



**Planning Inspectorate reference: ROW/3363939**

**Bristol City Council reference: BCC/DB3/7398116**

# **BRISTOL CITY COUNCIL**

## **STATEMENT OF CASE**

**The Wildlife and Countryside Act 1981 – S. 53 and Schedules 14 and 15**

**The City Council of Bristol Definitive Map and Statement Modification Order (No. 7) 2024**



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## INTRODUCTION

1. Bristol City Council is the surveying authority for the purposes of Section 53(2) of the Wildlife and Countryside Act 1981 ('the WCA 1981'). It is therefore under a statutory duty to keep the Definitive Map and Statement under continuous review and to determine any valid applications for modifications to the Definitive Map and Statement that it receives.
2. Section 53(5) of the WCA 1981 enables any person to apply to the surveying authority for an order to be made to modify the Definitive Map and Statement as respects any of the 'evidential events' specified in paragraphs (b) and (c) of section 53(3) of the WCA 1981.
3. Following the submission of an application on 1 May 2018 [**Appendix 6 pg. 210-236**] to modify the Definitive Map and Statement to include four footpaths across the Stoke Lodge playing fields ('the Application') and shown by broken black lines on Plan 1 [**Appendix 6 pg. 209**] the Public Rights of Way Committee resolved [**Appendix 1 pg. 1-5**], on 27 November 2024, as the Order Making Authority ('the OMA') to make a Definitive Map Modification Order.
4. The City Council of Bristol Definitive Map and Statement Modification Order (No. 7) 2024 ('the DMMO') was made on 10 December 2024 [**Appendix 2 pg. 6-14**]. During the statutory consultation period, two objections were received. One objection has since been withdrawn. Given that there is an outstanding objection, the decision whether to confirm the DMMO must now be made by the Secretary of State in accordance with paragraph 7 of Schedule 15 of the WCA 1981. The one outstanding objection [**Appendix 3 pg. 15-34**] is from the Cotham School ('the Objector').
5. This Statement now sets out background information to the Application and the making of the DMMO, the details of the Application, the legal tests to be applied and refers to the documentary and user evidence in accordance with paragraph



17.1.3 of the Guidance on Procedures for Considering Objections to the Definitive Map and Public Path Orders (as updated on 22 April 2026). It also sets out the OMA's position in response to the points made in objection to the DMMO.

### **BACKGROUND INFORMATION**

6. Stoke Lodge Playing Field ('the Site') and the large Victorian house, known as Stoke Lodge, have been owned by Bristol City Council since 1947. These were purchased by the City Council in two lots. Lot One was purchased on 13<sup>th</sup> July 1946 and Lot Two on 19<sup>th</sup> September 1947.
7. From the date of purchase until the local government reorganisation in 1974 the land was owned by Bristol City Council. In 1974 the newly formed Avon County Council became the landowner and remained so until 1996 when further local government re-organisation resulted in the creation of the new Unitary Authority of Bristol City Council.
8. The land has an area of approximately 22 acres. It is mostly grassland which surrounds the Stoke Lodge building. The whole area was initially held for housing after the Second World War. However, within a few years of purchase the land was appropriated for 'Educational Purposes' by Bristol City Council. The original plan had been to construct a new Secondary School on the site to meet the needs of the new housing being constructed in the area.
9. Large parts of the land were laid out to playing fields, including football and rugby pitches in the winter and a cricket field and athletics track in the summer. The site was also used as the detached school playing fields for various local authority schools. From 2000, the then Cotham Grammar school used the playing fields. In 2011, when the Cotham School became an Academy (and so a separate entity from the Council), the Council entered into a 125 year lease with the School for its use as their detached playing fields.



10. At that point, the Council as local education authority ceased any direct responsibility for the School and its use of the playing fields, and its role became that of landlord of the Site only.
11. Over the years, the field facilities were also used by local sports clubs under arrangements made with the schools managing the Site and/or with the Council as local education authority.
12. In 2011, an application was made by a local resident to register the Site as a Town and Village Green (the first TVG Application). This resulted in a public inquiry over 7 days in June and July 2016 held by an Inspector (the TVG Inspector) appointed by Bristol City Council in their role as the Commons Registration Authority.
13. In his Report dated 16 October 2016 [**Appendix 6, pg. 748-838**] the TVG Inspector recommended that the Site should not be registered as a Town or Village Green because the relevant criteria for registration had not been met in that signs located at some points on the site made the village green use contentious and not as of right. The Council's Public Rights of Way and Greens Committee (in their role as Commons Registration Authority) resolved that they would not follow the TVG Inspector's recommendation and instead registered the land as a Village Green.
14. Cotham School challenged the Commons Registration Authority's decision in the High Court - *R. (on the application of Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin) [**Appendix 4, pg. 35-63**]. That decision was quashed by the High Court and referred back to the Commons Registration Authority for re-determination, and this resulted in a decision to refuse registration.
15. Two further applications for Town Village Green status were subsequently submitted in 2018 and 2019 (the second and third TVG Applications) and these



were jointly placed before the same TVG Inspector who was appointed to determine the first TVG Application.

