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- formal match, he often walked on the pitch area. When his nephew was younger, he used to go with him to the land and have a football kickabout. He recently inquired of a group of about a dozen youngsters aged 10 to 14 who were playing football using one of the sets of goal posts how often they used the land. Their leader said that they used it every weekend “rain or shine”.
159. The land had been used by the St Brendan’s Old Boys’ Rugby Club for a mini rugby tournament, involving about 350 youngsters. People had gone to look at the tournament. There had been plenty of room to move around. The land had been used by the Scouts to teach their youngsters fieldcraft. He had seen the land used for kite flying, picknicking and for cricket. It was used by many dog walkers who invariably cleared up after their animals. He has picked blackberries on the land with his wife. He had not seen the athletics track used for athletics or running.
160. He had held arbitration seminars at Stoke Lodge. After the sessions it had been good to walk on to the land and get some fresh air. The students attending would have come from Bristol and the western counties – Cornwall through to Dorset. The students attending classes at Stoke Lodge came from all over Bristol. By way of example, the upholstery teacher lived in Redland.
161. He referred to the land around Stoke Lodge as Stoke Lodge Park. He was not aware of any formal documentation so referring to it.
162. He had seen men mowing the grass – he had seen them this week – they would have been aware of his presence on the land. He had waved to the groundsmen who had waved cheerfully back.
163. When he first moved to Stoke Bishop, the main gates that open on to Shirehampton Road were often left open; more recently they have been closed.
164. He was not aware of any Avon County Council signs on the land; perhaps because of his increasing visual impairment, he had not seen the Bristol City Council sign. He thought that in 1987 he would have been able to read the Avon County Council signs had he observed them.
165. W2 produced a copy of a “Domesday Map” prepared by John Garnons Williams in about 1986, but showing Gloucestershire at the time of the Domesday Book in 1086. North west of Bristol the settlement of “Estoche” may be seen.
166. Finally, W2 explained that in 2015 Bristol was European Green Capital and considered that this emphasised the importance of registration of the land as a town or village green.
167. O1 lives at xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. He used the land infrequently up until 2003. He then used it on a weekly basis, walking with his partner and her dog. Since 2007 he has used the site on a daily basis, primarily for dog walking. He retired in August 2010, and became the principal dog walker, visiting the land mostly in the afternoon – very rarely in the morning and sometimes in the evening.
168. He accessed the land through the main entrance to Stoke Lodge on Shirehampton Road [1] and [11] or, most frequently, via the opening near the mini-roundabout at the junction with

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- Parry's Lane [9]. Since the provision of the pedestrian gate to the new children's play area, he has used that entrance; before that provision was made, the gate was often locked. Now the access to the children's play area – which has been open for about eighteen months - is never locked.
169. He has seen many other dog walkers, who seemed to him the largest group of regular users – typically between 12 and 15 when he visited between 1 pm and 4 pm. He has seen little evidence of organised sports activities during the week; he accepted that this may have been because it took place in the morning and he visited the land in the afternoon. In contrast he was aware of the playing fields being used for junior football and rugby games. He could only recollect having seen the running track marked up on one occasion. When he saw ground staff on the land he avoided them. He didn't interrupt a formal game of football but did walk on a marked up pitch when it wasn't being used for formal sport. He had never asked permission to use the land for informal recreation nor knew of anyone who had asked for it. He had never seen a notice or advertisement granting permission for informal recreation. When using the land he had never been challenged or asked to leave; he did not know of anyone who had been.
170. He was not aware of the Avon County Council signs, apart from seeing them referred to at the inquiry. He was aware of the Bristol City Council sign, although his route going by access point [11] does not take him past it. When O1 first saw the sign it was facing inwards to the field, and he thought that it applied to the grounds of the house. He had since seen the sign in all sorts of orientation. O1 produced a photograph of it taken on 12 March 2015 when it was facing towards the house. It has now moved by about 20 degrees. O1 accepted that the Bristol City Council sign went up in 2009. The children's playground opened in 2014. He didn't remember an Avon County Council sign where the Bristol City Council sign now was. If it had been there, there was no reason why he wouldn't have seen it.
171. H2 now lives at xxxxxxxxxxxxxxxxxxxxxxxx but he first knew the area in 1953 when his family moved to xxxxxxxxxxxxxxxxxxxxxxxx. He was then aged 13. He moved away in 1968 but he still came back to see his family. He had then used access point [4] but he couldn't remember details about it – it was just a gap.
172. He moved to xxxxxxxxxxxxxx in Stoke Bishop in 1982 and to his present address in xxxx. As far as he was aware use by the public had been continuous since 1953.
173. He now used access points [9] and [4], the latter when he was returning from the Shirehampton road shops via the land. There were no signs at either of these two entry points. He considered that the gap at access point [9] had been left intentionally. He believed that there were Avon County Council signs at two other entrances he considered these obsolete. If there had been a sign on the beech tree on south western boundary of the site he would have been able to observe it when he was walking his dog, but he had not seen any sign there.
174. He had become aware of a Bristol City Council sign recently. He thought that it post dated the TVG application and related to the overflow car park at Stoke Lodge. It was in an area of the field that he did not go to. He had only seen the back of it.

