two or three poorly worded and ambiguous signs erected in relation to such a large site were not sufficient in the context of such a large site;

    iv) there is no evidence that the School adopted the Avon County Council signs as the Inspector suggests. Indeed, the evidence given by Ms Sandra Fryer (Chair of the Governors at the School) before the 2016 Inquiry was that the informal use of the playing fields "had been satisfactory from the School's point of view".

<u>The public inquiry in 2016 (paragraphs 149-164)</u>

43. The Inspector's analysis on this issue is legally flawed on numerous grounds including:

i) the Inspector has misunderstood the relevant law;

ii) the Inspector has completely ignored the majority of the Applicants' legal and factual submissions and evidence on this issue;

iii) the Inspector has erroneously proceeded on the basis that the 2016 Inquiry was a "*well-publicised cause celebre*…and the applicants do not assert to the contrary" and has incorrectly relied upon evidence said to support this conclusion when, properly analysed, it is clear that such evidence does not support this conclusion.

44. The Inspector's conclusion on this issue is premised on Sullivan J's judgment in *R v South Gloucestershire Council, ex p Cheltenham Builders*. At para 152 of his report, the Inspector stated:

> "The case [ie *ex p Cheltenham Builders]* is thus authority for the proposition that an objection to a first application may render use in respect of a subsequent application contentious and not *as of right*. It is also authority for the proposition that for use to be contentious there does not have to be a physical act in respect of the land. Contrary to the Applicant's submissions. I do not think that what Sullivan J decided in this regard is in any sense *obiter* and, for that reason, not binding."

45. Firstly, the Inspector is, with respect, simply wrong that the comments in Sullivan J's judgment are binding on him. Such comments are clearly obiter rather than part of the ratio of the judgement and thus not binding on anyone. Sullivan J concluded that the challenge succeeded on three grounds:

i) the Council had erred in law in its approach to the concept of "user" (paras 29-33);

ii) the procedure adopted by the Council was unfair because there was no oral hearing (paras 34-40);

iii) the Council erred in law in its approach to the concept of "locality" (paras 41-48).

46. Sullivan J's conclusions on these three issues were more than sufficient to determine the claim (the Applicants' note in passing that the Inspector ignored part of the ratio in *ex parte Cheltenham Builders* as to the requirement to hold an oral hearing). What the

Inspector had to consider were obiter comments for Sullivan J at paras 70-71 in *Cheltenham Builders* and comments from Morgan J, doubting the correctness of Sullivan J's comments, in *Betterment Properties v Dorset County Council* [2010] EWHC 3024 (Ch) at paragraph 139. The above argument was advanced by the Applicants in their October 2022 submissions. At no point does the Inspector engage with why such submissions was wrong; he merely asserts, without detailing the basis for such an assertion, that he did not accept the Applicants' case on this point. Neither the Inspector (nor the PROWG Committee) is bound by Sullivan J's comments. Therefore, by proceeding on the basis that he was so bound by such comments, the Inspector reached an erroneous and unlawful conclusion. Whilst it is not open to the Inspector (or the PROWG Committee) to hold that *Cheltenham Builders* was wrongly decided (see para 154 of the report) it was open to both of them to prefer the obiter comments of Morgan J in *Betterment Properties* to Sullivan J's obiter comments in *Cheltenham Builders*.

47. In any event, properly analysed, the two paragraphs in *Cheltenham Builders* do not support the Inspector's conclusion on the facts of this case. Paragraph 70 of Sullivan J's judgment states:

> In this context, the reaction of the applicants for registration to the landowner's objection must be relevant. If they had refuted the objection and persisted with their application, then it might well have been reasonable to have expected the landowner to do more to resist the exercise of the claimed right, for example, by erecting fencing or putting up notices. However, the reaction of the applicants after initially disputing the points made in the claimant's solicitor's letters of objection, was to withdraw their application to register the land as a village green. From the claimant's perspective, therefore, it had "seen off" the applicants' contention that its land was a village green. Why did it need to do any more to make it plain that it was not acquiescing in the acquisition of village green rights over its land?
>
> (emphasis added)

48. It is clear from the highlighted passage that where, as happened in the present case, the Applicants persisted with the application (as both Mr Mayer and the two present Applicants did) objection to an application at a public inquiry by itself is insufficient. The landowner had to do more. Both the Council and School were well aware of this and implicitly accepted as much. In their October and December 2022 submissions to

the Inspector,[6] the Applicants referred to discussions between the School and the Council about the need for a landowner statement to demonstrate that continuing use was not "as of right".

49. Further, the Inspector appears to have completely disregarded the twenty four page annex to the Applicants' December 2022 submissions setting out their detailed factual response on the *Cheltenham Builders* argument which refers to the relevant evidence. The annex set out facts and supporting evidence establishing that:

    i) the conduct of the Council and School at the public inquiry in 2016 did not convey any clear message in relation to ongoing informal use of the Land;

    ii) neither the School nor the Council had authority under the terms of the School's lease to render use contentious by their words or actions at or after the public inquiry;

    iii) the School and the Council were in discussions about the possibility of making a landowner statement under the Commons Act 2006 to bring "as of right" use to an end, that they did not consider that such use had already ended (meaning that they and their advisers did not consider than any protest had been "made clear");

    iv) the evidence demonstrates (a) that neither the School nor the Council genuinely considered that use had been made contentious by virtue of the 2016 public inquiry or following that inquiry, and (b) that the public at large was also aware of any such hypothetical message having been communicated.

50. There is no proper consideration of these points in the section of the Inspector's report that addresses the *Cheltenham Builders/2016 public inquiry point* (see paras 149-164 of the report).

51. Further and in the alternative, even if the PROWG Committee rejects all of the above arguments, it is a necessary element of this ground for rejecting the application to register

[6] See paras 96-98 of the October 2022 submissions and para 54 of the December 2022 submissions.

the Land as a TVG that the Inquiry was a "well-publicised cause celebre" (see the first three sentences of paragraph 162 of the Inspector's report). The Inspector did not properly address his mind to this issue because he proceeded on the basis that it was not in dispute: the Council asserted that the inquiry was a well-publicised cause celebre and he has assumed that "the applicants do not assert to the contrary." However, as detailed above, the Applicants repeatedly asserted to the contrary. As this assertion was inconsistent with the Inspector's predetermined views set out in his March 2021 report, he simply ignored such repeated assertions and proceeded on the basis that it was common ground that the Inquiry was *a well-publicised cause celebre*.

52. As the Applicants made clear in their submissions the Inspector's assumption that the Inquiry was well-publicised was incorrect: the vast majority of the members of We Love Stoke Lodge (a Facebook group now comprising over 1400 members) only became aware of the threat to the Land when the School stated that the Council had permitted it to install a fence in late November 2018 (see the Applicants' May 2021 submissions quoted above). Further, this point was supported by the large number of witness statements filed in support of the two applications but, because of the CRA's failure to provide these to the Inspector (in breach of the Inspector's directions and the requests of the Applicants) the Inspector did not consider the 166 witness statements filed in support of the two applications. 89% of the 166 witnesses had no involvement in the earlier application but even those who did provide witness statements in support of Mr Mayer's application did not consider that anything about use of the Land had changed after the public inquiry. None of this evidence has been challenged (of course, in the absence of a public inquiry, there has been no cross examination of these witnesses). Given the absence of a public inquiry where the Applicants' could adduce oral evidence on this issue, the Inspector was required to proceed on the basis of the factual position set out by the Applicants namely that the Inquiry was not a *well-publicised cause celebre"*.

53. At paragraph 162 of his report, to support his conclusion, the Inspector refers to evidence adduced by Cotham School Parent and Carer Group:

> "reflective of local understanding that the use was contentious at the time of the public inquiry and remained contentious thereafter. I have noticed, for example an appeal for funds by Save Stoke Lodge Parkland which must date from early 2017. The leaflet is headed *Stoke Lodge- the battle continues*.... The Group have

also plotted on a map the eleven locations around the playing field pre-2018 where campaign signs were posted."

54. The Inspector's misplaced reliance upon this "evidence" further demonstrates why a public inquiry was necessary and why the failure to hold one rendered the procedure adopted fundamentally unfair to the Applicants. In relation to the 2017 appeal for funds, this newsletter was seeking donations toward Save Stoke Lodge Parkland's costs at the judicial review. The newsletter made clear that "Bristol City Council has announced that it supports the decision of the PROWGC" (to register the land as a TVG based on 20 years of 'as of right' use). This document thus does not provide evidence that local inhabitants were made aware of the Council's opposition to use of the Land; the document evidences the exact opposite: ie that, in 2017, the Council's position was that the local inhabitants' use over the relevant 20 year period for TVG 1 was "as of right". The Inspector's reliance on the Cotham School Parent and Carer Group's map with eleven locations where it was said there were pre 2018 campaign signs is again incorrect (and would have been exposed as incorrect if there had been a public inquiry with cross examination of witnesses). In relation to the eleven pins:

i) six relate to notices along Shirehampton Road which refer only to "retaining open access" (in response to the School's proposal to erect a fence). These posters do not anywhere refer to the previous TVG process, the 2016 public inquiry or the Council's position at that Inquiry;

ii) two of the pins relate to the Avon County Council signs and again do not, in any way, evidence the fact that the Council's position at the Inquiry was somehow widely known;

iii) the remaining three pins relate either to signs raising funds for the judicial review (in which the Council was <u>defending</u> its decision to register the land (ie that 'as of right' use had been established)) or to a sign that invites users to object to the School's pavilion planning application which "encroaches 5 metres into the TVG".

55. None of this evidence supports the Inspector's conclusion that the public inquiry or the Council's opposition to registration was well known. Indeed, some of this evidence indicates that the Council, at various times, supported the registration of the Land on the basis, inter alia, that use of the Land was "as of right".

56. In relation to the School's objection before the Inquiry, the School's right to use the Land was subject to the terms of the lease. The lease provided that the School's use was subject to "all existing rights and [all existing] use of the Property, including use by the community". The Inspector, in his report, only considered the issue of 'rights', not the fact that the School's use is subject to ongoing community use. In such circumstances, the School's objection to registration could not have somehow rendered use by local inhabitants contentious as it simply did not have the power to restrict or prohibit community use by virtue of the terms of the lease.[7]

57. In such circumstances, it is clear that the Inspector's conclusion that the 2016 public inquiry somehow rendered use of the Land not "as of right" is fundamentally misconceived and not a basis for rejecting the application to register the Land as a TVG.

Implied permission (see para 146)

58. The Inspector's approach to this issue is a further example of how he has unlawfully predetermined this matter. In his March 2021 report, the Inspector advanced an argument that the Council's actions post 2012 (by installing 2 dog waste bins, inter alia, on a public road outside of the Land and by erecting a play park also outside of the Land) may somehow possibly give rise to the existence of implied permission to local inhabitants to use the Land. Such an argument was repeated un-amended at paragraph 146 of the March 2023 report.

59. Neither the Council nor the School in their submissions sought to advance any argument based on the Inspector's theory on this issue and the Council expressly accepted that it was "entitled only to such rights over the Land as the lease reserves to it" which did not include the right to grant permission (explicitly or implicitly) to local inhabitants to use the Land.

[7] As a result of the lease, the School did not have the power to render use by local inhabitants contentious by erection of signs in 2018. However, as a result of Ms Welham's subsequent application, the 2018 signs are irrelevant.

60. The Applicants advanced detailed arguments on this issue at paragraphs 106-108 of their October 2022 submissions which the Inspector has completely ignored.[8] In particular, he failed to address at all how the Council with no statutory power to control the use of the Land and no power to so control the Land under the lease could somehow grant permission to use the Land without consulting either the School or University who had practical control of the Land. In short, the Inspector's paragraph on this issue is nonsense; it is unsupported by either the Council or the School and it merely evidences the unfair and unlawful approach adopted by the Inspector.

Statutory incompatibility

61. The Inspector addressed this issue at paragraphs 55-74 of his recent report. The Inspector's conclusions on this issue, unlike his conclusions on the "as of right" issue, are correct. Statutory incompatibility is not a reason to refuse registration of the Land as there is no such statutory incompatibility.

Conclusions and the way forward

62. For the reasons set out above, use by local inhabitants of the Land was "as of right" for the whole of the relevant 20 year period. The Inspector's conclusions to the contrary are inconsistent with the both the factual and legal position. The PROWG Committee are therefore required to register the Land as a TVG.

63. Whilst the Applicants are confident in the correctness of the above analysis, they appreciate that, inter alia, in light of the lengthy and expensive process that has occurred before this matter has reached the PROWG Committee, the Committee may be reluctant to depart from the Inspector's recommendations. However, a failure to so depart is very likely to lead to further litigation and expense which is in no one's interests. The Inspector, in his March 2021 report, suggested that if the PROWG Committee was minded to depart from his recommendation they should first seek advice from a KC (see paragraph 95 of the March 2021 report). If the PROWG Committee do not feel able to register the Land as a TVG without further legal input, the Applicants accept

[8] See also the Annex to May 2022 submissions on this.

that it would be appropriate to obtain such advice. Such advice should not only address the "as of right" issue but also the procedural fairness and predetermination issues.

Andrew Sharland KC

11 KBW

11 April 2023

IN THE MATTER OF TWO APPLICATIONS TO

REGISTER STOKE LODGE PLAYING FIELDS

STOKE BISHOP, BRISTOL AS A TOWN GREEN

UNDER THE COMMONS ACT 2006

SUBMISSIONS ON BEHALF OF MS BURGESS AND MS WELHAM

Introduction and summary

1. These submissions set out Ms Burgess' and Ms Welham's ("the Applicants") case on their applications to register land at Stoke Lodge Playing Fields, Stoke Bishop, Bristol ("the Land") as a Town and Village Green ("TVG") pursuant to section 15 of the Commons Act 2006.[1] On 6 July 2020, Bristol City Council in its capacity as the Commons Registration Authority ("the CRA") decided to join the two submissions. The Applicants submit that all of the elements of the definition of Town and Village Green in section 15 Commons Act 2006 are met and therefore the Inspector should recommend to the CRA that it register the Land as a TVG.

[1] Ms Burgess's application is made pursuant to section 15(2) Commons Act 2006 whilst Ms Welham's application is made pursuant to section 15(3) Commons Act 2006.

2. In particular:

   i) there is no statutory incompatibility between the registration of the Land as a TVG and the statutory provisions that apply to the Land;

   ii) use was "as of right" throughout the relevant 20 year period. In particular:

      a) the old Avon County Council ("Avon CC") signs did not render the local inhabitants' use of the Land as contentious or by force in 1998 or subsequently;

      b) the stance taken by Bristol City Council ("the Council") or Cotham School ("the School") at the 2016 Public Inquiry did not render subsequent use by local inhabitants contentious;

      c) the local inhabitants' use was not with the "implied permission" of the Council at any stage during the relevant 20 year period.

3. These submissions set out the Applicants' legal arguments as to why the land at Stoke Lodge Playing Fields should be registered as a TVG. The annex to these submissions sets out, in more detail, the Applicants' argument relating to signage (not just the Avon CC signs but also the Council's 2009 sign). These submissions do not repeat all of the arguments set out in this annex; it is therefore essential that they are read alongside the annex which together form the Applicants' submissions.

Factual Background

Introduction

4. The Inspector is familiar with some of the relevant factual background to this matter having held the non-statutory inquiry into Mr Mayer's application to register the land as a TVG ("TVG 1"). The Inspector has also considered various submissions in relation to the two current applications. The full factual background is therefore not set out in detail in these submissions.

5. In TVG 1, the Council stated that it had "sought to obtain and put before the Registration Authority copies of all relevant documentation in its possession whether supporting or contrary to the Council's case".[2] However, it is clear from the Applicants' research that unfortunately, the Council failed to provide the Inspector with a significant amount of relevant documentation (see bundles A-F). In particular, the evidence relating to the very limited powers of Avon CC (prior to 1996) and the Council (from 1996) to control use of the Land is clearly very relevant to the Avon CC signs issue considered below.

6. The Inspector's conclusions on TVG 1 were (necessarily) reached on the basis of the evidence then before the Inspector. In light of the further evidence now gathered, it appears that some of the Inspector's conclusions in his report on TVG 1, particularly those relating to the Avon CC signs and the Council's 2009 sign were incorrect.[3] In the Inspector's March 2021 report, his conclusions on the effect of the Avon CC signs during the Relevant Period (ie July 1998-July 2018) were based, to a considerable extent, on his

[2] This statement is taken from the first page of the Council's Notice of Objection to TVG 1 dated 18 November 2011.

[3] Of course, there is no criticism of the Inspector on this point as he could only make his recommendations on the basis of the evidence that was before him.

earlier conclusions in relation to TVG 1. These conclusions will need to be revisited in light of the further evidence submitted by the Applicants.[4]

Relevant factual background

7. Below, certain key factual and legislative matters are set out in chronological order.

8. On 13 September 1982, section 40 of the Local Government (Miscellaneous Provisions) Act 1982 which concerned nuisance on school playing fields came into force.

9. On 17 September 1982, the Avon CC Joint Ad Hoc Sub-Committee on Community Use of County Council Premises noted tacit acceptance ie acquiescence of informal use of the majority of school playing fields in their area [B3/b319].

10. In 1983/1984, Avon CC erected three signs on the Land. One sign was at the West Dene entrance (behind the pavilion, and only visible to someone entering at that point), one was near to the corner with Parrys Lane, facing users entering via an informal pedestrian entrance through a gap in the stone wall from Ebenezer Land. A third identical sign was placed at the boundary between the car park and the playing fields, to the north-west of the Stoke Lodge House. Sir Wyn Williams, at paragraph 54 of his judgment, records that the third sign was removed in or about 1996/1997 although the Inspector concluded that this sign remained in place until at least 2007.[5]

[4] The annex to these submissions goes into considerable detail about this factual material.

[5] The third sign only became apparent at the non-statutory public inquiry in 2016. This is why the Inspector's May 2013 report refers to two signs rather than three signs.

11. In late 1987/early 1988, a new groundsman appears to have temporarily and unofficially closed the West Dene gate. Avon CC instructed the grounds manager not to lock the gate [see B11/b359-372 and B12/b373-375].

12. On 1 September 1987, section 42 of the Education (No 2) Act 1986 came into force. Section 42 provides that the Articles of Government for all County Schools must provide that the use of school premises is under the control of the School's governing body subject to any direction by the Local Education Authority. Fairfield Grammar School, which at this time was using the Land as part of its school premises was a "county school" for the purposes of the 1986 Act. From the 1 September 1987, the only basis on which local education authorities (ie Avon CC and subsequently the Council) could exercise control over land that they owned but were used by county schools was pursuant to a formal direction being issued. No direction seeking to control informal use of the land by local inhabitants was ever issued by either Avon CC or the Council.[6]

13. The Education Reform Act 1988, set out a statutory framework for Local Management of Schools (LMS). It required local education authorities to produce a scheme for LMS to come into operation from April 1990.

14. In late 1989/early 1990, a groundsman temporarily blocked the Cheyne Road entry point using pruning debris. This debris was removed by local residents [B14/b378-380 and

[6] As detailed below at para 15, Avon CC did issue a direction in 1990 but this did not relate to such use.

B15/b381]. An Avon CC spokesperson told the local press that a kissing gate would be installed at that entry point, although this did not in fact happen – however, clearly Avon CC did not object to informal use via that entry point.

15. On 23 January 1990, in preparation for Local Management of Schools, the Avon CC Education Committee agreed a direction for schools that requires the continuation of lettings practices for adult education but provides that, "except as outlined in this directive, Governing Bodies would be free to determine the use to be made of their premises." [item F4][7] Thus Avon CC decided not to make a direction in relation to playing fields generally or the Land in particular as to informal community use, ie use by local inhabitants for lawful sports and pastimes. Avon CC had the power to issue a direction permitting such use or prohibiting such use but it did not exercise this power in January 1990 (or at any other date). It thus left the issue of whether such use by local inhabitants for lawful sports or pastimes should be permitted or prohibited to the Governing Bodies of the Schools for whom the Land formed part of their premises (ie Fairfield School until 2000 and subsequently Cotham School).

16. On 1 April 1990, Local Management for Schools was introduced in Bristol. The effect of LMS was that responsibility for both control of school premises (which included the Land) and control of school budgets was now in the hands of various schools' governing bodies.

[7] The Committee resolved at (ii) "that the policy option 2 outline in paragraph 5.9 of the report be directed to the schools proposed in paragraph 5.9.3." The proposed direction in paragraph 5.9.3. makes a direction in relation to use for adult education but expressly states that "Governing Bodies would be free to determine the use to be made of their premises…."

17. On 1 April 1996, Avon CC ceased to exist. The Council became the local education authority and educational premises, including the Land, transferred to the Council's ownership albeit as a result of statutory intervention, the Council only had limited powers to control use.

18. On 1 November 1996, section 149 Education Act 1996 came into force replacing section 42 of the Education (No 2) Act 1986. Section 149 was in similar terms to section 42 although it additionally provided that the Governing Body, in exercising control of the use of the school premises outside school hours, should, "have regard to the desirability of the premises being made available for community use".

19. On 1 September 1999, section 40 and Schedule 13 to the School Standards and Framework Act came into force replacing section 149 Education Act 1996. Schedule 13 provided that the occupation and use of school premises (which included the Land) was under the control of the governing body subject, inter alia, to any direction from the local education authority (ie the Council) or any transfer of control agreement. As with section 149 of the 1996 Act, there was a requirement that the Governing Body, in exercising control of the use of the school premises outside school hours, should, "have regard to the desirability of the premises being made available for community use".

20. On 1 September 2000, the Land became the designated playing field for Cotham Grammar School [D4/d630]. Cotham Grammar School was a maintained secondary school and a community school for the purposes of the relevant provisions of the School Standards and Framework Act 1998. At this date, the Land became part of Cotham School's premises.

21. On 1 September 2001, Cotham Grammar School became a comprehensive school but still remained a community school under the School Standards and Framework Act 1998.

22. On 1 February 2004, Cotham School entered into its first Transfer of Control Agreement with the University of Bristol [A18/a248-249]. This Agreement records that the "site is open, at present, to the public and dogs".[8] This agreement thus acknowledged the public's informal use but did not provide that such use was either permitted or prohibited. This Agreement reflects the reality that the School, during the relevant period, acquiesced to such use.

23. In June 2009, the Council erected a sign in the grounds of Stoke Lodge House. This sign was not commissioned by Cotham School (who, subject to any direction from the Council)[9] was the only body that could lawfully exercise any control over the use of the Land by, inter alia, local inhabitants. It is clear from the statutory responsibilities in existence at this time (ie the School had responsibility for controlling the use of the Land whilst the Council had statutory responsibility for controlling the use of the grounds of the House) that, contrary to the Inspector's conclusion in his October 2016 report, the 2009 sign related to the grounds of Stoke Lodge House rather than the Land.

[8] Subsequent transfer of control agreements contained the same words, see A30/a298-299, A31/a300-303 and A12/a219-224

[9] No such direction was ever issued.

24. In April 2010, the Council's Cabinet were briefed [A1/a1-23]. This note set out the legal position under the School Standards and Framework Act 1998 and the Council's understanding of the factual position. This note stated that:

    i) the use of school premises within a community [maintained] school is under the control of the governing body and subject to any directions given by the Local Education Authority (para 2.10/a3);

    ii) when a local authority is considering an open access policy to school playing fields it is Counsel's opinion that the Authority should seek to persuade the governing body that they themselves would willingly adopt a policy of open access [para 2.13/a4 and appendix B paragraph 2/a13]

    iii) Post *Redcar*, revocable permission did provide a guarantee against TVG registration and "landowners now need to proactively take steps to keep people [off] their land to prevent future registration (para 2.17/a4-5, 2.18a5), see also Appendix D pargraph5/a16 as "active steps to exclude recreational trespassers."

25. On 4 March 2011, Mr David Mayer (who had no connection with the Applicants) applied to register the Land as a TVG (ie TVG 1).

26. After Mr Mayer's application, neither the School nor the Council took any steps "on the ground" to make clear that such use was either permitted or prohibited.

27. On 1 September 2011, Cotham School converted to an academy and was granted a 125 year lease of Stoke Lodge Playing Fields under the Academies Act 2010. The lease provided that the School's use was "subject to all existing rights and use of the Property,

including use by the community". The Department for Education's Land Transfer Advice and the Council's policy on academy conversion both provide that the lease should provide for transfer on an "as is" basis, see A7/a65-81 and A8/a82-104. Sir Wyn Williams noted, in relation to the lease, that:

> "It is common ground that the creation of the lease was and is no bar to the registration of the land as a green" (see para 6)

28. On 23 May 2013, the Inspector issued a report recommending that the Land should be registered as a TVG because he was of the view that all the statutory criteria had been met. In relation to the Avon CC signs, the Inspector stated:

> 68. None of the objectors seek to rely on the signs as rendering the use contentious and thus not *as of' right.*
>
> 69. It appears that the Avon County Council signs were put up in the late 1980s[4]. Thus they predate the relevant 20 year period although not by much. The wording is perhaps a little odd - not *Do not trespass on this Playing Field* but *Members of the Public are warned not to trespass on this Playing Field.* Nonetheless I think that the more restrained form would still be effective to render use contentious[50]. As far as l know, there were only two of these signs to cover the whole of the site and in particular there was not a sign at the Cheyne Road entrance. Some users would not have seen any sign; and the question of the extent of knowledge of the signs is not a matter which has been explored in oral evidence. There is thus an outstanding issue as to whether the landowner put up sufficient signs. The Bristol City sign is more recent but I would judge that most users of the site would not have seen it, not entering the application via the Learning Centre. There is, in any event, a factual dispute about that sign.
>
> 70. In my judgment the signs have to be seen in context. I think that it is difficult to argue that the use of the application site has been contentious when, apart from the signs, no other steps have been taken to render the use contentious. It seems to me that the present case is a classic one of acquiescence. If local people were not supposed to be on the land, then when it was being used by the schools or school's licensees, local people could have been so told. It would have been possible for local people to have been turned away on one day of the year, as envisaged by Lord Bingham.

29. The Council then changed its position on the signs and contended that a public inquiry was needed.

30. On 25 June 2013, section 15A of the Commons Act 2006 came into force. Section 15A provided that owners of land could make a declaration to negate the registrability of land as a town and village green. At no point between 25 June 2013 and July 2018 was such a declaration made.

31. On 23 July 2013, in response to the Inspector's report, the School raised objections to the report. In relation to signage, the School stated:

> "There has been much conversation about signs. With hindsight Cotham School should have put fresh signs up when we took the site over [in 2000] and certainly when we became an Academy…." [B26/b445][10]

32. This statement accurately reflects the legal position: from 2000 when Cotham School took over use of the Land from Fairfield School, it was for it to control it (subject to any direction from the Council).[11] If, post 2000, the School had wished to exercise such control it could and should have put up its own signs (as a number of other Schools similarly affected did). The failure by the School to take any steps in response to such use, by local inhabitants, for lawful sports and pastimes indicates that the School, like the

[10] The School's letter goes on to assert it relied on the "old signs". However, this, ex post facto, justification does not accord with the contemporaneous evidence that indicates that the School acquiesced to the local inhabitant's use and made no decision to control use of the Land by prohibiting or permitted use by local inhabitants.

[11] From the beginning of the Relevant Period to 1 September 2000, it was for Fairfield School to exercise control over the Land. Again, at no time did Fairfeld School permit or prohibit use, by local inhabitants, of the Land for lawful sports and pastimes.

Council, acquiesced to such use. The Inspector's May 2013 conclusion that this was a "classic case of acquiescence" accorded with the factual and legal position.

33. In June/July 2016, the Inspector conducted a nine day non-statutory public inquiry into TVG 1.

34. On 14 October 2016, the Inspector published his report into TVG 1. He recommended that the Land should not be registered as a TVG because, on the basis of the evidence before him, as a result of the three Avon CC signs, use was not "as of right" throughout the relevant 20 year period (ie 1991-2011). The basis for this conclusion was that use was not "as of right" between 1991-1996. In light of this, the Inspector decided that he did not need to consider the position post 1996.

35. On 12 December 2016, the Council's Public and Rights of Way and Greens' Committee ("the Committee") met to consider the Inspector's recommendation. They decided to reject the recommendation and grant the application for registration.

36. On 9 March 2017, the School issued a claim for judicial review challenging the Committee's decision to register the Land as a TVG.

37. On 3 May 2018, Sir Wyn Williams handed down judgment in *R (Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin). The Court quashed the Council's decision to register the Land as a TVG. Both the School and the Council (but not the Applicants') were party to this claim and are bound by the various conclusions set out therein.

38. On 25 June 2018, the Committee reconsidered the matter and decided not to register the Land as a TVG.

39. On 24 July 2018, the School removed the two Avon CC signs and the Council's 2009 sign and erected its own notices. Had this action been taken prior to conversion to academy status, it would have accorded with the statutory regime detailed above that it was the School and not the Council who had the power to control (ie prohibit or permit) use of the Land by local inhabitants for lawful sports and pastimes (subject to any direction made by the Council). However, post-conversion, the School's rights as tenant were subject to the terms of its lease including the community use provision. Thus on 24 July 2018, but not before, the School took steps (albeit ineffective steps) to render use by local inhabitants contentious.

40. On 14 September 2018, Ms Burgess applied to register the Land as a TVG pursuant to section 15(2) Commons Act 2006 (TVG 2) [1/1-42].

41. On 5 April 2019, the School objected to Ms Burgess' application, inter alia, on the grounds, that the 2018 signs precluded registration, such that from the date that the signs were erected (24 July 2018) use was contentious and thus not "as of right".

42. On 22 July 2019, Ms Welham applied to register the Land as a TVG pursuant to section 15(3) Commons Act 2006 (TVG 3] [7/169-205]. This application was necessary given the School's approach to amendment of Ms Burgess' application. The relevant period in relation to TVG 3 is 22 July 1998 to 22 July 2018.

43. On 2 March 2021, the Inspector issued a report. This was said to be the Inspector's conclusions on the applications for TVG 2 and TVG 3. The Inspector recommended that both applications be refused on the ground that use was not as of right during the relevant period because:

    i) the Avon CC signs rendered use contentious;

    ii) the Council's and School's objection to TVG 1 rendered subsequent use contentious.

44. However, these conclusions were reached without consideration of relevant evidence. The Inspector therefore agreed to reconsider the matter following provision of evidence and further legal submissions.

Legal Background

Relevant Village Green legislation

45. Section 15 of the Commons Act 2006 is entitled "registration of greens" and provides:

> (1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
> (2) This subsection applies where–
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
> (b) they continue to do so at the time of the application.
> (3) This subsection applies where–
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
> (b) they ceased to do so before the time of the application but after the commencement of this section; and
> (c) the application is made within the relevant period
> (3A) In subsection (3), "the relevant period" means—

(a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b);

…

46. Section 15A Commons Act 2006 is entitled "Registration of greens: statement by owner". Section 15A provides:

> (1) Where the owner of any land to which this Part applies deposits with the commons registration authority a statement in the prescribed form, the statement is to be regarded, for the purposes of section 15, as bringing to an end any period during which persons have indulged as of right in lawful sports and pastimes on the land to which the statement relates.
>
> ….

Relevant Education law provisions

47. The Education Law provisions relevant to the Land (so far as relating to control of school premises) are set out in appendix 1 to these submissions.[12]

Submissions

Introduction and structure

48. These submissions will address each of the elements of the test under section 15 Commons Act 2006. The Applicants do not anticipate the majority of the necessary elements are controversial and therefore these will be dealt with briefly.[13] The Applicants understand the controversial issues to be:

i) whether the doctrine of "statutory incompatibility" applies to preclude registration of the Land as a TVG;

[12] These statutory provisions are also at F1.

[13] If the Applicants' understanding as to the lack of controversy is erroneous, the Applicants will respond to any new arguments in its reply submissions.

ii) whether use of the land is "as of right" throughout the relevant 20 year period. This issue raises three sub-issues namely:

a) whether the three old Avon CC signs mean that use in 1998 and thereafter was not 'nec vi' (ie without force);

b) whether the stance taken by the Council and/or the School at the 2016 Public Inquiry renders such use as not 'nec vi' post 2016

c) whether use was with the implied permission of the landowner and therefore was not 'nec precario' (not with permission).

49. What the Applicants understand to be the controversial issues will be considered after brief consideration of the non-controversial elements of the section 15 test.

<u>"A significant number of inhabitants"</u>

50. In TVG 1 the Inspector accepted that a significant number of the inhabitants of the locality in which the Land is situated had used it for recreational purposes (i.e. lawful sports and pastimes) for the requisite 20 year period i.e. between March 1991 and March 2011 - see paragraphs 340 to 342 of the Inspector's report and paragraph 22 of Sir Wyn Williams' Judgment.

51. Evidence forms /witness statements as summarised in Annex G[1/22-26 and 7/202-203] and provided in Annex F (held by the CRA) have been submitted by 104 local residents for TVG 2 and a further 62 local residents for TVG 3. 100% of witnesses live within the

locality (BS9 1/2 postcodes) as summarised in Annex G of each application. This is more than sufficient to demonstrate that a "significant number of inhabitants" used the Land during the relevant period.

"Of any locality, or of any neighbourhood within a locality"

52. In TVG 1 the Inspector considered issues of 'neighbourhood' and 'locality' and confirmed at paragraph 460 of his report that, with the deletion of part of Sea Mills that was included in the previous neighbourhood map (and is not included for the purposes of this application), the area identified constitutes 'a cohesive neighbourhood'.

53. The locality as drawn on Map B appended to the applications depicts the locality – briefly comprising the political ward of Stoke Bishop (excluding Durdham Downs and Clifton Downs which are protected and registered as a City-wide amenity), plus the south western section of the Westbury on Trym Ward.

54. In relation to locality, the Inspector noted at paragraph 89 of his Report dated 2 March 2021 that in its initial submission, the Council took a point as to whether use had been by the inhabitants of an identified locality. He stated:

> 'I think that no point of substance arises on this aspect of the applications which should lead to them being rejected. If it were necessary for the registration authority to consider a locality or neighbourhood within a locality different to that identified in the applications, it seems to me that it would be appropriate for it to do so'.

55. The above analysis is correct.

"In lawful sports and pastimes"

56. Annex J to the application sets out a list of 30 recreational and sporting activities and pastimes which have taken place at Stoke Lodge Playing Fields during this period and fall into the category of 'lawful sports and pastimes'.[14] The evidence forms provided in support of these applications detail extensive use of the land for these activities for at least 71 years and throughout the claimed period. The Inspector was satisfied on this point in TVG 1;[15] the nature of the recreational and sporting activities and use by the community is unchanged in the period up to the date of this application.

57. At paragraph 19 of his March 2021 report [34/430], the Inspector said:

> 'In respect of the land which is the subject of the applications which I have been asked to consider there has already been a lengthy public inquiry. This was in respect of an application relating to the period 1991 – 2011 rather than 1998 – 2018 but "on the ground" it is evident that the use has carried on in the same way. Thus the dispute is not about whether local people have used the land for sports and pastimes'.

58. This accurately reflects the position.

"On the land"

59. All of the Land included in this application as shown on the plan relating to Application Form 44 section 5 is used by the community in the various ways described in the witness statements throughout the year. All witnesses have signed and dated Map A as part of their submission.

[14] [1/29].

[15] See para 22 of Sir Wyn Williams' judgment in *R (Cotham School) v Bristol City Council*.

"For a period of at least 20 years"

60. The witness statements demonstrate consistent use by the community throughout the whole ownership period by the Council and its predecessor authorities continuing with no period of exclusion until the School erected a fence in early 2019. The Council itself, in its submissions to the High Court, accepted that use for informal recreation had been ongoing for the requisite length of time.

61. The only aspect in which the use of the Land changed since the previous application (up to the erection of the fence in 2019, after the end of the relevant period for these applications) is that the School, which has a lease to use Stoke Lodge Playing Fields for its sports provision, voluntarily chose to cease providing sports at the site from the end of 2013 and also ceased to permit hire to local sports clubs (from late 2016). Both of these decisions were reversible by the School at any time but of course changed the relative proportions of use of the land by the different parties.

And continue to do so at the date of the application/ceasing not more than one year prior to the date of the application'

62. Ms Burgess' application is made under section 15(2); Mrs Welham's under section 15(3). Following the joinder of the applications, as matters currently stand the end date of the relevant 20-year period is the earlier of the two relevant dates in the applications, namely 22 July 2018.

Statutory incompatibility

63. The issue of statutory incompatibility has been considered on multiple occasions by the Inspector and, on one occasion, by the High Court:

    i) paragraphs 413-452 of the Inspector's report on TVG 1;

    ii) paras 88-104 of Wynn Williams J's judgment in *R (Cotham School) v Bristol City Council*;

    iii) paragraphs 30-57 of the Inspector's March 2021 report [34/431-437];

    iv) paragraphs 10-15 of the Inspector's Directions of 17 March 2022 [41/1043].

64. On every occasion, the decision-maker has rejected the statutory incompatibility argument advanced by the Council and the School. At paragraph 15 of the Inspector's March 2022 directions, the Inspector stated:

> "Accordingly it will be necessary for the Objectors to work on the basis that the applications are not to be rejected on the basis of statutory incompatibility…"

65. In light of this clear indication, the Applicants will address the issue of statutory incompatibility briefly. If, contrary to the Inspector's indication, the Council and/or the School advance detailed arguments on this issue, the Applicants will respond to such arguments in accordance with the timetable set out by the Inspector.

66. At the relevant time (ie, the time of registration), the Council did not "hold" the Land for any statutory purposes at all. At this date, the Land was held by the School pursuant to the 125 year lease granted by the Council to the School (see clause 12 of the lease [A9/141]). The Council has no power to terminate the lease early to use the Land for

other educational purposes. This reality is reflected in the Council's financial statements which record, in relation to academy schools, that land and building assets that are subject to a 125 year academy lease are derecognised and removed from the Council's financial statements as they are no longer within the Council's control [E9/e977-979 and E10/e980-982].

67. In relation to the School, as an academy school it has no statutory duties in relation to the Land. Unlike the Council, the School is not under a statutory duty to provide physical education. Whilst the School has an obligation to provide suitable outdoor space, there is no requirement to provide such outdoor space on the Land. The School can (and indeed has) provided suitable outdoor space elsewhere. Thus no issue of statutory incompatibility arises.

68. In such circumstances, the Inspector was clearly right to conclude that at the relevant time, the Council did not hold the Land for any statutory purposes whatsoever. Any contrary conclusion would be fundamentally inconsistent with the reality of the situation and would be based upon a legal fiction. The Council and the School's approach on the issue of statutory incompatibility is unsupported by any authority. Their approach essentially rests on ignoring the fact that the Council entered into a 125 year lease with an independent school (ie Cotham Academy) which has no statutory duties in relation to the Land itself.

69. Further, and in any event, both the School and the Council are bound by the findings of the High Court on this issue to the extent that they are not inconsistent with Supreme

Court's judgment in *Lancashire.* Wynn Williams J's conclusions are consistent with the Supreme Court's judgment in *Lancashire*.

As of right 1: The Avon County Council signs

Introduction

70. The Applicants' submissions on this issue address the following issues:

    i) the relevant law;

    ii) the Inspector's previous analysis of the Avon CC signs;

    iii) the correct approach to the signage in light of the relevant factual and legal background.

The relevant law

71. It is well-established that "as of right" in section 15 Commons Act 2006 means that the use is "nec vi, nec claim, nec preario", ie not by force, nor stealth, nor the licence of the owner. Lord Hoffmann in *R (Sunningwell PC) v Oxfordshire CC* [2000] 1 AC 335, 352H stated that what matters was how the matter would have appeared to the owner of the land.

72. In *R (Lewis) v Redcar and Cleveland BC (No 2)* [2010] 2 AC 70, Lord Walker, para 36 stated:

> In the light of these and other authorities relied on by Mr Laurence I have no difficulty in accepting that Lord Hoffmann was absolutely right, in *Sunningwell* [2000] 1 AC 335, to say that the English theory of prescription is concerned with "how the matter would have appeared to the owner of the land" (or if there was an absentee owner, to a reasonable owner who was on the spot)….

73. In *R (Godmanchester Town Council) v Secretary of State for the Environment* [2008] 1 AC 221, the House of Lords considered section 31 of the Highways Act 1980 and the meaning of "as of right." Lord Hoffmann stated:

> "….there may be a notice which says 'No right of way. Trespassers will be prosecuted.' Nevertheless for upwards of 20 years members of the public may have ignored the notice and used the way, openly and apparently in the assertion of a right to do so. Their user will satisfy section 31(1) [ie use by the public was 'as of right']…."

74. The above approach was applied by the House of Lords in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889. Lord Walker stated:

> It has often been pointed out that "as of right" does not mean "of right". It has sometimes been suggested that its meaning is closer to "as if of right" (see for instance Lord Cowie in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035, 1043), approving counsel's formulation). This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who puts up a notice stating "Private Land - Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time".
>
> (emphasis added)

75. The correctness of these two statements have never been doubted. They remain good law.

76. The continuous presence of legible signs may be sufficient to render use contentious, see *Taylor v Betterment Properties (Weymouth) Ltd* [2012] 2 P & CR 3 as summarised in *Winterburn v Bennett* [2016] EWCA Civ 482, para 23.

77. The meaning of 'as of right' was further considered outside of the TVG context in *Winterburn v Bennett* [2016] EWCA Civ 482. This case concerned the acquisition of a right to park. Neither *Godmanchester* nor *Beresford*, which were clearly relevant, appear to have been cited to the Court of Appeal. The Court of Appeal applied the approach set

out in *Betterment Properties* and concluded, on the basis of the relevant facts in that case (ie a small area with two signs clearly visible to all users of the car park and no contrary evidence), that these signs were sufficient to render use contentious. Whilst *Winterburn* may have been correct in relation to the right to park in a small area, it does not purport to establish a general principle that the existence of signs prohibiting use necessarily renders subsequent use contentious. Indeed, the Court of Appeal explained their reasoning on the basis that they were simply applying the approach of the Court of Appeal in *Betterment* which, they held was, that that the continuous presence of legible signs may, depending on the particular factual circumstances, be sufficient to render use contentious.

The Inspector's analysis of the Avon CC signs

78. The Inspector has considered the Avon CC signs on three occasions albeit on none of these three occasions was he provided with all the relevant factual evidence (or the applicable legal regime) which is now before him.

79. As detailed above at para 28, in his May 2013 report, the Inspector concluded that the signs were insufficient to render use contentious in the absence of any other steps being taken by the land owner. He described it as "a classic case of acquiescence."

80. In his October 2016 report, on the basis of the Court of Appeal's judgment in *Winterburn*, the Inspector concluded that the signs were sufficient to render use contentious during the period 1991-1996 (when Avon CC was abolished and replaced by the Council) (see paragraphs 367-412 of the October 2016 report). The Inspector concluded that:

> "the reasonable landowner would have considered that he had done enough to render use contentious, ie by posting notices at what he would perceive to be the principal entrances to the site." (see para 389)

81. The Inspector's analysis of this issue at paragraphs 60-70 of his March 2021 report [34/438-439] draws heavily on his previous conclusions in his report on TVG 1. In summary, he concluded that nothing relevant changed between 1991-1996 and July 1998 (ie the beginning of relevant period for TVG 2/3) and that if use was contentious during the period 1991-1996 use was still contentious in 1998 at the beginning of the relevant period.

The correct approach

82. Once the full relevant factual and legal context is considered, it is clear that by 1991, the then owner of the Land, Avon CC would not have considered that it had done enough to render use contentious (and indeed it had not attempted to do so). The Applicants' case on the position prior to the relevant period is set out at pages 11-27 of the Annex on signage and should be read in full. What follows here is just a summary of the key points. By 1991, Avon CC were aware of the following matters:

i) the existence of a small number of signs by a minority of entrances to the Land.

ii) the fact that the signs were widely ignored by local inhabitants who continued to use the Land for lawful sports and pastimes;

iii) when caretakers/groundsmen have sought to prohibit use by closing a particular access, Avon CC has countermanded such an approach making clear that, notwithstanding the signage, the Council was not prohibiting use by local inhabitants of the Land.

83. Further and importantly, Avon CC was also aware that, by 1991, it had no power to control use of the Land except by way of direction. The previous year (1990), Avon CC had made a direction in relation to school premises in its area, including the Land. This direction provided that schools were required to continue to give access to their premises for adult education use but, in relation to other potential uses of school premises, including the Land, that was a matter solely for the Governing Body of the School. It was thus clear that Avon CC from 1990 had positively decided not to control use of playing fields including the Land. It was not seeking to either prohibit or permit use by local inhabitants for lawful sports and pastimes. By 1991, in light of Avon CC's positive decision not to control use of the Land and to leave decisions as to whether to permit or prohibit local inhabitants from using the Land for lawful sports and pastimes to the Governing Body of the School whose premises it was (ie at this time, Fairfield School), it would have been clear to both the actual owner (Avon CC) or a putative "reasonable owner" that the signs were obsolete as they were not backed by legal authority.[16] It is clear that the local inhabitants treated them as such: there is no evidence that from 1991 the signs had any effect whatsoever on the local inhabitants who, during this period, used the Land for lawful sports and pastimes. The Avon CC's decision not to attempt to control

[16] By 1991, in the absence of a relevant direction, the Council had no more power to control the use of the Land than the Inspector. If the Inspector had put up signs on the Land prohibiting use by local inhabitants, such inhabitants would no doubt have ignored them on the basis that the Inspector had no right to limit their use of the Land and equally, the Inspector would have known that he had no such authority. By 1991, the position is factually the same in relation to the Council's signs: the Council had no right to limit use of the Land except via a formal direction. This was a matter for the Governing Body of the School who used the Land.

use of the Land is, to use the Inspector's language in his 2013 report "a classic case of acquiescence."

84. Turning now to the relevant period, ie from July 1998 onwards. By this time, Avon CC had ceased to exist albeit its decisions continued to have effect (including its 1990 direction limited to adult education use of school premises). The Council, like Avon CC, did not issue a direction in relation to use of the Land by local inhabitants as it had the power to do under the various statutory regimes applicable post July 1998.[17] The Council, like Avon CC, left such matters solely to the discretion of the governing body of the relevant school (ie Fairfield between 1998 -2000 and Cotham School thereafter). In light of this, the suggestion that the Council, as the landowner post 1996, somehow adopted the signs and sought to regulate use of the Land by reliance upon them when no direction was issued (given that such a direction was a legal pre-requisite to the Council exercising any control over the Land) is simply wrong. Both the actual owner (the Council) and the reasonable owner, being aware of the legal position as to its limited powers to control use of the land, would have known that it had not taken any, let alone sufficient, steps to render use contentious. The key step that needed to be taken was for the Council to issue a direction controlling use of the Land. No such direction was ever issued and therefore the signs were not backed up with any legal authority.

85. Further, the relevant schools (Fairfield and Cotham) both failed to make a decision, during the relevant period, as to use by local inhabitants. Unlike various schools utilising other playing fields in the Council's area, neither school decided to erect signage stating

[17] See the appendix to this document detailing the various statutory schemes applicable at various times.

that use by local inhabitants was permitted or prohibited. Further, there is no evidence that during the relevant period, the schools directed their mind to the issue of such use. The relevant statutory provisions (set out in the appendix) required the schools to have regard to the desirability of making the premises available for community use. This was a "relevant consideration" although this did not mean that schools were required to allow community use on their land. The Applicants have not found any contemporaneous evidence that indicates that either of the schools lawfully applied their minds to the exercise of their discretion and decided to permit or prohibit local inhabitants from using the Land. If such evidence existed, no doubt the objectors would have adduced it. In the absence of such evidence, the schools must be taken to not have decided to either prohibit or permit use of the Land by local inhabitants for lawful sports and pastimes. Whilst the schools were clearly aware of such use, they acquiesced to it. In the case of Cotham School, this is manifested in the various Transfer of Control Agreements during the Relevant Period.

86. The above analysis relates to the Avon CC signs. Some reliance has been placed by the objectors on a sign erected by the Council in 2009 near the Land but located within the curtilage of Stoke Lodge House. In his 2016 report, the Inspector concluded that this sign probably related to the Land rather than grounds around Stoke Lodge House although, he went on to conclude that this sign was not sufficient to render use of the Land contentious. However, now the relevant statutory regime is understood, it clear that the Inspector was wrong to conclude that the 2009 Council sign related to the Land. As detailed above, in 2009, the Council had not power to regulate use of the Land by local inhabitants (as no direction had been issued in relation to such use). However, the Council did have the legal power to control the use of Stoke Lodge House and its grounds.

Section 5 of Annex 1 (on signage) develops the Applicants' arguments on the 2009 sign further and provides a number of other reasons why the 2009 sign did not relate to the Land. The Inspector is asked to consider this annex carefully for the detail of such arguments.

As of right 2: The Council and the School's objection at the 2016 Public Inquiry

87. Both the Council and the School contend, in their objections to registration of the Land as a TVG, that use was contentious and thus not 'as of right' during the latter part of the relevant period because the Council, as the landowner, objected to TVG 1 (which concerned the period 1991-2011).[18] The legal basis for this argument is said to be Sullivan J's judgment in *R v South Gloucestershire District Council, ex p Cheltenham Builders Ltd* [2004] JPL 976 at paras 70-71.

88. The Inspector accepted this argument concluding that it was supported by the judgment in *ex p Cheltenham Builders*, see paragraphs 74-84 of 2 March 2021 report.[19] The Inspector appears to have concluded that *ex p Cheltenham Builders* is authority for the proposition that if the landowner resists an application to register land as a TVG and that resistance is either successful or the applicant withdraws the application in response to such an objection, it necessarily follows that any subsequent application to register the land as a TVG will inevitably fail.

[18] See Council's objections 3/46-47 and 14/310-312 and School's objections 4/51-52 and 13/297.

[19] 34/440-442

89. Both the Council and the School's arguments and the Inspector's conclusion on this issue are misconceived. In particular:

i) Sullivan J's comments in *ex p Cheltenham Builders* are obiter;

ii) such obiter comments are inconsistent with subsequent case law including the Supreme Court's judgment in *ex p Lewis;*

iii) further and in the alternative, even if Sullivan J's obiter comments in *Cheltenham Builders* were correct in relation to the particular facts of that case, the present case is fundamentally different and the obiter comments do not apply.

90. In *ex p Cheltenham Builders* the Council registered the land in question and this was challenged by way of judicial review and an application pursuant to section 14 of the 1965 Act by the owners (Cheltenham Builders Ltd). Sullivan J concluded that the challenge succeeded on three grounds:

i) the Council had erred in law in its approach to the concept of "user" (paras 29-33);

ii) the procedure adopted by the Council was unfair because there was no oral hearing (paras 34-40);

iii) the Council erred in law in its approach the concept of "locality" (paras 41-48).

91. Sullivan J's conclusions on these three issues were more than sufficient to determine the claim. The comments relied upon by the Council and the School at paragraphs 70-71 of Sullivan J's judgment were not necessary for the judgment and thus must be treated with

caution. There were clearly obiter rather than part of the ratio. Sullivan J opined that, on the particular facts of the case, ie where the landowner's objection had led the initial application to be withdrawn, this was sufficient to "see off" the applicant's application on the basis that use of land in question after the withdrawal of the initial application was contentious.