16. The TVG Inspector decided [**Appendix 6. pg. 839-858**] that, because there had already been a comprehensive public inquiry in relation to the first TVG Application, a further inquiry was not necessary. After the exchange of written information and submissions between the parties, the TVG Inspector recommended [**Appendix 6 pg. 859-890**] to the Commons Registration Authority that the second and third TVG applications should also be refused because the relevant criteria had not been met. The relevant period under consideration was 1998-2018. The Inspector recommended that, although Avon County Council had been abolished in 1996, the notices continued to have effect so that the use of the playing fields was contentious and not 'as of right'. Moreover, from 2016 onwards, the publicity surrounding the inquiry into the first TVG Application meant the use must then have been considered contentious and not 'as of right'.
17. On the 28th of June 2023, the Council's Public Rights of Way and Greens Committee (in their role as Commons Registration Authority) again decided, notwithstanding the Inspector's recommendation, to register the Site.
18. Subsequently, the Cotham School made an application to the Court to rectify the town and village green register (pursuant to s.14(b) of the Commons Registration Act 1965). The decision was handed down on 10 June 2025 (*Cotham School v Bristol City Council* [2025] EWHC 1382 (Ch)) [**Appendix 5 pg. 64-181**] with the Judge determining that the Site did not meet the statutory criteria of a Town or Village Green at the date of registration and that it was just to rectify the register to remove the entry. The Judge held that the statutory education purposes for which the land is held are incompatible with the registration of the whole land as a town or village green. The Judge further held that there was no user 'as of right' due to that use being contentious, as evidenced by the existence of the signs and the publicity surrounding the 2016



public inquiry for the First TVG Application. Further, the judge concluded that there was interruption of use during the relevant 20 year period so that it was not 'continuous'.

### **DETAILS OF THE APPLICATION**

19. The Stoke Lodge DMMO Application [**Appendix 6 pg. 210-236**] was made by Mr Preece ('the Applicant').
20. The Applicant identified four footpaths for inclusion on the Definitive Map and Statement. These were:
  - Route 1:** B-C-D (PROW Consultant's report) [**Appendix 6, pg. 209**] or G-B-A (on Order plan) [**Appendix 2. pg. 14**]
  - Route 2:** G-C-H-J (PROW Consultant's report) [**Appendix 6, pg. 209**] or E-B-I-H (on Order plan) [**Appendix 2 pg. 14**]
  - Route 3:** B-G (PROW Consultant's report) [**Appendix 6, pg. 209**] or G-E (on Order plan) [**Appendix 2 pg. 14**]
  - Route 4:** B-H (PROW Consultant's report) [**Appendix 6, pg. 209**] or G-I (on Order plan) [**Appendix 2 pg. 14**]
21. The Application claimed public footpaths extending from the perimeters of the Stoke Lodge playing fields across the fields to their endpoints.
22. As the Council is the landowner of the Site, the Commons Registration Authority (in relation to a TVG application on the same land) and the OMA for the Application, an external Public Rights of Way consultant ('PROW Consultant') was appointed to undertake further documentary investigation. The informal consultation with the landowners and the Applicant was carried out by the Council's Public Rights of Way Officers who then provided comments to the PROW Consultant.



23. With the specialist advice of the PROW Consultant, Robin Carr, upon commencement of the investigation of the claim PROW Officers ensured that the claimed routes reflected the content of the evidence forms so that the claimed routes would adjoin existing recognised public highways. This was relevant for the claimed routes to/from Cheyne Road, and the claimed routes adjacent to Stoke Lodge house as follows:
- (1) The claimed routes commencing and/or terminating at Cheyne Road required inclusion of part of the unadopted private Cheyne Road, so that the route met the adopted highway of Stoke Paddock Road (adding an approximately 60 metre length to this claimed route) (being points A-B on the plan in the Consultant's Report [**Appendix 6, pg. 209**] or points F-G on the Order plan, proposed footpath 680 [**Appendix 2, pg. 14**]) .
  - (2) The claimed routes commencing and/or terminating at Stoke Lodge house required inclusion of the access road to Stoke Lodge house, then south-east along the perimeter of the carpark via a segregated pedestrian path and gate to meet Shirehampton Road, the adopted highway. This added approximately 145 metres to the length of the claimed path (being points E-F-G on the plan in the Consultant's Report [**Appendix 6, pg. 209**] or points C-D-E on the Order plan, proposed footpath 679 [**Appendix 2, pg. 14**]).
24. These additional lengths would have been necessary to walk by members of the public to reach the claimed routes at Stoke Lodge playing fields.
25. This is reflected in the Order by the numbered links as follows:
- Route 1:** A-B-C-D (PROW Consultant's report [**Appendix 6, pg. 209**] or F-G-B-A (on Order plan) [**Appendix 2, pg. 14**] – links 680, 683 and 678
- Route 2:** E-F-G-C-H-J (PROW Consultant's report [**Appendix 6, pg.209**] or C-D-E-B-I-H (on Order plan) [**Appendix 2, pg. 14**] – links 679, 682, 684 and 681