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175. Between 1982 and 2011 he sometimes used to jump over the wall between access points [9] and [10] but apart from that only used access points [9] and [4]. He thought that at access point [8] a gap had been left intentionally. He had no recollection of access point [9] ever being closed with wire. He believed that access points [9] and [10] were the same now as they were in 1982.
176. He was a dog walker and he observed a pattern of use – there would be people on the land between 8 am and 9 am; then perhaps it tailed off; in the afternoon there would be the heaviest use. He had counted 85 people on the land on a weekday afternoon. He was not aware of any dog walker being challenged or of friction between the groundsmen and dog owners. He had not heard of an incident when a dog got into the changing rooms.
177. He had seen the land used for the range of recreational activities identified in section 26 of his evidence questionnaire; the “rounders” he had observed was perhaps baseball. He had also seen the land used for formal sports. He had not interfered with games in progress. Formal sports use did not prevent him from using other parts of the land. He had never sought permission from anyone to use the land for informal recreation; he did not know anyone who had or who had received such a permission. He didn’t know of anyone who had been challenged or asked to leave the land. The presence of animal faeces on the land was not a reason for not using the land.
178. He had seen Clifton High School and Cotham School using the land in the morning. They were not there at 9 pm and to his recollection they were there for about an hour, although he accepted that unless he had gone down twice on a particular morning he would not have been able to tell whether there had been one session or two sessions. He didn’t recall them using three as opposed to 2 pitches and he did not recall seeing as many as 90 children. When he was walking the dog on the land when PE lessons were going on, he would keep well away. Other dog owners would do the same.
179. He almost certainly had seen the school sports days in 2000 and 2001 – he had a good view of the eastern part of the land from his house. He thought that there had been 5 or 6 sports days in the period 1990 – 2010, largely taking place in the afternoon. He had gone on to the land on occasions when sports days were on, with or without his dog. He didn’t specifically remember to Cotham School Sports Day with about 500 people present. There had been a big difference in the size of the sports days – some were involved just pupils coming in coaches. The land was never closed off and it was only ever the eastern part of it that was used. He did not know who had lobbied for the dog litter bins (one near the West Dene entrance, the other on the land near access point [7]). They had been put in at different times, but post dated the TVG application. H2 said that he could not imagine why the dog bins were put in if the Council didn’t want people to use the land.
180. A1 lives at xxxxxxxxxxxxxxxxxxxx. He moved there in July 2005. He and his wife were already familiar with the area as they had met while they were both students at xxxxxx University. A1 was a resident in xxxxxxxx on xxxxxxxxxxxx for three years between 1973 and 1976. He was aware of that time of the playing fields at Stoke Lodge and believed that some students used them for informal games. When he moved back to Stoke Bishop in 2005 it was immediately obvious that that the land was used for informal recreation, walking the dog and more formal sporting activities.

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181. In September 2005, he and his wife acquired a three month old puppy. Before doing so, he explored the local area to see where it might be possible to exercise it. He saw that people did take their dogs on to the land at Stoke Lodge and he assumed that he also would be able to do so. At that time he did see one of two Avon County Council signs – either the one near access point [3] or the one near access point [7], he cannot remember which. Having read the sign, his understanding was that the activity proscribed was any which caused or permitted nuisance or disturbance to others. He had no intention of allowing his dog to be a nuisance to anybody. The local community was already undertaking the activity which he wanted to undertake. In any event, the sign was in the name of Avon County Council, which had ceased to exist. He was not aware of the sign having any impact on the behaviour of anybody. Having acquired the dog, A1 did take him on to the land, sometimes once but often twice in a day. On average he would walk the dog on the land 5 – 7 times a week. He got to know many of the dog walkers and met some of his neighbours for the first time walking on the land. This continued until their dog died in November 2014. As regards walking his dog, he had walked him around the perimeter of the land but he had also walked him all over the place and he didn't always walk around the perimeter. Stoke Lodge was often part of a walk – A1 would walk through and would be on the perimeter of the field for part of the time. He had walked the dog in other places – the Downs, Combe Dingle, Blaise Castle, sometimes along the road – it all depended on the circumstances.
182. He and his family have used the land for other reasons than walking the dog. He has taken guests and visitors on walks which have taken in the land. When he had guests they might go and look at the trees. He had picked blackberries there, collected fir cones and also collected rubbish. He has taken friends with children to the children's playground. He has used the land at all times of day.
183. He had entered land by all the several entrances – by the mini-roundabout (access point [9]) from Ebenezer Lane (access point [6]), through the Stoke Lodge entrance (access point [1]) and from Cheyne Road (access point [4]). His main access was at access point [9]
184. He has often seen groups of children, sometimes with a parent, practising kicking a football or rugby ball or practising cricket. On the lower area he has seen individuals practising golf. He has seen groups of teenagers and families sitting and chatting. He has seen people of all ages walking across the land between Parry's Lane and Shirehampton Road, or Cheyne Road. In addition to the wide range of activities referred to in Q26 of his evidence questionnaire, he had seen someone idling a motor bike on the land; and someone with a radio controlled car.
185. He has seen, and sometimes stopped to watch, formal games of cricket, rugby, football and also athletics. Schools generally used the land in the morning before noon. Sometimes it was just groups of children, occasions when several pitches were being used at once. He never interfered with a game in progress. The use of the land for formal sports did not prevent access to the totality of the land or prevent his enjoyment of the land.
186. He had observed the ground staff going about their work. They would have been aware of his presence on the land.
187. He had never been approached by anybody to say that he should not be on the land or that he should leave and had not heard of anyone else being so approached or asked to leave. He was not aware of any action to restrict access and paths and ways on to the land, other than the