92. The Inspector's decision on this issue assumes the correctness of the Sullivan J's judgment on this issue in *Cheltenham Builders*. However, Sullivan J's obiter comments on this issue was incorrect. They were doubted by Morgan J in *Betterment Properties v Dorset County Council* [2010] EWHC 30456 (Ch) at paragraph 139. In *Betterment* the land owner had also previously objected to an application, inter alia, on the grounds that use was not "as of right". The Council had considered the landowner's objections and concluded that the land should not be registered as a TVG. Morgan J concluded that the land owner's objection to a previous application and the subsequent refusal to register the land in question did not render subsequent use contentious:

> "The principal reason for this conclusion is that nothing changed on the ground in terms of the character or extent of the user. The October 1995 objection appears to have had no impact on the actual user. Further, the landowners did not take any physical steps to follow up their stance nor did they take any other steps to communicate the terms of the objection more widely." (see para 137)

93. The above points apply with equal, if not greater, force to the present land. Nothing changed on the ground in terms of the character or extent of the user. The landowner (ie the Council) did not take any physical steps to follow up their stance.

94. Similarly, in *R (Lewis) v Redcar and Cleveland BC* [2008] EWHC 1813 (Admin), there had been a previous application which the Council landowner had objected to including on the basis, inter alia, that use was not 'as of right'.[20] The Council had appointed an independent inspector who, in 2005, held a non-statutory inquiry and had concluded that the land should not be registered as a TVG. The Council accepted this recommendation.

[20] The factual background to the various applications is set out by Sullivan J in his first instance judgment: [2008] EWHC 1813 (Admin) paras 4-8.

A further application to register the land in question as a TVG was made in June 2007. The applicant in the second application had been one of those persons whose written evidence in support of registration had been considered by the inspector in the first application.[21] The applicant in the second application was clearly aware of the first application and the Council's objection to it. Notwithstanding this, the High Court, Court of Appeal and Supreme Court did not suggest that the landowner's successful objection to an earlier application somehow rendered any subsequent use contentious. Sullivan J who heard *Lewis* at first instance was the judge in *Cheltenham Builders* and indeed, the relevant passages from his judgment in *Cheltenham Builders* were quoted in his judgment in *Lewis*[22] but he did not reject the Claimant's application for judicial review on this basis.

95. The Supreme Court were clearly aware of the earlier unsuccessful application as it is referred to in the judgment[23] but nevertheless concluded that the land in question should be registered as a TVG as use during the relevant period (including the period after the first application was rejected) was 'as of right'. The Inspector's conclusion on this issue is fundamentally inconsistent with the Supreme Court's conclusion in *Lewis*. If the Supreme Court in *Lewis* were right to conclude that the land in question should be registered, the Council and School's arguments on this point, and the Inspector's conclusions on it in the March 2021 report, are wrong. It is simply not open to the Inspector (or the Council) to ignore the Supreme Court's judgment in *Lewis.* They are bound by it and it inevitably follows that this ground of objection fails.

96. The above analysis accords with the understanding of the Council and School at the relevant time. As the inspector is aware, section 15A Commons Act 2006, which came into force on in June 2013, enabled the Council as landowner to deposit a statement which would have the effect of bringing to an end any period by which use was "as of right". The Council and the School appear to have discussed the possibility of making such a

[21] See para 6 of Sullivan J's judgment in *Lewis*.

[22] See paras X.

[23] See eg Lord Walker JSC's judgment at paras 7-9. They will also have been aware of Sullivan J's obiter comments in *Cheltenham Builders*

statement. In the minutes of the School's Finance, Premises and General Purposes Committee dated 21 November 2016, it is stated:

> "Have put in a planning application, for fencing, following advice from the Barrister, as this will prevent a further TVG application…Are also looking at making a landowner statement, once the planning application is submitted."
> [C10/c535]

97. Further, on 3 August 2018, the School held a meeting with Council officers, the outcomes and actions which are recorded (apparently from the School's perspective) in notes at C14/c553. During this meeting the School informed the Council that its barristers had advised it to erect signs or fencing as soon as possible evidently in an attempt to bring an end to "as of right" use and reduce the risk of a further TVG application.

98. If the School and Council were of the view that their objection to TVG 1 was sufficient to render use not "as of right" there would, of course, be no need for such a statement and/or signs/fencing. The School and the Council continued to discuss the possibility of making such a statement, see notes of meeting between the Council and the School dated 21 September 2018 (C15/c555) whilst the School also put up (ineffective) signs. The contemporaneous evidence clearly supports the Applicants' case that the objections to TVG 1 were not sufficient to render any subsequent use of the Land as contentious and thus not "as of right". That was the (reasonable) understanding of local inhabitants and this understanding was shared by both the Council and the School.

<u>As of right 3: Implied Permission</u>

Introduction

99. The Council contended, in its objection to TVG 2, that use by local inhabitants during the relevant 20 year period was permissive.[24] However, by the time it put in its objection to TVG 3, the Council appears to have sensibly abandoned this argument.[25] By contrast, the School, in its objection to TVG 2 did not suggest that the any use by local inhabitants

[24] 3/47-48 (objections to TVG 2).

[25] 14/301-317.

was permissive.[26] However, in its objection to TVG 3, the School suggested that use was permissive after 8 January 2007 to the end of the qualifying period by virtue of section 507B Education Act 1996.[27] The fundamental internal inconsistencies between the arguments advanced, at various times, by the School and the Council and the inconsistency between the School's and Council's arguments strongly suggests that there is no arguable implied permission argument rendering use of the Land not "as of right" during the relevant period.

100. The Inspector addressed the implied permission argument at paragraphs 72-73 and 85-88. The Inspector concluded:

    i) use was not permissive between 1998-2012 (paras 85-88);

    ii) it was possible that use was permissive between 2012-2016 (paras 72-73).

Alleged permissive use between 1998-2012

101. The Inspector was right to conclude that there is no credible argument that use was permissive during this period. Firstly it is not open to the School and/or Council to advance this argument given the findings of the Inspector and the High Court in *Cotham School*. At paragraph 364-365 of his report, the Inspector stated:

> 'It seems to me that there are essentially two possibilities. The first is that the public were positively allowed by Bristol City Council to use the land. The land was held for educational use and this would no doubt have been viewed as its primary use of the land but it would also have been actually envisaged that the public would use it. On this basis it would have been envisaged the land would have functioned very much as an open recreation ground with it being used by schools as well as by clubs who would pay for use and by the public who would not. Given that no such actual permission has been discovered, it might be that the permission would be one implied from the circumstances. (*In R (Barkas) v*

[26] 4/50-56.

[27] 13/298-299

> *North Yorkshire Council,* Lord Carnwath envisaged that a permission might properly have been implied from the circumstances in *R (Beresford) v Sunderland City Council* where the land functioned as an extension to the public park next door)....
>
> What I think sounds against the first possibility is the *ad hoc* nature of access to the land and the absence of any signage suggesting that it was available for public use.'

102. Under Ground 4 of its judicial review challenge to the Council's decision in relation to TVG 1, the School contended that the local inhabitants' use was not as of right because permission had been given for such use. Sir Wyn Williams rejected this argument in clear terms, see paragraphs 76-87 of his judgment. The School (and Council) was a party to this judgment but did not appeal against the Court's findings on this issue. They are thus bound by them.

103. Whilst the relevant period (1998-2018) for this application is different to the previous application (1991-2011), this argument relates to the period up to 2012 and nothing relevant changed between 2011 and 2012 in terms of user of the Land.[28]

104. Contrary to arguments advanced by the School, section 507A and B of the Education Act 1996 do not render local inhabitants' use of land permissive. Gilbart J in *NHS Property Services v Surrey CC* [2016] 4 WLR 130 considered the impact of sections 507A and 507B Education Act 1996 and concluded that land held pursuant to such statutory provisions may be registrable. The Inspector, in rejecting arguments advanced by the School and the Council, analysed Gilbart J's judgment in this way, see paragraph 442 of his report (and there was no challenge to this conclusion in the subsequent judicial

[28] The lease was granted on 1 September 2011 so sections 507A and 507B ceased to apply from that date.

review). The Supreme Court in *Lancashire* endorsed Gilbart J's judgement in *NHS Property Services* (see paragraph 66). This argument is thus simply not open to the School.

105. As the Inspector rightly concluded, there is no reason why there cannot be co-existence between the local residents using the land for lawful sports and pastimes and the use by the School and others for sporting activity. In *R (Lewis) v Redcar and Cleveland Council (No 2)*, the Supreme Court concluded that such peaceful co-existence was possible between local residents using the land for lawful sports and pastimes (mainly walking with or without dogs) and the use of the land for golf. The fact that local inhabitants deferred to golfers who were playing golf did not render such use not "as of right". The deference by the local residents did not imply that such use was permissive. Similarly, the fact that local residents may have deferred to use on the Land in question for organized sports does not render such use permissive.

Alleged permissive use between 2012-2018

106. At paragraphs 72-73 of his March 2021 report, the Inspector suggests, without determining the issue, that local inhabitant's use of the land between 2012 and 2016 may have been permissive by virtue of the Council placing two waste bins on a public road and elsewhere outside of the Land and the installation, in 2016, of a play park on land adjacent to the Land and with access to it. It is notable that neither the School nor the Council have sought to advance any implied permission argument based on the waste bins and play park both located outside the Land in their various written objections to TVG 2 and TVG 3. Neither party has been shy to run multiple and often weak arguments

in this case: no doubt the reason why neither the School nor the Council advanced this argument was because they were of the view that this argument was hopeless. The School and Council's initial view that there was no basis for this argument is correct.

107. At the time that the two waste bins were installed and the play park constructed, the Council did not, in any meaningful sense, "own" the Land. As the Inspector noted at paragraph 54 of his March 2021 report, at this time the Land was "directly owned by an independent school which is not under a statutory duty to provide education." Between 2012-2018, the Council held a reversionary interest in the land which was subject to a 125 year lease. It did not have any powers (whether statutory or otherwise) to grant local inhabitants implied permission to use the Land. The Council during this time did not have any statutory duties in respect of the Land. As the Council notes at paragraph 30 of its June 2021 submissions, as reversioner under the lease, it "is entitled only to such rights over the Land as the lease reserves to it." It is common ground that the lease does not reserve the Council to regulate day to day use of the Land.

108. Neither local inhabitants nor the owner of the Land, knowing that the Council had no power to permit local residents to use the Land at the time (ie after 2011) would have thought, for one minute, that the Council's actions on different land somehow granted local inhabitants permission to use the Land. The actions said to potentially give rise to the implied permission are nowhere near the majority of entrances to the Land. If the Council were intending in 2012, or subsequently, to grant permission to local inhabitants to use the Land, one would expect to see the Council consulting, or at least notifying, the School and the University (who managed use of the Land via transfer of control agreements) that it intended to grant permission to local inhabitants to use the Land. Yet

there is absolutely no evidence that the Council thought that it was granting permission to local inhabitants to use the Land or that anyone, whether local inhabitants or the School viewed the Council's actions after 2011 as even hinting that local inhabitants had permission to use the Land. Indeed, there is evidence from the Council that it was of the view that it did not have the power to grant permission to local inhabitants to use the Land, see for example the Council's email of 31 August 2018 (C16/C556) where the Council stated "it was not in a position" to authorise a large-scale group event on the Land as "we do not have the primary legal interest." In such circumstances, any conclusion that use by local inhabitants post 2012 was with the implied permission of the Council would be at odds with the facts and the law and would be perverse.

<u>As of right 4: 24 July 2018 signs erected by the School</u>

109. On 24 July 2018, the School erected three signs on the Land replacing the obsolete Avon CC signs. This was the first time that School (or its predecessor school) took action to attempt to control the use of the Land notwithstanding that since 1987, the Governing Body of the relevant school whose premises the Land formed part, had the power to regulate such use. At no point in the previous 20 years had either Fairfield School or Cotham School/Academy taken any meaningful steps to either prohibit or permit use of the Land by local inhabitants. However, as the Inspector rightly noted at para 90 of his March 2021 report, the July 2018 signs are not relevant to Ms Welham's application (ie TVG 3) as the relevant period ends prior to the erection of these signs.

Conclusions

110. For the above reasons, all the elements of the section 15 test are met. In particular, use during the relevant 20 year period was "as of right" and there is no statutory incompatibility between registration of the Land as a TVG and the statutory purposes for which the Land was held at the date of the application. In such circumstances, the Inspector should recommend to the Council that it should register the Land as a town or village green.

Andrew Sharland KC

11 KBW

26 October 2022

Appendix 1

Relevant Education Law provisions

111. Section 42 Education (No 2) Act 1986 came into force from 1 September 1987. Section 42 is entitled "School premises" and provides:

> The articles of government for every county and maintained special school shall provide—
>
> (a) for the use of the school premises at all times other than during any school session, or break between sessions on the same day, to be under the control of the governing body;
>
> (b) for the governing body to exercise control subject to any direction given to them by the local education authority and in so doing to have regard to the desirability of the premises being made available (when not required by or in connection with the school) for use by members of the community served by the school.

112. Section 42 Education (No 2) Act 1986 was repealed and replaced by section 149 Education Act 1996 from 1 November 1996. Section 149 is entitled "county and maintained special schools: control of use of premises outside school hours". [29] It provides:

> (1) The articles of government for every county and maintained special school shall provide—
>
> (a) for the use of the school premises outside school hours to be under the control of the governing body except to the extent provided by any transfer of control agreement into which they may enter by virtue of paragraph (c);
>
> (b) for the governing body in exercising control of the use of the school premises outside school hours—
>
> (i) to comply with any directions given to them by the local education authority by virtue of this sub-paragraph; and
>
> (ii) to have regard to the desirability of the premises being made available for community use;

[29] A primary or secondary school which is maintained by a local education authority is a county school by virtue of section 31 of the Act.

(c) for the governing body to have power to enter into a transfer of control agreement if their purpose, or one of their purposes, in doing so is to promote community use of the school premises outside school hours; and

(d) for the governing body, where they enter into a transfer of control agreement, to secure so far as reasonably practicable that the controlling body exercises control in accordance with any directions given to the governing body by virtue of paragraph (b)(i).

….

(5) In this section—

"community use" means the use of school premises (when not required by or in connection with the school) by members of the local community;

113. Section 149 was repealed and replace by section 40 of the School Standards and Framework Act 1998 entitled "control of use of school premises by governing body" and Schedule 13 which came into effect on 1 September 1999. It remains in force.[30] Section 40 provides:

> Schedule 13 has effect in relation to the control by the governing body of a maintained school of the occupation and use of the school premises.

114. Schedule 13 is entitled "Control of school premises by governing bodies" and provides:

Community and community special schools: general[31]

[30] Although the School Standards and Framework Act 1998 (SSFA 1998): section 40 and Schedule 13 were due to be repealed and replaced by section 31 of the Education Act 2002, the repeals have not been commenced so the SSFA provisions remain in force.

[31] A school that was a county school under the Education Act 1996 becomes a community school under section 20 and schedule 2 of the School Standards and Framework Act 1998.

1(1) This paragraph applies to a community or community special school.

(2) The occupation and use of the premises of the school, both during and outside school hours, shall be under the control of the governing body, subject to—

(a) any directions given by the local education authority under sub-paragraph (3);

(b) any transfer of control agreement entered into by the governing body under paragraph 2; and

(c) any requirements of an enactment other than this Act or regulations made under it.

(3) The local education authority may give such directions as to the occupation and use of the premises of a community or community special school as they think fit.

(4) In exercising control of the occupation and use of the premises of the school outside school hours the governing body shall have regard to the desirability of those premises being made available for community use.

Transfer of control agreement in case of community or community special school

2(1) Subject to sub-paragraph (2), the governing body of a community or community special school may enter into a transfer of control agreement with any body or person if their purpose, or one of their purposes, in doing so is to promote community use of the whole or any part of the school premises.

(2) The governing body shall not enter into any transfer of control agreement which makes or includes provision for the use of the whole or any part of the school premises during school hours unless they have first obtained the local education authority's consent to the agreement in so far as it makes such provision.

…

9 In this Schedule—

"community use" means the use of school premises (when not required by or in connection with the school) by members of the local community;

ANNEX 1:

NOTE ON SIGNAGE AT STOKE LODGE

1. OVERVIEW

1. This document addresses the following matters:

    1) Overview;

    2) Statutory provisions on the control and use of school premises;

    3) The approach taken by the objectors during the relevant period up to 1 September 2011;

    4) The approach taken by Avon CC in the period up to 1 April 1996;

    5) The 2009 Bristol City Council sign;

    6) *Winterburn v Bennett* arguments;

    7) Position of the objectors from 1 September 2011 onwards.

2. Since 1 September 1987, control of, and decisions about, the use of school premises has been delegated to the governing bodies of maintained schools, subject only to any direction given to them by the local education authority. This is set out in section 42 of the Education (No. 2) Act 1986, subsequently section 149 of the Education Act 1996 and then section 40 of the School Standards and Framework Act 1998 (SSFA) (see extracts in item F1). Neither Avon County Council ("ACC") prior to 1 April 1996 nor Bristol City Council ("BCC") after 1 April 1996 as landowner ever made a direction in relation to use by local inhabitants for lawful sports and pastimes of Stoke Lodge Playing Fields. Thus, although both ACC and BCC had the legal authority to direct the School, inter alia, in relation to such ongoing informal use of the land at dates from 1 September 1987 onwards, neither used that power to prohibit (or permit) informal such use of the land. This failure is clear evidence that BCC in particular acquiesced to the local inhabitants' use of the land for lawful sports and pastimes. There is documentary evidence to support this (see for example item A1, Applicants' Bundle at A1 Briefing Note to Cabinet, April 2010) in which BCC acknowledges the legal position in

relation to the control of school premises and specifically refers to unfettered community access to Stoke Lodge Playing Fields).

3. BCC assumed legal responsibility for education and ownership of Stoke Lodge Playing Fields from 1 April 1996. The first annual report of the BCC Education Committee notes that from 1 April 1996 it was 'fully responsible for carrying out the duties and responsibilities of the council as a local education authority (LEA), in accordance with the law and council strategy' (paragraph 3 of item B24 – Applicants' Bundle B433). BCC would clearly have been aware of legal restrictions on its powers to control the use of school premises, and that relying on the mid-1980s ACC signs that remained on the site was not a valid means by which it could legally exercise any control over the use of the site. No direction was ever made in relation to the land.

4. The Inspector has suggested that there was no reason for considering that the attitude of the City Council post-1996 was any different from that of the former County Council (pre-96) and that it had not in fact altered its position from objection to acquiescence [67] (Amended CRA Bundle 426 at page 439). This assumes (a) that TVG1 reached a correct conclusion regarding the attitude of ACC (which, as is now clear from the evidence, it did not); and (b) that no other relevant factors exist to be considered – indeed, the Inspector has said that 'Nothing changed in the intervening period to 1998'. The latter statement is factually and legally incorrect, given the previous introduction of Local Management of Schools, changes to legislation, and other evidence relating to BCC's approach. Cotham School never took steps to erect any signage in relation to the use of the site, though it had the legal authority to do so. In fact it repeatedly acknowledged, in its Transfer of Control Agreements with the University of Bristol that 'the site is open, at present to the public and dogs'. The School's approach, like that of BCC, amounts to a "classic case of acquiescence."

4. Although ACC erected signs on the land in around 1983/4, that were in TVG1 considered to be prohibitory, informal use of the land continued unabated and ACC took no steps to control or discourage this use. If ACC considered that it was relying on the signs up to 1 September 1987 to prohibit use (which it did not – see below), it would have been aware thereafter that the signs were not a valid means of controlling use of the land. It must therefore be taken to be acquiescing in ongoing informal use of the land from that date at the latest.

5. In fact, if the ACC signs ever had any relevance as prohibitory signs in relation to informal recreation, they had already ceased to do so prior 1 September 1987, as shown by:

- witness evidence, newspaper reporting and ACC records demonstrating that despite the erection of signs in the early 1980s, ACC was aware of and acquiesced in informal community use of the land – this includes significant new evidence that was not made available to the TVG1 inquiry and which demonstrates that the meaning and effect of the ACC signs was misunderstood in TVG1;

- evidence of formal discussions regarding playing field sites generally, and SLPF specifically, in the years before the dissolution of ACC, showing that policy and practice in relation to playing field sites generally did not suggest that informal use was prohibited;

- evidence of ACC's approach to the letting of educational premises; its recognition of the change introduced by the Education (No.2) Act 1986 in relation to the control of premises, and its use of its direction-making power prior to the introduction of Local Management of Schools in April 1990. The minutes of County of Avon Education Committee dated 23 January 1990 (item F4) record that in preparation for the introduction of LMS, the Education Committee made a direction in terms that, subject to maintaining provision for adult education and other matters on a continuing basis, 'Governing Bodies would be free to determine the use to be made of their premises'.

The above evidence, as discussed further below, proves that from 1 September 1987, ACC did not regard the signs at Stoke Lodge Playing Field as having any ongoing effectiveness or legal validity. Its position was that the control of premises was, in relation to the regulation of informal public access, a matter for the relevant governing body. The relevant governing body took no decision to permit or prohibit use of the land by local inhabitants for lawful sports and pastimes.

6. The 2009 BCC sign is of no relevance since the evidence, properly examined (including section 40 SSFA), indicates that it was never the intention of BCC that the sign that was erected should refer to the playing fields (nor could it have been, under the SSFA provisions). It can only be properly understood as referring to the grounds of Stoke Lodge House.

7. If, contrary to the above, some or all of the signs are considered to have any relevance to these applications, the principle in *Winterburn v Bennett* is not applicable. The principle that a landowner may defeat the accrual of TVG rights by the erection of 'sufficient and suitably placed signs' has not been tested in a context where the landowner (the Council) seeks to rely on a limited number of signs erected by a previous (now defunct) landowner, outside the scope

of the current landowner's powers under legislation and having taken no relevant action of its own, in the context of a site of this size with multiple formal and informal entry points. Further, it is not possible to reach a conclusion that the signs are sufficient in number, appropriately located and 'sufficiently clearly worded' (in the context of the change of landowner and changes to legislation).

2. STATUTORY PROVISIONS ON THE CONTROL AND USE OF SCHOOL PREMISES

2.1 The statutory framework for Local Management of Schools (LMS) was set out in the Education Reform Act 1988. LMS required schools to be responsible for their own budgets. Local Education Authorities were required to draw up schemes to delegate budgets to school governors, the aim being to allow local schools to be more responsive to the needs of their communities. The formula compiled by the LEA had to be approved by the Secretary of State. Some areas of spending remained the responsibility of the LEA; others were delegated to schools under the scheme adopted by each LEA with the intention that the freedom associated with delegated budgets would lead to a more astute use of resources.

2.2 From 1 September 1987 it was a statutory requirement for the articles of government of a county school to include a provision stating that the control of school premises was under the control of the governing body; Cotham School's articles of government (and those of Fairfield High School before it) must be taken to have been correctly drawn in accordance with the 1986 Act and successor legislation. Cotham School's governing body includes several individuals (including the current Chair of Governors) who have been governors for over 20 years and must be taken to have been aware of this provision throughout the relevant period. It is clear that for action to have been taken restricting use of the application land (or granting permission to use it), communication would have had to take place between the relevant school and the Council (having regard to the desirability of the premises being made available for community use, as per the legislation) [1]. It has never been argued by either the School or the Council that any such consultation, decision or action took place.

2.3 Department for Education and Science circular 7/88[2] stated: 'Section 42 of the Education Act 1986 provided for the governing body of a county school to have control over the use of the school's premises outside school hours, subject to directions by the LEA and having regard to the desirability

[1] By way of context, Hansard for 10 May 1993 records the following exchange during the House of Lords debate on these provisions (vol 545 cc1061-172 at 1075)

Lord Dean of Beswick: Let us suppose that [a county school] had a local authority which took a meaningful policy decision by a substantial majority in the council chamber that all the county schools under its control, as a matter of policy, had to share their school facilities with the community in which they were sited because there were no other facilities there. What would the situation be?

Lord Henley (for the government): Perhaps we are further apart than I thought. It is a matter for the school and not for the LEA. No doubt the LEA might encourage the schools as and where possible, and certainly, going the other way, we would expect, as I tried to make clear, county schools to consult their LEA before they entered into any agreements, because those agreements might affect the LEA, affecting the use of school premises during school hours. In the case of county schools, the LEA will generally be the owners of the premises. Again I stress that we shall certainly draw that out in guidance once the Bill has received Royal Assent.'

[2] Extract at item B20 (Applicants' Bundle B394), taken from County of Avon Education Committee minutes dated 13 February 1989; circular 7/88 was consolidated into circular 2/94 – copy also included at B20 (Applicants' Bundle B394 at page B395ff).

of use by the local community. Nothing in schemes of local management should restrict LEAs' freedom to issue such direction within the framework of the 1986 Act'. Note that this language is also reflected in the Council's 2010 Briefing Note (item A1, Applicants' Bundle A1).

2.4 In the context of these applications, the significance of LMS is that schools took on financial and legal responsibility for maintaining playing fields (from April 1990) and had express powers to control the use of their premises. They had freedom to use their funding to hire other facilities instead of using their designated playing fields (as Cotham School in fact did). In some cases, the changes resulted in schools declaring areas of their playing fields surplus to requirements in order to reduce ongoing costs (while keeping funding based on pupil numbers etc at the same level).

2.5 Avon County Council implemented LMS in April 1990. This is reflected elsewhere, for example, in the Hoopers Farm TVG determination[3], in which at paragraph 5.23 the Headteacher of the relevant school referred to signs being replaced '(at least following the introduction of LMS)' and makes clear that the school managed community lettings. At paragraph 5.38 the Deputy Head states that 'with the introduction of LMS, the school was handed responsibility for the land, both as to school use and non-school use'.[4] This change is also reflected in ACC records:

(a) minutes of the Schools Sub-Committee dated 25 January 1983 (approximately around the time that the ACC signs are thought to have been erected) note at paragraph 4 that 'since 1979, final delegated authority for the lettings of premises rests with the Education Committee and not with Head Teachers or Governing Bodies' – see item F3. This explains the reference on the ACC signs to directing requests for use to the Director of Education; and

(b) recognising the impact of the forthcoming introduction of LMS, on 23 January 1990 the ACC Education Committee agreed to use its direction-making power to protect the existing use of educational property by, for example, the Adult Education Service, while recognising that 'it is the Governing Body which has responsibility for determining the patterns of use of school premises' (see paragraph 5.9.2 of item F4).

2.6 The wording of the directive approved by the Education Committee on 23 January 1990 (see item F4) in preparation for the introduction of LMS covers the continuation of existing regular lettings and the establishment by Governing Bodies of a sub-committee responsible for encouraging the wider community use of school premises. It then provides that 'Except as outlined in this directive, Governing Bodies would be free to determine the use to be made of their premises'. This exercise of direction-making power by ACC makes clear that it was in the hands of the governing body of the

[3] https://www.ftbchambers.co.uk/sites/default/files/Hoopers%20Playing%20Farm%202008.pdf
[4] As an aside, the TVG determination in relation to Packer's Field records that the predecessor school to the City Academy erected its own signage at Packer's Field in 1994.

school with designated use of Stoke Lodge Playing Fields to determine its position in relation to ongoing informal community use. This was explicitly not a matter about which ACC chose to exercise control; it could have covered informal community use in its direction but did not do so.

2.7 Relevant provisions of the School Standards and Framework Act 1998 (the SSFA) and its predecessor provisions from the Education Act 1996 and the Education (No. 2) Act 1986, are set out in item F1. The governing bodies of maintained schools have had control over the use of school premises effectively from April 1990 under LMS and under their articles (subject to any direction from the local education authority) from at least 1 September 1987[5]. From 1 September 1999 onwards, the SSFA has provided express statutory power for the governing bodies of maintained schools to control the occupation and use of their premises both during and outside school hours, subject to any directions given by the local education authority. Paragraph 1(4) of Schedule 13 of the SSFA further provides that 'In exercising control of the occupation and use of the premises of the school outside school hours the governing body shall have regard to the desirability of those premises being made available for community use.'

2.8 Department for Education guidance on the SSFA provisions is now set out in the Governance Handbook (see extract at item F2). This states at paragraph 305ff that:

> 'The governing body of maintained schools are given day to day control over what happens in school buildings and grounds both inside and outside school hours through law and are responsible for deciding how school premises are used… All maintained schools must also liaise closely with their [Local Authority] as legislation also gives the LA some powers of direction over the use of school premises. Exceptions to the governing body's ability to control the use of school premises may exist: … where a Transfer of Control Agreement (TOCA) has been made… [or] where the LA issues directions on how school premises should be used.'

2.9 At paragraph 307 the guidance notes that, by contrast, 'The academy trust board do not have statutory control of their premises and must refer to the terms on which they occupy their site to determine their powers around community use of their premises and what happens in them on a day to day basis.' This is relevant to the period on and after 1 September 2011.

2.10 Under paragraph 2 of Schedule 13 SSFA, schools may enter into a transfer of control agreement with another entity 'if their purpose, or one of their purposes, in doing so is to promote community use of the whole or any part of the school premises'. 'Community use' is defined in paragraph 9 of the schedule as 'the use of school premises (when not required by or in connection with the school) by members of the local community'. Cotham School entered into Transfer of Control Agreements on an

[5] Prior to this, the articles of government of maintained schools typically included a similar provision, and this became a statutory requirement under the Education (No.2) Act 1986 with effect from 1 September 1987 (again subject to any direction made by the local education authority).

annual basis from at least February 2004 onwards. Examples are at items A18, A30, A31 and A12 (Applicants' Bundle A248, A298, A300 and A219 respectively). Each of these agreements records in the schedule of services and service levels that 'the site is open, at present, to the public and dogs' (note that the language indicates that this is not a new situation and implies both knowledge of informal use and acquiescence in that ongoing use).

2.11 In the context of these TVG applications, the introduction of LMS from 1 April 1990 is significant because:

(a) Control of the land was explicitly devolved to the school using the land (Fairfield up to 2000, then Cotham). Education land around the city, including SLPF, was transferred from ACC's ownership to BCC's ownership from 1 April 1996 and BCC took on, for the first time in more than two decades, responsibility for education services. BCC produced a paper entitled 'Achievement in Bristol: the Development Plan for the new Education Authority'. In section 11 this notes a commitment to ensuring that services and schools 'look outwards to the communities they serve… Schools in particular represent a substantial investment for the community and we must continue to explore ways of making them more accessible, particularly as continuing gateways to lifelong learning'. BCC's approach was to encourage shared use of school playing fields, but the decisions about management of the land rested with the relevant school under LMS subject to any formal direction by BCC. This approach is also apparent from the 2010 Cabinet Briefing Note that will be commented on below.

(b) Budgetary controls were split between local authorities and schools. Education Committee minutes dated 17 December 1998, noting a change of arrangements so that Cotham School would use Stoke Lodge from September 2000, also record an increase in the allocation of funding to Cotham School for the purposes of maintenance of the playing fields (see item D4, Applicants' Bundle D624 at page D630). Decisions regarding maintenance, access and signage were devolved to schools, not retained by the local authority. This was acknowledged by Cotham School in a letter to the Inspector in TVG1 (item B26, Applicants' Bundle B444 at page 445), stating that 'with hindsight, Cotham School should have put fresh signs up when we took the site over' - but it did not in fact do so.

3. APPROACH TAKEN BY THE OBJECTORS DURING THE RELEVANT PERIOD UP TO 1 SEPTEMBER 2011

3.1 At no time has the Council issued a direction under the SSFA (or its predecessor provisions) to prohibit or permit use by local inhabitants of Stoke Lodge Playing Fields. Even if the Council were to argue that it 'inherited' the direction made by ACC in January 1990, decisions about any regulation of informal use of school premises were left to school governing bodies under the terms of that direction. In fact, it is implicit in the 2010 Briefing Note at item A1 (Applicants' Bundle A1) that no previous

direction has been made in relation to Stoke Lodge Playing Fields or about informal public access to playing fields in general. At no point in this period did Cotham School erect signs or take other action to regulate use of the fields either during or outside school hours. It explicitly acknowledged in the TVG1 process that it had taken no such action. Both Objectors were clearly aware of ongoing informal use and can be assumed to have been aware of the statutory provisions governing this issue (not least because the School repeatedly entered into Transfer of Control Agreements under the SSFA provisions).

3.2 The Transfer of Control Agreement between Cotham School and the University of Bristol at item A18 (Applicants' Bundle A248) (unsigned but dated 1 February 04) provides for the maintenance of the land by the University for the second half of the academic year 2003/04. This states in the schedule 'Athletics - pits etc. will be kept as clean as possible, considering the site is open, at present, to the public and dogs'. A further Transfer of Control Agreement dated 1 August 2005 (item A30, Applicants' Bundle A298) contains the same wording.

3.3 Transfer of Control Agreements between Cotham School and the University of Bristol dated 11 June 2008 (item A31, Applicants' Bundle A300) and 1 September 2010 (item A12, Applicants' Bundle A219) state in the schedule 'Athletics - pits etc. will be kept as clean as possible, considering the site is open, at present, to the public and dogs'.

3.4 The report card put into evidence at exhibit 27 of the BCC evidence file for TVG1 (see item B30, Applicants' Bundle B463) refers to an agreement dated 1 August 2009 between Cotham School and the University of Bristol which is assumed to be in the same terms - i.e. referring to the land being open to the public and dogs, only two months after the 2009 sign was erected. This agreement is also acknowledged at paragraph 2.40 of the Cabinet report at item A1 (Applicants' Bundle A1), immediately prior to a reference to the site allowing unfettered community access. Clearly, neither officers nor the School considered that there was any restriction regarding access to the site as a result of the 2009 or any earlier sign.

3.5 The Briefing Note to Cabinet in April 2010 (item A1, Applicants' Bundle A1) sets out the legal position under the SSFA together with the Council's position and understanding as at April 2010. It details several aspects on which the Council had obtained specific advice from Counsel. It makes clear that the Council was aware of ongoing public use of SLPF. It states that:

- the use of school premises within a community [maintained] school is under the control of the governing body and subject to any directions given by the Local Education Authority [2.10] (A3)

- when a local authority is considering an open access policy to school playing fields it is Counsel's opinion that the Authority should seek to persuade the governing body that they themselves would willingly adopt a policy of open access [2.13 (A4) and App B 2 (A13)]

- Post-*Redcar*, revocable permission did not provide a guarantee against TVG registration and 'landowners now need to proactively take steps to keep people [off] their land to prevent future registration' [2.17, 2.18 (A4-A5) and referred to in App D 5 (A16) as 'active steps to exclude recreational trespassers']

- SLPF 'is currently unfenced and allows unfettered community access' [2.41] (A7) - note the present tense.

3.6 At no time in the relevant period up to 1 September 2011 did the Council make a formal direction in relation to community use of SLPF. It must therefore be taken as having expressed no position in relation to ongoing informal use; in fact the Briefing Note to Cabinet makes clear that the Council's position (on advice from Counsel) was to support shared use and to encourage governing bodies to do the same.

3.7 Under Bristol City Council's adopted scheme for sharing funding under Local Management of Schools, external notices and signs were the responsibility of the relevant school, not the Council. An extract from the adopted scheme is at item B25 (Applicants' Bundle B437)[6] and records on page 6 (B442) that 'sign boards, notices, name plates, flag poles and other external joinery fixtures' are for the account of the school (note that this mirrors the division in Circular 2/94 referred to above). Thus if Fairfield Grammar School (as the incumbent school at Stoke Lodge Playing Fields in the 1990s) or Cotham School (from 1 September 2000) had thought that the ACC signs were correct and effective but needed to be updated (or incorrect or ineffective and needed to be replaced), the responsibility for commissioning, and cost of erecting, replacement signs would have fallen to their account, not the Council's.

3.8 At no time in the relevant period up to 1 September 2011 did Cotham School take any action to indicate that ongoing informal use was either prohibited or permitted. Indeed, it has never argued that it did so. It was the responsibility of the School to erect signage if it wished to do so; neither Fairfield Grammar School or Cotham School took any such action in relation to SLPF. The School itself has admitted that it was well aware of the importance and relevance of signage but failed to take any such steps: on 23 July 2013 the School (via headteacher Malcolm Willis and then Vice-Chair of Governors Sandra Fryer) wrote to the Inspector (item B26, Applicants' Bundle B444 at page B445) in response to his 25 May 2013 report stating that:

[6] The extract is marked as a draft; BCC has informed us in response to an FOI request that it no longer holds the final version of the LMS scheme for either 1 April 1996 onwards or for 2008/9.

'There has been much conversation about signs. With hindsight Cotham School should have put fresh signs up when we took the site over and certainly when we became an Academy.'

3.9 The School thus accept that it was their responsibility to put up appropriate signage. Despite this, it was not until July 2018 that the School took any (albeit ineffective) action to erect signs in an attempt to regulate ongoing 'as of right' use.

3.10 In the letter referred to above (item B26, Applicants' Bundle B444) the School went on to say 'but there were old signs and we relied on those'. As shown by the evidence listed above, this is an ex post facto justification which does not accord with the contemporaneous evidence of the School's acquiescence to informal use, as evidenced, inter alia, by the Transfer of Control Agreements it entered into with the University. In fact, Ms Fryer later went on to contradict this statement in her evidence to the TVG1 public inquiry. At paragraph 279 of the TVG1 Inspector's Report she is recorded as accepting that 'in the past the use of the playing fields had been satisfactory from the School's point of view… and this perhaps explained why signs were not put up at an earlier period'. In other words, she recognised that school use had coexisted peacefully with informal community use from at least 1 September 2000 and that the governing body had not therefore seen any need to implement controls e.g. via signage. Ms Fryer's written statement to the TVG1 inquiry is at item F17 and confirms that the lease was entered into on the basis of the land being used as school playing fields 'in an ongoing manner' i.e. no change in day to day use was suggested by the School to have been written into the lease on academy conversion.

3.11 Ms Fryer then went on at paragraph 280 to state that 'Cotham School when it started using the land was using an existing facility for the signage of which Bristol City Council was responsible'. The Applicants note that, as a long-term governor of the School, as Vice-Chair and later Chair of the School's Governing Body, and as Chair of its Finance, Premises and General Purposes Committee, Ms Fryer was perhaps uniquely well-placed to know that the Council was not in fact responsible for the control of the playing fields or for erecting signs on the fields – these matters were the responsibility of the School and it had seen no need to take any action on the matter (because, as Ms Fryer stated in the previous paragraph, the situation had been satisfactory from the School's point of view at this time). The School, like other Bristol schools, had been subject to LMS since April 1990 (an extract from the history section of the School website confirming this is at item F5). It is very troubling that neither the School nor the Council thought it appropriate to draw the correct legal position to the Inspector's attention during the TVG1 process and public inquiry. This failure led the Inspector into error.

3.12 The statutory provisions show that the ACC signs had no legal effect on or after 1 September 1987, and certainly during the relevant period for this application. However, as questions have been raised during this process as to (a) the potential ongoing effectiveness of the ACC signs during the application

period and (b) whether ACC actually intended the signs to be prohibitory when erected, the next section will address that issue. If the Inspector agrees with the Applicants that he must be guided by the statutory provisions and the evidence relating to the period for this application, then section 4 will not be relevant to his considerations, but it is included for completeness.

4. THE APPROACH OF AVON COUNTY COUNCIL IN THE PERIOD UP TO 1 APRIL 1996

4.1 At the start of the period relevant to these applications, there were signs on the application land regarding access to Stoke Lodge that were erected by the previous landowner, Avon County Council. The signs stood at the West Dene entrance (behind the pavilion, and only visible to someone entering at that point) and near to the corner with Parrys Lane, facing users entering via an informal pedestrian entrance through a gap in the stone wall from Ebenezer Lane. The Inspector accepted in TVG1 (see e.g. paragraphs 334 and 366 of the TVG1 Inspector's Report) that until around 2007 a third identical sign had existed at the boundary between the car park and the playing fields, to the north-west of the house[7]. He concluded that in the mid-80s 'the reasonable landowner would have considered that he had done enough to render use contentious i.e. by posting notices at what he perceived to be the principal entrances to the site', even though the evidence suggested that not all users would have seen or 'registered' the signs; and that many individuals used routes that would not go past any of the signs.

4.2 The ACC signs stated (see photo at item B1A, Applicants' Bundle B304):

> MEMBERS OF THE PUBLIC ARE WARNED
> NOT TO TRESPASS ON THIS PLAYING FIELD
> In particular the exercising of dogs or horses, flying model aircraft parking vehicles or the use of motorcycles and the carrying on of any other activity which causes or permits nuisance or disturbance to the annoyance of persons lawfully using the playing field will render the offender liable to prosecution for an offence under section 40 of the Local Government (Miscellaneous Provisions) Act 1982.
> Requests for authorised use should be made to the Director of Education
> COUNTY OF AVON

4.3 That is, the signs set out a warning not to trespass, some commentary about activities that might, if they amounted to 'nuisance or disturbance' fall within the scope of section 40 of the Local Government Miscellaneous Provisions) Act 1982; and a direction as to where to send requests for authorised use of the playing fields (such as hiring pitches for club sports).

4.4 Paragraph 233 of the Inspector's report suggests that the signs were erected in 1985/6. In fact, we now know from archive records that they were erected somewhat earlier than this, between September 1982

[7] At paragraph 54 of the JR decision this removal is recorded as taking place in 1996/7. The TVG1 applicant, David Mayer, was 'agnostic' about the existence of this sign at any time, but the Inspector accepted that it had existed.

and September 1984. Although Avon County Council ceased to exist from 1 April 1996, and the 20-year period relevant to these applications does not begin until mid-1998, the existence of the signs has been raised as an issue in these applications partly due to the following comment by the Inspector in paragraph 390 of his TVG1 Report:

> 'although the fact that a sign says "Avon County Council" rather than "Bristol City Council" does not mean that the day after Bristol City Council takes over from Avon County Council the notice ceases to have any effect, someone might well wonder, say, ten years after Avon County Council ceased to exist whether any particular sign that it had put up had continuing effect. These may be interesting points but it seems to me that they do not fall for determination in the present case.'

4.5 We note that it does not appear that the Inspector's attention was ever directed to the provisions of the Education (No.2) Act 1986 and subsequent legislation, or the relevance of Local Management of Schools in relation to the ACC signs. As above, section 42 of the Education (No.2) Act 1986 took effect from 1 September 1987 and Local Management of Schools was adopted in Bristol from 1 April 1990. The commentary below about TVG1 should be considered in that context.

4.6 The Inspector recommended that the TVG1 application for registration be refused on the basis that the ACC signs were effective at least until 1 April 1996, so that use of the land was not 'as of right' throughout the 20-year period relevant to that application. The approved minutes of the PROWG Committee record that when the matter was considered by BCC Councillors on 12 December 2016, 'a wide ranging discussion occurred about the significance of those signs. The minutes record that in that discussion, 'Members agreed that in 1985 Avon County Council signage had made the position sufficiently clear that use of the site was contentious and not as of right' but 'Some members considered that this had changed over time and due to the size of the site, circa 22 acres, there was not sufficient number or sufficiently clear … signage to affect public perception that use of the site was contentious and not 'as of right' and this had been exacerbated by Avon County Council ceasing to exist.' (see item B2, Applicants' Bundle B306).

4.7 The High Court's ruling in the subsequent judicial review notes that a majority of BCC Councillors considered that the position set out in the signs erected by Avon CC in the mid-80s had changed over time (JR paragraphs 30-32); however due to defects in recording and giving reasons for the decision to register the land, the December 2016 decision to register the land as a TVG was overturned.

4.8 New evidence from research in the Council's archives that was not made available to the Inspector in TVG1 demonstrates that the Inspector's conclusion is likely to have been factually incorrect as to ACC's intention and as to the effect of the signs when erected, meaning that his conclusion as to use being not 'as of right' between 1991 and 1996 was flawed due to the failure to disclose the applicable

statutory context and other evidence. The combination of these factors is likely to have misled the Inspector as to the effect of the signs during this period. This was the sole basis on which the Inspector recommended rejection of the TVG1 application.

Avon CC's approach to public use of the land

4.9 Addressing the context for the ACC signs in his TVG1 report, the Inspector said:

> '364. …It seems to me that there are essentially two possibilities. The first is that the public were positively allowed by Bristol City Council to use the land. The land was held for educational use and this would no doubt have been viewed as its primary use of the land but it would also have been actually envisaged that the public would use it. On this basis it would have been envisaged the land would have functioned very much as an open recreation ground with it being used by schools as well as by clubs who would pay for use and by the public who would not. Given that no such actual permission has been discovered, it might be that the permission would be one implied from the circumstances. (In *R (Barkas) v North Yorkshire Council*, Lord Carnwath envisaged that a permission might properly have been implied from the circumstances in *R (Beresford) v Sunderland City Council* where the land functioned as an extension to the public park next door).The second is that the use of the land by local people was tolerated or acquiesced in but never permitted so that members of the public would have been "tolerated trespassers" to use Lord Walker's phrase in *Beresford*.
>
> 365. What I think sounds against the first possibility is the ad hoc nature of access to the land and the absence of any signage suggesting that it was available for public use . It seems likely that the gates on Shirehampton Road would have been locked and, in any event, they were not directly providing access to the land, but to Stoke Lodge. The gates at Access Point [2] look to have been primarily gates to a service yard. Access Points [4], [5] and [6] while going back a long time, look to have been made by made by the use rather than being provided by the Council. Access Point [7], whenever it was made, is a way in over a decaying wall. Access Point [8] was accessed through the service yard. Access Point [9] is on any view a gap in the wall and not a "proper" access. Access Point [10] is just a convenient place where people can easily get over the wall. I accept that Access Point [3] may have been open and rendered the site freely accessible but it is the only "proper" entrance out of ten. Accordingly I think that the public were trespassers at this time, although some may have believed that they were permitted or had some entitlement to go on the land.
>
> 366. This then provides the context for the erection of the Avon County Council signs, some time in the 1980s'.

4.10 Evidence was provided to the TVG1 inquiry suggesting (anecdotally) that signs were erected in playing fields across Bristol in the 1980s in an effort to mitigate anti-social behaviour including use of motorbikes on playing fields and also problems caused by dog mess. The signs were not specific to Stoke Lodge Playing Fields (for example, identical signs are referred to in the Winterbourne Academy/Hoopers Playing Field TVG case)[8].

4.11 At paragraph 369 of the TVG1 report, the Inspector considers the 'intrinsic ambiguity' in the wording of the ACC signs and concludes that they were intended to indicate that five activities (the 'exercising of dogs or horses, flying model aeroplanes, parking vehicles or the use of motorcycles' plus causing or permitting nuisance or disturbance, were contentious activities. He relied on evidence provided by Bob Hoskins, Landscape Manager in the BCC Parks Team, in concluding that 'County-wide, the County was taking action in respect of general trespass in respect of educational premises; in the context of the site with which I am concerned it was confirming the pre-existing situation and not for [the] first time granting a limited consent' [paragraph 372].

4.12 New evidence provides a more reliable documentary record of ACCs approach. A meeting of the ACC Joint Ad Hoc Sub-Committee on Community Use of County Council Premises dated 17 September 1982 (item B3, Applicants' Bundle B312 on page B313) records that:

> 'The Chairman said an agreement on a common approach was needed throughout the County so that it was clear to individuals through which channels to approach for use of facilities. The Director of Education stated that District Councils had a statutory responsibility to make recreational provision for their own areas.' (emphasis added)

4.13 At item (3) (B314) the committee went on to discuss the use of hard play areas and playing fields:

> 'The Director of Education said that he estimated that up to half the County Council's playing fields were used by the public on an informal basis. In addition there were organised lettings for hockey, rugby, football, cricket. He said adult and youth organisations caused few problems but it was considered that the informal use should be more controlled. He aimed to encourage adults to use facilities, who would in turn encourage use by children.
>
> Difficulties arose with letting hard play areas which, especially in the older schools, were often located directly adjacent to buildings. In these situations, problems such as break-ins, theft, vandalism and fires were a problem. However, little vandalism occurred on playing fields…
>
> The Chairman said that there were a number of playing fields which were not being used to their full extent and suggested that notices could be published locally to improve and

[8] See https://www.ftbchambers.co.uk/sites/default/files/Hoopers%20Playing%20Farm%202008.pdf at paragraph 3.22.

encourage their use. There was an impression amongst the public that informal use of playing fields was a right and in some areas, fencing of these areas had been abandoned due to this, which in turn, created the problem of nuisance for home-owners overlooking these fields.

In answer to a Member, the Director of Education said that discussion with colleagues at District level, who were responsible for pitches and parks, had confirmed that the general public respected fenced off areas and pitches which had been freshly seeded. He agreed that the adoption of this technique could protect overuse of parks and fields by casual users.

The Chairman felt that if the public considered they had official entitlement to use facilities, albeit on a casual level, they were more likely to protect those facilities themselves than if they were officially denied all rights of access. A typical example of this was the St Pauls sports facilities, which encouraged a degree of local pride.

It was agreed that where access to facilities was solely through school buildings, the possibility of opening up new accessways directly into the grounds for easy public use could be investigated.' (emphasis added)

4.14 It is also clear from these minutes that ACC had made arrangements for limited permissive use in relation to some playing fields – see the discussion at 3(2) (B313-314) on Ashton Gate School, Cherry Gardens School Warmley and South Street School Bristol. Clearly the Council's approach was site-specific.

4.15 The paper supporting the above discussion (also item B3, Applicants' Bundle B312 at pages B317ff), written by ACC's Director of Education, states that:

'The majority of the Authority's larger playing fields are used informally by members of the public, although the extent of use varies from site to site according to local conditions. This informal use of playing fields has increased rapidly over the past few years to a point where public use is now customary and readily accepted by the local community and the Governing Bodies. Elsewhere the availability of playing fields and hard play areas varies from the total exclusion of the public to a completely open plan approach whereby all the playgrounds and playing fields are used by the community without question. It is evident that the availability of education facilities depends on the location of each establishment, the site conditions and the attitude of the Governing Body and Head Teacher. Some playing fields are now so well used at weekends that it is no longer possible or worthwhile to maintain security fencing.' [4.2] (B319)

'The Authority, in recognition of increased public demands for facilities, has for some time tacitly accepted that its playing fields in particular can be utilised by the local community.

However, this approach has to be tempered with the amount of vandalism and misuse of property which can occur, the problem is non-existent in some areas and very prevalent in others... The numbers of complaints received from schools and parents in relation to the fouling of fields by dogs has increased dramatically over the past years.' [4.3, emphasis added (B319)].

'There is little doubt that the present 'informal' use of fields will continue to increase and the point will be reached when difficulties will occur, unless there is a more positive and defined Authority Policy on the use of external facilities. Some fields are so well used and the community involvement has existed for many years. However, there are instances where public use has been actively discouraged and where, with a little imagination, reasonable access could be provided, if only on a trial basis.' [5.1 (B319)]

4.16 At paragraph 5.3(c) of this report (B320-321), a recommendation is made (subsequently accepted by the Joint Ad Hoc sub-committee on community use of County Council premises) that:

'in some instances it would be a fairly straightforward and relatively inexpensive proposition to install gates, stiles and provide additional fencing to facilitate public access. <u>In other cases the removal of fencing would be required, especially in those instances where the more determined members of the public are unofficially using playing fields on a large scale</u>.' (emphasis added)

It is notable that the Council's approach is <u>not</u> to prevent ongoing casual public access – either by the removal or installation of fencing, as appropriate in a particular location. The Director of Education goes on to state that 'The Authority needs to recognise the amount of informal use which now exists in many areas by the creation of a more positive attitude to public use. Although great care has to be taken to avoid an upsurge in misuse and vandalism with its attendant cost implications, there does seem to be scope for a gradual, phased programme of increased public access which would form part of a policy statement on access to facilities. As there are over seven hundred different Education and Community Leisure establishments, such a policy would need to take into account the specific application of a generalised policy.' We have not found any evidence that such a policy was developed or published; however, we note that the School's Sub-Committee minutes of 25 January 1983 (item F3) record that in this period, the final delegated authority for the lettings of premises rested with the Education Committee and not with the Head Teachers or Governing Bodies (see paragraph 4). Although these minutes concern the ACC lettings policy rather than informal community use, one of the listed objectives is 'an extension of the community use of premises and playing fields' – perhaps, for example, by using signs to indicate to potential hirers how they could arrange to book pitches (see the comment from the Chair of the Education Committee in item B3 (Applicants' Bundle B312 at page B315) that 'there were a number of playing fields which were not being used to their full extent and…

notices could be published locally to improve and encourage their use'). This would help to explain the context for the erection of the signs by a council that also recorded itself as 'tacitly accepting' informal use of playing fields.