**Route 3:** A-B-G (PROW Consultant's report [**Appendix 6, pg. 209**]) or F-G-E (on Order plan) [**Appendix 2, pg.14**] – link 680, 685

**Route 4:** A- B-H (PROW Consultant's report [**Appendix 6, pg. 209**]) or F-G-I (on Order plan) [**Appendix 2, pg. 14**] – link 680, 686, 681

26. The Application was supported by 155 user evidence forms. [**Appendix 6 pg. 237-738**] These user evidence forms covered a period of use from 1946 – 2018.
27. On 27 November 2024, the PROW Consultant's report [**Appendix 6 pg. 182-207**] and its appendices [**Appendix 6 pg. 208-1040**] was presented to the PROWG Committee, together with the Council's officer's summary of the PROW Consultant's recommendation [**Appendix 7 pg. 1041-1044**]. The PROW Consultant's recommendation was that, based on the user evidence provided as part of the Application, the rights of way were reasonably alleged to subsist pursuant to s.53(3)(c)(i) of the WCA 1981. Prior to the PROWG Committee meeting on 27 November, 100 public forum comments were submitted [**Appendix 8 pg. 1045-1155**] including a submission from Cotham School (submission no. 99). [**Appendix 8, pg. 1153**].
28. The Head of Legal Services representative explained that regarding evidence for the existence of a Public Rights of Way, there were two different tests that applied; either a public right of way subsisted on the balance of probability or, whether it could be reasonably alleged that a public right of way subsisted. The Committee determined that, based on the evidence provided, the rights of way subsisted pursuant to s.53(3)(c)(i) so that an order should be made [**Appendix 1 pg. 1-5**]. Members considered that the user evidence had met the higher test and that the rights of way had subsisted on the balance of probability.



### **LEGAL TESTS TO BE APPLIED**

29. The key statutory provision applicable to the Application is Section 53(3)(c)(i) of the WCA 1981. This requires the surveying authority to modify the Definitive Map and Statement following:

***“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—***

***(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path...”***

30. For this provision to apply, there must first be a ‘discovery of evidence’. The PROW Consultant concluded that, as the user evidence provided with the Application had not previously been considered by the Surveying Authority, it was a ‘discovery of evidence’. Although the Objector does not appear to dispute this itself, the OMA can rely upon legal authority if necessary to demonstrate that this conclusion was well-founded: see Sauvain on Highway Law (6<sup>th</sup> Edition) at 12-58 [**Appendix 9**]; *Fowler v SSE* (1992) 64 P & CR 16 at 22 [**Appendix 10.1**]; *Mayhew v SSEnv* (1993) 65 P & CR 344 [**Appendix 10.2**]; and *R. (on the application of Roxlena Ltd) v Cumbria CC* [2019] EWCA Civ 1639 at [62] & [63][**Appendix 10.3**].
31. The evidence must then show, as referred to above, that a right of way ‘*subsists or is reasonably alleged to subsist*’ before an order can be made. The PROW Consultant therefore considered whether there was sufficient evidence to satisfy the relevant standard of proof that a presumption of dedication had arisen.



32. On consideration of the common law test of presumed dedication, the PROW Consultant recommended that this test had not been met based on the evidence available.
33. The PROW Consultant then considered the statutory test for presumed dedication as set out at Section 31(1) of the Highways Act 1980:
- “Where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”***
34. The burden of proving presumed dedication initially rests with the Applicant. As referred to above, section 53(3)(c)(i) provides for two separate evidential criteria for making an order; either that the right of way subsists or that the right of way is reasonably alleged to subsist.
35. Caselaw has considered these two separate criteria (as seen in *R. v Secretary of State Ex p. Bagshaw and Norton* (1994) 68 P. & C.R. 402 [**Appendix 10.4**] at first instance and approved by the Court of Appeal in *R. v Secretary of State for Wales Ex p. Emery* [1998] 4 All E.R. 367 [**Appendix 10.5**] which proceeded on the basis that the lower test was applicable only at the preliminary order-making stage).
36. Although the standard of proof at order-making stage can be lower if the evidence is sufficient to show that the rights of way are reasonably alleged to subsist, the usual civil standard ‘on the balance of probability’ will apply at confirmation stage; see *Todd and Bradley v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin) [**Appendix**



**10.6]**; see also *R. (on the application of Norfolk CC) v Secretary of State for the Environment, Food and Rural Affairs* [2006] 1 W.L.R. 1103 [**Appendix 10.7**]; and per Lord Phillips MR in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 W.L.R.1264 at [30], quoted at para.12–65 [**Appendix 10.8**].

