

**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 paragraph 5/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 1980s⁴. 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 contentious⁵⁰. As far as I 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 Fairfield 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.

“A significant number of inhabitants”

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 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 judgment²³ 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.

As of right 3: Implied Permission

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 Gilbert 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.

As of right 4: 24 July 2018 signs erected by the School

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 replaced 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: general³¹

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 7/88² 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 determination³, 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 1987⁵. 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 house⁷. 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.fibchambers.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. 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.’ (emphasis added)

It is notable that the Council’s approach is not 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 all 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 accurate¹² - 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 not 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 access to the same facilities it used as a maintained school. 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 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 s94 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 Gilbert J noted in *R (NHS Property Services Ltd) v Surrey CC* [2016] 4 WLR 130⁸ 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 Gilbert 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 position, 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 inhabitants¹⁶ 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 in 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 signs¹⁸ 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 signs²⁰ 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 90s²³', 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, include 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.

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11 KBW

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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 area¹. 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 public [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.'

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 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 objections², 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 CPCG¹, 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 use². 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.



Stoke Lodge area: 88,000m²
Winterburn car park area: 450m²
Just 0.5% of the area of Stoke Lodge

Overlay of the car park in Winterburn v. Bennett. To scale.

Distance ?
25 m

Start new

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



Tel: [REDACTED]
E-mail: [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

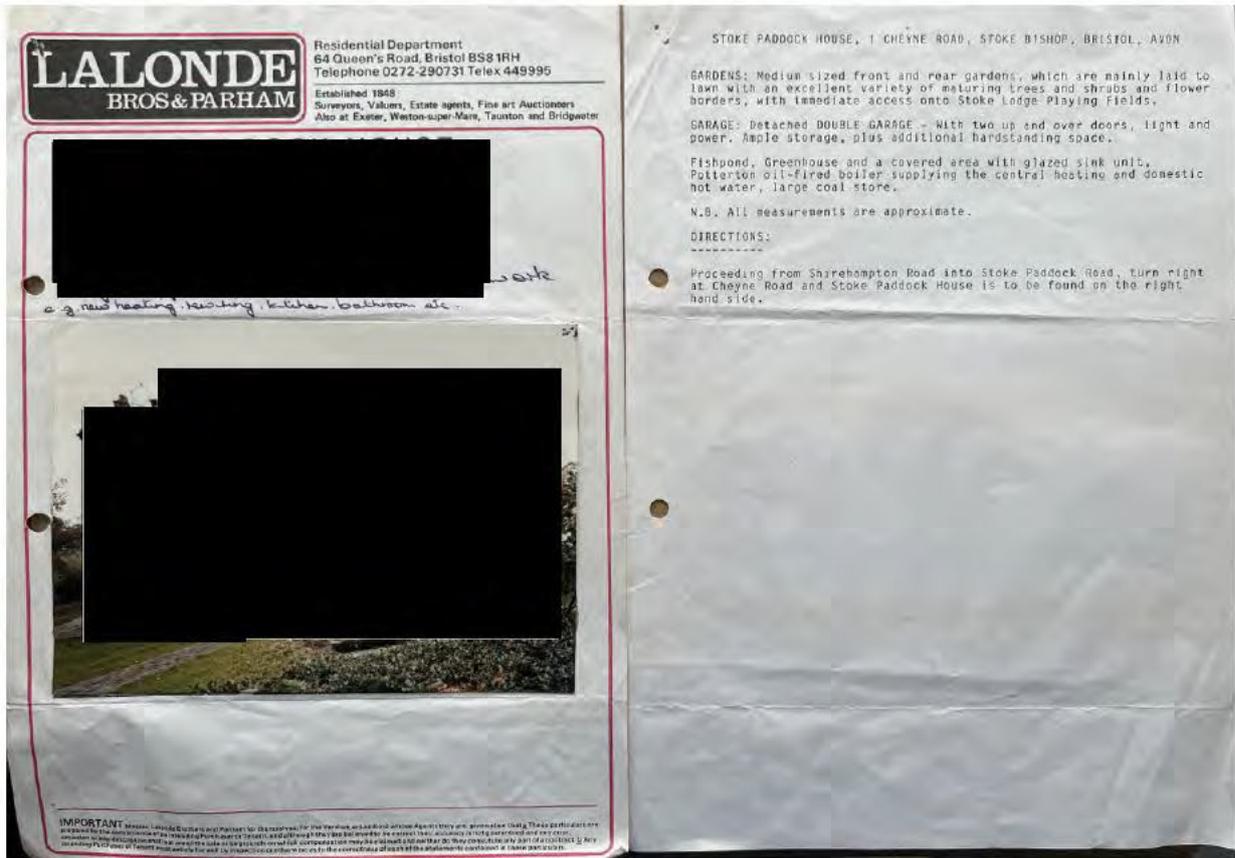


Image 1: Estate Agent’s brochure from 1983 advising “immediate access onto Stoke Lodge Playing Fields”.

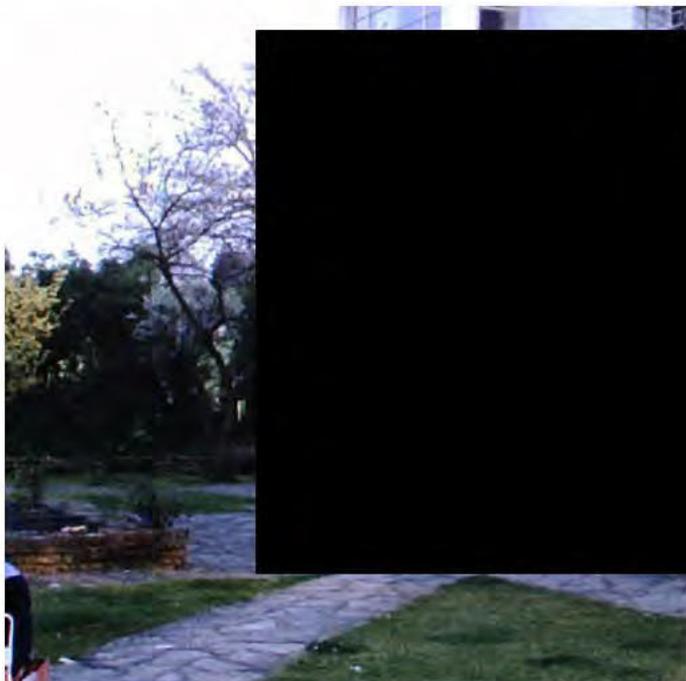


Image 2: May 1984 showing direct opening/access into Playing Fields directly from garden of [redacted]



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:

A black rectangular redaction box covering the signature of the witness.

Dated:

9 July 2021