4.17 For further context, the following evidence is also included:

(a) Minutes of the County of Avon Community Leisure Committee dated 5 May 1982 (see item B4, Applicants' Bundle B322) in which the Committee visited various sites, including Stoke Lodge: 'The proposed site for the replacement [Stoke Bishop] Youth Club in the old walled garden of Stoke Lodge was viewed. The Director of Education outlined the proposed development and drew attention to the surrounding playing fields which he hoped would be used more by young people in the area once the club had been established.' This development did not in fact take place, but the minutes show the approach of the Director of Education to use of the playing fields.

(b) Minutes of the County of Avon Education Committee dated 7 September 1982 record the fact that section 40 of the Local Government (Miscellaneous Provisions) Act 1982 would come into force a few days later, widening ACC's powers 'quite significantly in cases of minor nuisance and disturbance on education premises' (see item B5, Applicants' Bundle B324). The minute cross-refers to a report from the Director of Administration and County Solicitor (appendix L in B5, B330ff) which describes the new legislation at section 10. The report compares section 40 to pre-existing powers under local bye-laws – it appears that the introduction of section 40 was viewed as a continuation and widening of ongoing powers to control disorderly conduct on education premises.

4.18 It does not appear that the Education Committee took any immediate action in response to either the introduction of section 40 (via erection of signage) or to the report of the Director of Education on 'Multi-use of buildings/hard play areas and playing fields usage'. Minutes of a meeting of the Education Committee on 5 October 1982 (see item B6, Applicants' Bundle B338) simply note that the minutes of the Joint Ad Hoc Sub-Committee were 'received for information'. As expressly stated in the 17 September 1982 report by the Director of Education (see paragraph 4.3 on page B323), ACC had 'for some time tacitly accepted that its playing fields in particular can be utilised by the local community' and there is no indication that it was changing this position. This evidence is fundamental to a correct understanding about the intention and effect of the ACC signs. As noted at paragraph 76 and footnote 8 of the Applicants' 11 May 2021 submissions (Amended CRA Bundle 446 at page 473, if the Council had provided all relevant evidence on this point in line with its commitment in the early stages of that process, it is likely that the Inspector would have recommended registration in TVG1, since the Council's approach of 'tacit acceptance' appears to align exactly with the concept of 'tolerated trespass'.

4.19 The Inspector appears to have been swayed in his interpretation of the signs by relying on the statement made by Bob Hoskins about his interpretation and memory of ACC's approach to general public use, which is conclusively disproved by these minutes and reports. This attitude may not have been unique to Mr Hoskins; minutes of a meeting of the County of Avon Playing Fields Association on 13 December 1982 (item B7, Applicants' Bundle B344) state:

> '11(i) Dual use of County grounds – it was agreed that this vexed question was one in which the Committee did not wish to be involved. In principle, the County Council encourages such use but, in practice, implementation of this policy is hindered by school staff, particularly caretakers.'

4.20 It is apparent from the evidence and witness statements referred to below, as compared to the evidence provided in TVG1 and the approach taken by the Council whenever an issue was escalated to it, that different groundsmen sent 'mixed messages' over time, in some cases conflicting with each other as well as with the Council's consistent approach of tacitly accepting informal use. And, as demonstrated below, the majority of the wording on the signs had been rendered inapplicable before the start of the relevant period for these applications, with control of day to day use handed over to the relevant school user, not the Council.

4.21 There were numerous references within the TVG1 evidence to problems with motorbike riders entering SLPF – hence, for a period, the installation of a bollard at the Cheyne Road entrance. Minutes of the ACC Land and Buildings sub-committee Special Purposes Working Group for 31 October 1983 record that this was a 'particular area of difficulty' in the car park adjacent to Cross Elms Lane (this area is outside the application land). The committee resolved to restore the gates to the car park and install fencing to control the use of the car park – but there is no reference to any other measures being required in relation to any other unauthorised activities/informal uses – see item B8, Applicants' Bundle B347.[9]

West Dene gate

[9] The applicants' 30 July 2021 submissions included evidence regarding another playing field, Kensington Meadows in Bath, and the approach taken by ACC there, which provides comparator evidence of the Council's handling of a directly analogous situation. Minutes of the ACC Land and Buildings sub-committee Agriculture Working Group dated 6 April 1983 (see item B9, Applicants' Bundle B353) refer to nuisance and disturbance at Kensington Meadows Playing Fields in Bath and the 'need to clarify whether the use of the playing fields by the public should be encouraged or controlled in some way... Members were reminded that similar situations existed on other playing fields within the County, such as at Stoke Lodge, Bristol, where the main problem was the exercising of dogs. Resolved - that the Director of Estates Services post appropriate regulations at the playing field regarding their proper use...'
Minutes of the same sub-committee dated 21 September 1984 (see item B10, Applicants' Bundle B356) refer to the previous report on Kensington Meadows Playing Fields and stating that 'the mis-use had continued and considerable annoyance caused to adjoining residents, including damage to property. Whilst the Authority had no legal liability in respect of such damage, it was under some pressure to take steps to stop the trespass. However, the general view of local residents, other than those immediately affected, appeared to be that Kensington Meadows was a public open space to which access should be freely available at all times and for all purposes, including local festivals, model plane flying, motor cycling and the exercise of dogs. To erect a fence to reduce the nuisance would require some 290 metres run at an estimated cost of £3,950 and there would be no guarantee as to how effective this would be or how long it would last. No specific financial resources were available. Resolved - that no action be taken.'
Here we see that ACC erected signs at Kensington Meadows in 1983/4 that were apparently similar to the signs at SLPF, but when those signs were ignored and the 'nuisance' activities continued at Kensington Meadows, it specifically resolved to take no action. Having erected notices, and despite continuing informal use which the Committee said demonstrated that 'the general view of local residents… appeared to be that Kensington Meadows was a public open space to which access should be freely available at all times and for all purposes', it specifically resolved to take no action to address the situation. It thereby acquiesced in what it acknowledged to be the ongoing public attitude to informal use.

4.22 The evidence about the West Dene gate from the TVG1 public inquiry, as recorded in the Inspector's report, is mixed. Some people do not remember the gate at all (so presumably it posed no obstacle to them). At paragraph 12 the Inspector says:

> 'There was originally a pedestrian gate here. There is no evidence to suggest that it was ever locked in the twenty year period down to 2011 and, if it ever was locked, it was probably not locked during the day.'

At paragraph 144, the Inspector summarised Alex Macara's evidence that

> 'At access point [3] there used to be a metal gate. It was a like a small garden gate. It had a finger latch. It disappeared a long time ago – she thought not as long ago as ten years, but it could have been. She couldn't remember the arrangement as regards the latch ever being different. It was never locked and it would not have been possible to lock it.'

The Inspector notes that Alex 'made a drawing of the gate, indicating that it was made of lattice work in some way rather than being solid.'

At paragraph 217, David Preece gave evidence that

> 'There was a sprung gate at access point [3] that had no catch and which could be pushed open to enter the field without dismounting his bike. The gate was a small pedestrian gate about 1m wide and not very high. It was of tubular metal outline with criss-cross metal mesh as the actual barrier. He was sure that this gate was never locked nor this entrance unavailable to a bike in all the years that I used it. The gate has been absent for many years.'

Bob Hoskins was employed as an Area Landscape Manager within the Council's Parks Team and from 1981 was a district supervisor for school grounds in the northern area of Bristol for Avon County Council. In 1996 he transferred to BCC and was solely responsible for arboricultural issues across education grounds. He gave evidence (paragraph 238) that:

> 'There was always a pedestrian entrance on this side of the site but there is now a sign at that entrance. Prior to this he recalled that this access point was gated with a standard council gate and locked so that, when it was locked, the general public could not have accessed the site from this point. However this was the entrance from which school pupils accessed the site and although the gate would have been locked at night, it probably would not have been locked during the day. He remembered that the coaches bringing children to the site used to park in West Dene. There was one coach or minibus, perhaps more. Once the on site presence on the site went at the end of the 80s there wouldn't have been anyone to lock and unlock the gate. In all probability it was left open after this time.'

4.23 The PROWG committee in December 2016 spent considerable time discussing the effect of the signs and the evidence that Avon County Council was really seeking to discourage dog mess and other nuisance activities, rather than to restrict informal use of the land. Councillor Abraham recalled an incident in which the gates of Stoke Lodge Playing Field - in particular, the gate at the entrance from West Dene - were locked by a new caretaker acting on his own initiative, restricting public use (although not all access points were gated or could be blocked). This partial closure led to considerable public protest, as a result of which, after just three or four days, the County Council instructed the grounds managers not to lock the gates. Casual use of Stoke Lodge Playing Fields for informal recreation, lawful sports and pastimes then resumed and was not subsequently interrupted or interfered with. This was part of the evidence that led the PROWG committee to determine that the signs had ceased to be effective by 1991 and that the land should therefore be registered. These comments are recorded in the handwritten notes of the PROWG meeting (see item B11, Applicants' Bundle B359), although the discussion was excluded from the formal minutes of that meeting (item C2, Applicants' Bundle C495). Evidence about these events was not available to the Inspector in the TVG1 public inquiry. Comments include [Abraham] 'Across City – concern dog fouling; gate Stoke Lodge locked; signs may have been put up then; embargo 3/4 days. County Council – education ownership – told not to lock gates'.

4.24 The applicants have obtained further details of this incident, in the form of two new witness statements, dating the brief and partial unofficial closure to late 87/early 88 (see item B12, Applicants' Bundle B373-375). It is important to note that any restriction of access was partial (one gate only, when many other access points were available) and unofficial, and would not have been evident to users generally (only to those seeking to enter the land from West Dene). The key point from this evidence is about the attitude of Avon County Council. The incident post-dates the erection of the signs; it is clear that casual use had continued uninterrupted before and after the installation of the signs and that the caretaker's action was not official policy. Following protests from the public, the County Council instructed the grounds managers not to lock the gate. Access to the land would have been ongoing in any case via other entry points; the Council simply acquiesced in the West Dene gate not causing any impediment to that access.

Cheyne Road entrance

4.25 The TVG1 inquiry also heard evidence of incidents of blocking and unblocking the informal entrance at the top of Cheyne Road. Of this entrance, the Inspector said in paragraph 12:

> 'Cheyne Road, an unadopted road, terminates at the western boundary of the land. It is possible – perhaps likely - that at some time the land was fenced at this point but if so, this was a long time ago. Accordingly there is access on to the land from the end of Cheyne Road

(access point [4]). Until very recently there was a bollard in the middle of the accessway, evidently to prevent motorbikes from getting on to the land.'

At paragraph 106, Andrew Shaw is recorded as providing the following evidence:

'He would enter the land from Ebenezer Lane (access points [5] and [6]) and from the entrance at the end of Cheyne Road (access point [4]). In 1983 he suspected that there was neither a bollard nor a log at access point [4] and he couldn't remember which came first the bollard or the log. He always assumed that the bollard was to stop entry by motor bikes which at one time was a problem. He recalled a time when a log was "shoved" in front of the bollard at access point [4]. He didn't realise that the University had done this – he thought that it was done by youngsters. Thus he recalled a short period – about two weeks - when he had to step over the log to access the land. He recalled thereafter that the log had been moved away from the bollard. It was possible to access the land via Ebenezer Lane at this time. He thought the hedge through which access point [6] was taken was essentially in the same condition now as in 1983. There had always been a number of accesses through that hedge. He couldn't recall access at point [6] ever being blocked.'

At paragraph 143, the Inspector summarises Alex Macara's evidence:

'At some point a big tree trunk was put in front of access point [4]. What happened was it fell off the oak tree and landed more or less where it is now - she heard the crash. The larger branches were cut off and she imagined that a conscious decision was made to leave it there. The tree trunk had been there for at least ten years. She did notice that on one occasion it was pushed nearer the entrance after grass cutting. The bollard went in about 20 years ago and was only recently removed'.

Bob Hoskins (ACC/BCC employee as above) stated at paragraph 239 that:

'Access point [4] was a major area of contention as attempts were regularly made to block off this access point to members of the public. He recalled that there was a problem with motorbikes accessing the site via this point and at one time (again he cannot recall the exact dates) Council staff placed a tree trunk across this access point only to find that someone had put a chainsaw to it. He had seen the tree trunk but wasn't involved in moving it... Subsequently a wooden bollard was put in at the request of local residents. He put this in the early 90s, still in the days of Avon County Council, just about.'

At paragraph 317, Peter Faulkner Hudson (Grounds Manager for the University of Bristol/Coombe Dingle Sports Complex) states:

> ‘Access point [4] had not changed in appearance very much. There had always been a bollard there. The tree trunk was much further out into the field. Fairly soon after the University took over the running of the site he was inundated from phone calls from people saying that it was preventing them exercising their dogs. His Deputy Director said that it was better to let them back in, so the tree trunk was pulled out enough so that people could get access, although it was a bit awkward.’

In a witness statement to the TVG1 inquiry (see item B13, Applicants’ Bundle B376), Tony Greenwood (grounds maintenance staff for BCC) states ‘in the early period of my employment Kevin, my colleague, would block Cheyne Road to prevent access via that route’ (this is also repeated at paragraph 301). He says he started working for BCC in 1987 and was based at SLPF between 1992 and 2005.

4.26 Regarding the Cheyne Road entrance, the Inspector said at paragraph 412:

> ‘Second, the arrangements at access point [4] (ie the provision of a bollard) may be taken to suggest an implied consent to the public to use the land. This suggestion can be argued to be supported by the subsequent removal - in the light of protests - by the managers of the land of the obstruction of that access point by a tree. I think that it is difficult to attach too much significance to the latter event, of which many will have been unaware [And in particular, that the University were involved in moving the tree] but the general point still runs. However, if the situation at access point [4] is to be read as an implied consent, the landowner was potentially sending out “mixed messages”. In respect of use of the same piece of land by the same people, use of land cannot be simultaneously contentious and permitted. I think that after the erection of the notices, the reasonable landowner would not have considered that users of access point [4] – and more generally those who used the land using other accesses - would have considered that they were being given an implied permission. The situation has to be viewed as a whole, and so viewing it, I do not think that the provision of a bollard and the non-closure of access point [4] can be taken as a permission.’

4.27 Further investigation has revealed that there were two incidents when the Cheyne Road entrance was temporarily blocked.

(a) For a period of time, the entrance was blocked with pruning debris by the groundsmen (perhaps by ‘Kevin’ as referred to in Tony Greenwood’s witness statement, above). The branches etc were subsequently removed and taken away by local residents. A newspaper report of the removal (see item B14, Applicants’ Bundle B378), from the Bristol Evening Post dated 8 January 1990, includes the following statement:

> ‘A spokesperson for Avon County Council, which owns the land, said there were worries about motorcycles being ridden onto the fields and a fence with a kissing gate is to be put up.’

Clearly the article itself employs hyperbole (it seems very unlikely that 20 people actually crowded into a van that was then used to transport green waste to a recycling centre); and despite the claims of stealth tactics, ‘the police were very good and it was all very civilised’. A letter from an Avon County Council officer, JR Blackmore, to Veale Wasborough solicitors dated 4 January 1990 refers to the same incident, which suggests that the blocking and unblocking occurred in late 1989 (see item B15, Applicants’ Bundle B381). It is clear from this letter and the spokesperson’s comment that Avon County Council did not object to pedestrian access to the fields. ACC’s approach is further described in the witness statement of [redacted] (see item B16, Applicants’ Bundle B382).

In fact, no fence or gate (as referred to in the article and letter and which the objectors might suggest gave the appearance of implied consent) was ever installed – perhaps because this incident was followed very shortly by the Council’s 23 January 1990 direction, in advance of the introduction of LMS, that such matters were in the control of the relevant school’s governing body. However, it appears that the bollard discussed in TVG1 was installed some time later to address an issue with motorcycles accessing the field, without impeding pedestrians or buggies. This is another strong indication that ACC was not in fact opposed to public use of the field, but was acquiescing in that use (subject to wanting to discourage certain types of behaviour such as motorbike use that might damage pitch areas). This aligns precisely with the evidence set out above about ACC’s approach from the early 1980s onwards.

(b) A second blockage occurred when a very large branch fell off the oak at this entry point. One of its large side branches blocked the entrance briefly; local residents cut off the side branch and moved it to restore access. This took place at some point from 1990 onwards. The branch knocked down part of the old fence, enlarging the entrance. This created a concern for neighbours about vehicles potentially accessing the field at that point; a wooden stave fence was put in place by local residents to bring the pedestrian entrance back to its previous look and size, although people needed to turn right - as they still do - to get round the main part of the fallen branch.

Soon after the massive branch fell Peter Hudson, the head groundsman from Coombe Dingle, used a vehicle to push it to block off the Cheyne Rd entrance again. A few days later he moved it out of the way again on instructions from the University so that local residents could access the land more easily (see evidence of Bob Hoskins and Peter Hudson, above, which appears to date this to the early 1990s although this may be incorrect as the Applicants have been unable to confirm that the University was undertaking maintenance at this time).

4.28 In its formal objection to TVG1, the University of Bristol stated its understanding of the ACC signs as follows (see item B17, Applicants' Bundle B384):

> 'It has always been the case that use of the playing fields by third parties, including dog walkers, has deferred to the organised use of the site as playing fields by schools and local sports clubs. Any such other use by third parties has never been authorised, or as of right.
>
> Bristol City Council has stipulated, by way of signs around the site, that dogs are not allowed on the playing fields and that the owners would be fined if in breach. Unfortunately the notices and the policy has not been enforced…'

In this statement the University, as the entity charged with maintaining and managing the fields on a day to day basis since at least 2004, formally confirmed that there had been informal use of the fields by third parties, and that this had never been authorised. The University is not qualified to state that the use as not been 'as of right' - 'as of right' does not mean 'by right'. It also considers that BCC's objection is to dogs on playing field areas rather than to general informal use, but recognises that the notices in general have not been enforced. (Note that BCC placed only one sign on the site in 2009, and that we argue this does not refer to the playing fields anyway – see below). At paragraph 323 of the TVG1 report, Peter Faulkner Hudson says that 'It was difficult to discourage people walking dogs. He had reminded people after they have just walked past [the] sign that no dogs were allowed [on] site.' Thus the evidence shows that dog walking was occasionally challenged by a groundsman but other forms of lawful sports and pastimes were not; however the entity charged with managing the land during this period has confirmed that informal use was never authorised/permitted.

4.29 The applicants have also found a programme of playing field improvement works for 1987/8 (see item B18, Applicants' Bundle B387) from which it is apparent that fencing works were undertaken at various playing fields around Bristol, including Brook Road, Dorian Road, Gordon Road, Lawrence Weston, and Portway – but not at Stoke Lodge Playing Fields, where only internal decorations of the pavilion were thought necessary. This underlines that fencing was undertaken on a site-specific basis; ACC either did not see a need to fence SLPF (despite having erected its apparently prohibitory signs a few years earlier) – presumably because formal sports and informal recreation were coexisting peacefully (as confirmed by the School's evidence and as found by the Inspector in TVG1) or because it felt that the public would view access as being 'as of right' and would continue to use the field anyway, and tacitly accepted that position (see footnote above regarding Kensington Meadows).

4.30 In summary, the new evidence, considered alongside statements considered in TVG1 provides a more complete and accurate picture of the use of the land up to 1996. It is notable that the approaches taken by individual groundsmen are inconsistent with each other and inconsistent over time, apparently being based on their personal views; that the University sometimes had to redirect their efforts and

that in specific cases ACC instructed that obstacles to access should be removed. This echoes the comment made in minutes of the County of Avon Playing Fields Association (item B7, Applicants' Bundle B344) that shared use 'is hindered by school staff, particularly caretakers', despite the more tolerant attitude of the County towards such use. By contrast, it is clear that ACC consistently tolerated or 'tacitly accepted' public use (and expressly acknowledged in Committee that it did so) and, prior to 1996 had communicated through its conduct in response to occasional blockages of particular entry points that the signs were to be disregarded or of no effect. Such conduct is consistent with acquiescence rather than permission or prohibition.

4.31 In addition, item B19 (Applicants' Bundle B389) is a document obtained following a freedom of information request to the University of Bristol and is a set of handwritten notes on development options for Coombe Dingle and Stoke Lodge sites, drawn up by (we assume) the Director or Deputy Director of Sport for the University, at a time when it was seeking to persuade the Council to grant it a lease of (at least) the 'surplus' lower half of Stoke Lodge Playing Fields (Education Committee minutes at items D6 and D7 (Applicants' Bundle D645 and D658) refer to this). Although the notes are undated, from the context they appear to date from late 1996 or the first half of 1997. The writer notes as a general point for consideration (see point 5 on the second page) 'Who would maintain hedges around perimeter? Would we be allowed to fill in the gaps in the perimeter hedging? (Dogs)'.

4.32 As the Inspector said in TVG1, use cannot be simultaneously contentious and permitted. The incidents at the West Dene and Cheyne Road entrances were short-lived, unofficial and did not amount to any more than a minor impediment to access to the land as a whole, since multiple other entry points were continuously available. Only individuals who attempted to use those entry points during the periods of time when they had been blocked would have been aware that anything out of the ordinary had happened, and clearly the matter was rectified shortly afterwards. Many people would have been completely unaware of those isolated events; however, they are significant in terms of the evidence that they provide of ACC's attitude to informal use, despite the continued presence of the 'no trespassing' signs. This is acknowledged by the University in the notes referred to above and at item B19, Applicants' Bundle B389.

4.33 ACC's 'no trespassing' signs cannot be interpreted as statements of permission for use, since they purport to do the opposite (and were considered to do so in TVG1, on the face of the wording alone). As the inspector said in TVG1, in respect of use of the same piece of land by the same people, use of land cannot be simultaneously contentious and permitted. Despite any mixed messages being sent in relation to these temporary incidents at West Dene and Cheyne Road, the reasonable landowner would not have considered that users generally would have considered that they were being given an implied permission. Therefore, ACC acquiesced in informal use and such use in this period was not contentious but was 'as of right'. It follows that from before 1996, the ACC signs did not render the use of the

Stoke Lodge playing fields contentious. In fact, as explained above, ACC would also have been aware that from at least 1 April 1990 onwards, it had no power to control the use of the fields by the use of signs. Under its formal direction (see item F4),decisions about community use were for the relevant school's governing body. The landowner must therefore be considered to have continued its approach of 'tacit acceptance'.

The text of the mid-80s ACC signs was rendered largely inapplicable by external events

4.34 In relation to the text of the ACC signs, it is noted that:

- The main part of the text, referring to section 40 of the Local Government (Miscellaneous Provisions) Act 1982, was incorrect since from 1 November 1996 this section only applied to playing fields of further/higher education institutions maintained by a local education authority. Thus the sign appeared to threaten users with a criminal offence that did not apply to them. From 1 November 1996, section 547 of the Education Act 1996 applied a similar provision to 'playing fields and other premises for outdoor recreation, of (a) any school maintained by a local education authority'. Official guidance from the Department for Education and Employment and the Home Office from December 1997 entitled 'School Security: Dealing with troublemakers' (extract at item B31, Applicants' Bundle B464) states at footnote 2 on page B471 that 'The provisions relating to schools in section 40 of the Local Government (Miscellaneous Provisions) Act 1982 have been consolidated unchanged into the Education Act 1996. Section 40 of the 1982 Act will now only apply to LEA-maintained further or higher education institutions. Notices warning of these provisions should in future refer to the Education Act 1996' (emphasis added)[10]. We have noted above that the suggestion that Cotham School relied on the signs cannot be correct; here we note that for it to have done so would also have been contrary to this official government guidance.

- The Objectors would also have been aware that this DfEE guidance (item B31, Applicants' Bundle B464) discusses at section 3.9 on page B474 the possibility of prescriptive rights being gained through periods of continued access. At section 3.11 on page B475 the government guidance refers to the possibility of tolerated trespass, stating expressly that 'schools are not obliged to tolerate the informal public use of playing fields (e.g. for football matches or walking), but should consider that doing so can in some instances serve as a deterrent for would-be trespassers and, indeed, potential criminals'. It is clear from the guidance that tolerated trespass was not unusual and was seen as having advantages in providing passive supervision of playing fields, particularly when the school was not present (which in the case of detached playing fields such as the application site, is the vast majority of the time).

[10] Note that the example of nuisance activity on playing fields given in this guidance is 'where a trespasser drives a motorbike onto playing fields and disrupts a PE lesson', which provides some indication of the narrow interpretation the government gave to the section 547 power – see footnote 3 on page B471.

- The signs had become inappropriate in directing requests for pitch hire to the Avon County Council Director of Education. It would not, in any case, have been appropriate to erect a sign directing requests for pitch hire to the BCC Director of Education, since under Local Management of Schools, management and maintenance was delegated to the relevant school using the fields, or to an entity (such as the University of Bristol) managing pitch hire on its behalf.

- Under Local Management of Schools provisions and the schedule agreed by BCC in 1996, a decision to erect signage would have been one for the school to take, within the scope of the LEA's publicised policy and practice for school playing fields; neither Fairfield Grammar nor Cotham School did so even though the signs were inaccurate in directing requests for potential club hire bookings (which would have produced revenue for the relevant school) to the Director of Education of a defunct education authority. Like the public, both schools appear to have ignored the signs or regarded them as irrelevant.

4.35 In summary, contrary to the arguments put forward on behalf of the Council, BCC did not simply decide to adopt all ACC signage as its own or see itself as continuing a prohibition made by ACC – to do so would not have been a valid or effective use of its powers under the SSFA and would not have been consistent with the direction made by ACC prior to the introduction of LMS on 1 April 1990 (see item F4)[11]. To argue that BCC adopted ACC's signs is both legally and factually incorrect. On their face, the signs were contrary to BCC's approach to the accessibility of education playing fields, and by 1 April 1996 virtually <u>all</u> the wording on the ACC signs was inapplicable or inappropriate. It is not reasonable to assume that BCC was choosing to express an intention as landowner in a legally ineffective manner nor that Cotham School was choosing to rely on signs that were inaccurate in factual information and misleading to the public, or that it considered those signs still to be valid. The conduct of both Objectors, as shown in the evidence, is inconsistent with this. The fact that BCC did not exercise its power to control use of the land and neither Fairfield Grammar School nor Cotham School updated these signs under their statutory power indicates that, like everyone else, they were simply ignoring them and continuing to acquiesce in ongoing informal public use of the land. As confirmed by Ms Fryer's evidence to the TVG1 public inquiry and as noted by the Inspector in TVG1, informal access coexisted peacefully with school and club use during this period as it had done for previous decades.

[11] In relation to the alleged 'adoption' of ACC notices generally, the minutes of the Leisure Services Committee for 24 September 1996 (see item B27, Applicants' Bundle B446) record that the committee took a decision to update signage on children's playgrounds and play facilities around the city, noting that: 'There is a need to update signage regarding management. For safety reasons it is essential the public know exactly who to contact if there is a problem'. This decision was taken just 6 months after the change of control. No equivalent decision to update the signage on school playing fields to make ownership/management/contact details clear was taken, because BCC would clearly have been aware of the statutory restriction on how it could exercise its power to control the use of land, and because the matter of external signage was delegated to individual schools under LMS.

5. The 2009 BCC sign

5.1 During the ownership of the application land by BCC from 1 April 1996 to (at least) mid-2009, neither of the Objectors took any action, whether by Direction or by erecting signs, to either restrict or permit public use of the playing fields, although it is clear that significant informal public use continued throughout this period. In mid-2009, however, BCC erected one sign (see item B1B, Applicants' Bundle B305). This sign stated:

> Private grounds
> These grounds are private property and there is no right of public access.
> Legal action will be taken against any trespassers.
> Any request for the use of these grounds should be made in writing to the divisional director of Property and Local Taxation. The exercising of dogs on these grounds is forbidden.

5.2 In relation to this sign, the TVG1 Inspector's report concludes at paragraph 397 that, despite some ambiguity, 'on balance, I think that the reasonable landowner would consider that he had put up a sign that would be construed by local people as applying to the playing fields and not the grounds of Stoke Lodge'. However, at paragraph 400 he concluded 'by erecting this one sign Bristol City Council could not reasonably have concluded that it had made it sufficiently clear that it was not acquiescing in the continued use of the land for recreational purposes by local users.'

5.3 It is apparent from the Inspector's comments that he was unaware of the SSFA provisions, which make it clear that the sign would not, and could not, have been intended to refer to the playing fields as, in the absence of a direction, the Council had no power to control their use, but only to the grounds of Stoke Lodge. This sign is not only insufficient (as already found by the Inspector) but is in fact ineffective and irrelevant, and the evidence considered at the previous inquiry was incomplete and misleading on this issue.

5.4 Relevant evidence from the bundle supplied by the Council for TVG1 is at item B32, Applicants' Bundle B476ff; relevant paragraphs from the IR include: 22-23, 235 and 244. In brief, the evidence provided to the TVG1 inquiry was that the sign was put up as a 'stamp of ownership' by the Council; and that 'a new sign' was to be displayed 'in the grounds of the adult learning centre' because 'this was considered to be the main entrance to the site accessed by members of the public'. Mr Havens stated that this was a decision of his line manager ('Mick'). Tony Havens' witness statement (dated 1 February 2016) was generated specifically in response to a request from BCC to provide information about why the sign was put up.

5.5 The inspector noted the ambiguity arising from the positioning of the 2009 sign on the boundary between the house and the playing fields, and due to it being mounted on a single pole and rotating to face in different directions at different times [397]. There are four further issues to consider:

(a) *The statutory framework*

As above, under the SSFA BCC had no legal authority to regulate control of the application land through the use of a sign, in the absence of a direction, and was fully aware of this, as is evident in the Cabinet Briefing Note dated April 2010 (item A1, Applicants' Bundle A1). That note makes clear that unfettered public access to the land was ongoing and that no decision had taken by the Council to exclude public access to school playing fields in general or to SLPF in particular. In fact the decision of Cabinet, having considered this paper and in line with the advice of Counsel, was to encourage schools to adopt a policy of maintaining open access for themselves; and in relation to the proposals for SLPF, to hold a public consultation. The Cabinet specifically did not adopt the approach of imposing an open access policy on schools, although it was advised that it was able to do so. Similarly, there is no evidence that the School adopted an open access policy or indeed a policy prohibiting use of the land.

(b) *The wording of the sign was not applicable to the playing field area*

5.6 There are clear differences in wording between the ACC signs and the 2009 BCC sign. The 2009 sign did not refer to playing fields or education; it did not cite the statutory prohibition against creating a nuisance on playing fields; instead, the sign was headed 'private grounds' and persons wishing to make requests for use of the grounds were directed to write to the divisional director of Property and Local Taxation, when in fact it is clear that the playing fields were under the management of Cotham School and subject to a transfer of control agreement with the University of Bristol. The Director of Property and Local Taxation would have had no ability to provide authorisation for use of the playing fields (e.g. to hire out pitches). Thus any sports club wishing to hire a pitch would have been entirely wrongly-directed had it applied to BCC's Director of Property and Local Taxation.

(c) *The sign was commissioned by BCC, not by Cotham School*

5.7 If a decision was to be taken to exclude the public from the playing fields through the use of a sign, that would be a matter for Cotham School's governing body and the costs of commissioning and installing such signs would have been payable from the School's budget (see item B25, Applicants' Bundle B437 at page B442). There would be no reason for the Council to fund a sign that related to the playing fields, as is suggested in the evidence provided to the TVG1 inquiry, as this would have been the school's responsibility and expense and it would have been a legally ineffective way for the Council to attempt to regulate use. It would however be appropriate for the Council to fund a BCC-branded sign for Stoke Lodge house and its immediate surroundings.

5.8 Schools were able to commission works via the local authority under LMS. The internal BCC correspondence provided to TVG1 suggests that, for example, Ashton Park School had commissioned a sign with the BCC logo alongside its school name. However, any signage commissioned for Stoke

Lodge Playing Fields should have been commissioned by Cotham School, not by CYPS, and would have been subject to the School's approval in the same way as the other school signs referred to in the correspondence (see below).

5.9 There is no suggestion in the available correspondence that the School's approval was sought or that any discussion had taken place with the School about restricting use of the playing fields, and it appears that the commissioning process was undertaken solely by Mr Havens without reference to the School. It is notable that in the case of the schools referred to, the visuals supplied to Tony Havens were sent for approval to individuals at the relevant schools - but apparently there was no perceived need to check the wording of this sign with Cotham School. If the sign was intended to relate to the playing fields, that would be very surprising. Indeed the School has never suggested that it had any input into the commissioning of the sign and Cotham School's letter at item B26 (Applicants' Bundle B444) and Ms Fryer's evidence to the TVG1 inquiry at paragraph 279 also indicates that it had not erected any signs. In Mr Havens' written statement dated 1 February 2016 he states that 'I specifically recall arranging for a new sign to be displayed in the grounds of the adult learning centre', which would explain why no approval was sought from Cotham School.

5.10 It is much more plausible to conclude that Mr Havens was asked to commission, and given CYPS budget to obtain, a single sign (as per his written statement) in the grounds of the Adult Learning Centre for 'property transferred to CYPS' meaning the Adult Learning Centre itself. It is clear that the playing fields were already held by CYPS and were not the subject of a transfer to CYPS in 2008 (see the valuation in 2007, item B33, Applicants' Bundle B482). We note that although the location of the sign might be described as the 'main entrance to the site' in relation to users of the Adult Learning Centre and club users arriving by car, it would not be an apt description for the vast majority of the community's 'as of right' users. The evidence indicates that the sign was intended to refer to the Adult Learning Centre and that the wording commissioned was Mr Havens' own decision, not reflective of any decision by BCC to exclude or restrict public access to the playing fields.

5.11 Why was the sign erected on the boundary between the car park and the playing field rather than, for example, on the lawn of the house? Mr Havens' own evidence in TVG1 (see paragraph 244) was that 'his instruction was to put the new sign on the old posts to save costs and he thought this is what had happened'. Thus there was no specific decision to place a sign on the playing fields, but a decision to reuse an old set of posts. Significantly, the 'old post/s' refers in context to the 'third ACC sign' that is thought to have disappeared in around 2007 – the post was moved further north when the play park was constructed some years later. Much of the discussion in TVG1 centred on whether the sign faced the house or the fields, in the location in which it stood in 2016. However, when it was erected, the sign apparently stood at the corner of the car park (see photographs in item B34, Applicants' Bundle B484 showing the location of the old post socket), amongst and in front of tall boundary hedging. At

the time Mr Havens is referring to, the sign would have been directly seen by users driving into the car park (not by most people walking on or around the field). The same spot is now used by BCC as a location for signage about the car park and its opening times, clearly intended for users of the Adult Learning Centre. The reasonable inference, taking the sign in its context in 2009, would be that it referred to the car park and grounds on which the user had already entered. With a proper understanding of the legal framework, it is beyond doubt that this is what BCC intended.

(d) *The witness evidence provided to TVG1 was not consistent with the 2010 Cabinet Briefing Paper*

5.12 In reference to Tony Havens' 2012 email saying that 'The sign was put up to stamp our ownership. Funded from money made available by Mick to standardise property transferred to cyps', the Inspector commented: 'H4 [Tony Havens] said in his evidence that he didn't think that this referred to the sign at Stoke Lodge but it does appear to do so' [footnote 26 on page 43, referred to in paragraph 235 above]. We agree that in context, the email thread refers to the 2009 sign, but it is not clear that Tony Havens' account of events or his 2012 comment about standardisation of property transferred to CYPS is accurate[12] - or that the 'standardisation' should be understood as anything more than a BCC branding exercise, for the following reasons:

- The Council considered the issue of public access to playing field land in depth in 2010, and resolved that access should be maintained where possible (see the report to Cabinet dated April 2010 on 'Community Access to School Playing Fields' at item A1, Applicants' Bundle A1). This report is a highly significant document as it reveals a considerable amount about the Council's attitude and intentions at this time. Paragraph 1.3 of the report states that two development schemes (including one at Stoke Lodge) have been frozen 'until a decision on the future of open access to school playing fields is made' - this implies that open access is currently happening in practice. At paragraph 2.4 (page A2), there is a reference to 'Stoke Lodge Playing Fields – the proposed exclusion of public access to school playing pitches' (i.e. there is no suggestion that this exclusion has already happened, for example via the installation of the 2009 sign, even though paragraph 2.4 suggests that this 'proposed exclusion' was raised as an issue in November 2009, only 5 months after the installation of the sign). At paragraph 2.41 of the April 2010 report to Cabinet (page A7), it is stated that 'The playing field is currently unfenced and allows unfettered community access'. This is only 10 months after the erection of the 2009 sign; if the sign was intended to fetter community access, it appears that no one in Cabinet - nor indeed the author of the report, Michael Branaghan, Service Manager for Capital, Assets and Access within CYPS - was aware of the fact.

[12] Mr Havens made the point in his oral evidence that he had suffered a stroke and that his memory was no longer reliable.

- Mr Branaghan is assumed to be the 'Mick' referred to in Tony Havens' email dated March 2009 (see paragraph 2.19 above) who provided funding for signage across various CYPS sites. Indeed, Mr Branaghan was the officer who presented the consultation proposal at the public meeting in August 2010 and the minutes of that meeting do not record that he made any suggestion that public access to the fields was already restricted by virtue of the 2009 sign. It would not be consistent with his report to Council to think that he had given instructions to ban the public from the site via the use of signage less than 12 months previously. It is clear that the Council had not taken any such decision prior to the erection of the 2009 sign. Liz Peddle, the officer who responded to local resident Lynne Randall in September 2009 (see item B32, Applicants' Bundle B476) was also at that public meeting and does not appear to have suggested that use of the playing fields was permissive based on the sign. In fact by 2012 she appears not to have any particular awareness of the sign (see her 9 August 2012 email in item B32 at page B479 questioning the reference to 'the Director of Property and Local Taxation') so it is not clear that her 2009 response was written with any specific knowledge of any intention behind its installation. In fact the 2009 sign appears not to have been authorised or approved by anyone other than Mr Havens, and he had no apparent authority to commission, authorise or approve signage on behalf of Cotham School.

- The internal restructuring within BCC that led to property being transferred from the Education Department to Children and Young Peoples' Services took place on 1 May 2008 (see the background report provided by Susan Comer included in BCC's TVG1 evidence bundle at pages 54-59; reference on page 58). However, the whole of the Stoke Lodge playing field area was already held by CYPS prior to 2007, as is evident from the valuation document at item B33, Applicants' Bundle B482.

- The March 2009 email refers to 'the major CYPS project' involving signs at Ashton Park School, Gay Elms School and Ridingleaze House. It has not been possible to locate an image of the sign at Gay Elms School, but images of the other two signs are shown in item B35, Applicants' Bundle B486-7. From these photos it is apparent that any 'standardisation' did not relate to the rollout of a supposed BCC-wide policy to ban the public from playing fields, but was simply a rebranding using the BCC logo and red/grey colour scheme, with different wording on different signs but essentially providing the name of the establishment and relevant contact details. The Ashton Park and Ridingleaze House signs are purely informative and make no reference whatsoever to trespass etc. The Ridingleaze House sign is still in place (the photograph was taken on 22 November 2020); the Ashton Park School sign has been removed (presumably on academisation in 2018) but it is worth noting that the headmaster recorded on the sign in this photograph, Mr CC Gardner, retired in September 2011, which supports the sign being erected between mid-2009 and mid-2011.

- In Mr Havens' evidence to TVG1, he claimed that 'this sign was put up because the Council did not want members of the public to use the site'; however, he stated at [245] that he was not aware that BCC had agreed in September 2010 that ongoing as of right access to the site should continue (see items A4 and A5, Applicants' Bundle A29 and A42). In fact, the Cabinet paper of April 2010 (Applicants' Bundle A1) notes that the Council was in favour of shared use of playing fields. Combined with other evidence as to the Council's overall view of public access to Stoke Lodge, it is clear that the wording of the sign was intended to refer to the house and its immediate grounds/car park, and that the interpretation subsequently placed on it by Mr Havens reflected his own personal views.

(3) *Response of local residents*

5.13 One local resident wrote to the Director of Property and Local Taxation in response to the sign. However, evidence was provided to TVG1 that a year later, over 250 people wrote letters in response to the public consultation and then attended a public meeting and unanimously voted against a consultation proposal to restrict access to the land. It seems clear that there was no general impression, understanding or communication in July 2009 that the sign related to the playing fields rather than to Stoke Lodge House, otherwise a much greater response would have been expected.

5.14 In fact, Mrs Randall's letter (included in item B32, Applicants' Bundle B476 at page B477) is headed 'Re Stoke Lodge Adult Education Centre & Leisure Facility' which suggests that she thought the sign related to the house (whatever interpretation she placed on 'Leisure Facility' and whether that meant the lawn and arboretum or the wider playing fields).

- It is worth noting that Mrs Randall, aged 70, lived in Sea Mills Lane, directly opposite a large open green space and around half a mile away from Stoke Lodge. It seems very unlikely that she would have specifically sought out the playing fields as a place to walk, given the availability of a very large open area almost literally on her doorstep. She comments that it also provides 'access to the footpath'. It may therefore be that she used the Adult Learning Centre or wished to access the claimed public right of way across the field to Ebenezer Lane, and that her understanding was that the sign was intended to prevent her from using the grounds and paths around the house to do so.

- Mrs Randall's letter, reproduced at item B32 in the form submitted to the TVG1 inquiry, is incomplete - it clearly states 'PTO' at the bottom of the letter. It is not known whether she went on to clarify her understanding of the sign; as the letter is incomplete, the most that can be established from it is that the sign had been erected at a date prior to the letter being written. Mrs Randall unfortunately passed away in July 2020 so it has not been possible to obtain any further

information about the letter or her understanding and intentions. A full copy of the letter has been requested from under FOI but the Council has stated that it no longer retains a copy.

5.15 It is clear that there was no general understanding by community users that the sign referred to the playing fields, otherwise a much stronger reaction would have been guaranteed - not just one letter (of which only a partial extract is available). The Inspector has already concluded that:

> 'It seems to me that a landowner, waking up to the situation that the extant signs might no longer be considered to be effective, might very well want to make it clear that use is contentious. What on the face of it, he does is to replace the existing signs and, in the context of this site put up signs at access points [4] and [5]71. However what he actually does is to replace one sign… I conclude that by erecting this one sign Bristol City Council could not reasonably have concluded that it had made it sufficiently clear that it was not acquiescing in the continued use of the land for recreational purposes by local users.' [400]

As a result of the Applicants' research, it is clear that BCC did not erect a sign with the intention of making use of the playing fields contentious at all. Rather, it 'stamped its ownership' on the house and immediate grounds (now the Adult Learning Centre), which was within the CYPS remit. It would not have been appropriate for the Council to attempt to regulate use of the playing fields by means of a sign, or to erect such a sign without being commissioned to do so by Cotham School (and with the School providing funds for the sign).

Significance of the April 2010 Briefing Paper to BCC Cabinet

5.16 Finally, the importance of the Briefing Note to Cabinet in April 2010 (item A1, Applicants' Bundle A1) cannot be overstated. This document sets out the Council's position and understanding as at April 2010, and details several aspects on which the Council had obtained specific advice from Counsel. It makes clear that:

(a) The Council was aware of ongoing public use of SLPF. It states that SLPF 'is currently unfenced and allows unfettered community access' (see paragraph 2.41) – note the present tense, indicating that the 2009 sign was neither intended nor considered to impose any fetter on community access).

(b) The Council recognised the possibility of accruing 'as of right' use; the paper sets out options if the Council wished to mitigate a potential risk of applications for TVG registration. It states that post-*Redcar*, revocable permission did not provide a guarantee against TVG registration and 'landowners now need to proactively take steps to keep people [off] their land to prevent future registration' (see paragraphs 2.17 and 2.18 and the reference in Appendix D paragraph 5 to the need to take 'active steps to exclude recreational trespassers'). The paper was written

by Tony Havens' line manager and does not reference any signs restricting access to the playing fields, although the 2009 sign was erected only 10 months earlier and according to Tony Havens' evidence, was erected on his line manager's instructions.

(c) The paper discusses the possible adoption of a policy of open access – there is no indication that the Council had any formal policy prior to this date: in fact the paper lends weight to the accrual of 'as of right' use at SLPF, since it makes no mention of any restriction of access or express or implied permission prior to the date of the paper, and clearly recognises that community use was open and not 'in secret'.

5.17 Appendix D of the report (pages A16ff) summarises earlier Counsel's advice on the interaction of open access with TVG rights (see paragraph 2.15); this indicates that prior to the *Redcar* case, the advice given to the Council was that to mitigate TVG risk, signs should be erected indicating that access was permissive – i.e. specifically <u>not</u> restricting access. This is not what the 2009 sign did; the sign commissioned by Tony Havens would (had it been intended to refer to the playing fields) have contradicted specific legal advice on this issue given to BCC. In fact the Council took no steps to erect any permissive signs; despite being advised 'Landowners will need in future to take active steps to exclude recreational trespassers', no such steps were taken.

5.18 The Council's position was not to direct an open access policy itself, but only to encourage school governing bodies to adopt such a policy. In fact, it is clear from the report to Cabinet in April 2010 that the Council had received Counsel's advice in December 2009 that playing fields should remain open to public access unless governing bodies decide otherwise and that it 'should seek to persuade' school governing bodies 'that they themselves should willingly adopt a policy of open access'. In other words the Council had clearly neither permitted use that would bind schools (although it was open to it to impose such a policy), nor had it restricted use - it was acquiescing to use by local inhabitants and seeking to encourage schools to do the same.

5.19 Paragraph 5.3 of the report (page A9) is a clear recommendation to the Cabinet that:

> 'If the City Council wishes to retain opportunities for future development on school playing fields, options to avoid registration will need to be secured by placing a time restriction on the open access arrangement to ensure that the open access is only permitted for a period of less than twenty years in total. There would be a need to pass or publish a formal resolution to the effect that the open access would represent the granting of a revocable permission within this time frame.'

5.20 It has never been suggested that any such resolution was passed or published, despite this clear advice to the Council. Cabinet rejected both of these options in favour of a policy of encouraging schools to adopt open access to playing fields. The Council did not adopt such a policy itself.[13]

5.21 Having been advised to pass a resolution to permit use for a period of less than 20 years, the Council specifically did not do this. Having been advised that as LEA it could direct schools to permit open access to school playing fields, it did not do this either. Instead it resolved to encourage schools to continue open access by their own choice - in other words it gave no permission, express or implied, and clearly did not prohibit use since it was in fact in favour of open access. This is the clearest possible example of what the Inspector in his first recommendation in TVG1 termed 'a classic case of acquiescence'.

5.22 The Council took no steps whatsoever to restrict access to SLPF, and neither did Cotham School either as a maintained school up to September 2011 or as an academy school with a leasehold interest, until the School erected purportedly prohibitory signs on 24 July 2018.

Summary

5.23 The 2009 sign did not represent a decision or wish on the part of the Council as landowner to exclude access to the playing fields, or to inform users that they required permission to use the site. It is clear that there was no 'standardisation' of exclusionary notices across playing field sites, as may have been implied in the evidence provided to TVG1; and the commissioning process in relation to the sign indicates that it was not commissioned or approved by Cotham School as would be necessary if it had referred to the playing field area. BCC as landowner in fact had no intention of replacing the previous ACC sign with wording that purported to restrict access, but rather intended to simply 'rebrand' the Adult Learning Centre with a BCC logo on a sign referring to the lawn and immediate surroundings ('the grounds') of Stoke Lodge house, which are excluded from this application.

5.24 Following a public consultation in 2010 BCC's general view (having recognised the ongoing accrual of potential TVG usage) was that SLPF should remain open to informal community access. However, up to the date when the lease was agreed, BCC's policy and the SSFA provisions meant that it remained open to the governing body of Cotham School to decide otherwise. After that date, the School's right as tenant to use the land is expressed to be 'subject to all existing rights and use of the Property, including use by the community', which plainly includes accruing 'as of right' use.

[13] For completeness, we note that the Bristol City Council Area Green Space Plan published in 2010 excluded 'green spaces that are not freely accessible to the public, including allotments, city farms, school grounds or sites of Nature Conservation in private ownership'. SLPF does not fall within the scope of this Plan (maps are provided on pages 26-30; a copy can be provided if required) since it is not formal public open space (it is not a public park). However public use of SLPF was noted in the consultation process for this Plan, and it is clear that there was free unfettered access in terms of physical entry to the land.

6. *WINTERBURN V BENNETT* ARGUMENTS

6.1 Even if the Inspector considers, contrary to the above, that the ACC signs and/or the 2009 sign have any validity or relevance to these applications, the principle in *Winterburn v Bennett* that was relied on in TVG1 is not applicable in the context of these applications. It was this decision that influenced the Inspector's recommendation to change from 'as of right' use in his first report, to a recommendation against registration.

6.2 The issue of the sufficiency of the signs (effectiveness of wording, and sufficiency in number and location) has been raised (by the Council as well as the applicants) as a relevant issue in these applications. At paragraph 6 of the inspector's 2013 report in TVG1 he states that 'an application to register a town or village green is not private litigation between the applicant and the registration authority and whether land is properly registered or not registered is a matter of public interest'. Once an issue has been raised, it should not be ignored.

6.3 The whole Stoke Lodge site is a 26 acre estate with 14 formal and multiple additional informal entry points. Many users walked routes around the site without seeing any signs at all. By contrast, the case of *Winterburn v Bennett* concerned a much smaller area (a car park for 7 cars) with one entrance and two clearly visible signs.

6.4 In addition, *Winterburn* is a case about private easements. The principle enunciated by Richards LJ in *Winterburn* was that:

> 'In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be 'as of right'. [40]

6.5 At paragraph 37, he states 'I agree that the circumstances must indicate to persons using the land that the owner objects and continues to object to the use'. At paragraph 41: 'The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others'. This does of course assume that the landowner (in *Winterburn*, the fish and chip shop owner) has authority to regulate use of the land via a sign. In this case, BCC was subject to the statutory overlay of education legislation which restricted the method by which it was able to regulate use, but which provided an even more peaceful and inexpensive means of regulating use, via a direction under the SSFA. It did not make such a direction. Reliance on the ACC signs was not a legally effective means of the landowner regulating informal use at any time from 1 April 1990. This case can be differentiated from *Winterburn* in that the School, not the landowner, had control of use of the land under statutory provisions; the School failed to erect any signs regulating use.

6.6 The *Winterburn* principle is that the landowner must have taken action, and the signs must be sufficient to have the legal effect of rendering use contentious and not as of right. However, the landowner, BCC,

never made its position clear through the erection of any signs at all; neither did the School (as the entity with express statutory power to control use of the land). Even taking into account the old ACC signs, there were not sufficient clearly visible and legally effective signs on the land to achieve that result (particularly since neither of the Objectors had the requisite intention). The landowner's intention, as expressed in the 2010 Briefing Paper for example, was not a protest against public use of the land and no such protest was made sufficiently clearly as to render use contentious.