37. If the applicant is able to satisfy the relevant standard, the way will be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The burden is on the landowner to rebut the presumption of dedication that has arisen.
38. The legal test to be satisfied for statutory presumed dedication to arise is therefore:
  - i. enjoyment by the public as of right
  - ii. without interruption
  - iii. for a full period of 20 years.

Dealing with these in turn:

i) '*enjoyment as of right*'

39. The term "as of right" means without force, without secrecy and without permission. The issue of whether the use was by force or otherwise contentious is addressed below under Ground 3 of the Objection. There is no evidence that the use was secretive.
40. In considering the issue of whether the enjoyment was with or without permission, permission can be implied from the landowner's conduct, as well as expressly provided. The PROW Consultant noted that the Site is, and has been, used by various schools over many years. It has been set out with various sports pitches and tracks so that, whilst those schools were actively using those pitches and or tracks, it may have been that members of the public would not



be able to walk across them. Consequently, the PROW Consultant advised that it may therefore be possible to imply that use was subject to an implied permission and so, use would not be “as of right”. This issue is also considered below under Grounds 2 and 3 of the Objection.

ii) ‘*without interruption*’

41. In order for something to constitute an interruption for the purposes of section 31(1) of the Highways Act 1980, there must be some actual interruption which prevents enjoyment of the way.
42. An effective interruption requires actual interference with passage by the user, not simply a temporary lack of use, although the nature of the interruption need not necessarily be a physical one. In addition, the circumstances in which a restriction on use takes place and the absence of any intention deliberately to prevent use of the way as of right may be relevant (see for example *Lewis v Thomas* [1950] 1 KB 438) [**Appendix 10.9**].
43. This issue is addressed below under Ground 4 of the Objection.

iii) ‘*full period of 20 years*’

44. Section 31(2) of the Highways Act 1980 states that the 20-year period is retrospective from the date that the right to use the way is first called into question (“the Relevant Period”).
45. The PROW Consultant recommended that, based on the evidence available, the Relevant Period for the four footpaths could be:
  - (i) **For Route 1:**  
1998-2018 based on the submission of the Application being the first date that the use came into question.



(ii) **For Route 2 and Route 3:**

1965-1985 or 1988-2008 based on the dates that notices were erected.

(iii) **For Route 4:**

1965-1985 or 1998-2018 (for the above reasons).

46. The PROW Consultant also recognised that the routes may not just have been used as identified on the plan. Users may have used a variation of the routes so that the above Relevant Periods for each route may not have been so clearly separated. Consequently, it could be appropriate for all the above identified periods of time to be considered for all routes.

*no intention during the relevant period to dedicate*

47. Only the landowner has the power to dedicate a right of way over its land. Likewise, the presumption to dedicate can only be rebutted by the landowner.
48. For the duration of the Relevant Periods, the landowner has been a Council (either Bristol City Council or Avon County Council). There has been no evidence from the landowner sufficient to rebut the presumption of dedication in respect of any of the footpaths.
49. This issue is addressed below under Ground 5 of the Objection.

### **DOCUMENTARY EVIDENCE**

50. The PROW Consultant carried out limited historic research and concluded that any claim for the Routes will be unlikely to be supported by historic documentary evidence
51. There are clear findings of fact regarding the use of the land in the TVG Reports [**Appendix 6, pgs. 747-895**] (and considered in the Court Judgments) regarding the use of the land but these have to be considered in the context of the issues therein arising.



## **USER EVIDENCE**

52. The PROW Consultant compiled the list of routes **[App 6. pg. 202]** and dates for the 155 user evidence forms as follows:
- a) 57 people claimed use of Route 1 between 1946 and 2018;
  - b) 39 people claimed use of Route 2 between 1965 and 2018;
  - c) 25 people claimed use of Route 3 between 1960 and 2018;
  - d) 34 people claimed use of Route 4 between 1946 and 2018.
53. The PROW Consultant considered **[Appendix 6 pg. 202]** that there is sufficient use to support the establishment of the alleged public rights of way. That includes users who state they have used the routes for the whole period as well as those who have used the route in question for part of the Relevant Period. Both are relevant to gain an impression of the overall use and whether it is sufficient.
54. When analysing the user evidence as against the various Relevant Periods, the number of users per route per full Relevant Period are as follows:



|   | 1965 to 1985 | 1988 to 2008 | 1998 to 2018 |
|---|--------------|--------------|--------------|
| <b>Route 1<br/>Cheyne Road<br/>to Druids hill</b>     | 5 people     | 20 people    | 36 people    |
| <b>Route 2<br/>West Dene to<br/>Stoke Lodge</b>       | 4 people     | 19 people    | 32 people    |
| <b>Route 3<br/>Cheyne road<br/>to Stoke<br/>Lodge</b> | 2 people     | 10 people    | 15 people    |
| <b>Route 4<br/>Cheyne Road<br/>to West Dene</b>       | 4 people     | 14 people    | 26 people    |