gated entrance to the lodge, had never, to his knowledge, been closed, blocked or obstructed. He was not aware of anyone who had sought permission to use the land, although he assumed that those who used it for formal sports would have made appropriate arrangements. He never saw a notice or advertisement granting the public permission to use the land. The presence of animal faeces on the land was not a reason for using the land.

188. Mr Blohm asked A1 about his description of the land in his statement as Stoke Lodge Parkland. He thought that when he had been at University the land had been described as *the Playing Fields*. He accepted that it probably had not been described as Stoke Lodge Parkland until 2010 when the issue of public access had arisen. Accordingly Q7 in his evidence questionnaire was wrong – the land had been known as something other than Stoke Lodge Parkland. It had predominantly been known as Stoke Lodge. When he filled in the questionnaire he did not distinguish between Stoke Lodge and Stoke Lodge Parkland.
189. When he first saw the Bristol City Council sign, his recollection was that the back of the sign faced towards the Stoke Lodge building; he had not been entirely clear what were the grounds to which it was referring. Later it was turned round. Q 37 in his evidence questionnaire referred to the Bristol City Council sign²³.
190. Mr Ground asked A1 about the group that had made the application. He accepted that they were organised – they were a group that had coalesced out of a group of those who had used the land over many years. His impression however was that the land was not now used more than earlier because of the encouragement by the group of local people to use it. He thought that the use waxed and waned – for example he had used the land less since his dog had died in November 2010.
191. H3 lives at xxxxxxxxxxxxxxxxxxxxxxxxx. She moved to her present address in September 1978 together with their 2 year old son. They subsequently had had a daughter. Both their children attended Stoke Bishop Church of England School. Her daughter (who was aged 36 and who had left the school in 1991) had told her that at school they had played cricket on the land. They had walked there. She didn't know the frequency of this use.
192. Since 1978, she and her family have used the land for playing games with the children, children's parties, bird watching, flying kites, walking the dog and Brownie Sports Days. The Brownie Sports Day on the land would have been in the late 80s. She had seen others using the land for informal recreation – she would see up to a dozen at one time when she was walking her dog. Dog walkers walked their dogs in all different places. She had not seen the land used for organised games on a recognised pitch when she was using the land, but she had seen cricket and probably football when driving past in her car. She didn't think that it had been used that often by schools – she would have seen this if it had. She had seen school use and had seen coaches which she assumed had come from the schools using the land. She had seen them at access point [2] – they are not supposed to park there – causing traffic difficulties. She said that cricketers had used to use the land in summer a lot but she didn't think that they did anymore. Otherwise she was not aware of any decline in formal sports use.

²³ The question was *Has any attempt been made to prevent or discourage the use being made of the land ... by local inhabitants?* A1's answer was *There is a sign adjacent to Stoke Lodge, not at the entrance I used. I had then been using SLP for more than 2 years and I took no notice of it.*

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She used the site very early in the morning. She had seen ground staff cutting the grass, although not marking out pitches. They would have been aware of her presence. After 1994 her routine changed and her use of the land was occasional.

- [illegible]

match that afternoon with Bristol City Football Club. The players were very friendly and he got several autographs²⁴.

