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 <u>the applicants do not assert to the contrary</u>." 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 <u>may</u> be sufficient to render use contentious, see para 23. It did not hold that erection of prohibitory signs will <u>necessarily</u> 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 <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". 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 <u>briefly</u> 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