55. The PROW Committee resolved that, on the balance of probability, there was sufficient user evidence to raise the presumption of dedication of the four Routes for the Relevant Period 1965-1985.
56. The PROW Committee also concluded there was insufficient evidence of a lack of intention to dedicate during that Relevant Period 1965-1985. Consequently, the conclusion was that the rights of way subsist on the balance of probability.

### **RESPONSE TO OBJECTOR'S REPRESENTATIONS**

57. As noted above (at paragraph 5), the outstanding objection [**Appendix 3 pg. 15-34**] to the DMMO is from the Cotham School. The Cotham School are the current leaseholder of the Site. They have been leaseholder since 2011, which is the date they became an Academy and so an independent entity to Bristol City Council. Prior to that date, the Cotham School used the Site as its remote



playing field but, as it formed part of the local education authority, it was not a separate entity to Bristol City Council.

58. The School's objection of 5<sup>th</sup> February 2025 ('the Objection') relies upon six specific grounds of objection which are addressed in turn below. However, the grounds of the Objection refer at the outset to the date the use was called into question and this is considered first by commenting on the relevant twenty year periods of use.

#### **Relevant Period 1965-1985**

59. Paragraphs 7-11 of the Objection address the Relevant Period of 1965-1985 (being the period identified by the PROW Committee as the period when the presumption of dedication arose).
60. The Objection in this respect is on the basis that there is insufficient evidence of user for that period for the burden of proof to have been satisfied.
61. The PROW Consultant considered the evidence provided was sufficient for the right of way to be reasonably alleged to subsist and recommended the same to the PROW Committee.
62. For evidence of use, the same person does not have to use the route for the full 20 year period for the test to be satisfied in accordance with section 31(1) of the Highways Act 1980. It is correct that there are less user evidence forms for the beginning of this 20 year period e.g. from 1965-1968 but, given this time period is around 60 years ago, there will be a limited number of people now alive and/or still living in the same area to provide such evidence.
63. It is important to note therefore that the number of witness statements overall, and in particular for the earlier period, is unlikely to reflect the full use of the paths. The courts have recognised this in the context of the issue of sufficiency



of use in respect of claimed village green rights (see *R (oao Alfred McAlpine Homes Limited) v Staffordshire County Council* [2002] EWHC 76 (Admin) at paragraphs [71]-[77]) [**Appendix 10.10**]. The points made by the Judge in those passages have relevance also to evidence in support of claimed PROW.

### **Relevant Period 1998-2018**

64. The Objector then concentrates on the Relevant Period 1998-2018 for its objection. This period is identified as ending on the date when the Application was submitted.
  
65. The Objector's six grounds of objection therefore are only in relation to that period (see paragraph 11 of that Objection [**Appendix 3**]) and the Objector appears to contest the 1965-85 period on the basis of lack of sufficiency of use (see paragraph 10 of the Objection). However, as seen from paragraph 54 above, there were at least 4 evidence forms relating to use for the full twenty-year period 1965-1985 for each of the four routes, save for route 3. Even for that route, there were two evidence forms covering the whole of that period, six covering part. The OMA considers that these figures are not immaterial when considered correctly and in context and cannot be dismissed in the way the Objector has done.

### **Ground 1 – use not in the character of a right of way**

66. The Objector contends (at paragraphs 12-20 of the Objection [**Appendix 3**]) that the nature of the use is not that of a right of way. In support of this, the Objector refers to the Council (as Commons Registration Authority) having agreed with the TVG Inspector's conclusions that the use of the land was in the nature of a village green rather than a public right of way.
  
67. It is clear that the TVG Inspector was considering evidence presented to show use as a TVG and the Council agreed with the Inspector's overall conclusions on this. The types of use that would need to be shown to qualify for TVG



registration would be sports, recreation and pastimes. Evidence to show access across the land from one public point to another would not assist in the categorization of a TVG, although it is significant that the fact that such usage also took place was nonetheless acknowledged by the Inspector. The focus of the applicants and the Inspector in the TVG cases was on the evidence that was relevant to demonstrating qualifying use for the purposes of section 15 of the Commons Act 2006 and not use qualifying as a right of way. As the Objector itself points out (at paragraphs 12-15 of the Objection), these uses are essentially of a different character.