6.7 The importance of there being sufficient signs in the right places was highlighted by the Court of Appeal in *Taylor v Betterment Properties (Weymouth) Limited* (which was cited with approval in *Winterburn*):

> 'The judge has found that if left in place, the signs were sufficient in number and location; and were clearly enough worded; so as to bring to the actual knowledge of any reasonable user of the land that their user of it was contentious.' [60]

6.8 The following points demonstrate why the *Winterburn* principle is not relevant to these applications:

(a) **The signs were not effective** due to the ambiguous wording of the signs and lack of intent/legal authority on the part of either Objector, as demonstrated by the evidence discussed earlier. Neither were they effective as a form of permission – since detailed expert consideration previously concluded that they were not permissive, it cannot be said that they were 'clearly enough worded' to communicate any such intention to local users.

(b) **The signs were not determinative**

6.9 There were only three signs on a very large area of parkland with multiple access points. The car park in question in the *Winterburn* case was small (only 7 cars), had one access point and two signs (one at the single vehicle access entrance point and one in the front window of the club house). In *Winterburn*, there was thus no question of adequacy of signage. By contrast, the playing fields are approximately 22 acres in size (within a larger estate) and have in excess of 20 public access points and an additional 13 private gates onto the playing fields from the rear gardens of adjoining properties.

6.10 It is clear from case law that the number of signs and location are relevant when considering whether the use was "as of right". In particular, the Court of Appeal in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] 2 P & CR 3 [Aut/14] emphasised the importance of taking proportionate measures to notify inhabitants and putting up enough signs. Patten LJ stated: 'It seems to me that there is a world of difference between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft…' (emphasis added)

6.11 The Inspector concluded in relation to the single sign erected by BCC in 2009 that one sign would not be sufficient. It is a matter of judgement whether two or three ACC signs with relatively ambiguous wording were sufficient to render use contentious at the date they were erected, given the size of the site and apparent lack of intention of the landowner: the PROWG committee in December 2016 decided that, even if the ACC signs were effective when erected, the situation had changed by 1991. The evidence considered previously in this paper shows that neither ACC nor BCC had any intention of prohibiting public informal use of the land, and the evidence of changes to education legislation in relation to the use of the land (which was not made available to the Inspector in the TVG1 inquiry) proves that the PROWG committee was correct in its conclusion.

(c) Acquiescence

6.12 In the years since the erection of the signs, the previous landowner had acquiesced in public use of the land. This is in line with the Inspector's findings in his 2013 recommendation in TVG1, where he concluded that the site had been used as of right because although there were a small number of signs around the large site, the Council had taken no other steps to render use contentious. At paragraph 68 he noted that neither the Council nor the Claimant had contended at that stage that the three signs rendered the use contentious and thus not as of right, 'no doubt because of the limited number of signs and the Council's acquiescence to use by the local inhabitants for lawful sports and pastimes'. At paragraph 70, the Inspector stated:

> "In my judgment the signs have to be seen in context. I think that it is difficult to argue that the use of the application site has been contentious when, apart from the signs, no other steps have been taken to render the use contentious. It seems to me that the present case is a classic one of acquiescence. If local people were not supposed to be on the land, then when it was being used by the school or school's licensees, local people could have been so told. It would have been possible for local people to have been turned away on one day of the year, as envisaged by Lord Bingham." (emphasis added)

6.13 In his final recommendation in relation to TVG1, the Inspector did not depart from his earlier factual conclusion that the landowner had, in fact, acquiesced to such use. However, he concluded that such acquiescence was not relevant as the Court of Appeal's decision in *Winterburn* was binding on the Council in relation to this issue: the Inspector suggested that "the basis does not exist for Bristol City Council to do other than loyally follow the judgement of the Court of Appeal [in *Winterburn*]." [IR para 386]

6.14 The decision of the High Court notes at paragraph 27 that when the matter was considered by BCC Councillors on 12 December 2016, 'a wide ranging discussion occurred about the significance of those signs. The minutes record that in that discussion, "Members agreed that in 1985 Avon County Council

signage had made the position sufficiently clear that use of the site was contentious and not "as of right" but "Some members considered that this had changed over time and due to the size of the site, circa 22 acres, there was not sufficient number or sufficiently clear … signage to affect public perception that use of the site was contentious and not 'as of right' and this had been exacerbated by Avon County Council ceasing to exist.”' (Applicants' Bundle B306 at pages 308-309)

6.15 Ultimately, the reasons for rejecting the Inspector's recommendations included: 'Three members of the Committee considered that the facts of Winterburn…. were not the same as the facts in this case. Unlike the car park in that case Stoke Lodge Playing Fields is a large piece of land (about 22 acres) and there were only three signs. The small numbers of signs on such a large site was not sufficient to make the use of the land contentious.' (Applicants' Bundle B306 at B311)

6.16 In relation to this application, we have set out (a) detailed and significant evidence that Avon County Council's attitude to public use of the land was not in line with the conclusions reached by the Inspector in TVG1, as demonstrated by the evidence and information about the statutory framework that was withheld from that inquiry; (b) evidence about changes to the statutory framework resulting in signs ceasing to be a legally effective means for ACC to regulate use of the land from 1 April 1990, and (c) separate evidence about the approach of Bristol City Council from 1 April 1996.

(d) No relevant signs were erected by the Objectors during the relevant period

6.17 There were not 'sufficient and suitably placed signs' on the land as per *Taylor v Betterment* and highlight that throughout the 20-year period relevant to this application, the landowner (BCC) issued no formal direction in relation to informal access to the playing fields (which would have been the only legally effective means for it to regulate use of the land).

6.18 Neither the landowner nor either of the relevant schools (as the entities with day to day control) took any steps to update signage on the land, even though from 1 April 1996 onwards the ACC signs were inaccurate in several ways – first because they were misleading as to the ownership of the land; secondly because they misdirected any potential authorised user as to whom to contact for hire; thirdly because they misrepresented the Council's approach to public access to the land and finally because they referred to a legal provision that was not applicable. Thus the landowner made no attempt to restrict access via signage in the relevant period and neither did either of the schools during their periods as designated user. The evidence simply does not support the Objectors' arguments that either party was relying on those signs.

6.19 The School itself has admitted that it was well aware of the importance and relevance of signage but failed to take any such steps: on 25 July 2013 the School (via headteacher Malcolm Willis and then

Vice-Chair (now Chair) of Governors Sandra Fryer) wrote to the Inspector (item B26, Applicants' Bundle B444) in response to his 25 May 2013 report stating that:

> 'There has been much conversation about signs. With hindsight Cotham School should have put fresh signs up when we took the site over and certainly when we became an Academy.'

Despite this, it was not until July 2018 that the School took any (albeit ineffective) action to erect signs.

6.20 The Council itself argued in the JR (see extracts from skeleton argument at item C6, Applicants' Bundle C522) that:

- given that the School took the lease after the TVG application had been made and that the 'dual use' was then being carried on, Cotham School was aware of the position and potential implications;
- registration would reflect what has been the position on the land for at least the twenty-year period prior to the [TVG1] application; and
- it appears that the land has been used for a very long period for recreational purposes by the local community and the importance of the protection of recreational uses that arise from section 15 registration should not be overlooked.

6.21 We would argue that the situation applying to Stoke Lodge Playing Fields during the application falls squarely within the description given by Lord Wilson in *Lancashire*:

> '149. It was with complete passivity that, for no less than 20 years, [this] public authorit[y] contemplated the recreational use of [its] land on the part of the public. [The] simple erection at some stage during that period of signs permitting (or for that matter prohibiting) public use would have prevented such use of the land being as of right: *Winterburn v Bennett* [2016] EWCA Civ 482, [2017] 1 WLR 646. In such circumstances it is hardly surprising that [it] failed to establish its practical incompatibility with [its] own proposed use of it.'

6.22 We also note the Supreme Court's comments in the recent ruling in *TW Logistics Ltd v Essex County Council*:

> 'The idea that the acquisition of TVG rights... depends on acquiescence by the landowner... simply means that the landowner has been able to observe over a long period of time that the local inhabitants have appeared to be making use of the relevant land in the belief that they had a public right to use it and failed to take steps to disabuse them or prevent them from doing so.'

In over 20 years - years in which it was crystal clear to BCC and Cotham School that if they wanted to block the possibility of TVG rights, BCC need to make a Direction and/or the School needed to put up signs or fences, they did nothing. Instead, the School has repeatedly complained that local residents acted as if Stoke Lodge was a park - so it was very clear to the school that locals 'appeared to be making use of the land in the belief that they had a public right to do so'.

7. POSITION OF THE OBJECTORS FROM 1 SEPTEMBER 2011 ONWARDS

7.1 On the School's conversion to academy status in 2011, the legal position changed such that the Council has only a reversionary interest after the termination of the 125-year lease. Academy schools control the use of their land and buildings, subject to the terms of their lease (see paragraph 307 of item F2). From 1 September 2011, the School's right as tenant to use the land is expressed to be 'subject to all existing rights and use of the Property, including use by the community', which plainly includes accruing 'as of right' use.

BCC policy on academy conversions

7.2 In relation to academy conversions, Bristol City Council's Cabinet received a report on 23 June 2011 (see A7, Applicants' Bundle A65) setting out the Council's newly-adopted policy on academy conversions. Cotham School is specifically named in this paper as being among the first schools converting (see page A81). Subsequent schools are to convert in line with the same policy. This policy was developed at the same time that negotiations in relation to the lease for Stoke Lodge Playing Fields were just beginning - the Council was settling its policy for the first wave of academy conversions. The report notes that because of the automatic grant of a 125 year lease as part of the conversion process, 'There are concerns that this could result in the loss of a community asset and restrictions to the public access of specialist facilities and equipment' (see the third bullet point on page A67).

7.3 In relation to land transfer, paragraph 2.3 notes that 'The local authority are required to support the Academy conversion process in a number of ways, including land transfer…'.

7.4 Paragraph 4.1 on page A71 notes that the transfer of land is likely to be more complicated 'in many instances across Bristol where there is shared provision, joint access to specialist facilities or the provision of community facilities on the same site' – that is, the Council expressly recognised that shared use existed (for multiple schools across Bristol) and was a normal part of school arrangements. Paragraph 5.6 on page A73 states that governing bodies should 'consider their responsibility to the wider community and seek to ensure provision is made for continuing public access'.

7.5 Paragraph (c) on pages A79-A80 notes that:

> 'In some cases parts of sites are shared with other users and in such cases, only the assets directly relating to the school seeking academy status will be transferred, with separate lease arrangements put in place to ensure that the schools concerned can still have access to the shared land and facilities in question'.

7.6 It is in this context that the lease of Stoke Lodge Playing Fields was created, separately from the lease for Cotham School's main site. The lease was, from its first draft, amended from the DfE template to

make the school's rights subject to 'all existing rights and use, including use by the community' - it gives the school access to the shared land and facilities that it had been using prior to conversion, but does not override the existing shared use and public access. BCC's focus as it drafted the lease for Cotham (first draft produced on 18 July; see also references in emails at exactly this period in items F6 and F7) was to provide Cotham with a lease that gave it access to SLPF on the same basis as currently applied. It was never intended that the lease would 'upgrade' the School's use to exclusivity in the sense of ending ongoing public access, and then crystallise that additional benefit for the next 125 years. The negotiated amendment to the lease to maintain an 'as is' pattern of use is in line with the policy quoted above and with DfE Land Transfer Advice (see below). Note that this took place only a few months after the Cabinet's decision that SLPF would remain unfenced – both Objectors were very much aware of ongoing public access and use of the site, and the first TVG application was lodged in March 2011. The School negotiated a one-way break clause to allow it the flexibility to find other playing fields should it wish to do so. The language of 'use by the community' in clause 2.1 echoes the SSFA references. The lease agreed between the Objectors provided that the School would have access to the same shared land and facilities it was using prior to conversion, as per the Council's and DfE's policy.

DfE Land Transfer Advice

7.7 The Department for Education has published Land Transfer Advice for converting academies (item A8, Applicants' Bundle A82). This states:

> 'The Department's arrangements for ensuring the continued use of land by academies will need to take full account of the individual school's characteristics. This includes considering… the current arrangements by which land is either held for the purpose of the school or used by the school (including the pattern of use and the nature of that land); and any existing arrangements allowing others to make use of the school's land.' [page A85]

7.8 The document sets out the Department's policy context and key principles (pages A86-A87):

> 'The Department's key policy principle in resolving land issues for converting schools is to ensure that the appropriate protections for both public and trustee value in land are in place, and that the academy has both a secure future on its site, and <u>access to the same facilities it used as a maintained school</u>. The Department will always seek to ensure that the rights over the use of land given to an academy will be no worse than if the school had not changed its status.
>
> Our expectation is that all land and facilities used wholly or mainly for the purpose of the converting school will transfer and be made available to the academy in accordance with the

mechanisms set out in this guidance… However, experience has shown that schools make use of land in a number of different ways, and to differing degrees. It has also shown us that school land is used by third parties under a broad spectrum of formal and informal arrangements. We think that the best way forward is for the parties concerned to reach local agreements where these preserve all rights the school enjoyed as a maintained school. We strongly encourage all parties concerned with conversions to open up early dialogue not just about the possible transfer of land, but also about other mechanisms by which the existing use of facilities by the school (or role in managing those facilities), and use by the authority and local community, can be preserved. Such open discussion often helps prevent unnecessary delays to conversions.' (emphasis added)

7.9 The advice makes clear that where the facility is remaining in the ownership of the local authority, an academy will need to negotiate an appropriate use agreement with the landlord; all leases and subleases entered into by an academy trust need to be cleared by the Department. 'Even where the land is not to be transferred, the LA should put in place mechanisms to ensure that the academy may continue to use its current facilities on the same basis. As previously, the Department expects that locally agreed solutions will be possible in the vast majority of cases' (pages A88-A89). Finally, page A96 restates the principle that:

> 'Community schools have no ownership of the land before becoming academies and, because as much as possible we wish to see schools convert with arrangements that mirror their current position, they may not gain land ownership as part of the conversion.'

7.10 That this was the understanding of the parties at the time is supported by the following documents:

- a letter dated 5 October 2011 from David Mayer, Chairman of the Stoke Lodge Preservation Working Group, to Dr M Willis (head teacher) and Ms N Copplestone (Chair of Governors) of Cotham School (item A17, Applicants' Bundle A246), which refers to the school's conversion to Academy status and notes that Bristol City Council 'was obliged to formalise the current status quo regarding your access to Stoke Lodge in the form of a 125 year lease with Bristol City Council as landlord, Cotham School as tenant and the Community as ongoing users 'as of right'' and refers to maintaining 'clear dialogue regarding the ongoing use of the Parkland by both your Academy and the Community, in the harmonious way currently enjoyed by both interested parties'; and

- a response from Dr Willis dated 12 October 2011 (item A17, Applicants' Bundle A247) in which he states 'Thank you for your letter concerning Stoke Lodge and your express wish to maintain our close and harmonious relationship. We completely echo your sentiments…'. If Dr Willis had a different understanding about the impact of the lease on the status quo at Stoke Lodge, or

considered that there was any incompatibility in sharing the land on an ongoing basis, it is very surprising that he did not reference it in this letter (especially in the context of the ongoing TVG1 application). Dr Willis' understanding that the school shared use of Stoke Lodge with the local community continued to be evident in governing body minutes of February 2014 (item C17); it is further confirmed by the witness statement of Sandra Fryer, the School's current Chair of Governors to the TVG1 inquiry that the School was granted a lease to use Stoke Lodge 'in an ongoing manner' (the same phrase was used in witness statements from two other members of school staff).

- An email dated 28 June 2011 from BCC Legal Services to the School's solicitors (item F6) notes that the proposed lease for the playing fields would follow the DfE model lease with some changes, including that 'the lease will also be subject to all current users continuing, with the school being responsible for maintaining the facility to no better standard other than required for their own use'. We note the linkage here of a reduced maintenance obligation with the additional provision on continuing use (and that this does not refer to sports club hire – that is referred to elsewhere in the lease and would not be a reason to reduce the School's maintenance obligation).

- An email dated 12 August 2011 from the School's solicitors to BCC Legal Services (item F7) which includes discussion about an indemnity from the Council in relation to trees and boundary features. At paragraph 19 the School's solicitor states 'I would hope that some provision can be made by the Council to keep them in a reasonable condition as, excluding the playing field use, this land seems to me to be essentially open amenity land within a residential area'. In the response email dated 15 August 2011 (also at item F7), BCC Legal Services notes 'it was agreed that in respect of Stoke Lodge we would agree a much reduced repair clause, which you have agreed and which varies substantially from the Academy model'.

7.11 It is clear that both Objectors understood and agreed that the School's rights as tenant would be subject to ongoing use by members of the local community from 1 September 2011, in the same way as that use existed prior to that date. We note the similarity of the language used to the definition of 'community use' in the SSFA. We also note, however, that the lease excludes third party rights. The effect of clause 2.1 is that the School's rights are subject to ongoing use by the community, but the lease does not operate so as to make that use 'by right'. This is confirmed in an email dated 6 January 2020 from BCC to a local resident (see item F8).

7.12 Note that it is not the position of the Applicants that the School had no power to regulate use of the land from 1 September 2011 – it could have sought to renegotiate the terms of the lease with BCC, but having so recently negotiated them and having obtained valuable benefits as part of those negotiations

in recognition of the nature of the site, it must be taken as not having wished to do so. This is supported by the correspondence referred to above from October 2011 and by Ms Fryer's evidence to the TVG1 inquiry that ongoing informal use was not a problem from the School's perspective in this period. It is clear from later documents that the School accepted that coexistence was part of the terms of the lease. From October 2013 the Council gained the statutory power to end the accrual of potential TVG rights via a landowner statement. It did not make such a statement.

IN THE MATTER OF TWO APPLICATIONS TO REGISTER STOKE LODGE PLAYING FIELDS STOKE BISHOP, BRISTOL, AS A TOWN GREEN UNDER THE COMMONS ACT 2006

MS BURGESS AND MS WELHAM'S SUBMISSIONS IN REPLY

Introduction

1. These submissions reply to the submissions advanced by:
    i) Cotham School ("the School") dated 21 November 2022;
    ii) Bristol City Council ("the Council") as landowner dated 22 November 2022;
    iii) the submissions from the Cotham Parent and Carer Group ("CPCG") dated 23 November 2022.

2. Both the Council and the School advance arguments on statutory incompatibility and the Avon CC signs/as of right. The School, but not the Council, advance further submissions on the *Cheltenham Builders* issue. The CPCG do not make any legal submissions but purport to make factual submissions as to events between May 2018 and July 2019.

3. None of the November 2022 submissions take issue with the Applicants' submissions on implied permission.[1] All the objectors sensibly recognise that there is absolutely nothing in this argument.

Factual Findings

[1] See para 99-108 of the Applicants' October 2022 submissions.

4. The various objectors do not take issue with the vast majority of factual matters set out in detail in the Applicants' 26 October 2022 submissions. In the absence of express disagreement by an objector, the Inspector must proceed on the basis that the facts set out in those submissions are correct. Where an objector does not take issue with a particular fact, the Inspector will have to resolve, without the benefit of oral evidence, the correct factual position. However, as the objectors have not adduced any further evidence, it is likely that any such dispute will be resolved in the Applicants' favour.

5. The objectors, in their submissions, frequently ignore the correct factual position and advance arguments based on an inaccurate facts. Alternatively, the objectors ask the Inspector to disregard relevant evidence setting out the factual position or simply rely upon the incomplete, and at times inaccurate, evidence that was before the Inspector at the 2016 public inquiry. The objectors' approach has no merit. Notwithstanding the lack of a further public inquiry, the Inspector is still required to establish the factual position and apply it. The Inspector expressly asked parties to adduce any evidence that they wished to rely.[2] If the Inspector were to simply ignore the evidence adduced by the Applicants he would be acting unlawfully.[3] The Inspector is obliged to consider the totality of the evidence. In particular, the new evidence submitted by the Applicants requires him to reconsider his earlier conclusions on the effectiveness of the signs.

6. The Council's position on the facts is particularly problematic. As detailed in the Applicants' October 2022 submissions at para 5, the Council undertook to put all relevant evidence before the Inspector prior to the public inquiry into TVG 1. The Council failed so to provide the Inspector with all the relevant evidence. The Council cannot now rely upon its failure as a basis for a submission that the Inspector should disregard relevant evidence submitted by the Applicants (ie files A-F).[4]

---

[2] The Inspector acknowledged that the Applicants were entitled to adduce new evidence, see para 8 of the July 2022 directions [CRA's Amended Bundle/1074]

[3] The Council had previously asserted that the Inspector had a statutory duty to find the facts, see the Council's submission of 18 March 2020 [CRA's Amended Bundle/306]

[4] See eg para 10 of the Council's November 2022 submissions where it asserts that the Inspector's factual findings in 2016, at a public inquiry where neither Applicant appeared or was represented, are

Statutory incompatibility

i) Introduction

7. The two objectors' submissions are both premised on the unstated assertion that land owned by public authorities necessarily cannot be registered because it is inevitable that the public authorities' statutory duties owed in relation to the land will be incompatible with the registration of the land. However, this is not what the Supreme Court held in *Newhaven* or *Lancashire*. Neither judgment cast any doubt on the correctness of *New Windsor* [1975] Ch 380, *Trap Grounds* [2006] 2 AC 674 and *Lewis* [2010] 2 AC 70. It is thus clear that it is perfectly possible for public authorities to hold land which can be registered as a TVG.

ii) The Council's submissions (para 4-8 of Nov 2022 submissions)

8. The Council, in its November 2022 submissions, refers back to its June 2021 submissions and repeats them. It states that it wishes merely to add to the earlier submissions in one respect and then seeks to take issue with the Applicants' (and the Inspector's) conclusion that after the date of the lease the Council did not hold the Land for any statutory purposes at all. However, the Council's new submissions are not consistent with its June 2021 submissions which conceded:

    i) "for so long as a prior lease exists…the reversioner [ie the Council] is entitled only to such immediate rights over the Land as the lease reserves to him" (para 30 of the Council's June 2021 submissions);

    ii) whilst the lease continues, the Council "cannot in practice exercise those duties" (para 32 of the Council's June 2021 submissions).

9. At the time of registration (the relevant time for assessing whether there is statutory incompatibility) there is no incompatibility with the Council's statutory powers and duties (which it accepts cannot be exercised as a result of the lease) and registration of land as a TVG. Registration of the Land as a TVG would not prevent the Council from

somehow binding on the Applicants even though it is clear that at least some of the factual conclusions reached therein were based on incomplete or misleading evidence.

doing anything it has a statutory duty (or power) to do on the Land as it accepts that it cannot do anything in relation to the Land by virtue of the lease to the School.[5] Even if, which is denied, the Land remains "appropriated" for "educational purposes" this does not give rise to statutory incompatibility given the existence of the terms of the lease.

10. In reality, the Council's argument is that in 2136, when the lease reverts to the Council (assuming that the lease is not extended) there may be an incompatibility between registration of the Land as a TVG and whatever statutory duties the Council may owe at this future date. Given the direction of travel of education legislation, it is doubtful that, even if the Council still exists some 115 years in the future, it will have any involvement in education. The suggestion, which is implicit in the Council's case on this issue, that it will continue to have the same statutory duties at this point in the distant future and that this is a reason why registration should be refused in 2022, some 110 years earlier, is nonsensical and would bring the law into disrepute.[6]

iii) The School's submissions (paras 3-18 of the November 2022 submissions)

The School's statutory duties

11. The School contends that it is in the same position as the company in *R (NHS Property Services Ltd) v Surrey County Council* [2021] AC 194 and therefore the Inspector was wrong to conclude that there was no statutory incompatibility between the duties imposed on the Academy and registration of the land as a TVG.

12. This argument is premised upon two factual assertions:

[5] At para 6 of its November 2022 submissions, the Council incorrectly asserts that it was directed to grant such a lease. However, the Department for Education's Land Transfer Advice (Applicants' Bundle A8/a89) makes clear that a lease is not the only option. An Academy may be granted a licence to use the Land. Such an approach was adopted by the Council in relation to Fairfield High School's use of Muller Road Recreation Ground, see Applicants' Bundle E2/e874.

[6] The Council, at para 8, making passing reference to alleged statutory incompatibility between the legal duties said to be imposed on the School and registration of the land as at TVG. This issue is addressed in the response to the School's submissions below.

i) the School was "established by the Secretary of State to carry out a function imposed on her by Parliament" and thus it was in the same position as NHS Services Ltd;

ii) the School's statutory duties under Reg 3 Education (Independent School Standards) Regulations 2014 and s 94 of the Education and Skills Act 2008 under which it held the Land were incompatible with registration of the Land as a TVG.

13. Both factual assertions are incorrect.

14. First, the School was not established by the Secretary of State. It was established by the governors of the predecessor maintained School in 2011 as a standard part of the process of conversion to academy status. The Department for Education Governance Handbook for Academy trusts and maintained schools states that:

> 'An academy trust is a charitable company limited by guarantee. It is an independent legal entity with whom the Secretary of State has decided to enter into a funding agreement on the basis of agreeing their articles of association with the department' (paragraph 9).
>
> (emphasis added)

15. An extract from Cotham School's Articles of Association as agreed with the Department for Education (and based on the Department's model articles) is at item F16. It includes the following object:

> 'to promote for the benefit of the inhabitants of Bristol and the surrounding area the provision of facilities for recreation or other leisure time occupation of individuals who have need of such facilities by reason of their youth, age, infirmity or disablement, financial hardship or social and economic circumstances or for the public at large in the interests of social welfare and with the object of improving the condition of life of the said inhabitants'.
>
> (emphasis added)

16. The suggestion that the School is somehow in the same position as NHS Property Services Ltd, which is a company wholly owned and controlled by the Secretary of State is nonsense. The School is neither owned nor controlled by the Secretary of State. It is wholly independent of the Secretary of State: the regulations that apply to the School are

the Education (Independent School Standards) Regulations 2014. The school is not akin to an independent school it is such a school: "independent school" is defined in s 463 Education Act 1996 and includes academies (including the School) as well as fee paying schools. The School is not one of the ways in which the Secretary of State for Education carries out its functions but a wholly separate legal entity with different interests and obligations to the Secretary of State.[7] By contrast NHS Property Services Ltd is not independent of the Secretary of State. Further, the School, unlike NHS Property Services Ltd, has an obligation to provide facilities for recreation for the local inhabitants.

17. As Gilbart J noted in *R (NHS Property Services Ltd) v Surrey CC* [2016] 4 WLR 130[8] at para 135, the position in that case (i.e. that there was no use of the land consistent with the powers under which it was held that would not involve substantial conflict with use as a TVG) was very different to where land was held for education purposes such as s 507A Education Act 1996 which imposes a statutory duty to provide recreational facilities for the public. The analogy that the School seeks to draw is thus completely flawed.

18. Similarly, the School's second assertion that there is an incompatibility with the statutory duties under which it holds the Land and registration of the Land is also incorrect. In relation to s 94 Education and Skills Act 2008, this does not place any duty on the School: it merely empowers the Secretary of State to make regulations.

19. As to reg 3, there is no statutory minimum curriculum requirement for academies to provide physical education. Further, there is no statutory requirement that physical education be provided outdoors. In any case, there can be no point on inconsistency with the independent school standards since section 6(5) of the Academies Act provides that the relevant standards are to be treated as met in relation to the School on the conversion date – this statutory presumption effectively rules out any statutory

[7] Academies regularly challenge the Secretary of State's decision making which further demonstrates their independence, see eg *R (Khalisa Academies Trust Ltd) v Secretary of State for Education* [2021] EWHC 2660 (Admin).

[8] The Supreme Court broadly upheld and endorsed Gilbart J's approach.

incompatibility with the continuing informal use that was ongoing at that time and that is referred to in clause 2.1 of the lease.

20. At para 11, the School quotes the Inspector's 2016 report at para 452 where he suggests that evidently registration will preclude the School from using the Land for physical education. The Inspector was making clear that his tentative conclusion on this issue was based on the evidence that he had been provided. In particular, the School's head teacher had asserted that taking children to an "unfenced" site or a site to which the public have access to was not consistent with relevant guidance.[9] However, it is clear that the head teacher's suggestion that it was not possible, consistent with safeguarding etc, to use unfenced land was simply wrong.

21. Ofsted's School inspection handbook published in May 2019 and updated in September 2019 (see Applicants' Bundle A24/a277 at page a280) states at para 47:

> "Ofsted does not require schools to take any specific steps with regard to site security; in particular, inspectors do not have a view about the need for perimeter fences."
>
> (emphasis in the original)

22. Ofsted have confirmed in relation to the Land that there is no requirement for the Land to be fenced or to have the public excluded, see Applicants' Bundle A25 and A26/a281-282 and a283.

23. Many schools, both in Bristol and elsewhere, utilise unfenced playing fields which share use with local inhabitants. For example, the planning application supporting statement at Applicants' Bundle E1/e857-873 is an application for certain proposed improvements to the existing playing field surface at Muller Road Recreation Ground which is used by Fairfield High School (another large Bristol academy). This playing field is unfenced and

[9] See para 258 of the Inspector's 2016 report.

public access coexists with school use; see paras 7.3, 10.3.3 and 11.7 of the supporting statement which detail such coexistence.[10]

24. Indeed it is doubtful that the School, an independent school, is a public authority at all. The School is a company limited by guarantee.[11] Unlike maintained schools, the School is not part of, or controlled by, a local authority. If it is not a public authority, no question of statutory incompatibility can arise.[12] In any event, even if the School is a public authority, it does not hold the Land pursuant to reg 3 of the 2014 Regs (or s 94 Education and Skills Act 2008) or any other statutory provision. To the extent that it "holds" the land it does so pursuant to a lease that expressly provides for community use. The School, like Eton and Harrow, is required to comply with reg 3 but that does not mean that the land is held pursuant to these provisions.

The Council's statutory duties

25. The School's case on this aspect of its statutory incompatibility argument is premised on its assertion, at para 15 of its submissions, that prior to the creation of the Academy, "the land was held by the City Council for the purposes of education, pursuant to the same provision as those found by the Supreme Court in *NHS* [ie *Lancashire*] to preclude registration". However, again this is simply incorrect.

26. The Inspector, at paras 414-418 of his report in relation to TVG1 (ie Mr Mayer's application for registration) noted that the Council and School asserted that the Council held the land pursuant to the following powers:

    i) sections 507A and 507B Education Act 1996;

[10] See also the Department for Education Guidance, Applicants' Bundle at E3/e891, E4/e920 and D16/d846 which recognise that schools may use local authority parkland (which is necessarily open to the public) for the provision of education by the school.

[11] See *R (Cotham School) v Bristol City Council* para 12.

[12] Cf *Lancashire CC* and *NHS Property Services Ltd* (a wholly owned company controlled by the Secretary of State) which both clearly were public authorities.

ii) sections 120-122 Local Government 1972.[13]

27. The Inspector agreed with this analysis as did Sir Wyn Williams in *R (Cotham School) v Bristol City Council*. The Inspector further confirmed that this was the correct factual positon, see para 48 of the Inspector's 2 March 2021 report. It is not open to the Council or the School to now take issue with such conclusions as they elected not to appeal against Wyn Williams J's judgment and they are thus bound by such findings.

28. As the Inspector carefully noted at para 43 of his 2 March 2021 report, the statutory provisions that the County Council in *Lancashire* relied upon as showing incompatibility were completely different: s 8 of the 1944 Education Act 1944, ss 13 and 14 Education Act 1996, s 542 of the Education Act 1996 and s 175 of the Education Act 2002.

29. Once this is appreciated, it is clear that the School's argument in relation to the Council's statutory duties is misconceived.

30. Further, for the reasons set in the Applicants' February 2020 submissions [CRA's Amended Bundle/234-242], even if, contrary to the Applicants' primary contention, the statutory powers that the Council held the Land under prior to the Lease somehow continue after the Lease was entered into, there is no such incompatibility with the particular provisions at the time of registration.[14]

The Signs and as "as of right"

i) The School's submissions

31. At paragraph 21 of their November 2022 submissions, the School advances four reasons why the Applicants' arguments on the signs are misconceived. However, properly analysed, none of these four reasons undermine the Applicants' submissions.

[13] It was also asserted that the School held the Land pursuant to section 94 of the Education and Skills Act 2008 and the Education (Independent School Standards) Regulations 2014.

[14] See in particular paras 6-11 [CRA's Amended Bundle/235-236]

32. The School's first argument is that the Court of Appeal in *Winterburn v Bennett* held that it was irrelevant that the landowner had the legal power that use by local inhabitants was prohibited. However, the Court of Appeal held no such thing. In *Winterburn* this issue simply did not arise. The issue for the Inspector is whether the Council has, by its conduct, made its protest entirely clear.[15] However, the Council's conduct is not limited to the signs erected by its predecessor Council. As set out at paragraphs 82-83 of the Applicants' October 2022 submissions, whilst the existence of three old signs at a minority of entrances to the Land is part of the relevant factual background it is only a small part. The Inspector also has to consider the following facts: (a) that the signs were widely ignored by local inhabitants, (b) that Avon CC countermanded any attempts by caretakers/groundsmen to prohibit use of the Land, (c) that in January 1990 Avon CC positively decided not to make a direction prohibiting use of the Land by local inhabitants[16] and (d) at no point subsequent to the Council, in 1996, acquiring legal responsibility for education in the area and ownership of the Land did it take any steps to prohibit use of the Land by local inhabitants. The reasonable user would have been aware of such matters is the same way that a local inhabitant would have been aware of the supersession of the County Council by the City Council (see para 67 of the Inspector's March 2021 report). As with the supersession, the Council's decision not to issue a direction prohibiting use by local inhabitants in 1990 was not "a secret matter and all the relevant documentation would have been in the public domain."

33. The School's second argument is that actions by public authorities are presumed to be lawful unless and until quashed and "there was no challenge to the erection of the signs". However, the signs were erected in 1983/84. The Applicants do not suggest (and do not need to suggest) that such an erection was outwith Avon CC's powers at the time. However, it simply does not follow that because in 1983/84, Avon CC had the legal power to erect signs, that in 1998 (some 14/15 years later) and sometime after Avon CC ceased to exist, those signs, taken together with all the relevant factual circumstances,

[15] See *Winterburn* at para 40,

[16] The only direction made by the Council concerned use for adult education and explicitly stated that in respect of all other matters, 'Governing Bodies would be free to determine the use to be made of their premises' – see item F4.

were sufficient to make clear to the reasonable user that use of the Land for lawful sports and pastimes was prohibited.

34. The School's third argument is that the Inspector should assume that somehow the School can rely upon the signs and that by not taking any steps whatsoever they should be treated as if they had made a decision to prohibit use of the Land as they did not object to the erection of the signs. However, there is no basis for this assertion. The School had no involvement in the Land when the signs were erected in 1983/84. Indeed, the School's inaction in relation to this issue demonstrates that they did not wish to prohibit such use. The School's actions can be contrasted with the action of other schools in the area who did take steps to prohibit such use. As set out in paragraph 85 of the Applicants' October 2022 submissions, if the School is to make a decision as to the use of the Land, it is legally required to take into account a statutory relevant consideration namely the desirability of making the premises available for community use. It is simply not possible for the School lawfully to make a decision to prohibit such community use by inaction.

35. The School's fourth argument is that the "various internal material from the County Council and the City Council can have no legal relevance to the objective meaning and effect of the signs". This argument is flawed for a number of reasons. First, the issue is not what the objective meaning and effect of the signs is but whether the Council, has considering all relevant evidence, made its protest entirely clear. Section 15 makes no reference whatsoever to signs. The issue is whether use is "by force": when considering this the Inspector is required to consider all relevant evidence, not just a small number of out of date signs. Secondly, the material relied upon by the Applicants is not "internal material" but publicly available minutes of Council Committees. Such committees do not sit in secret: their minutes are published and are widely available. In the same way that the reasonable user would have been aware of the supersession of the local authorities, they would have similarly been aware of Council minutes that were in the public domain.

36. The School's argument at paragraph 22 that the 2009 sign somehow supports its case completely ignores the legal and factual position applicable at the time. The sign was located in the grounds of Stoke Lodge House. The Council had the power to regulate use within the grounds of Stoke Lodge House but had no power to regulate use of the Land.

In such circumstances, it is clear that the 2009 sign referred to the grounds of Stoke Lodge House rather than the Land (see para 86 of the Applicants' October 2022 submissions and section 5 of the Annex to those submissions).

ii) The Council's submissions

37. At paragraphs 11-16 of the Council's November 2022 submissions, the Council suggests that the Applicants were wrong to assert that the statements of Lord Hoffmann in *Godmanchester* and Lord Walker in *Beresford* had "not been doubted". However, the Council has failed to identify any authority where these statements were doubted – thus confirming, rather than undermining, the accuracy of the Applicants case on this point. The Council fails to identify any passage in *Barkas* where these two statements were doubted. Whilst the Supreme Court in *Barkas* departed from certain aspects of its previous judgment in *Beresford* the Council accept that Lord Walker's statement, relied upon by the Applicants, was not part of the reasoning said to be wrong. The Council fail to identify any part of the judgment in *Barkas* where any adverse comment is made on Lord Walker's statement on this issue (Lord Neuberger's comments on Lord Scott's view as to permissive use cannot sensibly be construed as doubting Lord Walker's statement. Further, there is no consideration in *Barkas* of Lord Hoffmann's statement in *Godmanchester* which does not appear to have been cited.

38. Similarly, there is nothing in the Court of Appeal's judgment in *Betterment* which doubts Lord Walker's statement (it does not appear to have been brought to the Court's attention). Further, *Godmanchester* does not appear to have been cited before the Court of Appeal in *Betterment*.

39. In relation to *Winterburn*, the Council asserts that "The remark of Lord Walker in *Beresford* was relied upon". However, this is simply incorrect. The WLR report details cases referred to in the judgment and there is no mention of either *Beresford* (or *Godmanchester*.) It appears that these neither of these relevant and highly persuasive House of Lords and Supreme Court authorities were cited.

40. The Council, like the School, seeks to suggest that the case law requires the Inspector not to go beyond the signs themselves and to ignore the publicly available documentation. The Council asserts that the landowner put up signs prohibiting use and that is the beginning and end of the matter. The Inspector merely needs to consider what happened "on the ground" and ignore everything else.

41. However, neither the landowner (the Council) during the relevant 20 year period nor the lessee (the School) put up any signs prohibiting use of the Land.[17] Neither the Council nor the School took any steps to make "its protest clear" let alone "entirely clear". The Council and School are forced to fall back on a small number of signs[18] erected some 14/15 years before the relevant period by a different organisation (Avon CC) which were consistently ignored by local inhabitants and which were undermined by Avon CC's actions acquiescing to such use. The Inspector previously concluded that such reliance was permissible because "the supercession of the County Council by the City Council was not, of course, a secret matter and all the relevant documentation would have been in the public domain." However, the Council seeks to "have its cake and eat it". It suggests that public documentation that makes clear that neither Avon CC nor the Council sought to prohibit use of the Land should be ignored but public documentation that establishes that the Council succeeded Avon CC's responsibilities should be taken into account. This is not the correct approach.

42. The Council's suggested approach is inconsistent with authority. For example, in *R (Lewis) v Redcar and Cleveland BC* [2008] EWHC 1813 (Admin), Sullivan J considered the surrounding factual context when considering the meaning and effect of the signs.[19] Sullivan J stated at para 21:

> I accept that the wording of the notices should not be considered in the abstract. The surrounding context, including any evidence as to their effect upon those to whom they were directed, should also be considered. The response to a notice may well be an indication as to how it was understood by the recipient. Moreover, the notices should be construed in a common sense rather than a

[17] As detailed above and in the October 2022 submissions, the Council's 2009 sign did not apply to the Land but to the grounds of Stoke Lodge House.

[18] See para 36 above.

[19] There was no appeal against Sullivan J's conclusions on this issue.

> legalistic way because they were addressed not to lawyers but to local users of the land.
>
> (emphasis added)

43. The Inspector, in his TVG 1 report, adopted a similar approach. At paragraph 372 of his report, the Inspector refers to the context and, in particular, Mr Hoskins's evidence on supposed county wide practice in relation to trespass on educational premises when considering the correct interpretation of the signs. It is clear from the new evidence that Mr Hoskins's evidence on this issue was not correct (the Inspector noted elsewhere that the Mr Hoskins's evidence on other matters was unreliable (see para 387 of the TVG 1 report)). The Inspector, when preparing his report in relation to these two applications, is required to reconsider the meaning and effect of the signs[20] taking into account all the relevant evidence now before him which provides the necessary "surrounding context". In particular, the following matters will need to be taken into account:[21]

    - Prior to erecting the signs, Avon County Council recorded its ongoing 'tacit approval' of informal use; the Applicants have also provided evidence of its continued acquiescence to ongoing informal use both in relation to the Land and other playing fields following the erection of the signs.[22]

---

[20] The language used in the signs is a "warning" rather than a prohibition.

[21] These matters are considered in more detail in the Applicants October 2022 submissions and the annex thereto.

[22] At paragraph 372 of the Inspector's TVG1 Report, he commented (in relation to the wording of the Avon signs) that 'in the context of the site with which I am concerned it was confirming the pre-existing situation and not for the first time granting a limited consent'. It is clear from the ACC minutes now available to the Inspector that this conclusion was incorrect – it was not in fact the case that Avon CC had prohibited use prior to erecting the signs. In fact, the evidence now available suggests that Avon had two primary motives in erecting the signs:

(a) to make known the provisions of the newly-introduced section 40 of the Local Government (Miscellaneous Provisions) Act 1982 which 'had the effect of widening the powers of the County Council quite significantly in cases of minor nuisance and disturbance on educational premises' – see the minutes of the County of Avon Education Committee dated 7 September 1982, Applicants' Bundle B5 at b325 and b329-330; and

- In the years after the signs were erected, Avon CC acted repeatedly and publicly in a manner that was inconsistent with the signs, specifically in relation to the Land. This included directing the gate at the West Dene entrance to be unlocked to allow continued access after an unauthorised locking by a new groundsman (see paragraphs 4.22 to 4.24 of the Annex to the Applicants' submissions dated 26 October 2022 and the evidence referred to there); and a public response (reported in the local press) to the unauthorised blocking of the Cheyne Road entrance by a groundsman, in which it stated that it intended to install a stile at that entry point to facilitate use (although this was not in fact installed, probably due to the introduction of Local Management of Schools shortly thereafter) (see paragraphs 4.25 to 4.28 of the Annex to the Applicants' submissions dated 26 October 2022 and the evidence referred to there).

- At paragraph 236 of the Inspector's TVG1 report, he notes evidence from a former Avon County Council groundsman that 'in the late 80s or early 90s[23]', the Council advised its employees 'not to confront members of the public as they might put

(b) to encourage pitch bookings – see the minutes of the Avon County Council Joint Ad Hoc Sub-Committee on Community Use of County Council Premises dated 17 September 1982 (Applicants' Bundle B3/b315): 'there were a number of playing fields which were not being used to their full extent… notices could be published locally to improve and encourage their use. …If the public considered that they had official entitlement to use the facilities, albeit on a casual level, they were more likely to protect those facilities themselves than if they were officially denied all rights of access' (b316).

In light of the Council's standing approach of 'tacit acceptance' (see Applicants' Bundle B3, paragraphs 4.2-4.3 on b319) of informal public use of playing fields, it might be asked why the words 'no trespassing' were included on the Avon signs at all. The answer to this appears to be that in order to 'activate' the section 40 LG(MP)A provisions, it is necessary that the person committing the nuisance must be on educational premises without lawful authority (see paragraph 25 on b329). The signs did, therefore, including a warning in relation to trespassing in their wording. However, this did not indicate a change in Avon County Council's approach to ongoing (non-nuisance) informal use, as was made clear by its subsequent conduct. Indeed, the signs appear to contemplate that informal use of the land would continue but that certain activities might amount to a nuisance.

[23] Council staff continued to maintain the Land as contractors to the School even after the introduction of Local Management of Schools in April 1990.

themselves at risk'. The witness went on to say that 'Staff were certainly aware that the land was used by the public for informal recreation. Reasonable use was never challenged; a challenge was only issued when they were doing something anti-social.' At paragraph 393 the Inspector referred to this as a 'standing instruction' from the Council not to confront dog-walkers (contrary to the language used on the signs).

- In 1990, in response to statutory changes, it made a Direction that explicitly confirmed that decisions as to the control and use of the Land were solely within the power of the governing body of the school using the Land.

- In the period from 1 April 1990 to 1 September 2000, Fairfield High School, as the school using the Land, did nothing to make any protest clear (all the incidents above took place during the period when Fairfield High School was the designated user of the Land).

- In the period from 1 September 2000 to 1 September 2011, the School, as the user of the Land, did nothing to make any protest clear. In fact it repeatedly acknowledged over a period of years in formal legal contracts with the University of Bristol in relation to the management of the Land that 'the site is open, at present, to the public and dogs'. At paragraph 322 of the TVG1 Inspector's Report, a University employee gave evidence that under these Transfer of Control Agreements, 'The groundstaff undertook a basic level of maintenance that was suitable for an unprotected site'.

- In April 2010, the Cabinet Briefing Note recorded that there was 'unfettered public access' to the Land.

- At the public inquiry in 2016, the School's Chair of Governors (and Chair of Finance Premises and General Purposes) gave evidence that the School had been content with ongoing informal use of the Land in the period of its tenure and that this was why the School had not put up any signs.

44. The objectors do not contest the evidence presented by the Applicants about Avon CC's conduct in the incidents at the West Dene gate and the Cheyne Road entrance, nor the

evidence of their own witnesses in the TVG1 inquiry about the lack of challenge by groundsmen to users of the field.

45. In particular, with regard to the Cheyne Road entrance, Avon CC went on record with a public statement, reported in the local press, that it did not object to informal use via that entrance (and in fact was intending to install a stile to formalise the entry point, although Local Management of Schools appears to have been a supervening event). As the Inspector may remember, there was never any sign at the Cheyne Road end of this 23 acre field and it was entirely possible for users to enter at that point, use the field for informal recreation and leave by any one of multiple entry points, without ever seeing a sign at all. In the Inspector's TVG1 report paragraphs 364-365 he commented on 'the ad hoc nature of access to the land'[24] but it would be surprising, given that this was clearly a principal entry point (and was well-represented in the evidence given to the TVG1 inquiry) that no sign was ever erected at this entry point if as a 'reasonable landowner' Avon CC genuinely intended to make an objection to informal use clear. Indeed, it is not possible to consider that in January 1990 Avon CC considered use to be contentious (despite the signs) since it was publicly acquiescing to informal use and the Land is not in any way internally divided. Access at this single point at one end of a 23 acre field is access to the whole field without restriction. There is no evidence that acceptance of informal use was a change of stance by Avon CC in January 1990 – indeed, the evidence provided by the Applicants demonstrates the opposite, in line with the statutory framework on the control and use of school premises.

46. This is not a case concerning a farmer's field which is largely unmanned with little to no contact with users except via signage. The Land is playing field land with extensive presence of groundsmen, school staff and club hirers on a daily basis. Indeed, multiple witnesses at the TVG1 public inquiry gave evidence of speaking cordially with the groundsmen or waving at them, and of watching school matches (that is, with school staff

[24] The School's risk assessment at Applicants' Bundle A14/a237 notes at least 19 informal access points and that 'the entire perimeter is relatively easily accessible to trespass, due to generally low walls or poor/dilapidated fencing. A 200m section of the boundary is nothing but a tree line adjoining a public footpath'.

present).[25] At paragraph 351 of his TVG1 Report, the Inspector noted that 'The evidence went to show that… use by local people could co-exist with use by the schools and sports clubs. This was not just a matter of local people going on to the land only when the schools and clubs were not on it.' At paragraph 352 he stated: 'It seems to me that the situation was one where the use by local people could and [did] co-exist with use by schools and sports clubs both geographically (because there would always be room for both) and temporally (because one could use the land when the other was not).'

47. Consistently unchallenged informal use is as 'visible' on the ground as signage, and clearly signalled the acquiescence that is also evident in the documents now available to the Inspector. The Council is mistaken in suggesting that the Applicants consider an 'extensive trawl' through minutes and legal documents to be necessary to determine what would have been apparent to the reasonable user. Those documents do, however, provide concrete evidence of what the position was 'on the ground' at the time – given the inconsistent, changing and often mutually contradictory explanations from the Council and the School about their positions, such evidence is essential in providing a contemporaneous record of the facts. The Applicants' position is, rather, that the conduct of the parties themselves was part of the visible message that was communicated to the reasonable user consistently over a period of years. What was 'visible' on the ground included ongoing daily informal use that was unchallenged by groundsmen or school staff (see the evidence recorded in TVG1 (referred to above) and the witness statement of [redacted] Applicants' Bundle B16/b382-383), as well as the instruction to leave the West Dene gate open, the removal of pruning debris blocking the Cheyne Road entrance

[25] See for example paragraphs 55, 84, 88, 102, 117, 121, 129, 162 of the TVG1 Inspector's Report. At paragraph 236 a Council employee states that 'Staff were certainly aware that the land was used by the public for informal recreation. Reasonable use was never challenged; a challenge was only issued when they were doing something anti-social'. At paragraph 317: 'Fairly soon after the University took over the running of the site he was inundated from phone calls from people saying that [the tree trunk] was preventing them exercising their dogs. His Deputy Director said that it was better to let them back in, so the tree trunk was pulled out enough so that people could get access, although it was a bit awkward.'

and the subsequent instruction by the University to its groundsmen to remove a large log that had been used to block this entrance (paragraphs 4.22 to 4.27 of the Annex to the Applicants' submissions of 26 October 2022)).

48. The Council cannot simply ignore the evidence now provided of Avon CC's inconsistent actions and subsequent acquiescence by all relevant parties. The question is not whether the landowner needed to 'do more' but whether any alleged effectiveness of the signs when erected could in theory survive such a series of contradictory statements and actions. The evidence shows that this was not the case, as confirmed by the approach of the School referred to above. Avon CC cannot possibly be said to have 'made its protest clear' and therefore action would have been required on the part of the School to render use contentious. Far from taking such action, the School effectively noted its acquiescence to ongoing informal use.

The Cheltenham Builders' argument, the 2016 inquiry and "as of right"

49. The Council make no new submissions in relation to this argument. The Applicants suggest that this amounts to a tacit acknowledgement that the arguments they previously advanced are misconceived; the Council simply has no response to the Applicants' arguments on this issue. The School does, somewhat half-heartedly, advance an argument on this issue, see paras 23-25 of their 21 November 2022 submissions.

50. The Applicants' detailed response to this argument is set out in Annex 1 to these submissions. The Applicants note that the School's submissions again ignore the relevant statutory regime applicable to the Land in question (set out in appendix 1 to the Applicants' 26 October 2022 submissions). Further, they ignore the fact that the Council's and the School's case before the Inspector was equivocal: both objections advanced an alternative argument that use was permissive rather than prohibited. Additionally, the School's submissions on this issue ignore the fact that the Council's position varied subsequently to the Inquiry. In particular, the Council sought to defend its decision that the Land should be registered (and thus was used as of right for the period 1991-2011).