200. P2 says that all the members of her family remember being asked at one time or other to leave the then Clifton High School playing field site, the then Imperial Sports Ground site and the Combe Dingle Sports Complex. There was always free and open access to the site and P2 believed that she was entitled to use it – just like the Downs.
201. Since returning to Stoke Bishop her children have used the land in very much the same way as she and her brothers and sister did at an earlier time, using it for playing cricket and football. She remembers her son as a teenager being a member Her youngest son walks the dog there every weekend with his friends, and she uses it about once a week. She usually uses access point [9], but also [1]/[11]. She had used access point [3] (walking to Westbury-on-Trym to see her daughter) and access point [4] (walking to Sea Mills Post Office). She has seen other members of the public using the land for informal recreation. The land was not used solely by dog walkers. She saw more people at the weekend than on weekdays, but she would usually see 8 – 10 people. She had observed the ground staff moving the grass and putting down white lines. They would be aware of her presence. The land was also used for formal sport. When formal sport was underway, she did not interfere with the game. Use of the land for formal sport didn't prevent her from using parts of the land which were not being so used. She had seen people walking on the pitches when there were no formal sports on them. She didn't know anyone who had sought permission for informal recreation. She did not know of anyone who was challenged or asked to leave the land. She recognised the Avon County Council signs near access points [3] and [7]. She was not aware of any similar signs on the land. She recognised the Bristol City Council sign near access point [12]. Although she was aware of them before, she first read the signs a few weeks ago – it was quite funny seeing a sign that said *No dogs* and a field full of dog walkers. Faeces on the land had not deterred her use – she considered it a very clean parkland.
202. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, so she was aware of what went on there. Every day there was a pre-school children's group from 8 am to 1.15 pm. On Monday the Hall was used for the Ladies' Choir, on Tuesday the Ladies Badminton, on Wednesday Pilates, on Thursday Social Bridge and on Friday Pilates. Upstairs there was an Art Group on Thursday pm and Yoga on Wednesday afternoon and evening. On Monday there was a Bridge group, on Tuesday dog training and on Wednesday a dance group. A dancing teacher fills in the gaps with dance classes. There were occasional bookings at the weekends.
203. The village hall, which is on the corner of Old Sneed Road and Stoke Hill, was built in 1885. It was owned and run by charitable trust – the Stoke Bishop Community Association. Those who attend activities do not just come from Stoke Bishop and may come from quite a distance – for example, one person who comes to the Bridge Group comes from Portishead. She thought that some of the people attending the dance classes may come from Sea Mills.

Written evidence

²⁴ Documentary evidence subsequently produced by showed that this event had occurred at Combe Dingle.

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204. The application was supported by 54 statements and/or questionnaires. Some of those making statements and/or giving questionnaires gave oral evidence to the inquiry; and of these making statements and/or giving questionnaires, 27 (ie exactly half) referred to the existence of signs on the land. In 2012 the Applicant also submitted a further 81 written statements; and then, more recently, some 58 additional statements in the form of e mails (all dating from 2016). These written statements are congruent with the oral evidence of user that I heard and go to support it, supplying “chapter and verse” so to speak of the oral evidence that I heard as to use by others which those who gave oral evidence had observed. I do of course recognise that this written evidence (and all the written evidence) was not subject to cross examination and is intrinsically less weighty than the oral evidence which was so subject.
205. Mr Mayer submitted four statements relating to specific matters.
206. S3 prepared for the benefit of the inquiry *A Brief History of Stoke Bishop*.
207. Stoke Bishop was originally a Saxon settlement, established around a spring. This can apparently still be seen trickling out, hidden in the garden of what was once the old school house. Nearby was Westbury-on-Trym, where there was a monastery. In 824 the Bishop of Worcester took control of the monastery and the land appertaining to it, which included Stoke, which thus became Stoke Bishop. Stoke (Bishop) is mentioned in the Domesday Book as Estoch.
208. In the Middle Ages Stoke bishop languished, while Westbury-on-Trym grew in importance, its Vicar in 1444 himself becoming the Bishop of Worcester. He may have set aside land in Stoke Bishop as a deer park. This is the area known as Sneyd Park (*sneed* meaning *set apart* in middle English).
209. On the dissolution of the monasteries, the land around Wetbury-on-Trym was broken up into a number of large estates, interspersed with farms. There was Stoke House on Stoke Hill, built by a Bristol magnate, Sir Robert Cann; Sneed House (encompassing Sneyd Park), the home of Joseph Jackson, a London merchant, who made his fortune in Bristol; and Kingsweston House, which Sir John Vanburgh designed and built for the Southwell family. Between the eighteenth and the middle of the nineteenth century, these estates were themselves broken up. Stoke Lodge was built in 1834 on land bought from the Kingweston Estate. The biggest change came following the death of Mary Jackson, the last of the Jackson family, who died without direct heir in 1811. The distant relatives who succeeded to the estate sold it off for the high class suburban development of Sneyd Park. Other development in Stoke Bishop followed. In 1860, Stoke Bishop became a separate parish (it had previously been part of the parish of Westbury-on-Trym) and the parish church of St Mary Magdalene, Stoke Bishop was consecrated. It was built on Mariner’s Drive, Sneyd Park. S3 says that the boundaries of the new parish *have defined Stoke Bishop ever since*.
210. (I have been supplied with a map showing the boundaries of the ecclesiastical parish. To the NW, SW and SE these are geographical features: the River Trym, the River Avon and Durdham Down. To the NE the boundary is formed by Parry’s Lane, save that where Parry’s Lane (if you are travelling west) dog legs to the south, the parish boundary follows the line of Ebenezer Lane. This means the land the subject of the town or village green application is on the northern edge of the parish. More specifically, the northern section of Bell Barn Road,

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Woodland Grove, Coombe Lane and West and South Dene are not within the ecclesiastical parish.)