68. The Objector also refers (at paragraph 20 of the Objection) to the absence of evidence of any worn paths along the claimed routes on the aerial photographs **[Appendix 6 pg. 1014-1031]** to support their objection. Aerial photographs are a snapshot in time and are not conclusive either way. They may assist but, in cases where the land is well maintained (as here), it is not surprising that 'desire lines' are not evident as they are more likely to be so in respect of paths through a farmer's field, for instance.
69. The character of a right of way is:
- a. A right to pass and repass (from one public place to another)
  - b. By the public in general
  - c. Over a defined route
70. From the user evidence provided **[Appendix 6 pg. 237-738]**, the PROW Consultant and officers identified the routes; all of which were from one public location to another public location. This is further detailed in Section 1 of the Applicant's response to the PROW Consultant's draft report (**Appendix 6, page 897-898**). The claimed use was by the public in general and clearly relates to use with the character of a right of way crossing the land whilst passing from one place to another.



## **Ground 2 – no actual enjoyment for the full 20 year period**

71. The Objector again refers (at paragraphs 28-30 of the Objection [**Appendix 3**]) to the TVG Inspector's 2016 Report [**Appendix 6. pg. 747**] and his comment that when a pitch was being used by a school or sports club it has exclusive use of that land and *'no-one claiming to walk a dog or fly a kite interrupted the game'*. It then goes on to cite *'subject to the occasional issues with dogs, use by local people could co-exist with use by the schools and sports clubs...'* The Objector concludes that the *'only rational inference to draw from such evidence is that the use was not sufficient use by the public for a full period of 20 years to manifest the assertion of a public right, because they were displaced onto other areas when the Land was in use by the School'*.
72. Firstly, again the TVG Inspector was considering use by residents for the purposes of establishing a TVG. Such use/activities would include dog walking and kite flying. Those activities (sports, recreation and pastimes) are very different to the activity of using a footpath i.e. the right of passage. Although a person may have a dog while using the footpath, the activity is one of passing and repassing.
73. There is no evidence to suggest that whilst the playing fields are in use, such use stops the public passing and repassing across the land even if there is a pause on so passing or a going around the sporting activity then being carried out as referred to in some of the evidence forms. Those evidence forms, in which this was recalled as happening (about half or a little over of the forms), very largely state that was only occasional. It is therefore not accepted that this is necessarily, as the Objector claims, an interruption of the claimed user as a PROW for any of the claimed routes to take the claimed used outside of section 31(1). Further, it will be necessary to assess the nature and frequency of this happening in relation to each claimed route during the different 20 year periods.



74. As referenced by the PROW Consultant [**Appendix 6. pg. 199**], he is aware of several school playing fields which have footpaths over them (see also paragraph 6.4 of the Applicant's response to the PROW Consultant's draft Report [**Appendix 6, pg. 906-907**]). Those playing fields appear to allow the lawful existence of both the school/other users and those using the right of way.
75. The Objector also suggests in the alternative that these 'exclusions' of the public from using the rights of way whilst the pitches are in use amount to an implied permission to use the ways so that the presumed dedication does not arise.
76. The PROW Consultant also raised this as a potential factor [**Appendix 6 pg. 202-205**] to consider when determining whether a presumption of dedication had arisen, but this was when considering whether the use was '*as of right*', which this Statement now considers.

### **Ground 3 – no enjoyment 'as of right'**

77. The Objector cites the erection of signs/notices on the Site to rebut the claim that the use was '*as of right*'.
78. The Objector relies on previous consideration of this point by the Council (see paragraphs 41(b), (d) and (f) of the Objection (**Appendix [3]**)). However, all instances listed by the Objector relate to the consideration of the TVG applications (in 2016 through to 2023). The signs/notices have never been considered in the context of the rights of way.
79. As the PROW Consultant advised [**Appendix 6 pg. 188**], section 31(3) of the Highways Act 1980 states:

*"where the owner of the land over which any such way as aforesaid passes-*  
(a) *has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and*



(b) *has maintained the notice after 1 January 1934, or any later date on which it was erected*

*the notice, in the absence of proof to the contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway”.*

80. The PROW Consultant considered **[Appendix 6. pg. 198]** that the location of the signs/notices and suggested that the signs located at points [S1] and [S2] **[Appendix 6, page 209]** would directly impact Route 2 and indirectly impact Routes 3 and 4.
81. The PROW Consultant however considered the wording of the signs to be unclear and so not sufficient to convey a lack of intention to dedicate the routes as public rights of way. The reference to ‘public access’ and for requests to use the grounds imply a reference to use of the grounds in general, such as for leisure and pastimes.
82. The Objector’s suggestion (at paragraph 42 of the Objection **[Appendix 3]**) that the Council’s position is perverse on this matter therefore discloses a failure on the part of the Objector to recognise properly the differences between village green rights and a public right of way, which is also seen in other parts of the Objection. It should also be noted that the signs in question do not relate to the period 1965-1985, as they were only first erected in 1985/6.
83. In relation to the period 1998-2018, it is noted that in *Cotham School v Bristol City Council* [2025] EWHC 1382 (Ch) **[Appendix 5]** the Court considered that the use was made contentious and thus not as of right by the Objector’s position taken in relation to the village green application including at the public inquiry held in 2016. However, that objection was in the context of the use of land as a whole for a village green and not PROW over the claimed defined routes.