51. At para 25 a), the School accepts that the comments that form the basis of this argument, namely paras 70-71 of Sullivan J's judgment in *Cheltenham Builders* are obiter. However, the School asserts that they are "nonetheless highly persuasive". The School fails to articulate any reason why such comments are "highly persuasive." They did not persuade Morgan J in *Betterment Properties*, Sullivan J in *Lewis* (who cited these comments in his first instance judgment at paragraph 14) or the Court of Appeal or Supreme Court in *Lewis*. Indeed, in the nearly twenty years since these obiter comments were made, no other judge has regarded them as persuasive and they have been doubted either expressly or impliedly on numerous occasions.

52. In relation to para 25 b) of the School's November 2022 submissions, the Court of Appeal's judgment in *Winterburn* does not undermine Morgan J's comments in *Betterment Properties.* As detailed elsewhere, *Winterburn* was not a TVG case and concerned very different facts. David Richards LJ does not suggest that Morgan J erred in any way (the Court of Appeal in *Winterburn* did not comment on Morgan J's judgment in *Betterment Properties).* In any event, the point in this case is that the landowner had not made his protest clear. The landowner (the Council) had not exercised its sole power to make its protest clear by issuing a direction or, post 1 October 2013, lodging a statement pursuant to section 15A Commons Act 2006. Similarly, the School has taken no steps to make its protest clear. Unlike other schools, it did not erect any signs whatsoever in the 11 or so years prior to the agreement of the terms of the lease in which it had legal power to control use of the Land (nor in the period thereafter up to 24 July 2018). Further, it took no other steps to make clear any protest (and it is clear from the documentary evidence now provided and witness evidence at the public inquiry in 2016 that the School did not in practice object to informal use in that period).

53. The point made by the School at para 25 c) of their submissions is a bad one. If the School's argument on this ground is correct, *Lewis* was wrongly decided by the Supreme Court and the judgment is *per incuriam.* The School's implicit suggestion that Sullivan J (the author of the obiter comments in *Cheltenham Builders*) at first instance, the Court of Appeal and the Supreme Court in *Lewis* alongside a number of the leading barristers specialising in TVG law all failed to spot this point is simply inconceivable. Sullivan J in fact refers to the point at paragraph 14 of his first instance judgment and states that

there is no binding authority on the issue, in a case where the landowner's 'opening shots' were unsuccessful so that its objection had not been made sufficiently clear.

54. As to para 25 d), the Applicants do not accept that such deliberations are irrelevant. In any event, the School's inaction and its failure (along with that of the Council) to take any steps to communicate its objection to ongoing use when such communication could have been simply and cheaply achieved by making a statement pursuant to section 15A Commons Act 2006 led reasonable users to understand that there was no such objection. Neither the Council's nor the School's objection to the 2016 Inquiry, which concerned a different period made clear to local inhabitants that there was an objection to ongoing use of the Land or an objection during the relevant 20 year period (1998-2018). In any event, post 2011 the School had no power to control use of the Land by local inhabitants given that its lease makes clear that its right to use the Land was expressly subject to the rights and use by the community, see clause 2.1.

The Cotham Parent and Carer Group submissions

55. The factual assertions made by the CPCG are addressed in Annex 2 attached.

Conclusions

56. For the above reasons and the reasons set out in the October 2022 submissions together with the various annexes, the Inspector should recommend to the Council that the Land be registered as a TVG as all the aspects of the statutory test are met.

Andrew Sharland KC

11 KBW

21 December 2022

ANNEX 1

APPLICANTS' RESPONSES TO 'CHELTENHAM BUILDERS' ARGUMENTS

The Applicants have set out in previous submissions (including their submissions of 26 October 2022) the reasons why *ex p Cheltenham Builders* does not provide authority for the proposition that any objection to a previous application would render further use of the land contentious and not 'as of right'. The Applicants submit that it is not open to the Inspector (or the Council or School) to ignore the Supreme Court's judgment in *R (Lewis) v Redcar and Cleveland BC*.

However, even if the Inspector disagrees with the Applicants' submissions on this point, there are multiple further reasons for dismissing the arguments made by the Objectors that their previous objections to registration had any impact on 'as of right' use on the ground. This Annex sets out facts and supporting evidence on the following points:

1. The conduct of the Council and School at the public inquiry in 2016 did not convey any clear message in relation to ongoing informal use of the Land.

2. Neither the School nor the Council had authority under the terms of the School's lease to render use contentious by their words or actions at or after the public inquiry.

3. It is clear from the evidence that the School and the Council were in discussions about the possibility of making a landowner statement under the Commons Act 2006 to bring 'as of right' use to an end, that they did not consider that such use had already ended (meaning that they and their advisers did not consider that any protest had been 'made clear').

4. The evidence demonstrates (a) that neither the School nor the Council genuinely considered that use had been made contentious by virtue of the 2016 public inquiry or following that inquiry, and (b) that the public at large was also unaware of any such hypothetical message having been communicated.

1. The conduct of the Council and School at the public inquiry in 2016 did not convey any clear message in relation to ongoing informal use of the Land.

1.1 The Council has argued that 'If the signage was itself insufficient to render the use contentious, the Council's public stance at the public inquiry did so' (Council's objection dated 4 April 2019 paragraph 17, CRA's Amended Bundle 44 at page 17). The Inspector in paragraph 82 IR (CRA's Amended Bundle 426 at page 441) drew an analogy to a situation where 'there is a public inquiry where the landowner makes clear his objection to registration and to the continuance of use'.

1.2 The Council's case in TVG1 concerned whether use was 'as of right' between 1991 and 2011. It did not indicate that use post-2011 was contentious. In relation to Stoke Lodge, the Inspector found that use was not 'as of right' only in relation to the period from 1991-96 and made no finding thereafter, but said that 'otherwise, my recommendation would have been that the land should be registered'. The PROWG Committee rejected this finding in December 2016 and concluded that use was 'as of right' throughout the period.

1.3 The Council's position at the public inquiry was that use in the period to March 2011 was, in the alternative, either prohibited (by virtue of the signs) or permitted. Separately, in a formal report by Council officers to the Neighbourhood Partnership dated 23 November 2012 relating to the exact location of the children's play park at Stoke Lodge Playing Fields (Applicants' Bundle A22/a261 at page a263) it was stated on behalf of the Council that 'The playing fields area has historically been used by the public for informal recreation. The Council maintains this is by right rather than as of right' (we note that this statement contradicts the Council's express statements in its Briefing Note, Applicants' Bundle A1/a1 – see for example paragraph 2.41 at page a7). As recorded at paragraph [370] of the TVG1 Inspector's report, the argument that the Council 'urged' on the inspector was that the Avon County Council signs only prohibited certain activities (dog walking, horse riding, drone flying etc) and did not prohibit walking (without a dog) or playing games on the land. It suggested that the latter activities were impliedly permitted. The Inspector rejected this argument and has consistently and repeatedly rejected the idea that the Council had given any implied permission in this period, but it is clear that the Council was not taking a position at the public inquiry that suggested that use could not continue, and ultimately its suggestion that any such use was permissive, was rejected.

1.4 Although any of these outcomes (prohibited/permitted/by right) could have made use not 'as of right', it could not have been apparent to local users from the Council's conduct at the public inquiry (even if they knew about the inquiry, which many did not) whether their ongoing use was alleged to be prohibited or permitted or by right – therefore the landowner could not be said to have communicated any single position to local residents in a clear and effective way; and, of course, following the PROWG meeting in December 2016 the Council took and subsequently defended the position that use was 'as of right'.

1.5 The Inspector commented in his Interim Report that:

> 'In addition, it was clear at the inquiry that the City Council and the School were objecting because they were concerned with the incompatibility, as they saw it, between the use of the land as a town or village green and its use as a school playing field, and based a legal argument upon that suggested incompatibility. Whether or not that argument was correct – a matter, of

course, which I have considered above – it made it clear that continuing use of the land by local people was contentious.' (paragraph 83, CRA's Amended Bundle 426 at page 441-442)

1.6 With due respect to the Inspector, even if the Objectors' arguments on statutory incompatibility had been successful – which they were not, either on his recommendation or at the judicial review – that would not, without more, have had the automatic and immediate result that day to day use became prohibited or permissive 'on the ground', in the context of the School's lease being subject to 'all existing rights and use of the Property, including use by the community'. The School would of course have had a decision to make had it succeeded in that argument, about how to operate going forward:

- It had already stopped using the playing fields at the end of 2013 (see Applicants' Bundle C17/c558) and could have continued with the approach of hiring other offsite facilities, or conducted PE on its main site as much as possible. This would, in fact, have been not only possible but a preferable educational outcome according to PE staff and governors on the School's Learning and Wellbeing Committee, which reported to the Governing Body in June 2014 (see item F9, paragraph 5) that 'If students could stay on site to do PE this would give them more time as currently curriculum time is taken up travelling off site… Yr. 8 performance review grades subdued. Out of 2 hours a week only 1 hour is spent teaching because of travelling time'. Again in July 2014 (see item F10, paragraph 7) the Governing Body noted that the Learning and Wellbeing Committee 'supported the proposal to timetable as much PE as possible on site to increase teaching time in the subject, reduce costs of transport and to provide flexibility in future whole school timetabling. This will be possible if School can develop PE provision on site through the placing of an AWP [all-weather pitch] on the grassed area[1]. It was noted that PE department had highlighted in their previous presentation that offsite provision will still be needed to provide full curriculum especially during exam period when the sports hall will not be available.'

- Alternatively, the School could have sought to renegotiate the terms of its lease (but would have run the risk of losing the valuable benefits that were agreed by the Council in recognition of ongoing informal public access); or it could have exercised the break clause in its lease to terminate its annual costs at Stoke Lodge.

However, as a tenant whose rights were expressly subject to 'all existing rights and use of the Property, including use by the community', the School could not lawfully have enlarged its rights under the lease by unilateral action.

[1] Note: The School now has both an all-weather pitch and a multi-use games area on its main site.

1.7 If even a successful claim of statutory incompatibility would not, without more, have rendered ongoing day to day use of the land contentious, then an unsuccessful claim clearly cannot have had that effect. As discussed below, what in fact happened is that in February 2017 the School submitted an application to redevelop the pavilion without a boundary fence (see Applicants' Bundle C13/c551) on the basis that the land had been or would be registered as a TVG, and that the School would continue to use it for sports (see paragraph 3.2 of Applicants' Bundle C13 at page c552). It clearly did not in fact consider day to day informal use to be incompatible with its statutory duties.

1.8 Neither Objector took any action whatsoever after 2011 or after the public inquiry in 2016 to resist the ongoing exercise of the claimed right or to indicate 'on the ground' to local residents and users of Stoke Lodge Playing Field that there was any change to the decades-long pattern of informal 'as of right' use. Given the size and nature of the application land, such communication could only realistically have been by signs or fences, neither of which were erected. There has never been any acceptance by users that ongoing use was not as of right - this is a very different situation to the *Cheltenham Builders* case, which concerned a very small area of land with relatively few local inhabitants, with identical applicants in both the first and second applications. In this case, the application site is a large area of land with multiple entrances, thousands of local users and different applicants (who played no active role in the TVG1 public inquiry or subsequent processes until 2018). At no stage did either Objector give any formal indication (let alone make it 'sufficiently clear') that it was no longer acquiescing in the public's ongoing user of the land. In the Council's case, it could not have done as this would have been contrary to its own expressed policy and Counsel's advice and outside its remit as the holder of only a reversionary interest in the land. Nothing in the lease permits the Council to regulate day to day use of the land. In the School's case, it could not do so since its rights as tenant were subject to that ongoing use. Instead, the School sought to obtain a landowner statement from the Council (indicating that in fact the School considered that 'as of right' use was ongoing – this is discussed further below). A landowner statement would have been effective to prevent the continuation of ongoing accrual of TVG rights, but the School was not successful in obtaining one.

The Council's actions following the public inquiry

1.9 It was not until December 2016 that the Council took a formal position as regards TVG1. Following consideration of the Inspector's report, it determined that the land should be registered as a TVG and then defended that decision via judicial review. It is not possible to coherently argue that the public should have received a message from the Council's conduct at or after the public inquiry that it objected to ongoing use by the community, and it would be artificial to consider the Council's various alternative arguments at the public inquiry as conveying a clearer and more permanent message than its subsequent repudiation of those arguments and defence of registration before the High Court.

1.10 The PROWG meeting on 12 December 2016 considered the Inspector's recommendation in relation to TVG1. The specific finding of the TVG1 report was:

> '391. I thus conclude that signs which were sufficient to render use of the land contentious were in place at the beginning of the twenty year period (1991) and that such use was contentious until at least the time when Avon County Council ceased to exist 1996. This means that the Applicant has failed to establish that use was as of right throughout the relevant twenty year period and the application must fail.'

> '462. I recommend that the land be not registered as a town or village green because in the relevant twenty year period use by local people has not been as of right. Otherwise my recommendation would have been that the land should be registered. I do not think that any of the other reasons argued for by the objectors should lead to the rejection of the application.'

1.11 The PROWG committee therefore discussed the relevance of the ACC signs at length (see handwritten officer's notes at Applicants' Bundle B11/b359), including discussion in relation to the relevance of *Winterburn* (as foreshadowed by paragraph 392 of the Inspector's TVG1 report). They rejected the inspector's recommendation, giving as a reason:

> 'Three members of the Committee considered that the facts in *Winterburn v Bennett* [2016] EWCA Civ 482 were not the same as the facts of this case. Unlike the car park in that case Stoke Lodge Playing Fields is a large piece of land (about 22 acres) and there were only three signs. The small number of signs on such a large site was not sufficient to make the use of the land contentious.'

1.12 The Council went on to defend its decision to register the land robustly at the subsequent judicial review. The outcome of that judicial review was that the judge found that the decision-making process and reasons had not been adequately recorded, and therefore did not support the departure from the Inspector's findings.

1.13 The PROWG Committee reconsidered the application in June 2018 (see the minutes at Applicants' Bundle C4/c515). At this meeting it gave scant discussion to the issue of signs and there was no discussion of whether ongoing use was contentious. After discussing the financial and party political implications of the process to date, the decision was made to accept the Inspector's recommendation and reject the application. An email from Ben Mosley (Head of the Executive Office) to Mike Jackson dated 4 July 2018, briefing the Council's Chief Executive on the matter, is in the email thread at Applicants' Bundle C5/c519 at page c520. The email notes that PROWG members voted on party political lines as to whether or not to register the land.

1.14 At no stage during or after the TVG1 proceedings did the Council communicate a general message to users that it was not acquiescing in the public's ongoing user of the land. Up to 2013, and again from 2016, it was not the Council's position that the signs made use contentious. In the interim period, it made alternative arguments including an implied permission argument (which was rejected). The argument being made on behalf of the Council that use had ceased to be 'as of right' also contradicts (a) the Council's own policy that schools should be encouraged to continue shared use of their playing fields (see the 2010 Briefing Note (Applicants' Bundle A1/a1)) and (b) legislation devolving decisions regarding the use of school premises to schools (up to 1 September 2011). From 1 September 2011 it would also have contradicted the provision that the Council itself had written into the school's lease protecting 'all existing rights and use of the Property, including use by the community' as such use existed at 31 August 2011. The Inspector himself, at paragraph 452(i) of his 2016 Report, noted that 'the land was acquired by Cotham School subject to any town or village green rights that there may have been over it' - i.e. subject to the ongoing accrual of those rights. The Council has no power under the lease or by statute to direct the day-to-day use of the land on or after 1 September 2011.

1.15 On the contrary, the Council's position, which it formally decided via the PROWG committee in December 2016 and then defended at the judicial review, was that ongoing informal use was 'as of right'. Its arguments before the High Court included the following (extract from skeleton argument on behalf of the Council attached at Applicants' Bundle C6/c522):

- Given that Cotham School took the lease after the [2011] TVG application had been made and that shared use was then being carried on, the school was aware of the position and potential implications [of registration as a town or village green] (paragraphs 77 and 91).
- Registration would reflect what has been the position on the land for at least the twenty-year period prior to the application (paragraph 87).

1.16 The Council also told the Court that 'It appears that the land has been used for a very long period for recreational purposes by the local community and the importance of the protection of recreational uses that arise from [TVG] registration should not be overlooked' (paragraph 78). In the light of the evidence that is now available but was not provided to the public inquiry in 2016, the Council was clearly correct to take this position before the High Court. It cannot lightly be assumed that the Council was deliberately misleading the Court as to its approach in relation to ongoing use.

1.17 This is a very different situation to the *Cheltenham Builders* example, where a message was communicated directly to the small group of users of the land about their ongoing use, and the application more generally, and (critically) the users then withdrew their application. The most that can be said in relation to Stoke Lodge is that the Council ultimately agreed on 25 June 2018 that use

was contentious up to April 1996 and that therefore the 20-year period in TVG1 had not been established. That being the case, it was entirely rational for the applicants to consider that an application in which the 20-year period post-dated April 1996 would not suffer the same impediment, and that there was no other bar to meeting the legal test.

1.18 In November 2016, the School applied for grant funding to carry out fencing works and to build a new pavilion. The application (CIF Bid submission Part A dated 22 November 2016 – see Applicants' Bundle C8/c529) includes the following statement:

> 'A5.2 Registration as Town or Village Green
>
> There was an application made by a local resident to register Stoke Lodge Playing Fields as a Town or Village Green in 2011. Cotham School has repeatedly resisted and objected to this application. Following a pubic [sic] enquiry held in 2016, the inspector recommended that the land should not be registered as a Town or Village Green. This recommendation is being put before the Commons Registration authority (PROWG committee at Bristol City Council) on the 12th December 2016. At that time it is strongly expected that the application will be rejected.
>
> …
>
> The expected failure of this 2011 application for two [sic] or village green status status does not preclude future applications from being submitted. It is the view here that if works are not undertaken to ensure these fields are used in a safe and controlled manner by the school, then this provision may be lost under a future application for status as town or village green. The following statement from the head teacher Joanne Butler should be noted with regard to the above; when asked what the school would do if the application was to be granted in the future, she noted, "the school would be put in an incredibly difficult position given the cost of Combe [sic] Dingle".' (emphasis added)

1.19 The School then, for strategic reasons, made a planning application (16/06304/F) (validated on 24 November 2016) to erect perimeter fencing. Minutes of the Finance, Premises and General Purposes Committee dated 21 November 2016 FP&GP Committee (Applicants' Bundle C9/c533) state:

> 'Have put in a planning application, for fencing, following advice from the Barrister, as this will prevent a further TVG application… Are also looking at making a landowner statement, once the planning application is submitted.'

1.20 We note that no landowner statement was ever made, although clearly if the Council's position had at any time been that it wished to contest ongoing informal use 'on the ground' then it could have done so to make clear its change of position (see section 3 below). It is evident from these minutes that the School did not consider that as of right use had been brought to an end by the process up to that point.

1.21 The School's Governing Body minutes of 7 December 2016 (Applicants' Bundle C10/c539) state:

> 'The Greens committee is meeting to consider the inspector's report next week. The TVG applicants are requesting a deferment to place a new TVG application, school will be presenting an argument against this. Have made a planning application for fencing which has had 80 objections. Governors were asked to put in support for the application. Have also made a Condition Improvement Fund bid to improve the facilities. Would like to negotiate shared access with the local community but do not want dogs on the playing field area. It would also be useful if Governors are able to attend the meeting.' (emphasis added)

1.22 Following the decision of the PROWG committee to recommend registration of the land as a TVG, the local Ward Councillors John Goulandris and Peter Abraham wrote to the School on 16 December 2016 'to counter robustly the misconception that this change in status means that the school has now lost its sports facilities' and 'to improve relations between all parties' (see Applicants' Bundle C11/c544). They requested that the 2016 fence application be withdrawn to 'demonstrate a major step forward in forging a lasting partnership between School and Community'.

1.23 The School did subsequently withdraw the application. Its FPGP committee minutes dated 27 March 2017 (Applicants' Bundle C12/c545) record its recognition that the fence would not in any case have received planning permission:

> 'The planning application for the fence has been withdrawn. This was likely to be refused due to detailed specifications which we plan to address in the future design of the fence. We have been consistently advised to have a live planning application.' (emphasis added)

We note that this 'consistent advice' to the School must be predicated on an understanding and acceptance by the School's advisers that ongoing 'as of right' use had not ended as a result of the TVG1 inquiry. If the School and its advisers did not consider that 'as of right' use had ended, on what basis can it now claim to have achieved that end, and how could local residents have understood that to be the case?

1.24 As its 'replacement' live planning application, the School submitted an application to redevelop the pavilion without a boundary fence. The Design and Access Statement dated February 2017 (see Applicants' Bundle C13/c551) makes clear at paragraph 3.2 that this planning application was

submitted on the understanding that the land had been or would be registered as a TVG, and that the School would continue to use it for sports (contrary to arguments it had put forward in TVG1 that it would not be possible for it do so, and that it would be put 'in an incredibly difficult position' if this occurred).

1.25 The School published a further fence proposal in late May 2018 which was exactly the same as the 2016 proposal (and therefore equally unlikely to gain planning permission – see the comments made in an email from the Head of Development Management to the Council's Chief Executive about the poor quality of the previous design, in the first email in the thread in Applicants' Bundle C5/c519). The difference in 2018 was that the School claimed that the fence could be erected under permitted development rules. The Council considered this matter in detail and responded on 13 July 2018 that this was not a valid approach (see Applicants' Bundle A16/a244) due to the land being the curtilage of a listed building (meaning that permitted development rights were withdrawn).

1.26 The Council has claimed (CRA's Amended Bundle 502 at page 516, paragraph 43(5)) that Ms Burgess' application was generated by the desire of both the School and the Council to regulate use, which is in itself an admission that use was not regulated up to September 2018. The evidence of the Council's own internal and external correspondence is that up to September 2018, its position was that the School should not proceed with its plan and that de facto community use was recognised. The School acknowledged that a planning application for this fence would not succeed; its planning consultant wrote to the Council on 17 August 2018 claiming that the Council's position in the 13 July 2018 letter that a planning application would be required was 'pivotal and devastating' for the School.

1.27 As the School sought to fence the land without engaging in a planning process, and because at all relevant times for the purpose of these applications the Council's response was that the School was not permitted to do so, users had no reason to assume that the Council had any desire at all to 'regulate use' of the land (and indeed the Council did not have any such intention, nor any legal authority in the matter since the land was subject to a lease to the School, the terms of which had been negotiated and agreed by both parties in 2011). There was no realistic prospect so far as the public was concerned that the fence proposed by the School in May 2018 would gain planning permission, since the published proposal had the same flaws as the previous (withdrawn) planning application and ran counter to the terms of the lease. Further, the School had no ability under the terms of the lease to unilaterally enlarge its rights and remove the proviso that its use of the Land was 'subject to all existing rights and use of the Property, including use by the community'.

1.28 On 3 August 2018 the School held a meeting with Council officers, the outcomes and actions from which are recorded (apparently from the School's perspective) in notes at Applicants' Bundle C14/c553. During this meeting the School informed the Council that its barristers had advised it to

erect signs or fencing as soon as possible – evidently in an attempt to bring an end to 'as of right' use and reduce the risk of a further TVG application. If the School's legal advisers still considered that the School or landowner needed to 'do more' to render use contentious, then how can it be thought that local residents should have considered that anything had changed about the quality of their use, when nothing had been communicated to them?

1.29 The School's proposal was framed at this stage as an 'offer' and a 'proposed plan'; 'the intention is that residents of the area will be free to continue to enjoy the fields for picnics and for informal play etc in much the same way as the school accepts they have in the past' (see the email dated 23 May 2018 from Jo Butler to Cabinet Member for Education Anna Keen at item F11, attaching the text of an email to Darren Jones MP). Two meetings between the School and local residents ensued, mediated by Darren Jones MP. A letter to constituents from Darren Jones dated 18 June 2018 describing his conclusions following the first meeting is at Applicants' Bundle A26/a283. A further letter dated 18 September 2018 following the second meeting is at item F12; it is clear from this these letters that no firm plan to fence the fields was in place at that stage: rather, at the earlier meeting 'it was agreed that, over the Summer, both parties would consider alternatives to an internal lockable perimeter fence as had been originally suggested by Cotham School'. Nothing in the tone of the School's letters and actions in this period suggests that it thought that informal use had been effectively prohibited and brought to an end as a result of its actions, or those of the Council, during the public inquiry. For more details on these matters, please see Annex 2 to these submissions.

1.30 The fact that the School went to the trouble and expense of erecting signs in July 2018 on the advice of its barristers again underlines its (correct) understanding that no action up to that point had rendered ongoing as of right use contentious. The School, and its advisers, clearly did not feel that anything that had taken place up to that date had achieved this result. The fact that its signs were considered by the Council to be unlawful throughout the period relevant to these applications, and exceeded the powers available to the School under the lease, means that they were of no effect - but the School clearly considered that no action had yet been taken that effectively rendered use contentious rather than 'as of right'. The School stated in its objection to Ms Burgess' application (CRA's Amended Bundle at page 52, paragraphs 9-10) that in erecting the signs the School was seeking to communicate its objection to the use of the Land for informal recreation. It stated that 'The landowner could have chosen to have acquiesced in the ongoing use of the land for informal recreation by withholding its consent under the terms of the lease for the erection of new prohibitory signs' (emphasis added) and that the erection of signs in the relevant locations on 24 July 2018 had rendered use contentious. These are clear admissions by the School that use was not contentious prior to 24 July 2018. The Applicants maintain that the signs were ineffective, but clearly the School would not have gone to the trouble and expense of erecting them had it not considered that 'as of right' use was still ongoing as at 24 July 2018.

Applicant's response following the public inquiry

1.31 Paragraph 70 of the *Cheltenham Builders* decision states:

> 'In this context, the reaction of the applicants for registration to the landowner's objection must be relevant. If they had refused the objection and persisted with their application, then it might well have been reasonable to have expected the landowner to do more to resist the exercise of the claimed right, for example, by erecting fencing or putting up notices'.

1.32 The applicant in TVG1 pursued his application despite objections to registration and never accepted those objections; therefore it 'might well have been reasonable' to have expected the Council or the School to 'do more' to resist the ongoing exercise of informal use of the field if any change in ongoing use was intended; however, the Council in fact decided to register the Land and then defended that decision on judicial review.

2. Neither the School nor the Council had authority under the terms of the School's lease to render use contentious by their words or actions at or after the public inquiry.

2.1 In its objection to TVG3 dated 18 March 2020 (see paragraphs 33-37, CRA's Amended Bundle 301 at pages 311 to 312), the Council appears to concede that the PROWG decision in December 2016 and the Council's subsequent defence of that decision meant that its conduct at the public inquiry was not relevant. It suggested that use might have become contentious from 25 June 2018 (the date of the PROWG decision following the judicial review). However, the School's objection to TVG3 dated 18 March 2020 still referred to the public inquiry (see paragraphs 32-33, CRA's Amended Bundle 288 at page 297) although, as can be seen from the evidence in this Annex, this is not consistent with the School's words and actions in the relevant period for these applications. There is an apparent difference between the Objectors as to the event that they wish to argue rendered use contentious, which serves to underline the untenable nature of this argument.

2.2 The Council's stance at the public inquiry, and any other purported steps taken by the Council to communicate a message to users can only be relevant if it is the landowner and has the responsibility to take decisions about access and use. This is inconsistent with the Inspector's finding that the land was no longer held by the Council after 31 August 2011.

2.3 From 1 September 2011, the Council has only a reversionary interest after the termination of the 125-year lease. Its statutory power to make a direction regarding use of school premises under the provisions of the School Standards and Framework Act no longer applies, as a result of the School's conversion to academy status. The argument that the Council had authority, merely by objecting to registration at a public inquiry, to regulate future use of the land is patently incorrect: it could not have done so by this method even prior to 1 September 2011 and now (by its own admission) had no control

over the use of the land as it had only a reversionary interest. Such an argument attributes to the Council greater powers to control the land after the creation of a 125-year lease than before. It also ignores the evidence set out in the 2010 Cabinet Briefing Note which makes the Council's support for the shared use of playing fields clear.

2.4 From 1 September 2011, the Council could make a legal case as to whether or not aspects of the section 15 test had been met, but it did not have authority to regulate day to day use of the land (subject to section 3 below regarding landowner statements). Its objection to TVG1 was dated 12 November 2011, less than 3 months after it had negotiated and signed a lease with the School that protected 'all existing rights and use of the Property, including use by the community'. That lease was negotiated and signed in full awareness of the TVG application made in March 2011 (see also the Council's skeleton argument before the High Court, Applicants' Bundle C6/c522). It would be surprising if the Council had changed its mind so soon after those negotiations; and if it had wished to bring an end to 'as of right' use it could have discussed this with the School as part of those negotiations (resulting in a more standard form lease, with greater financial liabilities for the School). In any event, from 1 September 2011 the Council's position as landowner was subject to the terms of the 125 year lease it had negotiated. Evidence has been provided (for example Applicants' Bundle C16/c556) that the Council does not consider itself to have any power to regulate use of the land as this is a matter for the School, subject to the terms of its lease.

2.5 After 31 August 2011, the rights of the Council as landowner and the School as tenant were exclusively as set out in the lease. Neither the Council nor the School had power to override the terms of the lease by taking a particular position at the public inquiry. The lease was negotiated and signed in full knowledge that a TVG application had been lodged. The Objectors could have negotiated a term that specified that community use was protected only if the TVG1 application was granted, but they did not do so. The standard Department for Education lease template (Applicants' Bundle A10/a146) was amended following negotiation between the Objectors to provide that the School's rights as leaseholder are 'subject to all existing rights and use of the Property, including use by the community' (see annotated comparison between template and executed lease at Applicants' Bundle A11/a178) . The Council's opening position in lease negotiations was that the lease should provide for 'all current users continuing' (see item F6).

2.6 Academy schools control the use of their land and buildings, subject to the terms of their lease. From 1 September 2011, the School's right as tenant to use the land is expressed to be 'subject to all existing rights and use of the Property, including use by the community', which plainly includes accruing 'as of right' use. From 1 September 2011, the School had no capacity to object to use of the sort that had existed in the years prior to that date (and was ongoing at that date). As stated in the Department for Education's handbook (see item F2, paragraph 307), 'the academy trust board… must refer to the

terms on which they occupy their site to determine their powers around community use of their premises and what happens in them on a day to day basis'. On and after 1 September 2011, the School therefore had no power to validly object to ongoing use by the community, although it could legitimately object to registration of the land as a TVG. The School's objection to TVG1 was dated 29 November 2011.

2.7 Note, however, that third parties (such as members of the public) are expressly excluded under the lease from having any rights such as a right of access. Clause 2.1 is a restriction of the School's rights as leaseholder, but does not grant concomitant legal rights to the community (see item F8, an email from BCC to a local resident dated 6 January 2020).

2.8 Like the Council, the School took no action in response to the TVG1 application, or at or after the public inquiry in 2016, to resist the ongoing exercise of the claimed right on the application land (until 24 July 2018 when it erected three purportedly prohibitory signs). In the School's case, any objection (had it occurred) would have been irrelevant given that, under the terms of its lease, its rights as leaseholder are 'subject to all existing rights and use of the Property, including use by the community'. It is, in any case, clear that the School had a clear and continuing understanding, from 1 September 2011 onwards, that its lease was subject to a shared use provision. See Applicants' Bundle C17/ c558, C18/c563 and C19/c580 and the discussion in section 4 below.

2.9 In *Cheltenham Builders* the High Court concluded (in part) that, read fairly and as a whole, the letters dated 15 December 2000 and 18 April 2001 made it sufficiently clear that the claimant developer (which had become the owner of the land) was not acquiescing in the applicants' user of its land. It held that the applicants' user of the site did not continue to be 'as of right' after the withdrawal of their first application on 8 June 2001. [71] Commenting on his own ruling in *Cheltenham Builders*, in his later judgment *in R(Lewis) v Redcar and Cleveland BC*, Sullivan J stated:

> 'However, it should be noted that the landowner's 'opening shots' in that particular war with the applicants for registration had apparently been wholly successful (see paragraph 71). What is the legal consequence if the 'opening shots', whether by correspondence or by the erection of notices, are not successful is less clear.' [14]

2.10 It is critical to note that it was not the letters of objection that were held to bring contentious use to an end in the *Cheltenham Builders* case, but the applicants' action in withdrawing their application on 8 June 2001. No such withdrawal was ever made in relation to TVG1; the process continued to completion and registration was then supported by the PROWG Committee in December 2016 and defended by the Council in the High Court.

2.11 We note that DEFRA's 'Guidance notes for completion of an application for registration of land as a Town or Village Green outside the pioneer implementation areas' dated October 2013 expressly envisages at paragraph 61 the possibility of repeated applications where there is significant new evidence, or a change in case law - it is clearly not DEFRA's view that any contested application would render a future application automatically invalid – see Applicants' Bundle C2/c495. Critical factors such as the introduction of Local Management of Schools and relevant changes in education legislation were not presented or considered in TVG1 and relevant evidence about ACC's approach to the use of playing fields was not provided to the Inspector.

2.12 In addition, it is vital for section 15(3) that there is certainty about the point at which use is made contentious. In this case it has been variously suggested that it was during an 8 day inquiry in June 2016 - or, in BCC's June 2021 submissions, a later PROWG decision in June 2018. Even assuming that they were capable of interpreting either of those events as bringing as of right use to an end, how could potential applicants know exactly when the one year period for section 15(3) starts and ends? It was relatively straightforward in *Cheltenham Builders* since the same applicants made each application and there was at that stage no need to identify a date for the end of contentious use, only that it had happened at some point prior to the second application. The current arguments suggest that public law rights relevant to thousands of local residents could depend on an action taken by one person (the section 15(2) applicant) of which they might not be aware - an action that in this case was never taken at all. The fact that neither the School nor the Council has identified (or even attempted to identify) a specific act which clearly communicated a message that ongoing use of the Land was no longer 'as of right' (and that these two parties were discussing making a landowner statement to achieve precisely that result) demonstrates the lack of any substance in this argument.

2.13 From the Council's perspective, at no point can it have thought that it had 'seen off' the applicant's contention - indeed, the Inspector himself disagreed with the Council's main argument about the impact of the signs, and only made a formal finding of contentious use in relation to the period to April 1996. The PROWG Committee then disagreed with the Inspector's finding and the Council spent the period from late 2016 to June 2018 defending the position that 'as of right' use existed in the period 1991-2011. If the Council's conduct at the 2016 public inquiry was in any way relevant, then surely its conduct before the High Court would be more so? It cannot be expected that, from its defence of 'as of right' use, local residents would form the understanding that use was contentious. In reality, it is apparent from the Council's internal and external communications throughout and after the period for these applications that it never had any intention of making ongoing use contentious (and that it did not consider that it had any ability to regulate day to day use of the land).

2.14 The Council states at paragraph 42 of its submissions dated 4 June 2021 (CRA's Amended Bundle 502 at page 515) that the issue is 'whether it would have been apparent to a reasonable local inhabitant

that the Council or the Academy was objecting to the inhabitant's use of the land'. This differs from the test set out in *Cheltenham Builders*, where the High Court ruled that the issue was how the matter would have appeared to the owner of the land, since in cases of prescription the presumption arises from the latter's acquiescence. First, any objection by the School (had it occurred) would be irrelevant given that, under the terms of its lease, its rights as leaseholder are 'subject to all existing rights and use of the Property, including use by the community'. Secondly, at no stage in the application period to 22 July 2018 did the Council (or the School) take any steps to erect signs on the land or otherwise make clear that ongoing use by the public was either forbidden or permitted. The Applicants note that although a landowner now has the ability to end 'as of right' use by making a landowner statement, it is an integral part of that process that the landowner is required to place signs on the land. These must be posted 'at or near at least one obvious place of entry to the land to which the application relates'. Regulation 4 of the relevant statutory instrument (SI 2013/1774) specifically states that this is 'so as to bring it to the attention of users of the land', effectively notifying users that 'as of right' use is potentially being brought to an end. This may well trigger a TVG application – clearly it was not Parliament's intention in creating this legislation that a landowner should be able to end public access rights by stealth or without proper process including a clear communication to actual users of the relevant land.

2.15 In light of the above, it is not relevant to pursue the question of whether or not the inquiry was a 'well-publicised cause celebre'; this phrase was introduced by the Council in its April 2019 objection (CRA's Amended Bundle 44) as a mechanism for imputing knowledge to thousands of people in the local community, in order to suggest that there was 'knowledge on the part of the person seeking to establish prescription that use is being objected to and has become contentious'. If no clear message was communicated, and the Objectors had no legal authority to communicate a message, then whether or not the 2016 public inquiry was a 'cause celebre' has no relevance. The Applicants note that the School and Council appear to have accepted that this issue is not worth pursuing.

2.16 The School's actions following the outcome of the judicial review, and associated evidence, have been discussed above. The fence proposal was framed by the School as an 'offer' and Darren Jones MP was involved in mediation meetings to look at alternative options which did not involve fencing and would not therefore disrupt public access. As discussed above, the issue of whether a fence could be erected was contentious as between the School and the Council; the Council's 13 July letter (Applicants' Bundle A16/a244) which confirmed that planning permission would be required due to the curtilage status of the land was described by the School's planning consultant as 'pivotal and devastating' to the School – this later led to the Council changing its position on curtilage despite the acknowledged prospect of 'inevitable legal challenge' by residents. These events are discussed more fully in Annex 2. Proposed development does not of itself render ongoing use contentious in circumstances where no

actual steps are taken on the land to restrict as of right use, and particularly in this case where the School's ability to regulate use is restricted in the lease.

3. Absence of a landowner statement

3.1 From 1 October 2013 the Council gained a statutory power to regulate use of the land. Section 15A of the Commons Act 2006 enables a landowner to deposit a landowner statement accompanied by a map, to protect land from registration as a town or village green as well as protecting the land from claims for additional rights of way. This allows landowners to prevent their land being registered as a town or village green, provided they are deposited before there has been 20 years' recreational use of the land as of right. If the land has been used for less than 20 years, the statement prevents users obtaining the 20 years they need to apply. If recreational use has already taken place over it for 20 years or more, then the deposit of a statement triggers the one year period of grace in which an application may be made. DEFRA's Guidance to Commons Registration Authorities on landowner statements dated December 2016 is included at item F14 and makes clear that the purpose of a landowner statement is to 'bring to an end any period of recreational use 'as of right' over land'. At paragraph 14 it states that 'The effect of depositing a landowner statement is to interrupt any such period of use of the land shown in the map and described in the statement'.

3.2 No landowner statement has been made in relation to Stoke Lodge Playing Fields. As noted above, it appears that the School had requested the Council to make a landowner statement, possibly as early as December 2016, but the Council took no such action. The minutes of the School's Finance, Premises and General Purposes Committee dated 21 November 2016 (Applicants' Bundle C10/c539) state:

> 'Have put in a planning application, for fencing, following advice from the Barrister, as this will prevent a further TVG application… Are also looking at making a landowner statement, once the planning application is submitted.'

3.3 It is evident from these minutes that the School did not consider that as of right use had been brought to an end by the process up to that point. Clearly, the School expected that the PROWG Committee would reject the TVG1 application and was hoping, both by a planning application and by means of a landowner statement, to prevent a new application being made. The issue appears to have been 'parked' during the period when the Council was defending its decision (and therefore defending ongoing 'as of right' use) before the High Court. However, the issue of a landowner statement was clearly raised by the School with the Council again following the High Court's decision: notes of a meeting between Council officers and the School dated 21 September 2018 (after the TVG2 application had been lodged) made by Gary Collins, Head of Development Management, record 'Landowner statement - where is this? Is this still relevant' (Applicants' Bundle C15/c555). As

highlighted above, if 'as of right' use has already ended, there is obviously no purpose to be served by making a landowner statement. The fact that Cotham School repeatedly refers to obtaining one, and had opened discussions with the Council on the subject, indicates that it, and possibly also the Council, considered that 'as of right' use was still ongoing. Both Objectors now wish to argue that it should have been clear to local residents that 'as of right' use had been ended due to the public inquiry – but if this was not clear to the School or the Council, how can it be argued that it should have been clear to local residents?

3.4 A request was made to the Council in the first half of 2021 to disclose under the FOI/EIR legislation any internal/external correspondence or minutes of calls/meetings relating to the making of a landowner statement under section 15A(1) of the Commons Act 2006 in relation to any Council-owned property. The Council refused to disclose any information in response to that FOI request – its response to this request referencing 'any Council-owned property' was 'The Council cannot provide a copy of a Landowner statement for Stoke Lodge Playing Fields as the Council did not make a statement'. This clearly indicates that discussions were held about the possibility of making a landowner statement in relation to Stoke Lodge Playing Fields.

3.5 When asked, by way of follow-up, to disclose any correspondence/minutes of calls meetings relating to the making of such a statement (as per the original request) the Council claimed that any FOI request relating to Stoke Lodge Playing Fields was vexatious and refused to answer it. The Council subsequently refused several other information requests on the same basis. On 22 August 2022 the Information Commissioner determined that the Council's 'blanket approach' to requests relating to Stoke Lodge is not a proper use of the relevant Freedom of Information Act exemption – however, the Council subsequently (on 4 October 2022 following an internal review) refused a separate third party request for landowner statement correspondence on the same basis, despite the ICO's ruling. We invite the Inspector to request the Council to disclose that correspondence to him and/or to draw his own conclusions about why the Council has repeatedly refused to comply with FOI requests on this matter.

3.6 Importantly, there would be no need to consider making such a statement, and the School and Council would not be discussing it, if they considered that 'as of right' use had been ended by virtue of the 2016 public inquiry, or if they considered that they had any other valid means of ending such use following the School's conversion to academy status under the terms of the lease.

4. The evidence demonstrates (a) that neither the School nor the Council genuinely considered that use had been made contentious by virtue of the 2016 public inquiry or following that inquiry, and (b) that the public at large was also unaware of any such hypothetical message being communicated.

4.1 The Council states (CRA's Amended Bundle 1067 at paragraph 9(3) and 12 to 14):

‘14. If the Inspector considers that further information is required, the Authority should have regard to the entirety of the documentation showing the extent to which the objections were known to the public. This will comprise the following, continuing to the end of the statutory period relied upon in respect of each application:

(1) The documents publicising Mr. Mayer’s application, the objection and the Inquiry;

(2) The various forms supporting and opposing Mr. Mayer’s application;

(3) The reportage of the Inquiry;

(4) The websites for ‘We [love] Stoke Lodge’ and ‘Stokelodgetvg.co.uk’;

(5) The communication with the Authority and Cllr. Abrahams referred to at paragraph [24] of Cotham School;

(6) The identities of the persons present at the meeting of PROWG on 12 December 2016

(7) The public reportage of the meeting of PROWG;

(8) The public reportage of the judgment of the administrative court in Cotham School;

(9) Public correspondence about the topic, including the numerous comments made on the stories concerning the TVG application published in the Bristol Post.’

4.2 It will be noted that the Council’s submissions do not specify on what basis use is said to have become not ‘as of right’, nor at what date – the objections were made on 12 November 2011 (for the Council) and 29 November 2011 (for the School). The public inquiry sat on 20–24 June, 27–28 June and 13 July 2016 and the Inspector’s decision was dated 14 October 2016. The PROWG Committee then decided that use was ‘as of right’ on 12 December 2016 and defended that decision until 25 June 2018.

4.3 In the March 2021 Interim Report (CRA’s Amended Bundle 426), Mr Petchey suggested (at paragraph 82) that where ‘there is a public inquiry where the landowner makes clear his objection to registration and to the continuance of the use… it seems to me highly arguable that the landowner can say in objection to the second application that his objection to the first rendered use after that date contentious’ (emphasis added). The difficulty with that proposition is, as set out above, that neither of the Objectors had the legal standing to effectively change the use of the land to make it contentious, and even if they did have that ability in law, there is no indication that an ‘objection…to the continuance of the use’ had been made clear.

On what basis do the Objectors suggest that use had become contentious?

4.4 Neither the School nor the Council has attempted to assert whether the effect of any hypothetical objection was to prohibit or to permit informal use such that it fails the test by being either 'nec vi' or 'nec precario'. There is no floating status of 'not as of right'. The totality of the evidence shows that neither the Council nor the School considered that use had become contentious.

4.5 It is clear that it was not the School's understanding that informal use had been prohibited or permitted – see, for example:

(a) the School's GB minutes dated 12 February 2014 (Applicants' Bundle C17/c558);

(b) the Options Paper produced by the School dated June 2014 (Applicants' Bundle C19/c580);

(c) the CIF Bid submission dated 22 November 2016, acknowledging the possibility of a further TVG application (Applicants' Bundle C8/c529);

(d) the School's erection of signs on the land on 24 July 2018 purporting (for the first time) to restrict access to the land;

(e) an email from the Headteacher of Cotham School dated 23 May 2018 to the BCC Cabinet Member for Education, referring to discussions about 'how we might work with local residents to ensure they can still access the fields' and attaching a letter sent to Darren Jones MP stating that 'the intention is that residents of the area will be free to continue to enjoy the fields for picnics and for informal play etc in much the same way as the school accepts they have in the past' – it appears that although the School may have hoped to suggest that use was 'permissive' at some point in the future, at this stage it was presenting a 'proposed plan to share the playing fields with the community' (see item F11).

(f) minutes of the meeting dated 3 August 2018 between the School and Council officers (see Applicants' Bundle C14/c553), in which the School records that its barristers had advised it to erect signs or fencing as soon as possible – evidently in an attempt to bring an end to 'as of right' use, which it must therefore have accepted was still ongoing at that stage.

4.6 It is clear that it was not the Council's understanding that informal use had been either prohibited or permitted – see, for example:

(a) the play park consultation as reported to the Neighbourhood Committee dated 23 November 2012 (Applicants' Bundle A22/a261),

(b) the PROWG committee's decision on 12 December 2016 and its subsequent defence of that decision (including the points made in its skeleton argument to the High Court in 2018 (Applicants' Bundle C6/c522);

(c) the Council's response to Cotham School dated 13 July 2018, making clear that informal recreational use of the land needed to be recognised in any planning application for a fence (Applicants' Bundle A16/a244);

(d) the description of the land by the Cabinet Member for Education on 22 September 2018 (Applicants' Bundle C1/c493);

(e) the decision of the Development Control B Committee dated 19 December 2018 in relation to one of the School's signs, stating that 'Planning consent cannot be used to restrict or prevent free public access to the land' (item F15).

4.7 If a change in ongoing 'as of right' use had not been made clear to/understood by either of the Objectors, how can it be said to have been made clear to the community at large? Further evidence is apparent from the absence of any relevant commentary in the minutes of Neighbourhood Partnership meetings in the years up to their dissolution in 2017. For context, when the Council held a consultation in 2010 about informal access to Stoke Lodge Playing Fields, around 250 people attended a public meeting to make their views known. When the School submitted a planning application in November 2016 to fence the land, it is understood that there were over 200 objections[2], and the application was subsequently withdrawn. When the School applied for advertisement consent in October 2018 to one of the signs it had erected purporting to prohibit access to the land, there were 297 objections. This is the scale of regular local reaction to any perceived threat to informal access to the land. And yet within the Neighbourhood Partnership minutes from mid-2016 onwards there is virtually no mention of the public inquiry, or of any purported impact on use of the land. Had there been any indication that a change was intended, this would clearly have been of great significance and notoriety – the absence of any such indication or communication being made to the community is clear from the total lack of commentary on the subject at the Stoke Bishop forum or Neighbourhood Partnership meeting. These are the primary fora in which protests would have been formally voiced and minuted.

4.8 By contrast to the public responses in the incidents listed above:

[2] The exact number is not known but the School's Governing Body minutes dated 7 December 2016 (Applicants' Bundle C10/c539) note that there were already 80 objections by that date since the application went live on the Council's Planning Online site, which is thought to have been around 30 November 2016 after the application was validated on 24 November 2016. Within the first week, the application had garnered 80 objections.

- the September 2016 Neighbourhood Partnership minutes focus on concern that a TV crew had been allowed to park HGVs on the playing fields, and potential repairs required to the site – there is no mention of the public inquiry that had taken place since the previous meeting;

- the December 2016 minutes include a reference to the application to fence the playing fields and how to object – again, if it was known or accepted that the public inquiry had in some way affected ongoing use, this would have been reflected in the public response and Neighbourhood Partnership minutes; and

- there is discussion in the May 2017 Neighbourhood Partnership minutes about funding a further dog waste bin, which would have been a patently absurd use of partnership funds had any such message been communicated – see item F13.

It is entirely clear that no message had in fact been communicated by the Objectors' actions or arguments at the public inquiry that ongoing use was prohibited or that permissive conditions had been imposed.

Evidence of how the School and Council actually regarded ongoing informal use from 2011 onwards

4.9 As seen in the Cabinet Briefing Note of April 2010 (Applicants' Bundle A1/a1), the Council's position was not to direct an open access policy itself, but to encourage school governing bodies to adopt such a policy. Subsequently, in 2011, the process of academisation led to a lease being granted to Cotham School in relation to the land that it was then using, on an 'as is' basis (see Applicants' Bundle A7/a65 and A8/a82). Accordingly, the Council inserted additional wording into the lease stating that the School's rights as tenant were 'subject to all existing rights and use of the Property, including use by the community'. This had the effect of writing open access into the lease, and the School was given various other benefits in return for this, recognising that, in the words of the School's solicitor, the land is 'excluding the playing field use, essentially open amenity land in a residential area'. The statement submitted by Sandra Fryer, the School's Chair of Governors, to the TVG1 public inquiry, confirms continuity between the use of the land before and after academy conversion, stating that the lease was 'on the basis of the land being used as a school playing field in an ongoing manner' (emphasis added; see item F17).

4.10 The Council's view, as expressed in an email of 31 August 2018 (see Applicants' Bundle C16/c556), was that it 'was not in a position' to authorise a large-scale group event at Stoke Lodge as 'we do not have the primary legal interest'. It suggested that 'the school should have the power to prevent a 'gathering' if it has not been approved by them' (we note that this assumes that the event would be of a type which fell outside the community use provision in the lease). The Council, based on advice from its legal team, considered that this was a matter for the school and 'the Council should not be

involved'. It is clear that the landowner did not see itself as being in a position to authorise even a one-off event; still less to give implied permission for ongoing use.

4.11 The School took no action at all to (purportedly) prohibit or permit access until 24 July 2018, but in any case it had no legal right to take such action under its lease.

4.12 Minutes of the School's governing body from 12 February 2014 (see Applicants' Bundle C17/c558), make clear that the School did not consider that any form of permission had been granted to the local community regarding its use of the land. In these minutes, the then-Headteacher refers to a public meeting that he and Sandra Fryer had attended at which the community had again insisted on the importance of open public access to SLPF. The minutes record that he 'spoke of his and SF's recent meeting with the Stoke Lodge Town and Village Green group regarding the pitch the school shares use of. He came away feeling he didn't want to be involved with… sharing that green space any further, and is currently looking at other suitable options'. In these minutes, the School clearly accepts the existence of community use of SLPF and that if it no longer wished to share the space, it would have to find an alternative location. Had Mr Willis considered that community use was permissive, he would presumably have withdrawn that permission or asked the Council to do so. He took neither action; instead the School ceased use of the field and continued using alternative (unfenced) facilities at Coombe Dingle Sports Complex, as it had already done for a decade or more. This indicates that use was neither prohibited (the School was not able to prohibit community use due to the terms of its lease) nor permissive (otherwise the minutes would refer to the School seeking to revoke the permission or have it revoked by the Council). The School ceased to use the Land for PE provision from late 2013.