211. In the early years of the twentieth century there was more development, but Stoke Bishop retained its rural character, because there were still big houses surrounded by large grounds: the Fry family at Stoke Lodge, the Wills family at Downside, Louis Nott at the Holmes and Sir George White at Old Sneed Park House. The population in 1911 was 1300.
212. Many joined up when the First World War broke out in 1914. S3 points out that the War Memorial records three sets of three brothers who were killed.
213. (I have seen the War Memorial, which stands at what may be called the eastern entrance of the parish from Bristol, travelling west along the Stoke Road).
214. After the war there was much development and some of the big houses were given over to other uses. During the war, American troops were billeted in Stoke Lodge while General Omar Bradley and his staff lived at the Holmes, planning the D Day assault on the Normandy beaches.
215. After the war, the big houses that survived were all taken over by institutions: Stoke House became Trinity Theological College, Downside became Nazareth House a Roman Catholic Orphanage, Holmes was taken over by Bristol University and Stoke Lodge by Bristol City Council. Other large houses were demolished and flats built in their place.
216. P3 was brought up at xxxxxxxxxxxxxxxxxxxx, leaving home aged xx in 1986.
217. As a child used the land for football and for riding his bike. The majority of the time he would use access point [3] although he was aware of other accesses. He is now aware of the Avon County Council sign at [3] but has no recollection of it as a child. He believes it to have been erected soon after he left home. 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.
218. P4 lived at xxxxxxxx from 1972 until 1988 thereafter returning in the university holidays until she started work in 1993. She did not recollect when the gate at access point [3] disappeared but it wasn't in place when she left home in 1988.
219. As a child until the age of 15 (1985) she played with her friends on bikes on the land. They referred to it as the Field. They also used it as a short cut to Shirehampton Road. In 1984 a pony that she had been looking after at xxxxxxxxxxxx escaped on to the land. It would not have been able to get there if the gate had been locked. In 1984, she and her brother had walked their neighbour's dog on the land when he was ill.
220. G1 has lived at xxxxxxxxxxxxxxxxxxxx since 1988. Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx.

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221. Her back garden gate opens on to Ebenezer Lane and it is easy for her to access the land. She observed that its use was not comparable to the use by Fairfield School. For a period of 2 or 3 years she monitored the use of the land by Cotham School, going on to the land every day in term time. They would use the land Monday to Thursday in the morning, more in the winter and autumn terms. They did not always come.
222. There would be two groups, the first group using the land between 9.30 am and 10.30 am and the second between 11.30 am and 12.30 pm. There would be about 20 – 23 boys, who kicked a football near the pavilion. Girls used the Combe Dingle Sports complex, where there was a hockey pitch. They used the land for an occasional game of rounders.
223. In June 2010 the School was averaging less than three hours a week. She produced some of her monitoring records which she had just found in an old cupboard²⁵. These are not complete nor altogether easy to interpret, but in broad terms appeared to bear out her comments.
224. Between 1989 and 2013 she organised “field events” for children and adults as part of a midsummer party – running races, egg and spoon sack races, tug of war and rounders. She had made programmes for all of them and produced that for Woodland Grove’s Golden Jubilee Celebrations in 2002, when there were events at 23 Woodland Grove, races on the land between 2.30 pm and 4 pm and then a street party.

Evidence on behalf of Bristol City Council as landowner

Oral evidence

225. C1 is employed by Bristol City Council as an xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxx. It is she who has searched the records of the Council which has been produced to the inquiry and which informs this Report. She has researched the minutes of Committee meetings of both Avon County Council and Bristol City Council; historic property files; conveyancing documents; record cards; and historic plans.
226. Among the records that C1 has found is correspondence relating to the erection of the Bristol City Council sign in 2009.
227. C1 visited the land on 10 October 2011 with a colleague in the Parks Department called H4. She parked in the car park to the left of Stoke Lodge as you enter by the main gates. There was a sign nearby which she identified as the Bristol City Council sign. The front of the sign faced the car park and house.
228. H4 then left and C1 walked around the playing fields in a clockwise direction. She noticed that some of the houses, whose gardens backed on to the playing fields, had gates which allowed them to take direct access on to the playing fields. Along the north western boundary to the playing field, she noticed a gap in the hedge with a wooden post in the middle of it, the land on the other side being the cul-de-sac known as Cheyne Road.

²⁵ Her statement is dated 28 June 2016, shortly before the end of the inquiry.