#### **Ground 4 – no use “without interruption”**

84. The Objector suggests (at paragraphs 45-46 of its Objection [**Appendix 3**]), as an alternative to Grounds 2 and 3, that the use of the playing fields was an interruption of use. However, again it is not accepted that the use of the routes was interrupted in a way so as to preclude reliance on section 31(1) of the Highways Act 1980 as explained in paragraph 73 above, in contrast to the position for the purposes of establishing a TVG.
85. As a further alternative, the Objector suggests that if the user was not disrupted because people continue to use the routes, the user would not be ‘as of right’ because it would amount to the commission of a criminal offence contrary to s.40 Local Government (Miscellaneous Provisions) Act 1982 and s.547 Education Act 1996. Those provisions apply where a person “*without lawful authority is present on premises ... and causes or permits nuisance or disturbance to the annoyance of persons who lawfully use those premises (whether or not any such persons are present at the time)*”.
86. For the activity to be a criminal offence therefore, it must cause or permit a nuisance or disturbance to the annoyance of persons who lawfully use those premises. It is not clear or been evidenced by the Objector that a person crossing a pitch (whether in use or not) for the purposes of using a route, was considered a nuisance or disturbance to the annoyance of the lawful user such that it was a criminal offence.
87. It is also not clear how the Objector’s reference (at paragraph 43 of its Objection [**Appendix 3**]) to *Network Rail Infrastructure Ltd v Welsh Ministers* [2020] EWHC 1993 (Admin) [**Appendix 10.11**] is relevant, given that the consideration of criminal activities was not considered in that case due to lack of evidence as is clear from paragraph [5] of the Judgment in that case (as also appears to be the case here).



### **Ground 5 – Contrary Indication**

88. The Objector suggests that, if the notices were sufficient to rebut the presumption of dedication by showing the use was not ‘as of right’, those same notices/signs are sufficient to show the intention of the landowner was not to dedicate the routes.
89. The OMA considers that, if the notices/signs are not sufficient evidence to show the use was not ‘as of right’ as it contends above, then it is unlikely that those same notices/signs will be consistent with a lack of intention to dedicate. The reason being that the location of the signs/notices is sporadic and doesn’t affect each Route claimed (thus implying the signs/notices do not relate to routes but to the more general use of the grounds for leisure purposes). Moreover, the wording of the signs is ambiguous in this context.

### **Ground 6 – No capacity of the person in possession to dedicate**

90. The objector relies on section 31(8) Highways Act 1980 which states:  
*“Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes”*
91. The Objector refers to the Supreme Court decision *R (Lancashire County Council) v Secretary of State for Environment, Food and Rural Affairs* [2021] AC 194 [Appendix 10.12] and proposes that the substantive point applies here i.e. that the creation of a public highway would be incompatible with the Council’s and Cotham School’s safeguarding duties.
92. In his report [Appendix 6 pg. 198-199], the PROW Consultant alluded to statutory incompatibility and noted that the TVG judgment was yet to be handed down and may have a bearing on this Application. At the time of writing his



report, the PROW Consultant advised that he was aware of at least one example of a definitive map modification order being confirmed for footpaths across school playing fields, based on modern user forms.

93. In June 2025 the TVG judgment was issued - *Cotham School v Bristol City Council* [2025] EWHC 1382 (Ch) [**Appendix 5 pg. 64-181**]. The Judgment followed the Lancashire judgment [**Appendix 10.12 pg. 1405-1447**] in that the Judge found there was statutory incompatibility of a school playing field also being a TVG.
94. In the TVG Judgment [**Appendix 5**] the Judge clarified, in several instances, that his consideration was related to TVGs only. For instance:
- Paragraph [52] of the judgment specifically confirms that the Judge’s consideration will be on statutory incompatibility in the context of TVGs. The Judge also made the point that the doctrine of statutory incompatibility in the context of town and village greens does not expressly appear in the legislation. That of course is in contrast to section 31(8) of the Highways Act 1980 in respect of PROW.
  - At Paragraph [114] of the judgment, the Judge states “*use has also been made for other purposes, such as taking a shortcut to a destination on the other side of the land. However, this is neither a sport nor a pastime, and so is irrelevant for this purpose, though of course may be important for the purpose of acquiring a public right of way across the land. But that is a separate issue, with which I am not concerned.*”
95. The OMA considers that the judgment in *Easteye Ltd v Malhotra Property Investments Ltd* [2020] EWHC 2066 (Ch) [**Appendix 10.13 pg. 1448-1674**] at paragraphs [320]-[322] provides a useful comparison between PROW and TVGs when considering Statutory Incompatibility (and the relevant caselaw for each). These are:



- i) **PROWs** – in cases considering 20 years user deemed dedication, unless there is evidence that the owner had no intention to dedicate, the owner’s ability to dedicate is relevant. The question whether the power to dedicate is incompatible with the owner’s statutory objects is one of fact, to be assessed by what could be reasonably foreseeable (*British Transport Commission v Westmoreland County Council* [1958] AC 126) [**Appendix 10.14**].
  - ii) **TVGs** – as there is no requirement for dedication, the issue of capacity to dedicate does not arise. The question of incompatibility turns upon whether the statutory purpose for which the land was acquired is compatible with its registration under s15 Commons Act 2006. The determination of whether the 2006 Act or those statutory purposes governing the acquisition take primacy is one to be determined by statutory construction (*R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council* [2015] AC 1547) [**Appendix 10.15**].
96. Based on the above, the question of statutory incompatibility for PROWs is whether the power to dedicate was incompatible with the statutory purpose for which the owner possesses the land and is a matter of fact to be assessed by what can be reasonably foreseeable. The reasonable foreseeability is to be considered at the date of consideration of registration i.e. now, not when the relevant 20-year period either started or ended (if different) (see *Westmoreland*, referred to above in paragraph 95 i) above, and *Ramblers Association v SoSEFRA* [2017] EWHC 716) [**Appendix 10.16**].
97. Further, paragraphs [64]-[65] of the *Lancashire* Judgment (see at paragraph 91 above) are relevant where the consequences of registration as a TVG was a key consideration as to statutory incompatibility. In that judgment, the judges referred to s.16 of the 2006 Commons Act which allows for deregistration of land but recognised that this provision is subject to the often ‘impossible’



requirement for replacement land (if over a certain size). They concluded that the effect of registration is that land becomes sterilized and cannot then be used for its statutory purposes.

98. Such a consequence would not necessarily apply when considering statutory incompatibility under s.31(8), not least because use by the public of land registered as a TVG is very different to use of a PROW over land, with very different impacts/restrictions on other uses and users of the land.
99. The right to pass and repass along a defined route is not unrestricted use of the land as a whole like a TVG, a point the Judge noted at several points in the Cotham School Judgment (see e.g. paragraphs [2], [116], [165], [231], [242], [277], [280],[292], [294], [297], [299], [303], [304] and [305]. There are also various statutory provisions which allow for the diversion of footpaths in different scenarios (for instance, s.257 Town and Country Planning Act 1990, s.118B, s.119 or s.119B Highways Act 1980) so that the land would not be 'sterilized' nor the owner prohibited from carrying out the statutory purposes (subject, of course, to evidence to the contrary).
100. The consideration of statutory incompatibility under s.31(8) remains as it has done since (and before) *Westmoreland (Viscount Simonds)* i.e. "*If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose. This, at least, is the view which have been consistently take for over one hundred years...*" (confirmed in *Easteye Ltd v Malhotra Property Investments Ltd and others* [2020] EWHC 2606 (Ch) [**Appendix 10.13**] at paragraph [319]).
101. Consequently, the OMA considers that there is no evidence to suggest that the use of the Routes by the public to pass and repass would be incompatible with educational purposes, with our without any necessary measures to prevent access on to the wider land, so as to preclude the DMMO being confirmed.



## **SUMMARY**

102. This Statement has set out the background information to the Application for and making of the Order, the details of the Application, the legal tests to be applied and refers to the documentary and user evidence in accordance with paragraph 17.1.3 of the Guidance on Procedures for Considering Objections to the Definitive Map and Public Path Orders (as updated at 22 April 2026).
103. The OMA's position and reasons for making and supporting the Order, having regard to the assessment undertaken by the Authority's Consultant, are set out above. The OMA considers that by the time the notices were first erected in 1985/86 the claimed PROW were already established. Further, as set out above and in the PROW Consultant's report, it is not accepted that the points raised in the Grounds of Objection defeat the Applicant's reliance on the later periods, if that were necessary.
104. Further, the Statement sets out the OMA's position of each of the Grounds of Objection and why it considers that the decision to make the DMMO was and remains well founded.
105. The PROW Consultant will provide evidence at the Public Inquiry and will explain his assessment and conclusions based on the matters before him at that time. His evidence will also take into account any new matters raised in the Applicant's and Objector's Statements of Case and he will comment as necessary and appropriate on the evidence of those parties provided to the Inquiry.
106. Once all Statements of Case have been provided, the OMA will seek to agree with the Applicant and Objector as many matters as possible, including an agreed nomenclature and colour code for the claimed routes; an agreed set of legal authorities, including both caselaw and legislation; an agreed set of common documents, all for use at the Inquiry.