4.13 Following that meeting, Cotham School commissioned a Feasibility Report from The Bush Consultancy (issue date 21 March 2014 – see Applicants' Bundle C18/c563) in relation to development of both the School's own site and Stoke Lodge Playing Fields. In section 1 this notes that 'an application for "Village Green" status is currently under consideration by Bristol City Council and the expectation is that this status will be awarded'. At section 9, the report notes that in relation to obtaining grant funding for developments, 'Areas of investment are likely to be prioritised towards Safeguarding projects and Improvements to play and sport spaces'. The report states that 'The Stoke Lodge site is historically controversial, and is furiously protected by a significant local population'. Note that it does not indicate that public use is prohibited or permissive, nor does it suggest that the School had any ability under the lease to make it so. Appendix G sets out three possible options for development of the playing fields, two of which involve half the playing field remaining as open space for community use.[3]

[3] Note that this report was shared with the School Governors on 21 March 2014. Three days later on 24 March 2014, at Sandra Fryer's request, the School's Facilities Manager performed the School's first ever risk assessment of Stoke Lodge Playing Fields and purportedly identified safeguarding risks at this sports facility (Applicants' Bundle A15/a241 records the view of the Council's health and safety officer that this assessment is overstated).

4.14 Later in 2014, the current Chair of Governors, Sandra Fryer, developed an 'Options Paper' considering various potential outcomes for the School's use of Stoke Lodge. This paper (Applicants' Bundle C19/c580) was prepared while the TVG1 process was ongoing and includes options ranging from the School giving up use of SLPF entirely, to proposals for a negotiated settlement of that application (apparently based on the Bush Consultancy proposals above). We note that option 4 considers the construction of fencing and says that 'this may be most difficult to resolve with the Community since no recognition of their presence let alone their dogs'. This paper makes clear that in mid-2014, the School (a) recognised ongoing community use of the field (if it thought use was permissive, it could have referred to withdrawing permission); (b) considered the possibility of giving up use of the playing fields (while evidently still fulfilling its statutory duties); and (c) had a number of potential strategies in mind for suggesting a compromise to the TVG1 process. Clearly the School did not consider that there was any permission that could be withdrawn in order to give it sole use of the playing fields – in fact it acknowledges that there is 'community presence' that should be recognised. These documents demonstrate the School's understanding that use of the land was shared but neither prohibited nor permissive.

4.15 Again, in December 2016 the School's stance was that it 'would like to negotiate shared access with the local community' (see Applicants' Bundle C10/c539). This does not indicate that use was either prohibited or permissive, or that the School had any right to make it so.

4.16 No signs relating to access were erected by either the School or the Council until in July 2018 the School erected signs that purported to restrict access in contravention of the terms of its lease; these signs were, at all relevant times for the purposes of these applications, regarded by the Council as unlawful and subject to enforcement action (Councillors later described the language used as 'threatening and misleading' in view of the shared use of the site – see item F15). In February 2019, having erected a fence, the school installed further signs which purported to grant permissive access, although it retained the earlier purported exclusionary (and now contradictory) signs in place.

Requirement for certainty as to date

4.17 As discussed above, neither the School nor the Council has attempted to point to a specific date on which use is said to have become contentious. It is not clear what the defining event would be alleged to be, nor what authority either party would have under the lease to change the nature of ongoing informal use. The most obvious date would be when the signs were erected on 24 July 2018; clearly the School did not consider that it had happened prior to that (and therefore it seems absurd for the Objectors to argue that the public at large should have been aware of any change in the nature of their use). Mrs Welham's application under section 15(3) covers this circumstance (without needing to consider the validity and effectiveness or otherwise of those signs). The fact that neither Objector has

been able to put forward a coherent argument pointing to any date prior to 24 July 2018 when they claim that use ceased to be ‘as of right’ makes clear that this argument has no substance at all.

ANNEX 2

COMMENTARY ON CPCG SUBMISSION DATED 23 NOVEMBER 2022 AND EVIDENCE RELATING TO EVENTS FROM MAY 2018 ONWARDS

1.1 The CPCG submissions appear to be based on a misunderstanding of the phrase 'contentious use' - their comments and evidence are directed at establishing whether it was controversial locally that the School had expressed a wish to put up a fence at a future date. However, TVG applications are frequently made in response to threats of potential development, and when it became clear that the School had no intention of negotiating in good faith in the mediation chaired by Darren Jones MP, that is what happened in this case. In the absence of any action banning/permitting ongoing use on the land itself, the CPCG submissions confuse a controversial news story with 'contentious use of the land'. They miss the point that the School's use under the lease is subject to use by the community and that it had no power to change this unilaterally by granting itself exclusivity.

1.2 The CPCG submission relates mainly to the period between 3 May 2018 (the date on which judgment was handed down in *R(Cotham School) v Bristol City Council*) and 24 July 2018 (the date when three purportedly prohibitory signs were erected by Cotham School) – a period in relation to which Counsel for both the School and the Council have seen no purpose in making submissions.

1.3 There are multiple inaccuracies in the statements made by the CPCG[1], but no evidence that is relevant to the determination of these applications. The Applicants do not intend to provide a full list of those inaccuracies; some examples are footnoted below and no admission is made as to the correctness of any CPCG statement that is not specifically countered in this Annex.

[1] For example:

- The claims made in 2.1 about adding 'many existing SSLP members' to the Facebook group is supposition, unsupported by evidence; likewise the claim at 4.2 about the distribution of an SSLP newsletter. The applicants have no information about the distribution of such a newsletter nor has any evidence been provided of such. The reference appears to be to a newsletter sent to the SSLP mailing list, to which the Applicants do not have access.
- The claim at 5.1 about Mr Mayer is supposition and unsupported by the evidence quoted.
- Paragraphs 7.2 and 7.3 do not refer to events that occurred in the period quoted (even if they had any relevance to these applications, which they do not).
- A number of dates are incorrect (for example, in points 13, 15, 17 and 18; points 17 and 18 are also factually inaccurate in a number of respects. It would not be possible, for example, for the WLSL Facebook group to be 'chiefly composed of ex-SSLP members' when the number of current members of the Facebook group is around seven times that of the number of members understood to be on the SSLP mailing list. The CPCG persists in seeking to argue that the two groups are the same; this is neither accurate nor relevant and the point has been addressed previously in submissions.
- Point 14.1 misquotes the reference to clause 2.1 of the lease ('all existing rights and use of the Property'), apparently in an attempt to characterise the community as claiming 'existing rights'.
- As to point 17, the CPCG submission is mistaken as to the date (Ms Burgess' application was submitted on 14 September 2018) and as to the details about how the submission was made but these details are in any case wholly irrelevant.
- As to point 18, the email sent by Mrs Welham commenting on her family's use of Stoke Lodge was sent, so far as she can recall, at the request of a neighbour. It contains no reference to the TVG1 application, nor did Mrs Welham attend, follow or play any active role at all in that process. She simply responded to a request to describe her family's use and then forgot all about it. She took no further part in any matters relating to Stoke Lodge until May 2018 as correctly stated in the Applicants' earlier submissions.

1.4 The CPCG submission, like its earlier submission dated 7 July 2021, seeks to argue that 'issues relating to Stoke Lodge were well publicised'. This point is neither relevant nor one that is being pursued by either the School or the Council. It fails, in particular, to take account of the following points:

(a) Following the judicial review decision, the School issued a newsletter to parents stating that 'We also recognise that these playing fields are a valuable community resource and welcome the opportunity, as we always have, to work with local residents to produce a cohesive plan for sharing use of the space in the future'.

(b) Neither of the Applicants (nor the CPCG) was present at the meeting held at Cotham School on 21 May 2018 with representatives of Save Stoke Lodge Parkland and Councillor Goulandris referred to at point 3 of the CPCG submissions. At that meeting, according to the School's own records which have recently been obtained following a Freedom of Information request, the School's stated objective was 'to work together and to agree outcomes. School will set out their position as to where they want to go. We will agree next steps.'

(c) The public statement issued by Cotham School on 25 May 2018 to which the CPCG submissions refer is expressed at point 6 to be a 'proposal which has been made to try to find a way of allowing the public to continue to use the space alongside the School and other users in a harmonious way' [CRA's Amended Bundle 788]. The School states that it has 'always expressed an intention to want to work with the community, to find an agreed way of being able to share the playing fields more widely with the local residents, whilst maintaining its duty of care to its student and staff' (emphasis added).

1.5 At no point in items (a) to (c) above is it suggested that the ongoing informal use of the Land has already been stopped or rendered contentious, although the School was proposing that such use might be restricted by a perimeter fence at a future date. The remainder of this Annex sets out, with reference to evidence submitted, a narrative of events during the period from May to July 2018, demonstrating that at no point was action taken to make clear to users of the Land that their use might be contentious (the School did not in any case have any authority to unilaterally grant itself greater rights than were available to it under the Lease, so no such action would have been effective even if taken).

1.6 The Headteacher of Cotham School wrote to Darren Jones MP on or about 23 May 2018 (see item F11) describing its proposal as an 'offer' and a 'proposed plan'. It suggested that in future when the fence was erected, informal use would be permissive on the part of the School, but that 'the intention is that residents will be free to continue to enjoy the fields for picnics and for informal play etc in much the same way as the school accepts they have in the past, however the site will be more secure (to combat potential vandalism of changing rooms etc)' (emphasis added). The School was clear from the outcome of TVG1 and the judicial review that use had not been permissive in the past (nor was it

prohibited as a result of the 2016 public inquiry), and appeared now to be suggesting that it would like it to be permissive in the future (although in fact the terms of the lease are such that the School does not have power to make informal use permissive by unilateral action).

1.7 The School published a further fence proposal in late May 2018 which was exactly the same as the proposal for which it had made a planning application in late 2016. The School was therefore aware that such a proposal would not be successful via a planning application – see:

(a) the comments made in an email from the Head of Development Management to the Council's Chief Executive about the poor quality of the previous design, in the first email in the thread in Applicants' Bundle C5/c519; and

(b) comments made by the Council's planning officer about its 2016 application (withdrawn in early 2017) which made clear that the Council would have rejected such a proposal had it been made via a planning application, since it breached two formal Council planning policies and was 'unnecessary in regard to safety' (this document has recently been obtained following an FOI request).

1.8 However, in its 2018 iteration, the School claimed that a perimeter fence could be erected under permitted development rules.

1.9 In early June 2018 a local resident received letters from Ofsted confirming that it does not require perimeter fencing around playing fields – see Applicants' Bundle item A25/a281-282. These letters were well-publicised on social media and in the local press (CRA's Amended Bundle, 843-847).

1.10 By 13 June 2018 Council officers had intervened, instructing the School that it could not proceed to erect a fence without planning permission due to the curtilage status of the land. The School protested to the Council (see Applicants' Bundle item C13/c594) and the Council ultimately responded on 13 July 2018 to both the School and local Councillors and residents – see Applicants' Bundle item A16/a244.

1.11 Darren Jones MP also investigated the position and published his own response on 18 June 2018 (see Applicants' Bundle item A26/a283) stating that based on responses from Ofsted and the Department for Education, he did not believe that a perimeter fence was a reasonable or proportionate proposal. He hosted a mediation meeting on 20 July 2018 at which it 'was agreed that, over the Summer, both parties would consider alternatives to an internal lockable perimeter fence as had been originally suggested by Cotham School' (see item F12). Note that no CPCG representatives were present at this meeting and the comments in 12.1 about what the CPCG supposes to be the content of the meeting are highly inaccurate.

1.12 The Council's response to the School dated 13 July 2018 (Applicants' Bundle item A16/a244) made its position in relation to ongoing use clear to Cotham School and was copied to local councillors and to WLSL and local residents. This letter informed the School that it would not be able to erect a fence around the playing fields without making a planning application (which would be subject to public consultation). It noted that this would require an assessment of the merits of the application, including a Statement of Community Involvement, including how the fence alignment would maximise 'the recreation space available outside of the fenced area'; how the fence design would acknowledge and respond to 'the historic parkland character of the site' and:

> 'the qualities of the recreational open space which would be available to the community. The School's recent proposal to establish a community park represents a positive way forward and would help to mitigate the proposals. We would always encourage you to consider this from the outset, to develop proposals through discussion with the local community and to include these within the application.'

1.13 In other words, the Council recognised de facto ongoing community use, and told Cotham School that if it wanted to fence off pitch areas, it must 'maximise the recreation space' available to the community, potentially going as far as establishing a community park to 'mitigate' for fencing off part of the area, which would be a detrimental loss of shared open space. This is a clear indication that the Council's position remained the same: it acknowledged ongoing informal community use of the Land. It also confirmed that the curtilage status of the Land meant that permitted development rights did not apply.

1.14 This was the Council's official (and public) position, and remained so (see for example the 'barrier busting schedule' at Applicants' Bundle A27/a287) until late September 2018 (after receipt of the TVG2 application – see Applicants' Bundle A28/a291) when it reversed its view on curtilage and told Cotham School it could put up a fence without a planning application; it did not, however, disclose this change of position to the public until early December 2018. In internal correspondence dated 24 September 2018, senior officers within the Council acknowledged that the change of position would lead to 'inevitable legal challenge from local residents' (see Applicants' Bundle A29/a294) - clearly they understood that no message had been communicated to users that their ongoing use of the land had been somehow prohibited as a result of the TVG1 public inquiry. This was the stage at which public awareness increased, with membership of WLSL increasing rapidly as local residents became alert to the threat to their green space. But by that stage the TVG2 application was already in place (14 September 2018). The TVG3 application was made at a later date but covers the period up to 22 July 2018. On the basis of the 13 July 2018 letter, the clear conclusion is that the Council accepted that there was ongoing de facto public use of the land and was taking steps to ensure that Cotham School respected the priority of the community use provision contained in its lease.

1.15 At the mediation meeting on 20 July 2018, the School failed to give any indication that it had made arrangements to erect purportedly prohibitory signs on 24 July 2018. In response to the erection of the signs on 24 July, Darren Jones MP published a comment expressing his disappointment and stating that at the mediation meeting a few days before, 'representatives of two community groups and the school sat down together to discuss options to bring this long-running saga to a mutually beneficial conclusion. These signs were not mentioned and they undermine the community's confidence that Cotham School are trying to work with users of the field'.

1.16 Thus, while the School's proposal to fence the Land was controversial, it was no more than a proposal and there was every indication that it would not be allowed to pursue it without a planning application. The School was also purporting to engage in good faith in mediation discussions to find alternative solutions to perimeter fencing. Had the School made a planning application for perimeter fencing, that would have been a trigger event preventing the TVG2 application; however, the School did not take that step (being aware of the Council's previous stance as indicated above). Instead, and without any prior indication, it erected purportedly prohibitory (not permissive) signs on 24 July 2018. The Council initiated enforcement proceedings against the School in relation to the signs; this was not resolved until after the relevant date for these applications.

1.17 On 3 August 2018 the School held a meeting with Council officers, the outcomes and actions from which are recorded (apparently from the School's perspective) in notes at Applicants' Bundle item C14/c554 (at point 7). During this meeting the School informed the Council that its barristers had advised it to erect signs or fencing as soon as possible - evidently in an attempt to bring an end to 'as of right' use and reduce the risk of a further TVG application. Clearly, the School's legal advisers still considered that the School or landowner needed to 'do more' to render use contentious, and that no action prior to this point had been taken that would be effective to end 'as of right' use.

1.18 In an email thread on 22 September 2018 Councillor Anna Keen, the Cabinet Member for Education, advised the new Chief Executive that Stoke Lodge Playing Fields are 'a public space and there's an agreement that the school can use it as their playing fields' (see Applicants' Bundle C1/c493). It is thus clear that the Council had not taken a position internally that public use was contentious, still less communicated any such message to users of the field. Otherwise, in such a recent and high profile matter relating to playing fields used by Cotham School, the Cabinet Member for Education would clearly have been aware of the fact.

1.19 As set out in (a) the Applicants' submissions dated 26 October 2022 at paragraphs 96 to 98 and section 3 of the Annex to those submissions and (b) Annex 1 to these submissions, it is apparent that the School was, during this period, requesting the Council to make a landowner statement to end 'as of right' use, meaning that it did not consider that any of its prior actions had been in any way effective to bring 'as of right' use to an end. The CPCG submissions are wholly misconceived.

Closing comments

1.20 This fence proposal was not the first one made in relation to the Land. In 2010, a public consultation was held about the possibility of fencing the Land; following strong public opposition, the Council's Cabinet agreed in September 2010 that the Land would remain unfenced, that any such proposals had 'categorically been dropped' and that the fields would remain open for public use 'as of right' (see Applicants' Bundle at A4/a35-36, A5/a42 and A6/a43). In April 2011 the Council again made a public statement that the Land would remain unfenced and that it wanted to 'quash these rumours once and for all' see Applicants' Bundle A6 at a56). It has never been suggested (including during TVG1) that the 2010 proposal had any impact on 'as of right' use of the Land. Just a few months later, the Land was leased to the School 'subject to all existing rights and use of the Property, including use by the community'. The School subsequently made a planning application to fence the Land in late 2016, which it withdrew following strong public objections and an indication from the Council that it would not be approved. Throughout the period, informal recreational use of the Land continued as it had done for decades – no fence proposal has ever achieved Council backing or had any impact on ongoing informal recreational use of the land. The erection of the current fence was described by the Council as being outside its control, having withdrawn the curtilage status of the Land.

1.21 The 'Sense not fence' posters to which the CPCG drew attention in its 7 July 2021 submissions specifically refer to 'retaining shared use' - that is, they are actually evidence supporting the Applicants' case that the understanding of the local community was that 'as of right' use was still ongoing at this time. The level of concern manifested locally also clearly shows that there was no understanding that any change to the nature of use had taken place as a result of earlier events. Rather, it shows that the community was committed to finding solutions to avoid any restriction of such use in the future.

1.22 No action was in fact taken 'on the ground' prior to the erection of signage on 24 July 2018 to attempt to suggest to users of the land that the School wished to protest against ongoing informal use[2]. The CPCG's latest submissions appear to contradict the School's submissions, which impliedly concede that by erecting signs on 24 July 2018 and by requesting the deposit of a landowner statement, the School was (by its own understanding) attempting to put an end to 'as of right' use – see paragraph 25(d) of the School's submissions dated 21 November 2022. As noted in Annex 1 to these submissions, the School also stated in its objection to Ms Burgess' application (CRA's Amended Bundle at page 52, paragraphs 9-10) that the signs were approved by the Council on the express basis that they 'restrict access to the site by members of the public' and that in erecting the signs the School was seeking to communicate its objection to the use of the Land for informal recreation. It stated that 'The landowner could have chosen to have acquiesced in the ongoing use of the land for informal recreation by withholding its consent under the terms of the lease for the erection of new prohibitory signs' and that

[2] The erection of the signs did not, of course, achieve its purported purpose since the School's rights as tenant are, under the lease, 'subject to all existing rights and use of the Property, including use by the community'.

the erection of signs in the relevant locations on 24 July 2018 had rendered use contentious (i.e. that it was not contentious prior to that). This admission by the School in itself renders the CPCG submissions irrelevant.


Distance
25 m
Start new
Stoke Lodge
Stoke Lodge area: 88,000m2
Winterburn car park area: 450m2
Just 0.5% of the area of Stoke Lodge
25m
Overlay of the car park in Winterburn v. Bennett. To scale.
1
2
3
4
5
6
6
6
6
6
7
8
9
10
11
12
13
14

Key:

1. Shirehampton Road main entrance

2. Parry's Lane - Gates by Gas plant on corner of Parrys Lane and Ebenezer Lane

3. West Dene - by derelict pavilion

4. Cheyne Road

5. Ebenezer lane - corner entrance

6. Ebenezer Lane (various via hedgerow)

7. Ebenezer lane (gap in wall)

8. Parrys Lane walk way- gates and gaps in fence

9. Parrys lane - entrance by roundabout

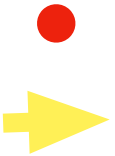
10. Shirehampton Road - low wall

11. Stoke Lodge Adult Education Centre - left of house

12. Stoke Lodge Adult Education Centre - right of house

13. Playground exit - onto land

14. Left of playground



= Avon County council signs

= informal or formal entrances


Key:
Sign
Formal entrance points
Resident access (Direct garden access)
Stoke Lodge
Stoke Lodge area: 88,000m2
Winterburn car park area: 450m2
Just 0.5% of the area of Stoke Lodge
25m
Overlay of the car park in Winterburn v. Bennett. To scale.

[redacted]
Tel: [redacted]
E-mail: [redacted]

[redacted]

[redacted] name is [redacted]. From April 1984 until February 2007, I lived at [redacted] This property is directly adjacent to Stoke Lodge Playing Fields on the south side of the Cheyne Road entrance to the field.

This entrance was well established when we moved in. We would walk frequently across the field either to West Dene, or to Stoke Lodge, or right up to Parrys Lane. There was unhindered access into and egress from the playing fields in all three directions. My children would often have played in the field; I also remember a neighbour playing golf and other people walking their dogs.

The estate agent's details for the purchase of my property in 1984 include 'GARDENS: ... with immediate access onto Stoke Lodge Playing Fields'. See Image 1. The opening into the field directly from my property can just be seen in Image 2 below This direct access is not more than 21m from the Cheyne Road entrance.

I have been asked to answer questions about my use of the playing fields during the period from 1984 to 2007, as follows:

1. Has it ever been suggested to me that I needed, or was given, permission to use the Cheyne Road entrance to access Stoke Lodge Playing Fields?

   A: Never

2. Has it ever been suggested to me that I was trespassing by using the Cheyne Road entrance to access Stoke Lodge Playing Fields?

   A: Never

3. Has it ever been suggested to me that I needed, or was given, permission to use the direct access from my property onto Stoke Lodge Playing Fields?

   A: Never

4. Has it ever been suggested to me that I was trespassing by using the direct access from my property onto Stoke Lodge Playing Fields?

   A: Never

5. Have I ever considered any of the above to be the case?

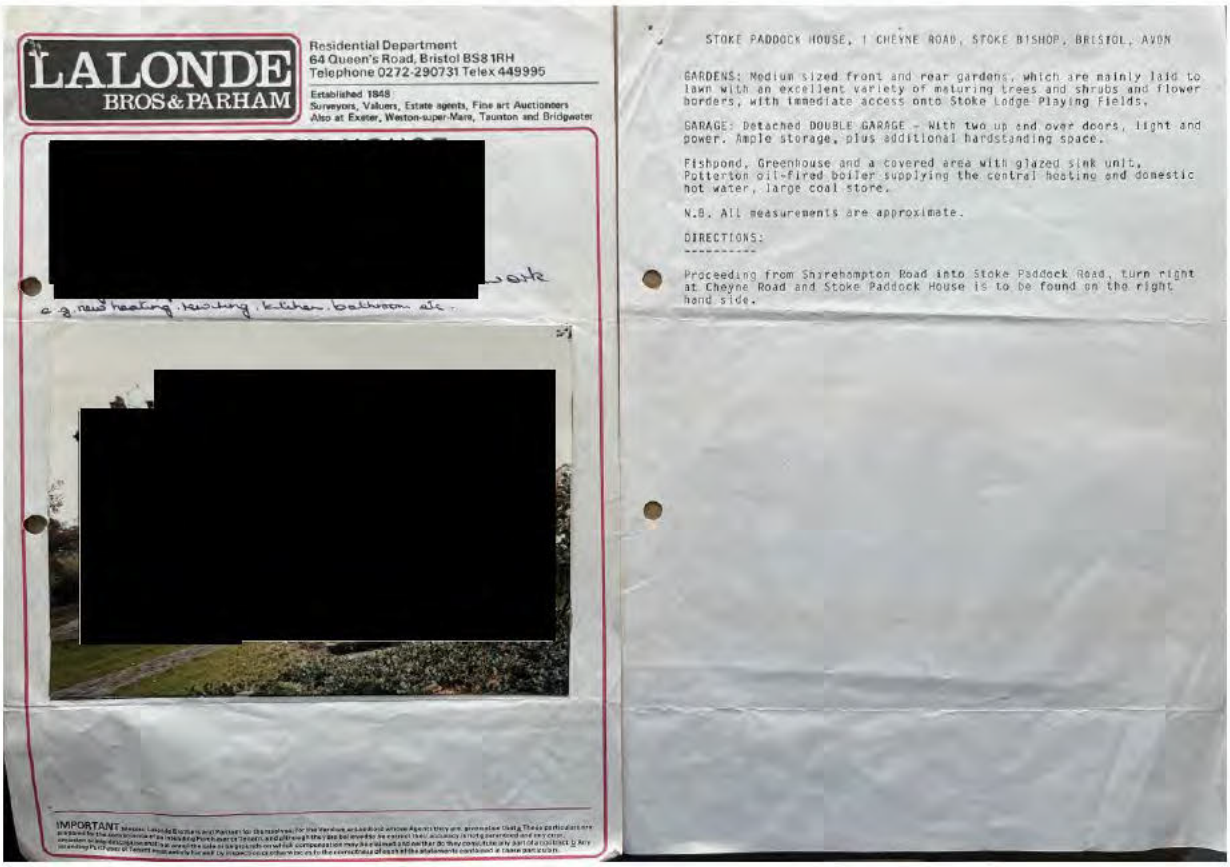
   A: Never

6. Has there ever been any signage at the Cheyne Road entrance relating to access to or use of the playing fields?

   A: Never at any time that I lived there, ie between the dates noted above.

I believe that the facts stated above are true.

Signed: [redacted] Dated: 10th March 2023



LALONDE BROS & PARHAM

Residential Department
64 Queen's Road, Bristol BS8 1RH
Telephone 0272-290731 Telex 449995

Established 1848
Surveyors, Valuers, Estate agents, Fine art Auctioneers
Also at Exeter, Weston-super-Mare, Taunton and Bridgwater

[redacted]

e.g. new heating, kitchen, bathroom etc.

[redacted]

IMPORTANT

STOKE PADDOCK HOUSE, 1 CHEYNE ROAD, STOKE BISHOP, BRISTOL, AVON

GARDENS: Medium sized front and rear gardens, which are mainly laid to lawn with an excellent variety of maturing trees and shrubs and flower borders, with immediate access onto Stoke Lodge Playing Fields.

GARAGE: Detached DOUBLE GARAGE - With two up and over doors, light and power. Ample storage, plus additional hardstanding space.

Fishpond, Greenhouse and a covered area with glazed sink unit. Potterton oil-fired boiler supplying the central heating and domestic hot water, large coal store.

N.B. All measurements are approximate.

DIRECTIONS:

Proceeding from Shirehampton Road into Stoke Paddock Road, turn right at Cheyne Road and Stoke Paddock House is to be found on the right hand side.

Image 1: Estate Agent's brochure from 1983 advising "immediate access onto Stoke Lodge Playing Fields".

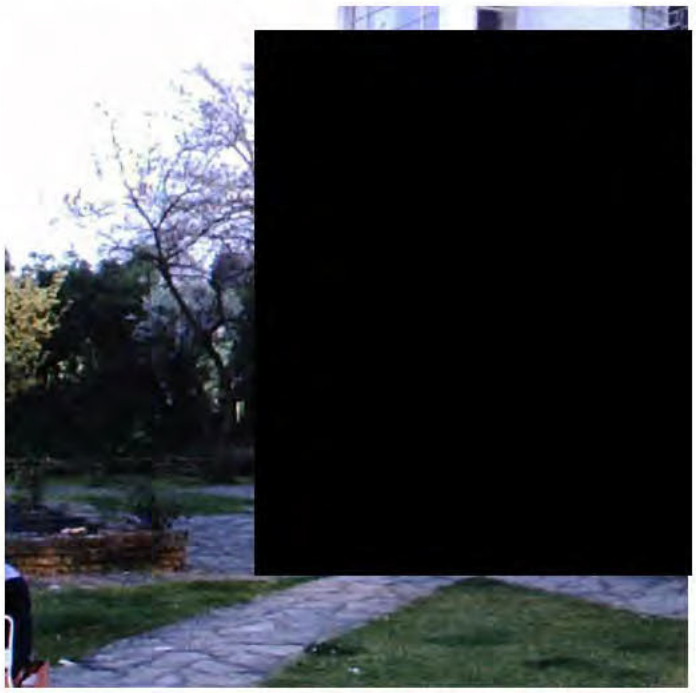


Image 2: May 1984 showing direct opening/access into Playing Fields directly from garden of [redacted]

Image 3 – 1996 – Fence had been added with gate at location of original opening/access. No longer in regular use.

Image 4: May 1984 – My two children, with a friend, playing in the Playing Fields. Note: two other walkers.

Image 5: 1989 - Hot air balloon about to take-off in the Playing Fields.

Image 6: February 2004: Two dog walkers exiting Playing Fields into Cheyne Road.

Statement of [redacted]

My name is [redacted] and I make this statement further to my statement dated 9 July 2021, which is attached to this statement. I have lived at [redacted] Cheyne Road since 1985 as detailed in my earlier statement. This property is directly adjacent to Stoke Lodge Playing Fields on the north side of the Cheyne Road entrance to the field.

Before moving to Cheyne Road my family and I had lived on Bell Barn Road since 1968. We would all use the entrance at Cheyne Road to access Stoke Lodge for family outings or for walking though to West Dene, Shirehampton Road or Parrys Lane, I was never once challenged about my presence on the field nor my use of the entrances. Many locals could be seen to be using the parkland in the same way and to my knowledge also remained unchallenged.

I have been asked to answer questions about my use of the playing fields from 1985 to date, my answers to these questions are as follows:

1. It has never been suggested to me that I needed, nor have I sought or been given, permission to use the Cheyne Road entrance to access Stoke Lodge Playing Fields.
2. It has never been suggested to me that I was trespassing by using the Cheyne Road entrance to access Stoke Lodge Playing Fields.
3. I have never considered either of the above to be the case.
4. There has never been any signage at the Cheyne Road entrance relating to access to or use of the playing fields.

I believe that the facts stated above are true.

Signed: [redacted]

Dated: 10th April 2023

IN THE MATTER OF TWO APPLICATIONS TO REGISTER STOKE LODGE PLAYING FIELDS STOKE BISHOP, BRISTOL AS A TOWN GREEN UNDER THE COMMONS ACT 2006

BETWEEN

EMMA BURGESS and KATHY WELHAM

- APPLICANTS

and

BRISTOL CITY COUNCIL AND COTHAM SCHOOL

- OBJECTORS

WITNESS STATEMENT OF [redacted]

1. I, [redacted] of [redacted] Cheyne Road, Stoke Bishop will say as follows; this statement is based on facts that are within my own knowledge and belief unless otherwise indicated and are true to the best of my knowledge and belief.
2. We bought [redacted] Cheyne Road bordering Stoke Lodge field in August 1985. Extensive building work was needed so we weren't able to move in until November. During these few months we were able to meet our new neighbours and explore the immediate surroundings.
3. We walked across and around the field many times and in so doing got to know the groundsman. I mentioned the obvious gaps and openings all around the field and he explained that the council did not object to people using the field for exercise, walking their dogs and playing football and cricket, all of which people were doing.
4. During our walks we would watch sport being played and on occasion, if it was sunny, we would take deckchairs to watch cricket matches. I'm pleased to say that we never witnessed matches being disrupted by people or dogs.
5. At one point the groundsman was faced with damage to the grass but, with the help of our neighbours, was able to take advantage of a recently fallen bough some 2 feet in diameter to make a suitable obstruction to inhibit entry by motorcycles but not to prevent pedestrian or

other normal use. I believe that some local people were, at one time, in conversation with the council about installing a kissing gate.

I believe that the facts stated in this witness statement are true.

Signed: [redacted]

Dated: 9 July, 2021

Steve Gregory

From: Joanne Mansfield
Sent: 11 April 2023 13:59
To: Kate Meller
Cc: Tom Dunsdon; Susan Ring; Andrew Sharland QC; Grant James; Allison Crossland; We Love Stoke Lodge; Kathy Welham; Penny Beeston; Ed Carpenter
Subject: RE: Stoke Lodge TVG

Dear Ms Meller

I am writing on behalf of the City Council (in its capacity as education authority and landowner) and further to the receipt of Mr Petchey's last Report dated 14 March 2023.

This process has been going on for a very long time now and all parties have had more than an adequate opportunity to address the Inspector on all issues. It is respectfully submitted that there is no need for the registration authority to ask the parties for yet further submissions to be referred to Mr Petchey. Mr Petchey has been very fair in giving an opportunity for the fullest possible submissions to be made but it is now the time for this matter to be referred to the PROWG committee for a final decision to be made. To do otherwise is not in anyone's interests and will increase the overall cost and delay in dealing with this matter. It is noted that the Applicant does not want there to be further submissions to Mr Petchey.

Whilst writing I should make it clear that the City Council (in its capacity as education authority and landowner) does not agree with Mr Petchey's conclusions on the issue of statutory incompatibility and I would be grateful if you could ensure this dissent with Mr Petchey's conclusions is drawn to the attention of the PROWG committee. If this matter is subject to judicial review, it will seek to uphold a decision to reject the application on this alternative basis.

Please acknowledge receipt of this e-mail.

Yours sincerely

Joanne Mansfield

Lawyer and Team Manager
Property Planning and Transport team
Legal Services
Bristol City Council
PO Box 3399
Bristol BS1 9NE

DX 7827 Bristol
Tel 07966172973
Fax 0117 9223836
e-mail joanne.mansfield@bristol.gov.uk

Please communicate with us only by email and not by post/DX wherever possible. Our lawyers and support colleagues may be working from different locations.

may not copy or deliver this Email to anyone and you should instead destroy it and are requested to notify the sender of your receipt of the Email immediately. No warranty is given that this Email is free from viruses and /or that this Email or any reply is secure from interception/corruption. Any opinions, recommendations and other information which do not relate to the business of Bristol City Council are included in this Email on the basis that they are personal to the sender and are neither given nor endorsed by Bristol City Council.

Joanne Mansfield

APPLICATIONS BY MS EMMA BURGESS AND MS KATHARINE WELHAM TO REGISTER LAND KNOWN AS STOKE LODGE PLAYING FIELD, SHIREHAMPTON ROAD, BRISTOL, AS A NEW TOWN OR VILLAGE GREEN

NOTE

Preliminary

1. A copy of my Report dated 14 March 2023 has been supplied to the interested parties and they have commented upon it. I am now asked to consider those comments and give the PROWG Committee the benefit of my further advice in the light of them[1]. I should say at once that the comments have not caused me to change my mind. My recommendation continues to be that the land in question should not be registered as a town or village green for the reasons that I gave in my report.

Introduction

2. If the use of land is contentious it is not *as of right.* If a landowner puts up a prohibitory notice or notices he potentially makes use of the land contentious. In the present case the landowner put up prohibitory notices. In my report I conclude that in the circumstances of the putting up of these particular notices, use of the land was not *as of right*. Because use of the land was not *as of right,* I advised the registration authority that should not be registered as a village green because it is a requirement of registration that use is *as of right*.

3. In any particular case, there may be reasons why a notice might **not** make use of land contentious.

4. It might be that the notice is not clear. I consider that the notices in the present case were clear.

5. It might be that there were not sufficient notices put up so that it could be that there were many people who used the land who did not or could not appreciate that their use was contentious. I consider that in the present case sufficient notices were put up to make the use not *as of right.*

6. In two reported cases, the Court said that if people ignored a prohibitory sign and carried on using the land and the landowner took no further steps to stop them using the land, then the landowner acquiesced in the use which accordingly ceased to be contentious and became, instead, contentious. This view was rejected by the Court of Appeal in *Winterburn.* What the Court of Appeal decided in *Winterburn* is binding on the registration authority.

7. The prohibitory notices were put up in the present case by Avon County Council. The relevant period to be considered is 1998 – 2018. Avon County Council was abolished in 1996. The Applicants say that the notices ceased to be effective when Avon County Council was abolished. I do not think that this argument is correct.

8. On top of all this, in June and July 2016 there was a public inquiry, lasting eight days, into whether the land should be registered as a village green. I consider that this in itself made the use of the land at this time contentious. Local people were saying that the land had become a village green and the landowner was strongly resisting that claim. There is a distinction between resisting a claim to register a village green and resisting use of the land claimed as a

[1] I am not asked to advise about matters of procedure.

village green but it is a fine one and I consider that the circumstances of the public inquiry made it clear that the use itself was contentious.

9. The landowners claimed that the use of the land for a school under the relevant statutes was incompatible with use of the land as a village green and accordingly the land could not be registered as a town or village green. There is nothing in the statute governing the registration of village greens about land not being registered on the basis of statutory incompatibility; the relevant law is set out in two decisions of the Supreme Court. The limits of the concept are not clear. In my report I say that a court might extend the concept to the circumstances of the present case but the circumstances are distinguishable. The ownership of the land is divided between the school (lease) and the local authority (freeholder). Registration of the land of an independent school would not of itself be incompatible with its use under any statute; nor would it be incompatible with the non-use of the land by the local authority. It is only when the two elements are brought together that the argument arises. I am unconvinced by it.

Specific points

Paragraph 27 of the Applicants submissions in respect of my Report

10. The applicants argue that my interpretation of *Winterburn* and its application of it to this represent a fundamental misreading of the case. I have explained in my reading of it at paragraphs 41 to 46 of my Report and I disagree with the criticism. It is necessary for the Committee to take a view about this. If I were wrong, then the Avon County Council signs would have been ineffective. Subject to arguments about the effect of the public inquiry and as to statutory incompatibility the land would be registrable; and subject to arguments about statutory incompatibility ought to have been registered in 2018 upon the application by Mr Mayer.

Paragraph 35 of the Applicants' submissions in respect of my Report

11. In 2011 Mr Mayer made an application to register the land; in 2016 I submitted a report into Mr Mayer's application recommending that the land be not registered; in 2016 the registration authority rejected the recommendation in my report and decided to register the land. That decision was challenged by the School and the decision was quashed on the basis that the authority had not properly considered my report. It is correct to say that the judge did not specifically uphold what I said in my report about the effect of the notices.

12. Accordingly, strictly speaking, in my report on the current applications, I was wrong to say that the judgment of Wyn Williams J *upheld my interpretation of the signs and advice that use in the period 1991 – 2011 had not been as of right.*

13. What I should have said is that Wyn Williams J *did not disagree with my interpretation of the signs and advice that use in the period 1991 – 2011 had not been as of right.*

14. There are however non-disagreements and non-disagreements. If Wyn Williams J had thought that what I had said about signs was wrong, one would have expected him to say so; potentially if he thought what I had said was wrong, he might have upheld the decision of the registration authority.

15. Moreover, the matter did not stop there. The registration authority went on to re-consider Mr Mayer's application in the light of my report. It decided not to register the land. It was thereby

endorsing my report and recommendations. That decision was not thereafter subject to judicial review.

Paragraphs 36 to 40 of the Applicant's submissions in respect of my Report

16. In the submissions of the Applicants that I addressed in my Report, they developed a new and additional argument that, despite the Avon County Council notices, the use of the land at all times was being acquiesced in so that user was not contentious[2]. This new argument had nothing to do with the intrinsic effectiveness of the signs and had not been made to me in my consideration of Mr Mayer's application. If it is correct it follows that, on the face of it, the land should have been registered upon Mr Mayer's application[3]. It is a complicated argument, involving an interpretation of reports and minutes of Avon County Council and a consideration of the legal position of the School as it was affected over time by various Education Acts. I dealt with that argument in detail and point by point in my Report; if I were now to respond to paragraphs 36 to 41 of the Applicants' submissions on my Report I would only be rehearsing once again what I said in my Report.

Paragraph 41

17. The Applicants criticise the way I address events "on the ground". There are a number of matters which would indicate that the use of the land was not contentious but was being permitted. This is not a *bizarre* conclusion as the Applicants suggest in their submissions on my Report; the question is how these matters are to be addressed in the context of the prohibitory notices. I conclude that the use of the majority remained contentious and that the use of some was indeed permitted. This would mean that the use of nobody was *as of right.* I reject the argument that somehow by virtue of these matters, the County Council was *acquiescing* in the use (so that the use, if it were acquiescing, would be *as of right*). I do not consider that the recent statements of [redacted] and [redacted] advance a consideration of this aspect of the matter.

Paragraphs 52 to 54 of the Applicants' submissions on my Report

18. At paragraph 158 of my Report dated 14 March 2023 I said of the proposition that the public inquiry was a well publicised cause celebre that the Applicants did not contend to the contrary. The reason for saying this is that the Applicants' submissions to me dated 21 December 2022 contained a considerable amount of material about the significance of the 2016 inquiry but did not take the simple point that it was not a cause celebre. However at paragraph 14 of their submissions they point out that they had contended to the contrary in their earlier submissions, from which they had not resiled. I am sorry that I misunderstood the position. The Applicants starting point of course remains a submission that even if the public inquiry was a *cause celebre,* it would not mean that the use of the land thereafter was contentious. I have dealt with that argument in my report dated 14 March 2023 and do not want to add anything further about it here.

19. As to my conclusion that the 2016 inquiry was a well publicised cause celebre, it seems to me that my conclusion on this point is a matter of judgment on the material that was presented to me. In the light of material indicating that it **was** a well publicised cause celebre, the Applicants are, of course, asserting a negative. It would have been open to them, if they had wished, to produce witness statements from people using the land in 2016 who were ignorant

[2] It is summarised at paragraph 89 of my Report dated 14 March 2023.

[3] Although, as the Applicants accept, I could not make a recommendation to the registration based on facts of which I was ignorant: see footnote 3 of their submissions to me dated 26 October 2022. The correctness of the registration is, however, subject to the argument about statutory incompatibility.

of the public inquiry[4]. Their failure to do so does not count against them, of course; it merely shows that they have not, by reference to such material, displaced the conclusion that can reasonably be drawn from the material relied upon by the landowners. Looking at the matter realistically, it is hard to imagine such witness statements (if they could be assembled) raising any doubt as to what is, in the circumstances a common sense conclusion. What may appear to be a common sense conclusion may in any particular case be displaced; I do not think that it has been in this case.

20. In my Report at paragraph 158 I noted that the Cotham School and Parent had plotted on a map the eleven locations around the playing field pre-2018 where campaign signs were posted. The Applicants now submit that two of these locations do not relate to campaign signs and I accept that this may be the case. However in all this one must not lose sight of the wood for the trees. As regards the other nine, it seems to me that they do indicate an appreciation in the neighbourhood that the use of the Field was contentious and to seek (as the Applicants do) to construe them as not relating to a dispute as to a claimed entitlement to use the Field is tendentious. The nine signs are examples of evidence that the use of the Field was contentious.

Paragraph 56 of the Applicants' submissions on my Report

21. The School's lease of the Field was subject to

    ... all existing rights and use of the Property including use by the community.

    The Applicants assert that the effect of this is that, as a matter of law neither the School nor the City Council could lawfully object to the use of the Field by the community; if, as they clearly did, the School and City Council objected to the use of the Field they had no power to do so and any such objections fall to be disregarded[5]. In 2011 the community had no rights to use of the Field so that part of the provision in the lease can have no application. It seems to me that the lease was recognising that the Field was subject to use by the community. This did not stop the lessee (the School) or the lessor (the City Council) subsequently objecting to that use.

Paragraphs 58 to 60 of the Applicants' submissions on my Report

22. The Applicants' say that the installation of dog waste bins in 2012 did not cause use of the Field to be permissive. In my Report I acknowledge that this may be the case (see paragraph 142). But if this is so, the use simply went on being contentious.

Paragraph 42 of the Applicants' submissions on my Report: scope for disagreement

23. It will be helpful if I here deal with a point taken at paragraph 42 of the Applicants' submissions. It is made in relation to the conclusion in my Report dated 14 March 2023 on signs but also has potential relevance to my conclusion in respect of the effect of the 2016 inquiry.

24. In my Report dated 14 March 2023, I explained the law as best I could and sought to apply that law to the facts as I considered them to be. If I have got the law wrong a decision made

[4] Clearly 11% of those who have made witness statements in support of the current applications will have known about the inquiry in 2016 (see paragraph 52 of the Applicants' submissions on my Report). The statements of the remaining 89% evidently did not expressly address whether they knew or did not know about it. It is hard to imagine that the remaining 89% were ignorant of it but that is not a matter about which there is evidence.

[5] See also paragraph 49 (ii) of the Applicants' submissions on my Report.

on the basis of that erroneous explanation of the law is liable to be quashed. The decision of course remains that of the Committee and if they are persuaded for whatever reason that I have got the law wrong, they will so decide and resolve accordingly. In doing so they will not need any reminding that they are lay people and that the registration authority has instructed me because of my expertise in this area of law; and they will also see that I have sought clearly to explain what the law is. Ultimately I am either right or wrong, and they have to take a view about that.

25. As to the interpretation of the facts, there may, at least in theory, be scope for greater disagreement. It is open to a decision maker to disagree with an Inspector's finding as to fact for reason given and, more broadly, with an Inspector's interpretation of the facts for reason given. I say "for reason given" because if a decision maker disagrees with an Inspector without giving reasons the decision making process will be flawed and the decision liable to be quashed.

26. For reasons I have given, I think that the land in the present case should not be registered as a town or village green. Further, it is appropriate that I should say that in my view the scope for the registration authority to reach a different decision is limited if it applies the correct law. It is not for me to suggest a way through the law and the facts whereby they might conclude that the land is registrable as a town or village green; and for such a conclusion not to be challengeable in law: it is for the Applicants to do this if they can. What I can say is that it seems to me that what the Applicants have done in their representations is to assert that I have got a great number of things wrong without suggesting what, if I had (in their view) got everything right would be the facts and law on which the registration authority would properly conclude that the land should be registrable.

Statutory incompatibility

27. Bristol City Council as landowner and Cotham School consider that statutory incompatibility applies to the current situation. Cotham School press upon me the analogy between the position of the Secretary of State for Health in the *Surrey* case and the Secretary of State for Education in the present case. However, on the face of it, if statutory incompatibility applies in the present case it is because of statutory incompatibility vis a vis Cotham School or Bristol City Council or both combined. If the Secretary of State for Education is to be considered relevant it does seem to me that the application of the concept statutory incompatibility is being extended. I do not discount the possibility of a court so extending the concept but I do not consider it appropriate to advise the registration authority to do so in the present state of the law.

PHILIP PETCHEY

18 May 2023

From: Joanne Mansfield [redacted]
Sent: 09 June 2023 15:35
To: Tom Dunsdon <tom.dunsdon@bristol.gov.uk>
Cc: [redacted]
Subject: RE: Stoke Lodge TVG - Inspector's Note (RL01.8)

Dear Mr Dunsdon

The Council, with the exception of the comments made in relation to the statutory incompatibility arguments advanced by Cotham School and the Council , endorses the comments of the Inspector. The only observation that it makes in relation to the substance of the note is that at paragraph 6 the Inspector refers to the two reported cases and only mentions Winterburn. The Council queries whether the Inspector also meant to mention Betterment as the other of the two reported cases referred to.

There is one further matter that the Council would like to address at this time that pertains to the consideration by the committee of the applications on the 28th June, and the suggestion by the Applicants that the Registration Authority and the Council have not maintained an appropriate relationship throughout the determination of these applications and that this leads in turn to concerns about pre-determination on the part of the PROWG committee.

In an e-mail to all parties of the 11th April Mr Sharland on behalf of the applicants said this:-

"Whilst we agree with Ms Mansfield's submissions regarding no further comments from the Inspector, we are extremely concerned about her further statement in relation to statutory incompatibility and, in particular, her comment: 'If this matter is subject to judicial review, it will seek to uphold a decision to reject the application on this alternative basis.' The clear implication from this is that Ms Mansfield knows that the PROWG will reject the application to register the Land. This raises serious concerns about the alleged 'Chinese wall' between the Council qua CRA and Council qua Landowner. It also raises serious concerns about possible predetermination by the Committee."

The Council rejects completely the suggestion that it has not maintained a professional relationship with the CRA. Throughout the timeline of these applications there has never been any suggestion of concerns about the "Chinese wall" and methodology used by the Council and the CRA to ensure the fair, impartial and arms- length conduct of these applications. It is inappropriate and unprofessional for lawyers to make serious allegations about other lawyers for which there is absolutely no factual basis. This applies to making unjustified inferences from statements made by opposing lawyers. There is nothing about the fact that the Council, as landowner and education authority doing as is suggested by Ms Mansfield ("*If* this matter is subject to judicial review") that implicitly supports the very serious allegations that have been made.

With no justification whatsoever this allegation attacks the professional integrity of the Council's lawyer as well as those engaged on behalf of the CRA. Accordingly the Council would request that the CRA invite the applicants to withdraw these comments.

Yours sincerely

Joanne Mansfield
Lawyer and Team Manager
Property Planning and Transport team

IN THE MATTER OF TWO APPLICATIONS TO REGISTER STOKE LODGE PLAYING FIELDS STOKE BISHOP, BRISTOL AS A TOWN GREEN UNDER THE COMMONS ACT 2006.

FURTHER REPRESENTATIONS TO THE PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE ON BEHALF OF MS BURGESS AND MS WELHAM

Introduction and summary

1. These further representations respond to the Inspector's Note dated 18 May 2023. They do not seek to address each and every point that arises in relation to the two applications to register the Stoke Lodge Playing Fields ("the Land") as a Town and Village Green ("TVG"). These representations should be read together with the Applicants' previous representations to the Public Rights of Way and Greens Committee ("the PROWGC") dated 11 April 2023 and the Applicants' earlier submissions to the Inspector dated October 2022 and December 2022 which were attached to the Applicants' April 2023 representations.

2. For the reasons set out below and in the Applicants' previous submissions, all elements of the legal test for registration of the Land as a TVG are met and therefore the PROWGC is obliged to register the land at Stoke Lodge Playing Fields as a TVG. Whilst the Inspector recommended that the Land should not be registered as a TVG because, in his view, use was not "as of right" for the relevant twenty year period, the Inspector's various reports/notes on this issue are legally flawed. Further, the Inspector, amongst other things, failed to follow a fair procedure by refusing to hold a public inquiry, misunderstood/misrepresented the Applicants' case on certain issues and failed to consider relevant evidence or properly address the Applicants' arguments.[1] In such

[1] See further, paras 6-24 of the Applicants' April 2023 Representations.

circumstances, the conclusions in his report on the "as of right" issue should be rejected and the Inspector's Report cannot simply be accepted in its entirety by the PROWGC which must instead consider the individual issues based on the evidence before them.

3. The PROWGC are in a better position to address the key factual disputes relevant to that issue. Even if one proceeds on the basis that the Inspector's analysis of the law on the "as of right" issue is correct (which is not accepted), it is common ground that it is open to the PROWGC lawfully to conclude that use was "as of right".[2]

Structure

4. These representations will address the following issues:
    i) the roles of the PROWGC and the Inspector;
    ii) the Inspector's conclusions on the signage;
    iii) the Inspector's conclusions on the 2016 Inquiry and whether it was a "cause celebre";
    iv) the statutory incompatibility issue;
    v) the findings that the PROWGC should make.

The roles of the PROWGC and the Inspector

5. It is important to remember that, in relation to the present case, Parliament has entrusted the Council (the registration authority), to decide whether or not the Land should be registered as a TVG. The Council has delegated this decision to the PROWGC. Parliament could, if it wished, have provided for a legally qualified judge to determine the issue but it took the view that this was not appropriate and that it should be

[2] At paragraph 25 of his May 2023 Note, the Inspector acknowledged that it was open to the PROWGC lawfully to take a different view on the factual position on the "as of right" issues (namely the signs and whether the 2016 Inquiry was a "cause celebre") provided that it gave adequate reasons for its conclusions. In stating that it is for the Applicants to show the PROWGC that the legal test is met on the facts (paragraph 23 of his May Note), he clearly acknowledges that such a conclusion is open to the Committee.

democratically elected local councillors who determined such matters no doubt, at least in part, because of their local knowledge and expertise.