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229. She continued along the northern boundary and observed an Avon County Council sign situated near to the pavilion. Continuing her walk, at the north eastern corner of the playing fields where the gas governor is located, there was another Avon County Council sign.
230. H5 is employed by Bristol City Council as an xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxxxxxx.
231. H5 supervises xxxxxxxxxxxxxxxxxxxxxxxxx on all education sites within the City and advises the Council on all grounds maintenance issues. He first joined the Council in 1965 and worked as an xxxxxxxxxxxxxxx between then and 1970. Between 1970 and 1972 he was employed as a groundsmen at Lawrence Weston Playing Fields. Between 1972 and 1981 he worked in private practice as a landscape operative for a landscape consultancy company. In 1981 he joined Avon County Council as a district supervisor for school grounds in the northern area of Bristol. His area included Stoke Lodge, and his responsibilities included arboricultural issues. In 1995 his responsibilities changed and he became solely responsible for arboricultural issues across the education grounds. In 1996 the responsibilities of Avon County Council as regards education were transferred to Bristol City Council. He remained in his arboricultural role until 2012. However he had no direct involvement with the site after the University took over management of it in about 2004.
232. H5's first involvement with the paying fields was approximately in 1981, when he joined Avon County Council xxxxxxxxxxxxxxxxxxxxxxx. He used to visit the playing fields at least weekly as he was the manager of the on site team and had to collect their time sheets. At that time there was no longer a full time groundsmen living on site but there was still a full time groundsmen and another part time groundsmen, their kit and machinery being kept in the pavilion. The system changed in the late 1980s to a system of "mobile" groundsmen.
233. He recalled the erection of the Avon County Council signage on the playing fields. This was approximately in 1985/6. The signs were put up on all Avon County education playing field sites, at what were considered to be the main entrances into playing fields which the public could access. There were two signs which are still present on the land – one near access point [3] and one near access point [7]. There were four other signs which were put up at this time but which have since been removed. They used the same wording as the signs which are still present. H5 said that the wording of the signs made it clear not to trespass on this playing field and that requests for authorised use should be made to the Director of Education. One of the signs that has now been removed was fixed to a large beech tree along the Ebenezer Way footpath. This was the standard Avon County Council sign. The tree is still in situ and H5 recalled that this sign caused some concern to a resident of a house in Woodland Grove as it was apparently very prominent in view from his kitchen window. H5 responded to his complaint by having the sign moved to a lower position on the tree. Another of the signs was erected to the left of the main entrance to Stoke Lodge (in a position where the Bristol City Council sign is today). All the Avon County Council signs were erected at the same time in the mid to late 80s. Finally there were two signs either side of the gate on Shirehampton Road giving access to the Adult Education Centre. He thought that one on the main entrance gate was still there and one was lost when one of the gates was destroyed when it was hit by a car. They responded to a problem that was experienced all over the County of Avon of trespassers on school land. He thought that they had disappeared after 2002.

234. Answering questions from Mr Mayer, H5 explained that he recalled the fixing of the Avon County Council sign to the beech tree, which had happened “much to his displeasure”. It had been fixed with nails – a minimum of two nails, top and bottom – facing into the playing field. It had originally been fixed higher up and facing towards the pavilion. By lowering it and altering its orientation into the field they had addressed the concern of the resident in Woodland Grove. He couldn’t say how it had ended up as shown in F3 photograph dating from June 2003. Generally in Avon signs were put up on posts, or on chain link fences. He couldn’t think of any other instance of a tree being used for an Avon County Council sign.
235. The Bristol City Council sign replaced an Avon County Council sign. Asked by Mr Mayer as to why it had been changed, he said that he thought that it was to put the stamp of ownership of Bristol City Council on the land²⁶. However, although he did see it after it was put in, he couldn’t really comment on the sign since he was not involved with its erection. He couldn’t say why only one of the Avon County Council signs was changed. As regards the Bristol City Council sign, this faced on to the car park area and not into the playing field. His recollection was that it had always done so. He hadn’t changed its orientation. Because of its orientation, he did not think that any reasonable person could consider that it applied to the Adult Learning Centre. Moreover there was no sign at the entrance to the centre where you would expect such a sign if was intended to apply to the grounds of the Centre. He said that the orientation of the sign had not changed since it had been erected.
236. H5 said that during his involvement with the playing fields there had been a general awareness from members of the public that their use had been contentious. He described the use of the site by members of the public without permission as an on going problem to the Council. He recalled that the public had been challenged regarding the use of the playing fields by dogs and were often subject to abuse. On one occasion a member of his staff called S4 was assaulted by a lady walking a dog when challenged to pick up dog faeces. He thought that this was in the late 80s or early 90s – S4 was an Avon employee. As a result of this and similar instances, staff were reluctant to challenge members of the public who are using the playing fields without permission from the Council. After this incident, members of staff were advised not to confront members of the public as they might put themselves at risk. Friction nonetheless continued between employees and members of the public. H5 described this as “verbal fencing” – sometimes it was friendly sometimes not. It was not necessarily unpleasant. Some would take advice, others would object to being told what to do. Staff were certainly aware that the land was used by the public for informal recreation. Reasonable use was never challenged; a challenge only issued when they were doing something anti-social.
237. He had a very clear recollection of there being at least four files kept in the offices of the Parks Department which contained a huge amount of historical and more recent information. They were all destroyed as a result of an office move in mid-2000. H5 had access to these files and was familiar with their contents. He was definitely able to state that they contained a large number of letters to and from the Council and members of the public concerning the

²⁶ In the papers supplied to the inquiry is a copy of an e mail dated 15 August 2012 from H4 to P5 and C1 in which he says *The sign was put up to stamp our ownership. Funded from money made available by Mick to standardise property transferred to CYPS*. H4 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.

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- contentious use of the site. In particular there were letters from members of the public complaining to the Council that they had been told by Council staff not to use the site. The files would also have contained evidence as to when repairs were carried out to the boundary of the site.
238. H5 recalled from many years back that the boundary on the Ebenezer Lane side of the site, which makes up just under half of the perimeter of the site, was not directly accessible to members of the public. This part of the boundary consisted of a stone wall from the Parry's Lane end up to the cottages in West Dene. 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. Until about 2005, from the cottages along the remainder of the perimeter on the Ebenezer Lane side of the site, there used to be a boundary consisting of hedges, trees and whatever remained of the old boundary wall. Over the years the boundary was persistently breached by members of the public trying to access the site to the extent that by about 2005 (he could not be exact as to dates) a number of gaps had appeared enabling the public to access the site without difficulty.
239. 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. The destroyed files would have contained letters to the Council from members of the public complaining about the Council's actions in blocking up this gap. 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. The contentious use of this access point was a problem up until 2000.
240. The lost files would also have contained a number of complaints from the clubs, schools and other organisations using the land. The Council constantly received complaints right up until when the University took over regarding dog walkers failing to clear up after their dogs. H5 said that *Safeguarding of children and preserving the site as an important educational facility was one of the main reasons why use of the site by members of the public was such a concern to the Council.*
241. In answer to questions from me, H5 explained that in 1981 the north eastern corner of the site, behind the gates that are access point [2] there was a car park and working yard. This was fenced off from the main site and formed a little enclave. There were a second set of gates into the site in line with the first set, and also some gates further down the fencing of the enclave. The gates would not have been kept open but locked, so there would not have been public access at this point. In 1981 at access point [7] there were only the remains of a

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wall, so there would have been access at this point, albeit over the remains of a wall. However access would have been into the car park/service yard area. As regards access point [6], he thought that in 1981 the boundary wall had largely collapsed; the remnants were standing but there was little left. Accordingly it would have been reasonably easy to access the field from these points. He couldn't remember if there was a gap at access point [5] at this time; access point [4] was open. At access point [12] it was possible to move freely on to the playing fields. At access point [1] there were gates to the Adult Education Centre. They were locked at night and unlocked during the day. He couldn't recollect people using access point [10] in 1981 and didn't believe that there was a gap at access point [9]. He thought that the use of this had occurred after new development had occurred on the other side of the road. To his recollection, there were not in 1981 any signs saying anything about access by the public. As access point [8] he thought that these gates would have been open during the day, but didn't think that there would have been access on to the land from access point [7] via access point [8].

242. H4 was an employee of Bristol City Council from about 1985 until his retirement in 2014. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
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243. H4 was very familiar with the land. This was not just because of his employment with Bristol City Council. He was born in xxxxx. As a young boy (from about the age of 11) he used to play on the playing fields. This was because he was friends with the son of caretaker who lived in a cottage adjoining the land and which had access on to it; otherwise he would not have dared to have gone on to the land. He was aware at that time that members of the public were not allowed to use the site and he remembered the caretaker constantly having to “shoo” people off the site and asking them to leave as they were trespassing. The caretaker or groundsman used to live on the site in those days, and H4 recalls that he had difficulty in controlling members of the public. H4 also stated, although he could not recall dates, that some or all the site was fenced off but the fencing was constantly vandalised. Over the years there have been numerous incidents at the site including vandalism, graffiti, damage to fencing and, on one occasion, an arson attack on the pavilion.
244. H4 cannot recall the exact dates but it would have been around late 2008/early 2009 that he was given the responsibility of commissioning new signs to be displayed at the entrance to the site. He knew that there were other signs around the site, but he specifically recalls arranging for a new sign to be displayed in the grounds of the adult learning centre. This was a decision of his line manager. This was because this was considered to be the main entrance to the site accessed by members of the public. Its intended purpose was to advise members of the public that they would need to get permission from the Council if they wanted to use it: he said “It is therefore true to say that this sign was put up because the Council did not want members of the public to use the site”. He recalled that trespassing was becoming a real concern to CYPS and “the main reason for the new signage was to safeguard the children who were using the site with permission due to a number of issues such as people walking their dogs on the site and failing to clear up after them, acts of vandalism, graffiti and general trespassing”. The office had been inundated with calls about dog muck in the grounds and similar. The land was an important educational facility that was regularly used by children, including a school and a

football club. It was also considered that as Avon County Council had been abolished in 1996, the existing signs were out of date and needed to be replaced. This was following advice received from a barrister following the “Packers” TVG case. Attached to an e mail dated 26 March 2009 would have been details of the proposal for the Bristol City Council sign and the sign would have been produced after that time. The wording was word for word what had been suggested by the barrister. H4 asked the sign company to replace all the signs on the site; they replaced only one. The reason why all the signs were not replaced was because the sign company did not do what he asked them to do. He saw the old sign before it was replaced and the new sign afterwards; his instruction was to put the new sign on the old posts to save costs and he thought that this is what had happened.