6. The Inspector's role is to ensure a fair procedure particularly where, as here, there are factual disputes about important issues. Where there is a serious application to register a piece of Land as a TVG, the registration authority is required to appoint a legally qualified inspector to hold a non-statutory public inquiry and make recommendations following that inquiry.

7. The Court of Appeal in *R (Whitmey) v Commons Commissioners* [2005] QB 282 stated:

> "The registration authority must act reasonably…In order to act reasonably, the registration authority must bear in mind that its decision carries legal consequences….If the dispute is serious in nature, I agree with Waller LJ that if the registration authority has itself to make a decision on the application….it should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry."
>
> (emphasis added)

8. The only purpose of appointing an Inspector is to ensure a fair procedure by holding a public inquiry. Given the complexity of this matter, the multiple legal and factual disputes and the importance of the matter to, amongst others, the local inhabitants, a public inquiry was necessary as a matter of law and also to comply with the clear terms of the PROWGC's Outline Procedure.[3] The Inspector repeatedly stated at earlier stages that he assumed these applications would be a 'straightforward case with no conflict on the facts' and only in his final Note admits that the arguments on the facts are complicated (paragraph 16), thus undermining his own conclusion that a public inquiry was not required.

[3] This is, of course, not the only legal error the Inspector made in the procedure adopted. He also unlawfully predetermined various matters, see paras 17-22 of the Applicants' April 2023 representations to the PROWGC.

9. As the Inspector expressly acknowledged, the PROWGC is not bound by the Inspector's factual findings or ultimate recommendation; it is entitled to take a different view provided it acts lawfully when doing so and, inter alia, gives reasons for its decision.

10. No doubt the PROWGC will be mindful of the fact that in December 2016 it rejected the Inspector's recommendation in relation to Mr Mayer's application and decided to register the Land as a TVG, and that its decision was subsequently quashed by the High Court. However, it is important to note the narrow basis for the High Court's quashing the PROWGC's earlier decision. The High Court acknowledged that it is open to registration authorities to "depart from the conclusion of an inspector on the basis of a justified difference in view about the relevant facts".[4] However, the PROWGC fell into error with its decision on that occasion because its conclusion was inconsistent with certain of the Inspector's findings of fact which it had expressly accepted. Further, it failed to give reasons for its decision.

11. The PROWGC is of course not, in any way, bound by its subsequent June 2018 decision not to register the land following Mr Mayer's application. The two applications that are now before the Committee relate to a different period of time and importantly are based on very different evidence that was not before the Inspector (or the PROWGC) at the time of the 2011 application. Whilst in relation to the 2011 application, it is not surprising that the PROWGC ultimately deferred to the Inspector's factual conclusions on the issue of "as of right" because he had held a lengthy public inquiry where he had heard and seen witnesses give oral evidence and be cross-examined on such evidence, there is no similar basis for deferring to the Inspector's conclusions because he has declined, in breach of both the law and the PROWGC's Outline Procedure, to hold a public inquiry.

The Signs

Introduction

12. The Applicants have previously addressed the signage in detail at:

[4] See *R (Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin), para 56.

i) paragraphs 70-86 of the Applicants' October 2022 submissions and the 47 page annex to these submissions);

ii) paragraphs 31-47 of the Applicants' December 2022 submissions in reply;

iii) paras 25-42 of the Applicants' April 2023 representations to the PROWGC.

13. The Applicants would ask the PROWGC to consider its previous submissions on this issue which are not repeated here. In summary, the Applicants accept that the erection of signs may, depending on the factual circumstances (including the wording of the signs, the number of the signs and other relevant circumstances), render any subsequent use of Land by local residents as contentious and thus not as of right. However, whether the signs are sufficient to render the use contentious is a question of fact and judgement for the PROWGC taking into account the surrounding circumstances. In the present case, the two Avon County Council signs[5] were not sufficient to render the use of the large area of Land with multiple entrances contentious. Nothing in the Court of Appeal's judgment in *Winterburn v Bennett* (or any other judicial authority) prevents the PROWGC from lawfully reaching this conclusion. Further, and in any event, the actions of the landowners both before and during the relevant twenty year period contradicted the signs and made clear that use by local inhabitants for lawful sports and pastimes was acquiesced in so that such use was not contentious.

14. The Inspector addresses signage issues at paragraphs 10-17 of his May 2023 Note.

The Inspector's reliance on *Winterburn v Bennett*

15. At paragraph 10 of his May 2023 Note, the Inspector makes reference to the correct interpretation of the Court of Appeal's judgment in *Winterburn v Bennett*. The Applicants have consistently maintained that the Inspector erred in his interpretation of the Court of Appeal's judgment in this case.[6]

[5] The third sign was not located at a public entrance but a service yard, see paras 241 and 389 of the Inspector's 2016 Report.

[6] See eg, paras 27-33 of the April 2023 representations.

16. At paragraphs 68-70 of his 2013 report, the Inspector concluded that whilst the Avon CC signs appeared to render use of the Land by local inhabitants contentious, the signs had to be considered in context and that bearing in mind the limited number of signs, the fact that a significant number of the residents would not have seen the signs, that the local inhabitants consistently ignored the signs, and that the Council took no steps to restrict use by local inhabitants, this was a 'classic case of acquiescence'. The sole reason for the Inspector's change of view in 2016 was the Court of Appeal's decision in *Winterburn*. He took the view that as a result of this judgment, if a landowner put signs up prohibiting use of the land this was all that the landowner had to do to render use contentious regardless of the other circumstances and issues of sufficiency. The Inspector now accepts in paragraph 16 of his Note that if his interpretation of the case is wrong, or <u>if the use of the Land was at all times being acquiesced in despite the notices</u>, then the Land should be registered.[7]

17. The Inspector has clearly misinterpreted the Court of Appeal's judgment in *Winterburn*. What the Court of Appeal held was that the continuous presence of legible signs <u>may</u> be sufficient to render use contentious, see para 23 of the judgment. It did not hold that erection of prohibitory signs will <u>necessarily</u> be sufficient to render use contentious, nor did it hold that the landowner's subsequent actions were irrelevant. The Court's analysis in *Winterburn* was clearly premised on the particular facts of the case which were very different to the present case. The Court stated:

> 'the circumstances must indicate to persons using the land that the owner objects <u>and continues to object</u> to the parking… On the facts of the present case, the presence of the signs in my judgement clearly indicated the owner's <u>continuing objection</u> to unauthorised parking.'
>
> (paragraph 37, emphasis added)[8]

18. Whilst the landowner in *Winterburn* had made its position 'entirely clear' given the wording of the signs and the fact that they were placed at the sole entrance and thus seen

[7] Indeed, if this evidence had been before the PROWGC on Mr Mayer's application that should in fact have been registered.

[8] See also para 40 of *Winterburn*: "…<u>where the owner has made his position entirely clear through the erection of clearly visible signs,</u> the unauthorised use of the land cannot be said to be "as of right".

by everyone who entered the car park, it cannot be sensibly said that the erection of two signs at a small minority of the entrances to the Land makes the position 'entirely clear'. Contrary to the Inspector's view in his report and paragraph 10 of his May 2023 Note, the Court of Appeal's judgment in *Winterburn* does not mean that the issue of "sufficiency" of the signage is somehow irrelevant.

Sufficiency of the signs

19. As set out in the Applicants' April 2023 Representations at paragraphs 32-33, the facts in the present case are starkly different to those in *Winterburn*. That case concerned a small car park approximately 450 square metres in size (with space for only 7 cars). There was only one entrance and there were two clear prohibitory signs present ('private car park, for the use of club patrons only') which would inevitably be seen by all persons who entered the car park through that one entrance. In such circumstances, it is unsurprising that the Court of Appeal concluded that such clearly worded signs were sufficient, on the facts, to render use contentious. However, the Land is over 200 times larger at 88,110 square metres with more than 30 formal and informal entry points including residential back gates giving household access onto the field. It was accepted in TVG1 that one of the three Avon CC signs was in a service yard, not a public entrance to the land[9] - so the Inspector's conclusions rested on only two of the three signs (behind the pavilion at West Dene and in the car park of Stoke Lodge House - both being locations where school and club sports users would be likely to see them, but not informal users entering via multiple other access points). Attached to these representations is an aerial photograph of the Land with the car park that was the subject of judgment in *Winterburn* superimposed upon it (to scale). It is clear from this aerial photograph how different the sites in question are.

20. Sir Wyn Williams in the High Court stated that it was 'not controversial' to decide, as the Committee did in December 2016, that the two sites were very different. This is unsurprising; it is self-evident that the two sites are entirely different and that the two signs would not be seen by a great number of users. It has never been suggested that

[9] See para 241 of the Inspector's 2016 report where he records evidence to that effect. The Inspector's conclusion on the signage issue is based only on the signs at [1] and [3], see para 389.

Avon County Council took even such simple steps such as writing to the householders who have back gates opening directly onto the field. It is clear that the landowner had not, by these two signs, done enough to make any objection clear. In the judicial review claim, the Council took the position before the High Court that the signs were not sufficient; the Council also accepted that sufficiency was a relevant issue in these applications but the Inspector chose not to consider it.

21. The Inspector has now admitted in his May 2023 Note at paragraphs 11-15, that, contrary to what he said in his March 2023 report, the High Court did not uphold his previous conclusion about the effect of the notices[10]. The judge held that it was open to the PROWGC to reach a different view on the relevant facts generally and the adequacy of the signs in particular provided it did not reach an internally inconsistent decision and provided reasons for departing from the Inspector's recommendation. The Inspector has now indicated the same in his May 2023 Note. It is thus open to the PROWGC to prefer the Applicants' evidence on this point, based on the submissions before them, and to decide that two signs were insufficient on a site of this size to make clear any objection by the landowner to informal use (if such an objection even existed).

Signs rendered ineffective by inconsistent actions

22. Further and in the alternative, even if the signs were sufficient in number and clarity to potentially render use contentious if considered in isolation, the relevant factual circumstances and, in particular, the conduct of the landowner (ie Avon County Council and the successor council, Bristol City Council) and the schools who used the Land during the relevant period, making clear that they acquiesced to informal use of the Land by local inhabitants, was sufficient to negate any effect of the signs. This is set out in detail in our submissions[11] and the underlying evidence was not contested by either the School or the Council, nor did either of those parties submit any evidence to the contrary.

[10] However, based on his incorrect understanding that the High Court had upheld his previous conclusion, he had refused to consider the Applicants' submissions on the interpretation or sufficiency of the signs in his Report. Such matters must therefore be decided by the PROWGC.

[11] See paras 83-85 of the December 2022 submissions and paras 36-41 of the April 2023 Representations.

23. The Applicants' April 2023 Representations set out how the Inspector had misquoted Avon County Council's 1982 report and minutes of the Ad Hoc Committee of the County Council at paragraphs 94-102 of his report. These minutes expressly record that Avon CC had for some years tacitly accepted informal use of playing fields. The Inspector has not, in his May Note, explained his selective and misleading quotation of passages from the report and minutes.

24. The Inspector accepted at paragraph 118 of his March 2023 Report that from 23 January 1990 Avon City Council had no formal policy in relation to informal use of the Land. Thus, from this date, Avon City Council did not seek to prohibit use of the Land by local inhabitants. Similarly, Bristol City Council, when it came into existence in 1996, had no formal policy in relation to informal use of the Land and thus was not seeking to prohibit such use. The power to regulate use of the Land throughout the relevant period (1998-2018) lay with the relevant school and the school alone (in the absence of a direction from the Council). It is common ground that during the relevant period the Schools (initially Fairfield Grammar and then Cotham School) took no steps to erect prohibitory signs or otherwise prohibit use.

25. The Inspector has failed to address, in his May 2023 Note, how he reached a conclusion that the schools somehow 'adopted' the Avon County Council signs by not removing them, particularly given that this analysis is inconsistent with the evidence. Ms Sandra Fryer, Chair of Governors at Cotham School gave evidence before the Inspector at the 2016 public inquiry that the informal use of the playing fields 'had been satisfactory from the School's point of view'.[12] In short, the School had not taken steps to prohibit informal use because it did not find such use problematic. There is significant evidence (detailed in the signage annex to the Applicants' October 2022 submissions) that the School did not adopt the signs. On the ground, the evidence is that Council and School staff such as groundskeepers were frequently present and had regular friendly interactions with local inhabitants demonstrating acquiescence to such use rather than adopting the (ambiguous and limited number of) signs.

[12] See para 279 of the Inspector's 2016 report.

26. The Applicants' April 2023 Representations also explained at paragraph 39 why the Inspector's conclusions in relation to the 2009 sign located near Stoke Lodge House could not be correct. The Inspector has failed to address either this issue or his misinterpretation of the 2010 Cabinet Briefing Note (which stated that the Land allowed unfettered access and that there was a potential concern about accruing TVG rights (specifically at Stoke Lodge), but that the Council's policy remained one of encouraging schools to accept shared use). The Briefing Note was written more than 20 years after the point at which neither Avon CC or the Council had any policy on the informal use of the Land.

27. The Applicants' April 2023 Representations also referred to the Inspector's conclusion that, by announcing in the local newspaper in January 1990 that it was considering installing a kissing gate at the Cheyne Road entrance (where there has never been any sign), Avon CC was somehow subtly signalling that if individual members of the public wrote to it seeking permission to use that entrance, that permission would be given. This remains a bizarre conclusion on the evidence and in the context of the geography of the site. Such a conclusion is irrational bearing in mind that this occurred three weeks prior to the Council declaring that it had no policy on informal use and that the Inspector is of the view that in relation to every other entrance to the Land, including entrances located just a few metres away, use would be contentious and would amount to trespass. It was never the Applicants' case that use via this entrance was somehow being permitted, as he appears to have incorrectly assumed; this is supported by the evidence of householders whose use of residential gates onto the field was never challenged or 'permitted'. This is another example of a key issue that would have been clarified during a public inquiry, had the Committee's Outline Procedure been followed, and of the detriment to the Applicants from the failure to follow proper process in this matter.

28. As the Inspector acknowledges in his May 2023 Note, if the Applicants' arguments on acquiescence are accepted then the Land must be registered and 'on the face of it, the land should have been registered upon Mr Mayer's application'. For the reasons set out above and in the previous submissions and representations, the PROWGC should conclude that both the Council and the Schools did acquiesce to informal use of the Land by local inhabitants throughout the relevant 20 year period.

The 2016 Public Inquiry and "Cause Celebre"

29. The Applicants have previously addressed this issue in detail at:

    i) paragraphs 87-98 of the Applicants' October 2022 submissions;

    ii) paragraphs 49-54 and annex 1 to the Applicants' December 2022 submissions in reply;

    iii) paras 43-57 of the Applicants' April 2023 representations to the PROWGC.

30. The Applicants would ask the PROWGC to consider its previous submissions on this issue which are not repeated here. In summary, there is a factual dispute as to whether the 2016 Inquiry was a "well-publicised cause celebre", the existence of which was sufficient to render any subsequent use of the Land as contentious. The Applicants have consistently disputed that the 2016 Inquiry was such a "cause celebre"; it did not render subsequent use contentious and thus not "as of right". What follows is a response to the points made by the Inspector in his May 2023 Note at paragraphs 18-20.

31. In relation to paragraph 18 of the May 2023 Note, the Inspector accepts that he misunderstood the Applicants' case and that he was mistaken when he stated that the Applicants did not dispute the School's and Council's assertion that the 2016 inquiry was a "well publicised cause celebre". In fact the Applicants had disputed this assertion on multiple occasions both previously[13] and in its most recent submissions to the Inspector including their December 2022 submissions. The Applicants have repeatedly set out detailed arguments and evidence why the 2016 Inquiry was not a cause celebre. The fact that the Inspector thought otherwise strongly suggests that he did not properly consider the Applicants' submissions and evidence on this issue.

32. The Applicants' April 2023 Representations highlighted that the Inspector had ignored their December 2022 submissions on this issue. In his May 2023 Note, the Inspector admits that those submissions 'contained a considerable amount of material about the significance of the 2016 inquiry' but says that they 'did not take the simple point that it

[13] See paragraphs 9-14 of the Applicants' April 2023 representations which detail where the Applicants have repeatedly made their position clear.

was not a cause celebre'. This is manifestly incorrect. Annex 1 to those submissions, which is in the hands of the Committee, sets out facts and cross-references supporting evidence on this matter: Committee members can see for themselves from page 1 of that Annex that, contrary to the Inspector's comment, the evidence submitted shows that:

i) the conduct of the Council and School at the public inquiry in 2016 did not convey any clear message in relation to ongoing informal use of the Land;

ii) neither the School nor the Council had authority under the terms of the School's lease to render use contentious by their words or actions at or after the public inquiry;

iii) the School and the Council were in discussions about the possibility of making a landowner statement under the Commons Act 2006 to bring 'as of right' use to an end; they did not consider that such use had already ended (meaning that they and their advisers did not consider that any protest had been 'made clear' as a result of the public inquiry);

iv) the evidence demonstrates (a) that neither the School nor the Council genuinely considered that use had been made contentious by virtue of the 2016 public inquiry or following that inquiry, and (b) that the public at large was also unaware of any such hypothetical message having been communicated.

33. In particular, section 4 of the Annex addresses the 'cause celebre' issue.

i) Paragraph 4.5 sets out that it was not the School's understanding that informal use had been prohibited or permitted as a result of the 2016 public inquiry, together with a cross-referenced list of evidence to which the Inspector has made no reference at all.

ii) Paragraph 4.6 sets out that it was not the Council's understanding that informal use had been either prohibited or permitted as a result of the 2016 public inquiry, together with a cross-referenced list of evidence to which the Inspector has made no reference at all.

iii) Paragraphs 4.7 and 4.8 make clear that since a change in ongoing 'as of right' use had not been made clear to/understood by either of the Objectors, it could not be said to have been made clear to the community at large, and provides a cross-referenced list of evidence to which the Inspector has made no reference at all.

iv) The subsequent conduct of the Council and the School is also discussed in section 3 and paragraph 4.9 onwards, making clear that both parties considered that 'as of right' use was continuing, including discussions about the making of a landowner statement to bring 'as of right' use to an end. The Inspector has completely failed to recognise the significance of these issues.

34. The Inspector has never properly addressed his mind to the evidence on the 'cause celebre' issue because he proceeded in his Report on the basis that it was not in dispute (and he did not analyse the Applicants' evidence in his May 2023 Note). The Applicants' evidence on this issue includes Neighbourhood Partnership minutes showing that use was not considered to have become contentious as a result of the 2016 inquiry.[14] The Inspector has also failed to address or even mention in any way the 'smoking gun' issue that in 2018 the School and the Council were discussing ways to end 'as of right' use via a landowner statement, so clearly they did not consider that it had ended prior to that point. Since neither the School nor the Council (nor their expert advisers) considered that 'as of right' use had ended as a result of the public inquiry there is no basis whatsoever for concluding that local inhabitants would have been aware. It is now known that the Council obtained and considered legal advice on whether or not to make a landowner statement and took a decision not to do so; it recognised ongoing 'as of right' use, had the opportunity to end that use, and chose not to end it.

35. The Inspector also suggests in paragraph 19 of his May 2023 Note that it would have been open to the Applicants 'to produce witness statements from people using the land in 2016 who were ignorant of the public inquiry'. This is a remarkable comment given the

[14] For example, the minutes of the final Neighbourhood Partnership meeting in 2017 record a decision to fund an additional dog waste bin on the playing fields, which is a clear indication that the community did not consider that there had been any change to their informal use of Stoke Lodge.

fact that the Applicants provided 166 witness statements in which every single witness specifically attests that the nature of their use of the field has not changed up to the date of their witness statement (these were obtained in August/September 2018 for Ms Burgess' application and in June/July 2019 for Ms Welham's application) - that is, none of these witnesses thought that their use had become contentious for any reason, whether or not they knew that a public inquiry had taken place in 2016. Obviously, witnesses could have been questioned about this at a public inquiry but due to the decision of the Inspector to depart from the CRA's agreed Outline Procedure and the requirements of the law, that opportunity was denied to the Applicants. The Inspector has not, despite multiple reminders on the point, considered the 166 witness statements and the CRA has never provided them to him notwithstanding the Applicants' repeated requests.[15] However, he is simply not in a position to ignore the evidence contained within them. Given the absence of a public inquiry where the Applicants' could adduce oral evidence on this issue, the Inspector was required to proceed on the basis of the factual position set out by the Applicants, namely that the Inquiry was not a 'well-publicised cause celebre'.

36. In relation to the issue on the 2016 public inquiry and whether this was a 'well-publicised cause celebre', the Applicants made clear in their April 2023 Representations that the Inspector had completely misunderstood the evidence he used to support his argument. In paragraph 20 of his May 2023 Note, he has retreated from his previous position and now states only that the posters displayed in 2018 'indicate an appreciation in the neighbourhood that the use of the Field was contentious'. However, these posters related to a completely separate issue about the proposed erection of a fence (a proposal that the Council itself was also opposing at the time). Such "evidence" does not come close to supporting the specific conclusion he had reached that the public generally would have considered that their use had ceased to be 'as of right' due to their awareness of the 2016 public inquiry. It is also the case that the Inspector has not had sight of the poster on which he now claims to be relying, as it was not submitted in evidence. It is simply not possible for him to have reached a proper conclusion based on what he imagines that poster to have said.

[15] See paragraphs 15-16 of the Applicants' April 2023 representations.

37. The PROWGC should therefore reject the Inspector's conclusion on the 'cause celebre' issue because he has failed to consider the relevant evidence and has reached his conclusion on an obviously flawed basis. Members of the PROWGC are in a better position than the Inspector to make a factual finding on this because:

    i) they are not proceeding on the incorrect basis that this issue is not in dispute;

    ii) they are able to consider all the relevant evidence on this issue.

The PROWGC should accept the Applicants' evidence, as set out in their submissions, on this point and conclude that the 2016 Inquiry was not a “cause celebre” sufficient to render any subsequent use contentious.

Statutory incompatibility

38. This is an issue of law. The Inspector has repeatedly concluded that no issue of statutory incompatibility would arise if the Land was registered as a TVG. The Inspector’s analysis on this issue, unlike his analysis of the “as of right” issue, is correct. The PROWGC should therefore accept his recommendation on this issue.

Suggested Reasons

39. For the reasons set out above and in the Applicants' submissions of October and December 2022 and their Representations to the PROWGC dated 11 April 2023, use by local inhabitants of the Land was 'as of right' for the whole of the relevant 20 year period. The Inspector's conclusions to the contrary are inconsistent with both the factual and legal position. The PROWG Committee is therefore required to register the Land as a TVG.

40. The PROWGC should resolve as follows:

    i) that the signs placed on the land by Avon County Council in the mid-1980s were not sufficient in number to be effective to render use of the Land contentious during the relevant period. Similarly, the sign erected by Bristol City Council in 2009 did not render use of the Land contentious;

ii) further, in addition to the insufficiency of the signs, the conduct of both the landowner and the schools throughout the relevant period for these applications was inconsistent with the wording on the signs and consistently indicated acquiescence to informal use by local inhabitants;

iii) that the Inspector's conclusion as to the effect of the 2016 public inquiry should be rejected as he has erroneously proceeded on the basis that the 2016 Inquiry was a 'well-publicised cause celebre' in reliance on evidence which, properly analysed, does not support his conclusion. Having considered the Applicants' submissions and evidence, the Committee considers that the evidence shows that use did not cease to be 'as of right' by reference to the 2016 public inquiry;

iv) that there is no other reason to consider that 'as of right' use has not been carried on continuously throughout the relevant period;

v) that the Inspector's conclusion on statutory incompatibility should be accepted, for the reasons set out in his Report;

vi) that all other elements of the legal test for registration as a Town or Village Green are met; and

vii) that Stoke Lodge Playing Fields should therefore be registered as a Town or Village Green.

Andrew Sharland KC

11 KBW

9 June 2023

Annex 1


Key:
Avon County Council Sign
Formal entrance points
Resident access (Direct garden access)
Stoke Lodge
Stoke Lodge area: 88,000m2
Winterburn car park area: 450m2
Just 0.5% of the area of Stoke Lodge
25m
Overlay of the car park in Winterburn v. Bennett. To scale.

IN THE MATTER OF TWO APPLICATIONS TO REGISTER STOKE LODGE PLAYING FIELDS STOKE BISHOP, BRISTOL AS A TOWN GREEN UNDER THE COMMONS ACT 2006.

FURTHER REPRESENTATIONS TO THE PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE ON BEHALF OF MS BURGESS AND MS WELHAM

Introduction and summary

1. These further representations respond to the Inspector's Note dated 18 May 2023. They do not seek to address each and every point that arises in relation to the two applications to register the Stoke Lodge Playing Fields ("the Land") as a Town and Village Green ("TVG"). These representations should be read together with the Applicants' previous representations to the Public Rights of Way and Greens Committee ("the PROWGC") dated 11 April 2023 and the Applicants' earlier submissions to the Inspector dated October 2022 and December 2022 which were attached to the Applicants' April 2023 representations.

2. For the reasons set out below and in the Applicants' previous submissions, all elements of the legal test for registration of the Land as a TVG are met and therefore the PROWGC is obliged to register the land at Stoke Lodge Playing Fields as a TVG. Whilst the Inspector recommended that the Land should not be registered as a TVG because, in his view, use was not "as of right" for the relevant twenty year period, the Inspector's various reports/notes on this issue are legally flawed. Further, the Inspector, amongst other things, failed to follow a fair procedure by refusing to hold a public inquiry, misunderstood/misrepresented the Applicants' case on certain issues and failed to consider relevant evidence or properly address the Applicants' arguments.[1] In such

[1] See further, paras 6-24 of the Applicants' April 2023 Representations.

circumstances, the conclusions in his report on the "as of right" issue should be rejected and the Inspector's Report cannot simply be accepted in its entirety by the PROWGC which must instead consider the individual issues based on the evidence before them.

3. The PROWGC are in a better position to address the key factual disputes relevant to that issue. Even if one proceeds on the basis that the Inspector's analysis of the law on the "as of right" issue is correct (which is not accepted), it is common ground that it is open to the PROWGC lawfully to conclude that use was "as of right".[2]

Structure

4. These representations will address the following issues:
    i) the roles of the PROWGC and the Inspector;
    ii) the Inspector's conclusions on the signage;
    iii) the Inspector's conclusions on the 2016 Inquiry and whether it was a "cause celebre";
    iv) the statutory incompatibility issue;
    v) the findings that the PROWGC should make.

The roles of the PROWGC and the Inspector

5. It is important to remember that, in relation to the present case, Parliament has entrusted the Council (the registration authority), to decide whether or not the Land should be registered as a TVG. The Council has delegated this decision to the PROWGC. Parliament could, if it wished, have provided for a legally qualified judge to determine the issue but it took the view that this was not appropriate and that it should be

[2] At paragraph 25 of his May 2023 Note, the Inspector acknowledged that it was open to the PROWGC lawfully to take a different view on the factual position on the "as of right" issues (namely the signs and whether the 2016 Inquiry was a "cause celebre") provided that it gave adequate reasons for its conclusions. In stating that it is for the Applicants to show the PROWGC that the legal test is met on the facts (paragraph 23 of his May Note), he clearly acknowledges that such a conclusion is open to the Committee.

democratically elected local councillors who determined such matters no doubt, at least in part, because of their local knowledge and expertise.

6. The Inspector's role is to ensure a fair procedure particularly where, as here, there are factual disputes about important issues. Where there is a serious application to register a piece of Land as a TVG, the registration authority is required to appoint a legally qualified inspector to hold a non-statutory public inquiry and make recommendations following that inquiry.

7. The Court of Appeal in *R (Whitmey) v Commons Commissioners* [2005] QB 282 stated:

> "The registration authority must act reasonably…In order to act reasonably, the registration authority must bear in mind that its decision carries legal consequences….If the dispute is serious in nature, I agree with Waller LJ that if the registration authority has itself to make a decision on the application….it should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry."
>
> (emphasis added)

8. The only purpose of appointing an Inspector is to ensure a fair procedure by holding a public inquiry. Given the complexity of this matter, the multiple legal and factual disputes and the importance of the matter to, amongst others, the local inhabitants, a public inquiry was necessary as a matter of law and also to comply with the clear terms of the PROWGC's Outline Procedure.[3] The Inspector repeatedly stated at earlier stages that he assumed these applications would be a 'straightforward case with no conflict on the facts' and only in his final Note admits that the arguments on the facts are complicated (paragraph 16), thus undermining his own conclusion that a public inquiry was not required.

[3] This is, of course, not the only legal error the Inspector made in the procedure adopted. He also unlawfully predetermined various matters, see paras 17-22 of the Applicants' April 2023 representations to the PROWGC.

9. As the Inspector expressly acknowledged, the PROWGC is not bound by the Inspector's factual findings or ultimate recommendation; it is entitled to take a different view provided it acts lawfully when doing so and, inter alia, gives reasons for its decision.

10. No doubt the PROWGC will be mindful of the fact that in December 2016 it rejected the Inspector's recommendation in relation to Mr Mayer's application and decided to register the Land as a TVG, and that its decision was subsequently quashed by the High Court. However, it is important to note the narrow basis for the High Court's quashing the PROWGC's earlier decision. The High Court acknowledged that it is open to registration authorities to "depart from the conclusion of an inspector on the basis of a justified difference in view about the relevant facts".[4] However, the PROWGC fell into error with its decision on that occasion because its conclusion was inconsistent with certain of the Inspector's findings of fact which it had expressly accepted. Further, it failed to give reasons for its decision.

11. The PROWGC is of course not, in any way, bound by its subsequent June 2018 decision not to register the land following Mr Mayer's application. The two applications that are now before the Committee relate to a different period of time and importantly are based on very different evidence that was not before the Inspector (or the PROWGC) at the time of the 2011 application. Whilst in relation to the 2011 application, it is not surprising that the PROWGC ultimately deferred to the Inspector's factual conclusions on the issue of "as of right" because he had held a lengthy public inquiry where he had heard and seen witnesses give oral evidence and be cross-examined on such evidence, there is no similar basis for deferring to the Inspector's conclusions because he has declined, in breach of both the law and the PROWGC's Outline Procedure, to hold a public inquiry.

The Signs

Introduction

12. The Applicants have previously addressed the signage in detail at:

[4] See *R (Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin), para 56.

i) paragraphs 70-86 of the Applicants' October 2022 submissions and the 47 page annex to these submissions);

ii) paragraphs 31-47 of the Applicants' December 2022 submissions in reply;

iii) paras 25-42 of the Applicants' April 2023 representations to the PROWGC.

13. The Applicants would ask the PROWGC to consider its previous submissions on this issue which are not repeated here. In summary, the Applicants accept that the erection of signs may, depending on the factual circumstances (including the wording of the signs, the number of the signs and other relevant circumstances), render any subsequent use of Land by local residents as contentious and thus not as of right. However, whether the signs are sufficient to render the use contentious is a question of fact and judgement for the PROWGC taking into account the surrounding circumstances. In the present case, the two Avon County Council signs[5] were not sufficient to render the use of the large area of Land with multiple entrances contentious. Nothing in the Court of Appeal's judgment in *Winterburn v Bennett* (or any other judicial authority) prevents the PROWGC from lawfully reaching this conclusion. Further, and in any event, the actions of the landowners both before and during the relevant twenty year period contradicted the signs and made clear that use by local inhabitants for lawful sports and pastimes was acquiesced in so that such use was not contentious.

14. The Inspector addresses signage issues at paragraphs 10-17 of his May 2023 Note.

The Inspector's reliance on *Winterburn v Bennett*

15. At paragraph 10 of his May 2023 Note, the Inspector makes reference to the correct interpretation of the Court of Appeal's judgment in *Winterburn v Bennett*. The Applicants have consistently maintained that the Inspector erred in his interpretation of the Court of Appeal's judgment in this case.[6]

[5] The third sign was not located at a public entrance but a service yard, see paras 241 and 389 of the Inspector's 2016 Report.

[6] See eg, paras 27-33 of the April 2023 representations.

16. At paragraphs 68-70 of his 2013 report, the Inspector concluded that whilst the Avon CC signs appeared to render use of the Land by local inhabitants contentious, the signs had to be considered in context and that bearing in mind the limited number of signs, the fact that a significant number of the residents would not have seen the signs, that the local inhabitants consistently ignored the signs, and that the Council took no steps to restrict use by local inhabitants, this was a 'classic case of acquiescence'. The sole reason for the Inspector's change of view in 2016 was the Court of Appeal's decision in *Winterburn*. He took the view that as a result of this judgment, if a landowner put signs up prohibiting use of the land this was all that the landowner had to do to render use contentious regardless of the other circumstances and issues of sufficiency. The Inspector now accepts in paragraph 16 of his Note that if his interpretation of the case is wrong, or if the use of the Land was at all times being acquiesced in despite the notices, then the Land should be registered.[7]

17. The Inspector has clearly misinterpreted the Court of Appeal's judgment in *Winterburn*. What the Court of Appeal held was that the continuous presence of legible signs may be sufficient to render use contentious, see para 23 of the judgment. It did not hold that erection of prohibitory signs will necessarily be sufficient to render use contentious, nor did it hold that the landowner's subsequent actions were irrelevant. The Court's analysis in *Winterburn* was clearly premised on the particular facts of the case which were very different to the present case. The Court stated:

> 'the circumstances must indicate to persons using the land that the owner objects and continues to object to the parking… On the facts of the present case, the presence of the signs in my judgement clearly indicated the owner's continuing objection to unauthorised parking.'
>
> (paragraph 37, emphasis added)[8]

18. Whilst the landowner in *Winterburn* had made its position 'entirely clear' given the wording of the signs and the fact that they were placed at the sole entrance and thus seen

[7] Indeed, if this evidence had been before the PROWGC on Mr Mayer's application that should in fact have been registered.

[8] See also para 40 of *Winterburn*: "…where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right".

by everyone who entered the car park, it cannot be sensibly said that the erection of two signs at a small minority of the entrances to the Land makes the position 'entirely clear'. Contrary to the Inspector's view in his report and paragraph 10 of his May 2023 Note, the Court of Appeal's judgment in *Winterburn* does not mean that the issue of "sufficiency" of the signage is somehow irrelevant.

Sufficiency of the signs

19. As set out in the Applicants' April 2023 Representations at paragraphs 32-33, the facts in the present case are starkly different to those in *Winterburn*. That case concerned a small car park approximately 450 square metres in size (with space for only 7 cars). There was only one entrance and there were two clear prohibitory signs present ('private car park, for the use of club patrons only') which would inevitably be seen by all persons who entered the car park through that one entrance. In such circumstances, it is unsurprising that the Court of Appeal concluded that such clearly worded signs were sufficient, on the facts, to render use contentious. However, the Land is over 200 times larger at 88,110 square metres with more than 30 formal and informal entry points including residential back gates giving household access onto the field. It was accepted in TVG1 that one of the three Avon CC signs was in a service yard, not a public entrance to the land[9] - so the Inspector's conclusions rested on only two of the three signs (behind the pavilion at West Dene and in the car park of Stoke Lodge House - both being locations where school and club sports users would be likely to see them, but not informal users entering via multiple other access points). Attached to these representations is an aerial photograph of the Land with the car park that was the subject of judgment in *Winterburn* superimposed upon it (to scale). It is clear from this aerial photograph how different the sites in question are.

20. Sir Wyn Williams in the High Court stated that it was 'not controversial' to decide, as the Committee did in December 2016, that the two sites were very different. This is unsurprising; it is self-evident that the two sites are entirely different and that the two signs would not be seen by a great number of users. It has never been suggested that

[9] See para 241 of the Inspector's 2016 report where he records evidence to that effect. The Inspector's conclusion on the signage issue is based only on the signs at [1] and [3], see para 389.

Avon County Council took even such simple steps such as writing to the householders who have back gates opening directly onto the field. It is clear that the landowner had not, by these two signs, done enough to make any objection clear. In the judicial review claim, the Council took the position before the High Court that the signs were not sufficient; the Council also accepted that sufficiency was a relevant issue in these applications but the Inspector chose not to consider it.

21. The Inspector has now admitted in his May 2023 Note at paragraphs 11-15, that, contrary to what he said in his March 2023 report, the High Court did not uphold his previous conclusion about the effect of the notices[10]. The judge held that it was open to the PROWGC to reach a different view on the relevant facts generally and the adequacy of the signs in particular provided it did not reach an internally inconsistent decision and provided reasons for departing from the Inspector's recommendation. The Inspector has now indicated the same in his May 2023 Note. It is thus open to the PROWGC to prefer the Applicants' evidence on this point, based on the submissions before them, and to decide that two signs were insufficient on a site of this size to make clear any objection by the landowner to informal use (if such an objection even existed).

Signs rendered ineffective by inconsistent actions

22. Further and in the alternative, even if the signs were sufficient in number and clarity to potentially render use contentious if considered in isolation, the relevant factual circumstances and, in particular, the conduct of the landowner (ie Avon County Council and the successor council, Bristol City Council) and the schools who used the Land during the relevant period, making clear that they acquiesced to informal use of the Land by local inhabitants, was sufficient to negate any effect of the signs. This is set out in detail in our submissions[11] and the underlying evidence was not contested by either the School or the Council, nor did either of those parties submit any evidence to the contrary.

[10] However, based on his incorrect understanding that the High Court had upheld his previous conclusion, he had refused to consider the Applicants' submissions on the interpretation or sufficiency of the signs in his Report. Such matters must therefore be decided by the PROWGC.

[11] See paras 83-85 of the December 2022 submissions and paras 36-41 of the April 2023 Representations.

23. The Applicants' April 2023 Representations set out how the Inspector had misquoted Avon County Council's 1982 report and minutes of the Ad Hoc Committee of the County Council at paragraphs 94-102 of his report. These minutes expressly record that Avon CC had for some years tacitly accepted informal use of playing fields. The Inspector has not, in his May Note, explained his selective and misleading quotation of passages from the report and minutes.

24. The Inspector accepted at paragraph 118 of his March 2023 Report that from 23 January 1990 Avon City Council had no formal policy in relation to informal use of the Land. Thus, from this date, Avon City Council did not seek to prohibit use of the Land by local inhabitants. Similarly, Bristol City Council, when it came into existence in 1996, had no formal policy in relation to informal use of the Land and thus was not seeking to prohibit such use. The power to regulate use of the Land throughout the relevant period (1998-2018) lay with the relevant school and the school alone (in the absence of a direction from the Council). It is common ground that during the relevant period the Schools (initially Fairfield Grammar and then Cotham School) took no steps to erect prohibitory signs or otherwise prohibit use.

25. The Inspector has failed to address, in his May 2023 Note, how he reached a conclusion that the schools somehow 'adopted' the Avon County Council signs by not removing them, particularly given that this analysis is inconsistent with the evidence. Ms Sandra Fryer, Chair of Governors at Cotham School gave evidence before the Inspector at the 2016 public inquiry that the informal use of the playing fields 'had been satisfactory from the School's point of view'.[12] In short, the School had not taken steps to prohibit informal use because it did not find such use problematic. There is significant evidence (detailed in the signage annex to the Applicants' October 2022 submissions) that the School did not adopt the signs. On the ground, the evidence is that Council and School staff such as groundskeepers were frequently present and had regular friendly interactions with local inhabitants demonstrating acquiescence to such use rather than adopting the (ambiguous and limited number of) signs.

[12] See para 279 of the Inspector's 2016 report.

26. The Applicants' April 2023 Representations also explained at paragraph 39 why the Inspector's conclusions in relation to the 2009 sign located near Stoke Lodge House could not be correct. The Inspector has failed to address either this issue or his misinterpretation of the 2010 Cabinet Briefing Note (which stated that the Land allowed unfettered access and that there was a potential concern about accruing TVG rights (specifically at Stoke Lodge), but that the Council's policy remained one of encouraging schools to accept shared use). The Briefing Note was written more than 20 years after the point at which neither Avon CC or the Council had any policy on the informal use of the Land.

27. The Applicants' April 2023 Representations also referred to the Inspector's conclusion that, by announcing in the local newspaper in January 1990 that it was considering installing a kissing gate at the Cheyne Road entrance (where there has never been any sign), Avon CC was somehow subtly signalling that if individual members of the public wrote to it seeking permission to use that entrance, that permission would be given. This remains a bizarre conclusion on the evidence and in the context of the geography of the site. Such a conclusion is irrational bearing in mind that this occurred three weeks prior to the Council declaring that it had no policy on informal use and that the Inspector is of the view that in relation to every other entrance to the Land, including entrances located just a few metres away, use would be contentious and would amount to trespass. It was never the Applicants' case that use via this entrance was somehow being permitted, as he appears to have incorrectly assumed; this is supported by the evidence of householders whose use of residential gates onto the field was never challenged or 'permitted'. This is another example of a key issue that would have been clarified during a public inquiry, had the Committee's Outline Procedure been followed, and of the detriment to the Applicants from the failure to follow proper process in this matter.

28. As the Inspector acknowledges in his May 2023 Note, if the Applicants' arguments on acquiescence are accepted then the Land must be registered and 'on the face of it, the land should have been registered upon Mr Mayer's application'. For the reasons set out above and in the previous submissions and representations, the PROWGC should conclude that both the Council and the Schools did acquiesce to informal use of the Land by local inhabitants throughout the relevant 20 year period.

The 2016 Public Inquiry and "Cause Celebre"

29. The Applicants have previously addressed this issue in detail at:

    i) paragraphs 87-98 of the Applicants' October 2022 submissions;

    ii) paragraphs 49-54 and annex 1 to the Applicants' December 2022 submissions in reply;

    iii) paras 43-57 of the Applicants' April 2023 representations to the PROWGC.

30. The Applicants would ask the PROWGC to consider its previous submissions on this issue which are not repeated here. In summary, there is a factual dispute as to whether the 2016 Inquiry was a "well-publicised cause celebre", the existence of which was sufficient to render any subsequent use of the Land as contentious. The Applicants have consistently disputed that the 2016 Inquiry was such a "cause celebre"; it did not render subsequent use contentious and thus not "as of right". What follows is a response to the points made by the Inspector in his May 2023 Note at paragraphs 18-20.

31. In relation to paragraph 18 of the May 2023 Note, the Inspector accepts that he misunderstood the Applicants' case and that he was mistaken when he stated that the Applicants did not dispute the School's and Council's assertion that the 2016 inquiry was a "well publicised cause celebre". In fact the Applicants had disputed this assertion on multiple occasions both previously[13] and in its most recent submissions to the Inspector including their December 2022 submissions. The Applicants have repeatedly set out detailed arguments and evidence why the 2016 Inquiry was not a cause celebre. The fact that the Inspector thought otherwise strongly suggests that he did not properly consider the Applicants' submissions and evidence on this issue.

32. The Applicants' April 2023 Representations highlighted that the Inspector had ignored their December 2022 submissions on this issue. In his May 2023 Note, the Inspector admits that those submissions 'contained a considerable amount of material about the significance of the 2016 inquiry' but says that they 'did not take the simple point that it

[13] See paragraphs 9-14 of the Applicants' April 2023 representations which detail where the Applicants have repeatedly made their position clear.

was not a cause celebre'. This is manifestly incorrect. Annex 1 to those submissions, which is in the hands of the Committee, sets out facts and cross-references supporting evidence on this matter: Committee members can see for themselves from page 1 of that Annex that, contrary to the Inspector's comment, the evidence submitted shows that:

i) the conduct of the Council and School at the public inquiry in 2016 did not convey any clear message in relation to ongoing informal use of the Land;

ii) neither the School nor the Council had authority under the terms of the School's lease to render use contentious by their words or actions at or after the public inquiry;

iii) the School and the Council were in discussions about the possibility of making a landowner statement under the Commons Act 2006 to bring 'as of right' use to an end; they did not consider that such use had already ended (meaning that they and their advisers did not consider that any protest had been 'made clear' as a result of the public inquiry);

iv) the evidence demonstrates (a) that neither the School nor the Council genuinely considered that use had been made contentious by virtue of the 2016 public inquiry or following that inquiry, and (b) that the public at large was also unaware of any such hypothetical message having been communicated.

33. In particular, section 4 of the Annex addresses the 'cause celebre' issue.

i) Paragraph 4.5 sets out that it was not the School's understanding that informal use had been prohibited or permitted as a result of the 2016 public inquiry, together with a cross-referenced list of evidence to which the Inspector has made no reference at all.

ii) Paragraph 4.6 sets out that it was not the Council's understanding that informal use had been either prohibited or permitted as a result of the 2016 public inquiry, together with a cross-referenced list of evidence to which the Inspector has made no reference at all.

iii) Paragraphs 4.7 and 4.8 make clear that since a change in ongoing 'as of right' use had not been made clear to/understood by either of the Objectors, it could not be said to have been made clear to the community at large, and provides a cross-referenced list of evidence to which the Inspector has made no reference at all.

iv) The subsequent conduct of the Council and the School is also discussed in section 3 and paragraph 4.9 onwards, making clear that both parties considered that 'as of right' use was continuing, including discussions about the making of a landowner statement to bring 'as of right' use to an end. The Inspector has completely failed to recognise the significance of these issues.

34. The Inspector has never properly addressed his mind to the evidence on the 'cause celebre' issue because he proceeded in his Report on the basis that it was not in dispute (and he did not analyse the Applicants' evidence in his May 2023 Note). The Applicants' evidence on this issue includes Neighbourhood Partnership minutes showing that use was not considered to have become contentious as a result of the 2016 inquiry.[14] The Inspector has also failed to address or even mention in any way the 'smoking gun' issue that in 2018 the School and the Council were discussing ways to end 'as of right' use via a landowner statement, so clearly they did not consider that it had ended prior to that point. Since neither the School nor the Council (nor their expert advisers) considered that 'as of right' use had ended as a result of the public inquiry there is no basis whatsoever for concluding that local inhabitants would have been aware. It is now known that the Council obtained and considered legal advice on whether or not to make a landowner statement and took a decision not to do so; it recognised ongoing 'as of right' use, had the opportunity to end that use, and chose not to end it.

35. The Inspector also suggests in paragraph 19 of his May 2023 Note that it would have been open to the Applicants 'to produce witness statements from people using the land in 2016 who were ignorant of the public inquiry'. This is a remarkable comment given the

[14] For example, the minutes of the final Neighbourhood Partnership meeting in 2017 record a decision to fund an additional dog waste bin on the playing fields, which is a clear indication that the community did not consider that there had been any change to their informal use of Stoke Lodge.

fact that the Applicants provided 166 witness statements in which every single witness specifically attests that the nature of their use of the field has not changed up to the date of their witness statement (these were obtained in August/September 2018 for Ms Burgess' application and in June/July 2019 for Ms Welham's application) - that is, none of these witnesses thought that their use had become contentious for any reason, whether or not they knew that a public inquiry had taken place in 2016. Obviously, witnesses could have been questioned about this at a public inquiry but due to the decision of the Inspector to depart from the CRA's agreed Outline Procedure and the requirements of the law, that opportunity was denied to the Applicants. The Inspector has not, despite multiple reminders on the point, considered the 166 witness statements and the CRA has never provided them to him notwithstanding the Applicants' repeated requests.[15] However, he is simply not in a position to ignore the evidence contained within them. Given the absence of a public inquiry where the Applicants' could adduce oral evidence on this issue, the Inspector was required to proceed on the basis of the factual position set out by the Applicants, namely that the Inquiry was not a 'well-publicised cause celebre'.

36. In relation to the issue on the 2016 public inquiry and whether this was a 'well-publicised cause celebre', the Applicants made clear in their April 2023 Representations that the Inspector had completely misunderstood the evidence he used to support his argument. In paragraph 20 of his May 2023 Note, he has retreated from his previous position and now states only that the posters displayed in 2018 'indicate an appreciation in the neighbourhood that the use of the Field was contentious'. However, these posters related to a completely separate issue about the proposed erection of a fence (a proposal that the Council itself was also opposing at the time). Such "evidence" does not come close to supporting the specific conclusion he had reached that the public generally would have considered that their use had ceased to be 'as of right' due to their awareness of the 2016 public inquiry. It is also the case that the Inspector has not had sight of the poster on which he now claims to be relying, as it was not submitted in evidence. It is simply not possible for him to have reached a proper conclusion based on what he imagines that poster to have said.

[15] See paragraphs 15-16 of the Applicants' April 2023 representations.

37. The PROWGC should therefore reject the Inspector's conclusion on the 'cause celebre' issue because he has failed to consider the relevant evidence and has reached his conclusion on an obviously flawed basis. Members of the PROWGC are in a better position than the Inspector to make a factual finding on this because:

    i) they are not proceeding on the incorrect basis that this issue is not in dispute;

    ii) they are able to consider all the relevant evidence on this issue.

The PROWGC should accept the Applicants' evidence, as set out in their submissions, on this point and conclude that the 2016 Inquiry was not a “cause celebre” sufficient to render any subsequent use contentious.

Statutory incompatibility

38. This is an issue of law. The Inspector has repeatedly concluded that no issue of statutory incompatibility would arise if the Land was registered as a TVG. The Inspector’s analysis on this issue, unlike his analysis of the “as of right” issue, is correct. The PROWGC should therefore accept his recommendation on this issue.

Suggested Reasons

39. For the reasons set out above and in the Applicants' submissions of October and December 2022 and their Representations to the PROWGC dated 11 April 2023, use by local inhabitants of the Land was 'as of right' for the whole of the relevant 20 year period. The Inspector's conclusions to the contrary are inconsistent with both the factual and legal position. The PROWG Committee is therefore required to register the Land as a TVG.

40. The PROWGC should resolve as follows:

    i) that the signs placed on the land by Avon County Council in the mid-1980s were not sufficient in number to be effective to render use of the Land contentious during the relevant period. Similarly, the sign erected by Bristol City Council in 2009 did not render use of the Land contentious;

ii) further, in addition to the insufficiency of the signs, the conduct of both the landowner and the schools throughout the relevant period for these applications was inconsistent with the wording on the signs and consistently indicated acquiescence to informal use by local inhabitants;

iii) that the Inspector's conclusion as to the effect of the 2016 public inquiry should be rejected as he has erroneously proceeded on the basis that the 2016 Inquiry was a 'well-publicised cause celebre' in reliance on evidence which, properly analysed, does not support his conclusion. Having considered the Applicants' submissions and evidence, the Committee considers that the evidence shows that use did not cease to be 'as of right' by reference to the 2016 public inquiry;

iv) that there is no other reason to consider that 'as of right' use has not been carried on continuously throughout the relevant period;

v) that the Inspector's conclusion on statutory incompatibility should be accepted, for the reasons set out in his Report;

vi) that all other elements of the legal test for registration as a Town or Village Green are met; and

vii) that Stoke Lodge Playing Fields should therefore be registered as a Town or Village Green.

Andrew Sharland KC

11 KBW

9 June 2023

Annex 1


Key:
Avon County Council Sign
Formal entrance points
Resident access (Direct garden access)
Stoke Lodge
Stoke Lodge area: 88,000m2
Winterburn car park area: 450m2
Just 0.5% of the area of Stoke Lodge
25m
Overlay of the car park in Winterburn v. Bennett. To scale.

APPLICATIONS BY MS EMMA BURGESS AND MS KATHY WELHAM TO REGISTER LAND KNOWN AS STOKE LODGE PLAYING FIELD, SHIREHAMPTON ROAD, BRISTOL, AS A NEW TOWN OR VILLAGE GREEN

REPORT

Preliminary

1. I have been appointed as an Inspector by Bristol City Council (acting as registration authority) to consider two applications under section 15 of the Commons Act 2006 which have been received by the Council to register land known as Stoke Lodge Playing Fields. The two applications are:
   (i) dated 13 September 2018 by Ms Emma Burgess; and
   (ii) dated 22 July 2019 by Ms Kathy Welham.

2. In my capacity as Inspector I am asked to prepare a report for the consideration of the City Council together with my recommendation as to whether the land should be registered or not. I am also asked to determine whether it is necessary that before I prepare my report there should be a public inquiry.

The background to the applications

3. In 2011 Mr David Mayer applied to Bristol City Council, as registration authority, to register Stoke Lodge Playing Fields as a town or village green. The Playing Fields were owned by Bristol City Council which, in its capacity as landowner, objected to the registration. Cotham School, which used the Playing Fields, also objected to the registration, as did two other users of the fields.

4. Under section 15 of the Commons Act 2006, in order for the Playing Fields to be registered as a town or village green, it was necessary for the registration authority to be satisfied that the land in question had been used by the inhabitants of a locality, or a neighbourhood within a locality, for a period of twenty years for lawful sports and pastimes; and that that use had been *as of right*. The relevant period of use was 1991 to 2011 (i.e. the 20 years to the date of the application).

5. As registration authority, the City Council appointed me as Inspector to consider the application and to report to it with my recommendation as to whether the land should be registered or not. The procedural history thereafter is somewhat complicated and is set out paragraphs 2 – 6 of the *Report* which in due course I made to the City Council in October 2016. The short point is that in order to enable me to make a recommendation, I decided that it was appropriate that there should be a public inquiry. Such inquiry took place over 9 days in June and July 2016.

6. Many issues were in contention at the public inquiry but, in end, it was my judgment that the matter turned upon whether the existence of three notices on the land had the effect of making use of the land by local people contentious and not *as of right*. I took the view that they did have this effect; and that accordingly the land should not be registered as a town or village green. I relied upon a case decided in the Court of Appeal as to the effect of notices which, of

course, was binding upon the City Council in making a decision upon the application (*Winterburn v Bennett*[1]*).*

7. The three notices had been erected in 1991 by Avon County Council, which had been abolished in 1996. It will be seen that on the basis that the existence of the signs made use of the land by local people contentious and not *as of right*, the use of the land between 1991 and 1996 when Avon County Council was abolished could not have been *as of right*. Mr Mayer's application was bound to fail on this basis. However it could be argued, and was argued, that the use of the land between 1996 and 2011 **was** as of right. On this point, in my report to the City Council, I said:

   I think that there are two points here. First, I think that if someone comes across an old and decrepit sign saying "Trespassers Keep Out" he might from all the circumstances consider that it was of no continuing application. Second, although the fact that a sign says "Avon County Council" rather than "Bristol City Council" does not mean that the day after Bristol City Council takes over from Avon County Council the notice ceases to have any effect, someone might well wonder, say, ten years after Avon County Council ceased to exist whether any particular sign that it had put up had continuing effect. These may be interesting points but it seems to me that they do not fall for determination in the present case. The two Avon County Council signs that are still in place, though clearly not new, are not decrepit; and the one that was at access point [12], although subject to some graffiti before it was removed, was similarly not decrepit as shown in the photograph dating from 2007 ...[2]

8. Apart from the issue as to whether the use was *as of right*, another issue that I considered was one based on the concept of what has become known as "statutory incompatibility", namely that the registration of the land was incompatible with it being held by the City Council as land for the purpose of education. Seeking to apply the leading cases on the point, namely *R (Newhaven Port and Properties Limited) v East Sussex County Council*[3] (in the Supreme Court) and *Lancashire County Council v Secretary of State*[4] and *R (NHS Property Services) v Surrey County Council* [5] (both decided in the High Court), I decided that there was no such incompatibility. However at the time of my report, permission to appeal was being sought in the *Lancashire* case and had been granted in the *Surrey* case. Thus there existed the possibility that the outcome of those appeals might affect my decision on this point.

9. The Public Rights of Way and Greens Committee of the City Council considered my report and recommendation at a meeting on 12 December 2016. It decided to reject my recommendation and to register the land as a town or village green. That decision was challenged by Cotham School by way of judicial review. As well as taking the point that, in the light of my report, the Committee should have decided to reject the application, the School also argued that the application should have been rejected on the basis of statutory incompatibility. By the time the case came on for hearing before Sir Wyn Williams (sitting as a Deputy Judge of the High Court) on 21 November 2017, the Court of Appeal had recently heard argument on the appeals in the *Lancashire* and *Surrey* cases (the two appeals were heard together) but had not delivered judgment. Sir Wyn heard argument but postponed delivering his own judgment until after the Court of Appeal had given its judgment (on 12

[1] [2017] 1 WLR 646 (CA).
[2] Paragraph 390.
[3] [2015] AC 1547 (SC).
[4] [2016] EWHC 1238 (Admin).
[5] [2016] 4 WLR 130.

April 2018). This enabled him to take into account written submissions on the question of statutory incompatibility which were submitted to him by the parties after the judgment of the Court of Appeal had been handed down.

10. In his judgment, delivered on 3 May 2018, Sir Wyn upheld the challenge. However in the light of the Court of Appeal's judgment in *Lancashire/Surrey* he rejected the argument that the application should be rejected on the basis of statutory incompatibility.

11. Following the quashing of the registration of the land, on 14 September 2018, Emma Burgess made a fresh application to Bristol City Council as registration authority to register the Playing Fields as a town or village green. The relevant 20 year period in respect of her application was 1998 to 2018 (i.e. the twenty years to the date of her application). She submitted the use of the land was as of right on the basis that Avon County Council had been abolished in 1996 and the signs that it had erected on the land had no legal effect after that date.

12. Bristol City Council and Cotham School[6] objected to the application. Among the points that they took was that the School had erected new signs on the land on 24 July 2018 and that, whatever was the position before, after 24 July 2018 the use had been contentious and not *as of right*. Ms Burgess contested that the signs were effective but if they were, then, on the face of it, the Objectors had a good point because (i) the application was made under section 15 (2) of the Commons Act 2006 and (ii) by virtue of section 15 (2) (b), in order to qualify for registration, qualifying use has to continue to the date of the application. There is however (also on the face of it) a ready response to this objection: an application can be made under section 15 (3) of the Commons Act 2006. By virtue of section 15 (3) (c) and (d) an application can be made for up to a year after qualifying use has ceased. Thus if the notices did have effect, one might think that the application could be considered under section 15 (3) instead of 15 (2). However Ms Burgess could not know that Bristol City Council as registration authority would treat her application in this way. In the light of this, on 22 July 2019, Katharine Welham made a further application to register the land as a town or village green relying on section 15 (3) (c) and (d) of the Commons Act 2006. This explains why Bristol City Council as registration authority have been asked to consider two applications rather than a single one.

13. By the time that Ms Burgess came to make her application, permission had been given for an appeal to the Supreme Court in the *Lancashire/Surrey* case. Accordingly, the City Council as landowner and the School submitted that a decision on Ms Burgess's application should be deferred until after judgment had been handed down in the *Lancashire/Surrey* appeal. By the time that Ms Welham came to make her application, argument in the *Lancashire/Surrey* case had just been heard; however judgment had not been handed down. This occurred on 11 December 2019. The judgment was evidently potentially important because it reversed the judgment of the Court of Appeal in the *Lancashire*/*Surrey* case. Bristol City Council as landowner and the School were able to take it into account in their objections to Ms Welham's application, arguing that it necessarily should lead to its rejection. In separate submissions, they argued that Ms Burgess's application should be rejected for the same reason. Both Ms Burgess and Ms Welham have responded in writing to the Objectors' case on statutory incompatibility.

[6] The School now holds a long lease of the land.

Documentation

14. The City Council as registration authority have helpfully prepared a paginated bundle containing the essential documents. References in this Report to page numbers without other attribution are to this bundle.

    The bundle contains the following substantive material:

    In relation to Ms Burgess's application

    Ms Burgess's application (pp 1 – 9)

    Objection to Ms Burgess's application by Cotham School (pp 11 – 17)

    Objection to Ms Burgess's application by Bristol City Council as landowner (pp 18 – 23)

    89 objections to Ms Burgess's application by members of the public (pp 42 – 135)

    Response by Ms Burgess to the objections of Cotham School and Bristol City Council (pp 24 – 41)

    Response by Ms Burgess to the objections by members of the public (pp 136 – 162)

    Submissions by Ms Burgess on the issue of statutory incompatibility (pp 185 – 193)

    Submissions by Cotham School on the issue of statutory incompatibility (pp 229 – 235)

    Submissions by Bristol City Council as landowner on the issue of statutory incompatibility (pp236 – 238).

    In relation to Ms Welham's application

    Ms Welham's application (pp 163 – 183)

    Objection to Ms Welham's application by Cotham School (pp 239 – 251)

    Objection to Ms Welham's application by Bristol City Council as landowner (pp252 – 268)

    27 Objections to Ms Welham's application by members of the public (pp 287 – 318)

    Response by Ms Welham to the objections of Cotham School and Bristol City Council (pp 269 – 286)

    Response by Ms Welham to the objections by members of the public (pp 319 – 340)

    In relation to both applications

    Letter dated 25 June 2020 on behalf Cotham School (pp341 – 342)

    Letter dated 30 June 2020 from Ms Burgess and Ms Welham responding to letter dated 25 June 2020 on behalf of Cotham School (pp343 – 346)

    E mail dated 2 July 2020 on behalf of Bristol City Council as landowner responding to letter dated 25 June 2020 on behalf of Bristol City Council as landowner (pp347 – 349)[7].

[7] I also note e mails from the Applicants and interested parties at pp 352 – 356.

Should there be a public inquiry?

15. I consider first whether it is necessary that there should be a public inquiry before I can make a recommendation to the City Council as registration authority.

16. In respect of applications for the registration of new town or village greens, Bristol City Council as registration authority have approved an *Outline Procedure* (2012). The relevant part of the procedure provides
    (a) Straightforward cases where there is no conflict of evidence, or no significant objection will be dealt with on the paperwork. The decision will be taken by the delegated officer (Strategic Director of Corporate Services) or [the Public Rights of Way and Greens Committee] as appropriate. Whether or not an independent inspector needs to be appointed prior to determination, particularly where the Council is the landowner, is a matter for PROWG.
    (b) In other cases there will be a public inquiry, i.e. a hearing, open to the public where both sides are able to present their evidence and make representations … Where the Council is landowner the inquiry will be conducted by an independent legally-qualified inspector …

17. In the present case, Bristol City Council as registration authority have asked me to decide whether it is necessary for there to be a public inquiry.

18. In a case in which in which important facts are in dispute and where the resolution of those factual issues is determinative of the application it will usually be necessary for there to be a public inquiry.

19. In respect of the land which is the subject of the applications which I have been asked to consider there has already been a lengthy public inquiry. This was in respect of an application relating to the period 1991 – 2011 rather than 1998 – 2018 but "on the ground" it is evident that the use has carried on in the same way. Thus the dispute is not about whether local people have used the land for sports and pastimes but is essentially twofold, namely whether
    (i) statutory incompatibility operates to preclude registration; and
    (ii) use of the land has been *as of right.*

20. The first issue turns on the legal basis on which the land is held. This is not in dispute.

21. As regards the second issue, what Ms Burgess and Ms Welham are saying is that the abolition of Avon County Council in 1996 makes all the difference and that thereafter the use by local people was *as of right.* I shall have to judge whether this submission is correct but the fact that Avon County Council was abolished in 1996 is not in issue.

22. The documentation identifies a further aspect of whether the use of the land has been *as of right.* Bristol City Council as landowner and Cotham School argue that, if it was not contentious before, the use of the land became contentious when Mr Mayer's application was objected to and was the subject of a public inquiry. The facts surrounding the objections and the public inquiry are set on in my *Report* dated 14 October 2016 and are not controversial.

23. On all the issues I have detailed written submissions.

24. In these circumstances I have decided that it is not necessary that there should be a public inquiry.

25. I recognise that in doing so I shall deprive myself of the benefit of oral submissions by the parties. However my decision does result in a saving of costs to the parties. It will also mean that it will be possible for a decision to be reached more quickly than otherwise which is a significant benefit in circumstances where the dispute began nearly ten ago.

26. In reaching my conclusion as to the need for a public inquiry I have had regard to the City Council's *Outline Procedure.* It seems to me that it does not anticipate every circumstance and, in particular, did not anticipate the present situation where there has already been a lengthy public inquiry to establish the facts. I do not think it constrains me to hold a public inquiry in circumstances where there are good reasons for not doing so.

27. I have also noted the suggestion made by both Ms Burgess and Miss Welham that there are significant factual issues that need to be considered at a public inquiry[8]. Although I accept that some factual issues arise in respect of some of the matters in respect of which submissions have been made to me by the parties, I have not identified any factual matter going to the two main issues which potentially affects their determination.

28. I have also noted the objections by members of the public to both applications. These seek to emphasise the facts as these objectors perceive them to be; they do not present a version of the facts that is significantly different to that relied upon by the City Council as landowner and the School. All of them are concerned about the practical effects of registration in terms of the functioning of the school. These are not matters for the registration authority: registration occurs if the statutory criteria are fulfilled (and not otherwise). Whether or not it is a good idea that the land should be registered is not a matter for the registration authority.

29. I now set out my conclusions in respect of the two main issues.

Issue 1: statutory incompatability

30. It is argued by Bristol City Council as landowner and Cotham School that the land cannot be registered as a town or village green because registration would be incompatible with the educational purposes for which they hold the land; just as in *R (Lancashire County Council) v Secretary of State for the Environment* land held by Lancashire County Council could not be so registered because it was incompatible with the educational purposes for which they held the land.

31. In *Newhaven*, the Supreme Court had determined that land held by port authority could not be registered as a town or village green. This was because of "statutory incompatibility" between the regime under which the land was held as a port and its status if it were registered as a village green. To the question *Does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?* the Supreme Court gave the answer *It does not*[9].

32. It will be evident that this answer gives rise to a further question, one which *Newhaven* did not address, namely, *Does section 15 of the 2006 Act apply to land which has been acquired by a local authority (whether by voluntary agreement or by powers of compulsory purchase)*

[8] See pp 286 and 345.
[9] See the speech of Lord Neuberger of Abbotsbury PSC and Lord Reed JSC (with whom Baroness Hale of Richmond DPSC and Lord Sumption JSC agreed).

and which is held for statutory purposes that are inconsistent with its registration as a town or village green? On a simple view, the same answer – *It does not* – would be returned to this question. If land held by a statutory undertaker for its statutory purposes is not registrable then, on the face of it, land held by a local authority for its statutory purposes is not registrable – for the very same reasons. However, every reader of the speech in *Newhaven* would have appreciated, that this could not be the right answer, because in paragraphs 98 to 100 of their speech, Lords Neuberger and Reed referred to three cases where land was held by local authorities and had been registered as a town or village green. The Respondent registration authority cited these cases in its argument that statutory incompatibility had no application to the registration of village greens. In their speech, Lord Neuberger and Lord Reed consider each of these cases in turn, beginning their discussion by saying that *In our view they can readily be distinguished from this case*[10]. Of *New Windsor Corporation v Mellor*[11] they observed that:

... the Court of Appeal was concerned with the registration of Bachelors' Acre, a grassed area of land in New Windsor, as a customary town or village green under the Commons Registration Act 1965 . The appeal centred on whether the evidence had established a relevant customary right. While the land had long been in the ownership of the local council and its predecessors, it was not acquired held for a specific statutory purpose. It had been used for archery in mediaeval times and had been leased for grazing subject to the recreational rights of the inhabitants. In recent times it had been used as a sports ground and more recently it was used as to half as a car park and half as a school playground. No question of statutory incompatibility arose.

33. I may add that at the time it acquired the land the Borough of New Windsor would not have been a statutory authority but have had an existence by virtue of a Royal Charter[12].

34. Of *Oxfordshire County Council v Oxford City Council*[13], they observed that:

... [it] concerned the Trap Grounds, which were nine acres of undeveloped land in north Oxford comprising scrubland and reed beds. The land was, as Lord Hoffmann stated (in para 2) "not idyllic". More significantly, while the city council owned the land and wanted to use a strip on the margin of it to create an access road to a new school and to use a significant part of the land for a housing development, ***there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility*** *(emphasis supplied).*

35. It is certainly true that the point was not argued and that the specific powers under which the land was held were not identified in the judgment. On the other hand, it is clear that the local authority wanted to develop the land for housing and that its registration as a village green would frustrate this.

36. Of *R (Lewis) v Redcar and Cleveland Borough Council (No 2)*[14], they observed that:

... [it] concerned land at Redcar owned by a local authority which had formerly been leased to the Cleveland golf club as part of a links course but which local residents also used for informal recreation. The council proposed to redevelop the land in partnership with a house-

[10] See paragraph 98. The discussion of the three cases is at paragraphs 98 to 101.
[11] [1976] Ch 380 (CA).
[12] Indeed this would have been the position when the litigation began. As I understand it, the Royal Borough of New Windsor ceased to exist on 31 March 1974, being replaced by a statutory authority established under the Local Government Act 1972 (the Royal Borough of Windsor and Maidenhead). This change in status is not reflected in the law report.
[13] [2006] 2 AC 674 (HL).
[14] [2010] 2 AC 70 (SC).

building company as part of a coastal regeneration project involving a residential and leisure development. Again, there was no question of any statutory incompatibility. ***It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green*** (emphasis supplied)***.***

37. Again it is true that the point was not argued but registration of the land would have impeded the provision of residential and leisure development.

38. The conclusion of Lord Neuberger and Lord Reed was as follows:

101. In our view, therefore, these cases do not assist the respondents. ***The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility.***

This conclusion evidently goes beyond distinguishing the three cases on the basis that the statutory incompatibility was not argued.

39. In *R (Lancashire County Council) v Secretary of State for the Environment* it was argued successfully that statutory incompatibility applied to land held for statutory purposes (in that case, education) held by a local authority. In reaching that conclusion, the majority (Lord Carnwath and Lord Sales) had to consider once again the effect of the three cases where local authority land had been registered as a town or village green. I note that at the outset of their speech they said: *Our task in the present appeal is not to make policy judgments, but simply to interpret the majority judgment in Newhaven and apply it to the facts of these cases.*

40. The speech expressing the view of the majority[15] was that of Lord Carnwath and Lord Sales. Their view of the cases considered by Lord Neuburger and Reed was as follows:

50. In relation to each of these cases, Lord Neuberger PSC and Lord Hodge JSC referred in entirely general terms to the statutory powers under which a local authority might hold land and were at pains to emphasise that the land in question was not in fact held in exercise of any such powers which gave rise to a statutory incompatibility. ***That was the basis on which they distinguished the cases****. It is clearly implicit in this part of their analysis that they considered that land which was acquired and held by a local authority in exercise of general statutory powers which were incompatible with use of that land as a town or village green could not be registered as such* (emphasis supplied).

41. I bound to say that this does seem to me to be a complete explanation; Lord Carnwath and Lord Sales do not "spell out" why they thought that Lord Neuburger and Lord Hodge considered that there was no statutory incompatibility in the *Trap Grounds* and *Lewis* cases.

42. As to the principle itself they observed:

It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act. There is no indication in that Act, or its predecessor, that it was intended to have such an effect[16].

43. In *Lancashire*, the Supreme Court held that the land was acquired for and remained appropriated to educational purposes, in exercise of the County Council's statutory powers as

[15] Lady Arden and Lord Wilson dissented.
[16] See paragraph 61.

education authority. The statutory provisions upon which County Council relied as showing incompatibility were:

(1) section 8 of the 1944 Education Act which imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character and equipment;

(2) sections 13 and 14 of the Education Act 1996 which require local authorities to contribute to the development of the community by securing efficient primary and secondary education;

(3) section 542 of the 1996 Act which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations (SI 2012/1943)) suitable outside space for physical education and outside play;

(4) section 175 of the Education Act 2002 which requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children".

44. The land was divisible into four different areas. Areas A and B were used as for outdoor activities and sports in connection with Moorside Primary School; Areas C and D were identified as a replacement school site.

45. Applying the legal principle that they had identified as set out above at paragraph 19 above to the specific facts of the case, Lord Carnwath and Lord Sales said:

In our view, applying section 15 of the 2006 Act as interpreted in the majority judgment in Newhaven, LCC ... can show that there is statutory incompatibility in each of their respective cases. As regards the land held by LCC pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of Area B as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place. Secondly, however, and more generally, such rights are incompatible with the use of any of Areas A, B, C or D for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes (see Newhaven*, para 96). The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law.*

46. I turn to a consideration of the facts of the present case.

47. In 2010, Parliament passed the Academies Act 2010. This empowered the Secretary of State for Education to enter into academy arrangements with any person. The arrangements were, in summary, that that person provided education without charge and that the Secretary of State provided funding for that provision. The Act provided that existing maintained schools could convert themselves into academies, and, if they did, the Secretary of State could make a scheme for the transfer of land of the maintained school from the local authority to the Academy. In the present case Cotham School, which before had been a maintained school, turned itself into an academy and the land on which it stood and its playing fields (which are

the subject of the application for registration as a town or village green) were transferred to the Academy. This was by virtue of a scheme made by the Secretary of State under section 8 of the 2010 Act.

48. It will be helpful now to take a step back. There are many independent schools in England that is, schools which are not owned and operated by local authorities. They are subject to regulation and inspection under Acts of Parliament but they are not provided by virtue of Acts of Parliament, and their owners (generally charitable trustees) are not under a statutory duty to provide education such as is imposed on a local authority[17]. On the face of it[18], land which they own will, in appropriate circumstances, be subject to registration as a town or village green. Academies are a new form of independent school. In the present case, Cotham School had a pre-existence as a maintained school and the land which it currently owns was previously owned by Bristol City Council as education authority[19]; however it might have been a school established by any person and not have had a pre-existence. I do not think that there would be any statutory incompatibility between the basis on which land was held by an entirely new academy and registration of that land in otherwise appropriate circumstances as a town or village green. Similarly, I do not think, subject to one matter, that there is any statutory incompatibility between the basis on which land is held by an academy which was formerly a maintained school and has now become an academy and the basis on which land is held by an academy which had no such pre-existence. In both cases, section 8 of the Education Act 1944, sections 13 and 14 of the Education Act 1996 and sections 175 of the Education Act 2002 have no application. Nor does section 542 of the Education Act 1996 (which prescribes open space standards for maintained schools) have any application.

49. I am of course aware that, as regards academies, by section 94 of the Education and Skills Act 2008, the Secretary of State may by regulations prescribe standards for independent educational institutions, of which academies (specific provision for which is contained in the Academies Act 2010) are one. By regulation 3 of the Education (Independent School Standards) Regulations 2014 (SI 2014 No 3283), the relevant standard is provided by paragraph 29 to Schedule 1 of the Regulations:

(1) The standard in this paragraph is met if the proprietor ensures that suitable outdoor space is provided in order to enable—

(a) physical education to be provided to pupils in accordance with the school curriculum; and
(b) pupils to play outside.

50. Thus if any person is to run an Academy accordingly to law, he or she or it **must** comply with this standard. However this is rather different to a statutory requirement to provide educational facilities on a particular piece of land: I do not think that it properly can be so construed.

---

[17] As to which, see paragraph 43 (1) and (2) above. I appreciate that it could be argued that they have such a duty by virtue of their status as charity trustees. On the basis, it could be argued that no land of a charity could be registered as a town or village green. As far as I am aware, this point has never been argued in the courts and, in the absence of clear authority I do not think this can be made one of the building blocks of the argument in this case.

[18] But see footnote 11 below.

[19] The reversion of the lease of the playing fields is of course still owned by the City Council.

51. At paragraph 48 above I said that, "subject to one matter", I did not think that there was any statutory incompatibility between the basis on which land is held by an academy which was formerly a maintained school and has now become an academy and the basis on which land is held by an academy which had no such pre-existence. I turn now to consider that one matter.

52. It seems to me that if the position were that Cotham School had remained a maintained school and the land on which it stood and the playing fields the subject of the present advice had remained in the ownership of Bristol City Council, the situation about which I am asked to advise would be indistinguishable from that in the *Lancashire* case. The position that currently obtains is that the reversion of the 125 year lease is still owned by Bristol City Council. Is it perhaps the position that the land is not registrable as a town or village green not by reference to the 125 lease vested in the School but by reference to the reversion of the lease vested in Bristol City Council?

53. In my judgment the answer to this question is that the land is not not[20] registrable by reference to the reversion of the lease. It seems to me that before a scheme was made by the Secretary of State under Schedule 1 to the Academies Act 2010, the land was held by Bristol City Council under the duties identified under the same sections as were identified in the *Lancashire* case. It seems to me that the position thereafter is different. It ceased, in practice, to have any statutory duties in respect of the land. It so happens that under Schedule 1 to the Academies Act 2010 the land continues to be used for the purposes of education but there is no necessary requirement for this by virtue of the mechanism by which the transfer of the immediate interest in the land was effected. As far as Bristol City Council were concerned, it might have been required to transfer the land to provide a site for a new hospital. On what basis, them, does Bristol City Council continue to hold the reversion to the land? In my judgment, it is not by reference to any specific power; it is by reference to the sort of unspecific power that the majority had in mind in *Newhaven* in the three cases which it considered at paragraphs 98 to 100 of that case.

54. In reaching this conclusion, I am conscious that if the land in the *Lancashire* case is properly not registrable, it can be argued that there is no sensible reason why the land in the present case should also properly be not registrable. There is however a significant difference between the two situations. In the first the relevant land is directly owned by a local authority under specific statutory duties to use it for the purposes of education. In the second, it is directly owned by an independent school which is not under a statutory duty to provide education. It is under a duty to provide educational facilities but that is by a reference to contract with the Secretary of State (and not directly a statute) and the duty is not specific to the land which it owns. I am also conscious that it may be argued that I have taken too narrow a view of the concept of statutory incompatibility. I recognise that a Court might so conclude. However it will be seen that my approach does reflect that in *Newhaven* as interpreted in *Lancashire* because it does identify a category of local authority land which is not subject to statutory incompatibility.

55. What I have written above is on the basis that the time to consider statutory incompatibility is the time when the application is made. If it were the case that it was necessary that the land should be registrable throughout the relevant 20 years, it will be apparent that in any

[20] The double negative is intended.

particular case it might be that, there being statutory incompatibility at some earlier stage, the land might not be registrable, even though no statutory incompatibility existed at the date of putative registration. In the present case, the position would be that the land would not have been registrable before 2010 (being land held for purposes of education by Bristol City Council) only becoming registrable after the land passed into the ownership (or substantial ownership) of the School. It might be observed that it would be odd for the School (to whom statutory incompatibility does not apply) to rely on the earlier period of incompatibility when it was owned by Bristol City Council. The public purposes as defined by Parliament, about the stymying of which the majority were concerned in *Lancashire*, would not be stymied. On the other hand, it may be observed that it is odd for land to be registrable on the basis of twenty years use when for a significant part of that twenty years it was not registrable because of statutory incompatibility. At paragraph 47 of *Lancashire*, the majority point out that cases on rights of way and easements were of assistance by way of analogy; it might be argued that the incapacity of a relevant owner at any time during the relevant period in those analogous circumstances points up the force of the latter argument.

56. The answer to this aspect of the matter is not spelt out in the Commons Act 2006 nor can it be conclusively deduced from any policy considerations articulated in respect of statutory interpretation. Statutory incompatibility was held in *Newhaven* to fall to be considered at the time of registration. It seems to me that it would require the authority of the Court to extend it so that it became a requirement of registration that statutory incompatibility did not exist at any stage during the relevant 20 year period. Moreover, I am confident that a Court would not take that further step, thereby preventing registration of land as a town or village green at a time when there is no statutory use of the land which would be frustrated by registration. This does not seem to me to make much sense.

57. I am conscious that the Court in *Newhaven* and *Lancashire* has given the Commons Act 2006 a narrow interpretation. It is difficult to predict with certainty that it might not further limit the application of the Act in a future case (like the present, if it had to rule on it). I would expect the School and perhaps the City Council as landowner to argue that the views I have expressed above are wrong. I am conscious both that (i) in any case my advice, given in good faith and with the benefit of my expertise may not be advice with which a Court (as the law in this area shows, potentially the Supreme Court) agrees[21] and (ii) on many legal questions, two competing views may be taken. Ultimately the City Council as registration authority has to take a view about the matter. In doing so, it will note that the matter is not in my view determinative i.e. as explained below, I consider that the application fails for other reasons.

Issue 2: ***as of right***

58. I consider first the effectiveness of the Avon County Council notices after 1996.

59. I begin by reminding myself that the relevant twenty year period in respect of both applications is 1998 - 2018[22].

[21] The three-fold disagreement in the Supreme Court in *Lancashire* demonstrates just how difficult this area of (judge-made) law is,

[22] September 2018 in respect of Ms Burgess's application and July 2018 in respect of Ms Welham's application. Since there is before the registration authority an application in which the relevant 20 year period ends before the erection of new notices in 2019, it is unnecessary to consider a possible amendment to Ms Burgess's

60. By virtue of section 17 of the Local Government Act 1992 and article 5 of the Avon (Structural Change) Order 1995 (SI 1995 No 493) the County of Avon ceased to exist and Avon County Council was abolished on 1 April 1996. Article 5 provides as follows:

    5 Existing local government areas

    (1) ***The existing county of Avon*** *and the existing Avon districts of Bath, Wansdyke, Kingswood and Northavon* ***shall be abolished****.*

    (2) ***The County Council****, Bath City Council, Kingswood Borough Council, Northavon District Council and Wansdyke District Council* ***shall be wound up and dissolved*** (emphasis supplied).

61. Accordingly, at the beginning of the relevant period, Avon County Council did not exist and had not existed for more than two years.

62. As explained above, the submission of Ms Burgess as regards the Avon County Council signs is that they are not relevant to her application because at the beginning of the 20 year period that applies to her application (1998), Avon County Council did not exist. She argues that by an operation of law (the abolition of the Council), a necessary fact to render the signs effective (the existence of the Council) had ceased to obtain. If one postulates the signs doing service for the landowner in person attending at the land and warning trespassers off, on the day before the abolition of the Council there was such a person present and warning trespassers off; on the day after, there was no such person but a new owner. That new owner, it may be argued, never contested the use but acquiesced in it.

63. This submission has the merit of simplicity. Further, it will be noted that it is either correct or incorrect; it involves no shades of grey. If it is correct, the existence of the signs and thereafter will be irrelevant and the argument which was decisive in leading to the rejection of Mr Mayer's application will not obtain.

64. In considering Mr Mayer's application, the continuing effect of the signs after 1996 (the abolition of the County Council) was not determinative; it was enough that they had the effect of making the use between 1991 and 1996 contentious. However the use relied upon by Mr Mayer did continue after 1996 and in my *Report* dated 14 September 2016 I did express a view about it which is set out at paragraph 7 above. It will be helpful to repeat it here:

    First, I think that if someone comes across an old and decrepit sign saying "Trespassers Keep Out" he might from all the circumstances consider that it was of no continuing application. Second, although the fact that a sign says "Avon County Council" rather than "Bristol City Council" does not mean that, the day after Bristol City Council takes over from Avon County Council, the notice ceases to have any effect, someone might well wonder, say, ten years after Avon County Council ceased to exist whether any particular sign that it put up had continuing effect.

65. It will be seen that I did not accept that the signs ceased to be of any effect upon the abolition of Avon County Council. Bristol City Council as landowner and Cotham School argue that I was correct to take this view.

---

application so that it would be made under section 15 (3) or for the registration authority to consider any period down to a date other than that of the application.

66. Bristol City Council as landowner and Cotham School rely on the view set out in my Report. The City Council add:

14. Avon County Council was abolished and its educational functions were transferred to Bristol City Council as part of a re-organisation of local government on 1 April 1996. There was no suggestion in the statutory provisions that this was anything other than an administrative alteration that was not intended to alter any of the arrangements or decisions made by Avon whilst in existence that related to its statutory functions. Any reasonable local resident would have known that Avon was being abolished and its functions and responsibilities transferred to Bristol. No reasonable person could have concluded that Avon's statement, policies and notices were to cease effect at midnight on 31 March 1996[23]

67. Revisiting this point, I have not changed my mind as to the continuing effect of the notices after 1996. In order to make use contentious by reference to signs, there is no requirement upon the landowner to identify himself. Moreover it is unrealistic to think that any person visiting the land on the first day of its ownership by Bristol City Council would have thought that his legal position had changed. This, of course, is looking at the matter subjectively. As a matter of objective fact, the position was that the powers and responsibilities had passed to Bristol City Council by operation of law. The effect of this is that Bristol City Council succeeded to the shoes of Avon County Council. I consider that this means that if Avon County Council objected to the use of the land by local people, Bristol City Council continued to do so as its successor. The supersession of the County Council by the City Council was not, of course, a secret matter and all the relevant documentation would have been in the public domain. A member of the public investigating the position would have appreciated that Bristol City Council had taken over from Avon County Council by operation of legal instrument and that there was no reason for considering that the attitude of the City Council was any different to that of the former County Council: it had not in fact altered its position from objection to acquiescence.

68. If the analysis above is correct, then the position as regards the contentiousness of the use of the land by local people did not change in 1996.

69. Further, that analysis would suggest that the notices were still effective in 1998 when began the relevant period on which Ms Burgess and Ms Welham rely. Indeed, it seems to me that if, as a matter of law, the notices did not cease to be effective in 1996, there is no basis for suggesting that they would have ceased to be effective in 1998. Nothing changed in the intervening period to 1998 after the abolition of Avon County Council and, in particular, the notices had not become decrepit. If this is correct, this finding is fatal to both applications because neither Ms Burgess or Ms Welham can have established use which for the relevant 20 years was *as of right;* the use at the beginning of each period relevant period was contentious by reference to the signs.

70. In fact I would go further and say that it is my conclusion that the use continued to be contentious - on the same basis as it was contentious in 1998 - down to 2009, when one of the Avon County Council signs was replaced by a Bristol City Council sign[24].

---

[23] See p 20.

[24] I noted in my *Report* dated 14 October 2016 that there was no positive evidence that the sign that was replaced existed beyond 2007. Nonetheless it would appear on the balance of probabilities that it did continue to

71. After 2009 the situation becomes factually more complicated. In 2009, as noted, one of the Avon County Council signs was replaced by a Bristol City Council sign which was not as effective as the sign it replaced[25]. Ms Welham points out that in 2012 the City installed dog waste bins and that in 2016 it installed a play park with access from the playing fields.

72. Were it necessary to decide the point, I consider that the use continued to be contentious until at least 2012. I can see the force of the argument that says that the installation of dog waste bins – although a small thing by itself - might suggest to a user of the land that Bristol City Council as landowner was no pursuing a different approach to that of Avon Council (abolished more than 15 years earlier); and that he or she might consider from the availability of the land for use when the School and sports clubs were not using it that the City Council were permitting use. I note in this context that the City Council (albeit, in the alternative) argue in respect of Ms Burgess's application[26] that it should be implied from the way that the land was used that they had implied permission.

73. I would approach the question of the use after 2012 in this way. One can see an argument that nothing significant changed in 2012 and that the use continued to be contentious. One can also see an argument that the position did change in 2012 and the use was permissive. In either case, use would not be *as of right*. What I find it impossible to hold is that in some way the signs and the litter bins cancelled one another out so that the City Council were now no longer objecting or permitting but (as they were required to do if use was to be *as of right*) **acquiescing.** Accordingly there was not qualifying use in the period 2012 to 2016. As to the period after 2016, see the discussion of Issue 3 below. Whatever the position down to 2016, it seems to me that use was contentious thereafter.

Issue 3: the public inquiry in 2016

74. In its objection to Ms Burgess's application, the City Council say:

> *... between 2011 and 2018 the local inhabitants who supported Mr Mayer's original application were in conflict with the Council as landowner as to whether Mr Mayer was entitled to have the land registered. One of the grounds of objection of the Council and the other objectors was that the use of the land by local inhabitants was not at any time as of right because it was contentious during the relevant period. The Council's view and the inquiry itself was a well-publicised local cause celebre. Few people who might have been affected by it would not have known of it or the views expressed by the Council, which Mr Mayer and his supporters sought to rebut. If the signage was itself insufficient to render the use contentious, the Council's public stance at the public inquiry did so*[27].

75. In support of this submission, the City Council refer to *R v South Gloucestershire Council, ex parte Cheltenham Builders*[28].

---

exist until it was replaced in 2009. In any event, it makes no practical difference whether the situation "on the ground" changed in 2007 or 2009.

[25] See paragraph 397 of my *Report* dated 14 October 2016.

[26] See p 21 of the Bundle. The point does not seem to be repeated in its objection to Ms Welham's application.

[27] See paragraph 17 at p 20.

[28] [2004] 1 EGLR 85.

76. The School makes the same point in its objection, also referring to the *Cheltenham Builders* case[29].

77. The City Council and the School both repeat this objection in respect of the application by Ms Welham[30].

78. Ms Burgess's Response is as follows:

> *... the Council's resistance of the 2011 TVG application does not demonstrate that the use was contentious post 2011. The council's case before the previous Inspector concerned, inter alia, whether the use was "as of right" between 1991 – 2011. Such opposition merely indicated that the Council was of the view that the local inhabitant's use of the land had not been as of right* ***during this time****. The fact that the Council's barrister cross-examined some of the apllicant's witnesses merely accepts that the use had been as of right between 1991 – 2011. It did not indicate that the use post 2011 was contentious[31].*

79. She seeks to distinguish the *Cheltenham Builders* case.

80. Ms Welham's Response is in identical words[32].

81. I should begin by observing that the City's statement that the inquiry was *a well publicised cause celebre* is in my judgment correct and I note that it is not challenged by Ms Burgess or Ms Welham. I heard 28 witnesses and throughout the inquiry there was a high level of public interest. Accordingly, the objection will not fail, if it does fail, on the basis that whatever was conveyed to the public was not sufficiently widely disseminated. I accept the City's assertion that *Few people who might have been affected by it would not have known of it or the views expressed by the Council…*

82. It seems to me that the Applicants' argument is best considered by reference to an example. Consider an application for registration of a town or village green where the landowner accepts that he acquiesced in members of the public entering on his land but disputes that the use has been by a significant number of local people. There is a public inquiry where the landowner makes clear his objection to registration and to the continuance of the use. If I assume that he or she is successful on the basis, a further application might be made seeking to bolster the evidence already given and in any event relying on a period of 20 years terminating at a later date than the 20 years originally relied upon. It seems to me highly arguable that the landowner can say in objection to the second application that his objection to the first rendered use after that date contentious. Local people might not have known about the objection until the inquiry but they would have known thereafter. To say as one might, that the objection only related to the first period of use seems artificial and not reflective of the reality of the situation.

83. It is even more artificial if the case of the landowner at the inquiry is that the use by local people is not *as of right* by reference to signs erected on the land and those signs are still *in situ*. That of course is the position in the present case[33]. In addition, it was clear at the inquiry that the City Council and the School were objecting because they were concerned with the incompatibility, as they saw it, between the use of the land as a town or village green and its use as a school playing field; and based a legal argument upon that suggested incompatibility.

---

[29] See paragraph 7 of its objection at p 51.
[30] See paragraph 36 at p 311 and paragraph 32 at p 297of their respective objections.
[31] See paragraph 14 at p 28.
[32] See paragraph 24 at p 278.
[33] Noting, of course, the replacement of one of the Avon County Council signs in 2009.

Whether or not that argument was correct – a matter, of course, which I have considered above - it made it clear that the continuing use of the land by local people was contentious. If the use was contentious it was not *as of right* and the period of use. If use of land between 2016 and 2018 was not as of right, neither Ms Burgess nor Ms Welham have established the requisite 20 years' use to support registration.

84. I consider that my conclusion is supported by the judgment of Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire Council.* The facts in that case were rather different to the facts of the present case but underlying the conclusion was a consideration of whether an objection to a village green application could render use continuing thereafter contentious (so that a second application based on use *as of right* down to the date of the second application was bound to fail). Sullivan J held that it could render subsequent use contentious.

Implied permission

85. As an alternative to its argument that use of the land was not as of right because it was contentious, Bristol City Council as landowner argue that the use was not as of right because it was permissive:

20. The previous inquiry heard substantial evidence as to the use of the land, which was substantially marked out as planning fields, and used as such by schools and sports clubs until 2014. That usage was by arrangement with the Council, and the nature of the arrangement entitled the user to exclusive use of the relevant part of the land for the duration of the period that they were to use it.

21. The nature, frequency and extent of this use were overt acts on the part of and authorised by the landowner. The public were aware of the nature of those acts, namely that the users were being granted exclusive use of defined areas for defined periods of time, and that in consequence they were being excluded from it correspondingly, and would be excluded from whatever areas over whatever periods the Council chose to use for educational purposes, including the whole.

22. In consequence they would have thought, had they thought about it, that they were able to use those parts of the land that they did use because they were being permitted to do so by the implied licence of the landowner[34].

86. Obviously, this argument is advanced as an alternative; use cannot at one and the same time be contentious and permissive.

87. For completeness, I should address this argument.

88. There is no reason why a party to proceedings cannot advance arguments in the alternative; he or she cannot know what view the Tribunal will take of his or her first argument and therefore it is appropriate for him or her to consider the position if it **is** rejected. However in the present case it seems to me that the City Council as landowner cannot realistically maintain an alternative argument here. The evidence shows that the Council's predecessor put up signs contesting the use of the land. Those signs may or may not have been effective but it is hard to see how Avon County Council, consistently with those signs, could have regarded a person

[34] See.p 21.

coming on to the land as other than a trespasser. If Avon County Council so regarded him or her, the County Council cannot have been impliedly giving him or her consent to come on to the land. Moreover as *R (Lewis) v Redcar and Cleveland Council (No 2)* showed there is no reason why co-existence between the use of land for sports and pastimes by local inhabitants and for sporting activity has the result that that use by local people is permissive (i.e. the fact that local people used the land for walking their dogs when the golfers were not using it for golf did not carry the implication that their use was permissive). Further, I note that an implied permission argument was run in *R (Lancashire County Council) v Secretary of State for the Environment* (albeit at a late stage) and in circumstances where the landowner did not itself use the land. The Supreme Court emphasised that *passive acquiescence, even by a statutory authority with power to permit recreational use, is not enough*[35]. I note *R (Mann) v Somerset County Council*[36], referred to by Bristol City Council; I agree with Sir Wyn Williams in *R (Cotham School) v Bristol City Council* that this *is a case which turns very much on the facts as found by the Inspector [in that case] and the inferences drawn by him*.[37]. If I were wrong in considering that the use was contentious in 1998 and thereafter I do not consider that it was permissive. As I have explained above, I do accept it is possible that the position changed in 2012 so that between 2012 and 2016 use was indeed permissive.

Other arguments

89. At paragraph 19 above I say that the dispute is essentially twofold – as to statutory incompatibility and whether the use of the land has been *as of right* because contentious; and I have addressed these arguments at paragraphs 30 to 88 above, together with the alternative suggestion that use was not *as of right* because it was permissive. I note that at p 5 of its initial submission, the City Council took a point as to whether use had been by the inhabitants of an identified locality. I considered the question of whether use had been by the inhabitants of a locality or neighbourhood within a locality at paragraphs 453 to 460 of my *Report* dated 14 October 2016. I think that no point of substance arises on this aspect of the applications which should lead to them being rejected. If it were necessary for the registration authority to consider a locality or neighbourhood within a locality different to that identified in the applications, it seems to me that it would be appropriate for it to do so. Cotham School note that since the public inquiry an application has been made to register a public footpath across the land[38]. The point is that in my *Report* dated 14 September 2016 I may have over-estimated the use of the land by members of the public for lawful sports and pastimes because some of that use may have had reference to a putative public footpath. I cannot envisage this point making any difference to my conclusion as to the significance of the overall quantum of use. However this may be, exploring the issue would, on the face of it, involve factual matters which would appropriately be the subject of oral evidence. In circumstances where the issue as to whether the use that did take place was *as of right* is determinative, it seems to me that it disproportionate in terms of effort and costs to seek to explore this issue further.

90. The submissions disclose an argument as to whether the replacement signs erected in July 2018 by the School were effective. Ms Burgess submits that they were not because they were inconsistent with the terms of the lease of the land to the school by Bristol City Council. For their part, Bristol City Council as landowner and the School dispute this and point to the agreement of the City Council to the erection of the signs. I note also that there is a point that

[35] See paragraph 42 at p 21.
[36] [2017] 4 WLR 170.
[37] See paragraph 86.
[38] See paragraph 15a at p 16.

one of the signs was taken down after failing to obtain advertisement consent. None of these matters is relevant to Ms Welham's application for reasons explained above. I do not propose to examine them further in this *Report.*

Conclusion and Recommendation

91. For the reasons set out above:

    I do not consider that either application fails because of statutory incompatibility (see paragraphs 30 to 57 above)

    However I do consider that the Avon County Council signs continued to be effective after 1996 so that the use of the land by local people in 1998 and thereafter was not *as of right* (see paragraphs 58 to 72 above);

    If the use was not contentious before 2016, it became contentious at that time as a result of the wide publicity given to the objection to registration of the City Council as landowner and the School by virtue of the public inquiry (see paragraphs 74 to 84 above);

    The possibility exists that between 2012 and 2016, use of the land was not contentious but by virtue of an implied permission. However if this was the case, use in this period was permissive and not *as of right*. Either way, it was not *as of right* (see paragraphs 73 above).

    Because use of the land was not *as of right* during the relevant periods, one of the statutory requirements for registration has not been met. In the circumstances, both applications should be rejected.

Procedure

92. My *Report* will now fall to be considered by officers. On the face of it, subject to any other matters arising, it will then be presented to the Public Rights of Way and Greens Committee. In the ordinary way it would be available for the parties to see not fewer than five days before the meeting of the Committee at which it is to be considered. It is a matter for officers but it seems to me that there would be merit in specifically giving the parties the opportunity to comment and in respect of a longer period (say 21 days). Although, by now, one might think that all that might be said on the issues, **has** been said, experience suggests that, given the opportunity to comment, the Applicants and Objectors would both take that opportunity. Officers might feel able to field those comments themselves or they might wish to refer them to me for comment before, at last, referring the matter to the Committee.

93. The merit of this procedure is that it ensures that everything that is relevant is taken into account in the Committee's decision and that if, as must at least be contemplated, proceedings for judicial review are brought in respect of the decision, the issues are narrowly defined.

94. It is appropriate to say something about the prospect of judicial review if the Committee accepts my recommendation. Although there can be no certainty about it, I am confident that such a challenge would fail and I think that the Applicants would struggle to obtain permission to bring the proceedings. As I have indicated, it is possible that the Objectors would succeed in persuading a court that, in addition to the applications being properly

rejected on the basis that the requisite use was not *as of right*, they should also be rejected on the basis of statutory incompatibility.

95. As far as I am concerned, the requisite legal basis for rejecting my recommendation does not exist. I am either right or wrong about the law. If I am right, by rejecting my recommendation, the Committee would expose itself to successful challenge by way of judicial review. If the Council were minded to reject my recommendation, I would recommend that it first obtains the advice of a QC.

PHILIP PETCHEY
2 March 2021

APPLICATIONS FOR REGISTRATION OF TOWN OR VILLAGE GREENS

THE COMMONS ACT 2006
THE COMMONS (REGISTRATION OF TOWN OR VILLAGE GREENS) (INTERIM ARRANGEMENTS) (ENGLAND) REGULATIONS 2007

(TIMESCALE – the entire process can take about a year)

OUTLINE PROCEDURE (approved by PROWG 25 June 2012)

An application to register land as a town or village green (TVG) can be made by anybody on any land. The effect of registration is that the land can only ever be used as a town or village green.

1. If anyone enquires about how to make an application to register a TVG they are sent a letter referring them to DEFRA, and to the Open Spaces Society as all the information they need is available on these websites.

2. Receipt of application:
On receipt of application Form 44, the Commons Registration Authority (CRA) allocates an application number, stamps the application using the CRA stamp and sends a letter acknowledging receipt together with the notice giving the reference number.

3. The CRA checks the application documents:
Ensures the form complies with the Regulations and is procedurally correct, relevant sections are completed, all supporting documents referred to are present, and that the plan complies with Regulation 10. It then gives preliminary consideration (Regulation 5(4)) to the application and to the evidence and reaches a decision as to whether to:

(a) reject the application at this stage due to it being incomplete or not in compliance with the regulations;
(b) reject the application at this stage based on the evidence;
(c) call for additional information;
(d) proceed with the application.

Before any application is rejected under clause 3(a) the applicant will be given a reasonable opportunity of taking action to put the application in order. Before any application is rejected under clause (3)(b) the applicant will be given a reasonable opportunity to put forward further evidence or arguments which the CRA will then consider. The CRA will give reasons for the rejection under clause 3(b) to the applicant. If the applicant does not accept the CRA rejection the application will be referred to PROWG by the CRA. Having considered the report of the CRA and any representations from the applicant PROWG may decide to allow the application to proceed to the full process or confirm the rejection.

4. Publicity:

(a) any known owner, potential objector or other interested party to be served with notice;
(b) notice posted at site, if reasonably practicable;
(c) notice published in newspaper;
(d) relevant ward Councillors notified;
(e) copy of application papers on deposit at the Council House

(f) notice published on Council's website.

5. Any objections are referred to the applicant (Regulation 6(3)) for comment. If necessary, the CRA will ask for any further information or documents to enable the application to be determined.

6. All applications will be determined in accordance with the legal test set out in the Commons Act 2006 and as soon as possible after the date by which statements of objection to an application have been required to be submitted (regulation 6(1)).

a) Straight-forward cases where there is no significant conflict of evidence, or no significant objection will be dealt with on the paperwork. The decision will be taken by the delegated officer (strategic director of corporate services) or PROWG as appropriate. Whether or not an independent inspector needs to be appointed prior to determination, particularly where the Council is the landowner, is a matter for PROWG.

b) In other cases there will be a public inquiry, ie. a hearing, open to the public, where both sides are able to present their evidence and make representations. Depending on the circumstances and the nature of the case, the inquiry will be heard by either a council legal officer, PROWG (or a sub-committee of PROWG) with advice from a council legal officer, or an independent legally-qualified inspector. Where the Council is landowner the inquiry will be conducted by an independent legally-qualified inspector otherwise PROWG will decide who is to conduct the inquiry.

c) Whoever is holding the inquiry may carry out a site visit during the inquiry process. The parties are normally invited to attend the site visit but are not permitted to make any further representations.

d) Following an inquiry hearing, there will be a report to PROWG summarising the evidence and facts with a recommendation as to whether or not the application should be accepted. This report will be prepared as follows:
    - Where the inquiry is held by a council legal officer, by that officer;
    - Where the inquiry is held by a committee (either PROWG or its sub-committee), by the council legal officer who advised the committee;
    - Where the inquiry is held by an inspector, by that inspector.

e) Following an inquiry, the application will be determined by PROWG on the basis of the report prepared at stage d) above.

When conducting an inquiry, which is a quasi judicial process, the CRA will ensure that the rules of natural justice are met.

8. Applicants and objectors are informed of the decision.

9. Application papers are returned to unsuccessful applicants, or land is registered in the case of successful applications.

25 June 2012
JD5.490