245. He was not aware that Bristol City Council had agreed open access to the site in September 2010.
246. At the same time as there were discussions within CYPS about replacing the signs, consideration was also given to fencing off the site. This was put to one side because of funding and the previous problems of fencing being vandalised. Because of the Council’s need to make significant savings, fencing was not really a viable option.

Written Evidence

247. H6 is the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.
248. He said that the University had used the land for more than 30 years for both its inter-university competition and intramural competitions. The use had been on Wednesday afternoons and weekends. During the period that the land was owned by Bristol City Council, the use of the pitches would be negotiated by the University with the Council. In the period 1990 – 2000/1, the University worked with the Council and Fairfield School to ensure that their respective uses of the land were compatible. This was relatively easy to achieve given that Fairfield School would use the land between Monday and Friday between 9 am and 12 noon and 2 pm to 3.30 pm. Cotham School had the same pattern of use after 2001. Cotham School’s use was compatible with the University’s use. The University’s Management and Maintenance Agreement with Cotham School sought to maximise the space for University, School and Club use. The University had worked with the local clubs to avoid clashes at the weekends. The pattern of use had not changed in the relevant period. He produced a document showing use by the Shire Colts Football Club and a letter from the Bristol Ladies Union FC which uses the land for mid-week training and have been doing so since 2008.
249. S5 has been Business Manager of Cotham School since 2005. He did not have records going back ten years to the time when the School started using the land but produced records of the bookings between 2010 and 2013. All lessons were timetabled for the first two periods of the school day. This had been the arrangement since before he started working for the school²⁷.
250. He produced a letter from B3, who was the Chairman of the Shire Colts Junior Football Club. B3 explained that the Club provides competitive and non-competitive football for children aged 6 to 18 and has used the land since the 1980s. The Cub used the land every weekend

²⁷ He was writing before the use of the land by the school had ceased.

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(both Saturdays and Sundays) during the season for matches and throughout the year for coaching, plus mid-week summer training leading into the season. This had been the pattern for the last 30 years, increasing with the success of the Cub. The Shire Colts had a membership of 200 local families and the Bristol Ladies Union FC (which incorporated their ladies' section) had 150 girls and women playing for it.

Evidence on behalf of Cotham School

Oral Evidence

251. B4 is the xxxxxxxxxxxxxxxxxxxxxxxxxxxx, having been appointed in January 2015. It is rated by Ofsted as *Oustanding*.
252. B4 gave me some background information about the school.
253. It had an eight form entry and 1480 students. In respect of ethnic mix, about 45% of its pupils were categorised as “black minority ethnic” , and 30% were of Somali origin. It was no longer a predominantly white, middle class school. 40% of Year 7 pupils were entitled to free school meals, a proportion that was rising.
254. Some pupils had what are styled “complex family arrangements” for example where a parent was in prison or subject to a restraining order. There were five such cases at the moment. Photographs of the parents concerned were known to Reception and they were prevented from accessing the School. B4 was concerned that if the school used the Stoke Bishop Playing Field without it being secured by fencing, there could be attempted access by parents such as this on the Playing Fields.
255. There were three entry points at the school site, all of which were secure, entry being by means of entry card. Pupils entered by a single entry point which was unlocked at the appropriate time, subject to supervised access and then locked again. Pupils were locked in during their time on the premises. There was also a Visitors' Entrance and a Delivery Entrance. Visitors needed to be buzzed through. They would then be signed in, given a lanyard and be allowed supervised access. All classrooms had security. There were similar security provisions as regards the Delivery Entrance. All the site was covered by CCTV.
256. The School had a duty under the Education (Independent School Standards) Regulations 2014 both to keep its pupils safe and to provide for their welfare by providing for suitable outdoor space for physical education in accordance with the curriculum.
257. By reference to the first requirement, the School had a *Child Protection and Safeguarding Policy*. It was reviewed every year and every year the requirements became more stringent. The latest version dated from October 2015, although B4 also produced the version dating from July 2010. This reflected how attitudes to school security had changed over the years, starting with the Dunblane Primary School shootings in 1996. There had been high profile incidents in Bristol that had highlighted the concern, and Ofsted had shown increasing interest in the issue.
258. In B4's view, taking pupils to an unfenced and unsecured site was not consistent with this policy and she agreed both with the Risk Assessment that had been carried out in the time of her predecessor (see below). She explained that she wanted to make the Playing Fields a safe

a secure environment – they were in effect outdoor classrooms. The need was for fencing of some sort; the details of which had not been worked out.

259. As regards informal recreational use by the community, the School would try to allow recreation by other members of the community, although this was not something that had been worked out in great detail; there would need to be discussion with community partners. She had talked to the Newmarket Academy where something had been put in place to allow this. Here there were 8 gates to a field which was locked during the school day. She was confident that the School would be able to come to some arrangement with the community.
260. As regards the second requirement. in February 2013, Ofsted published *Beyond 2012 – outstanding physical education for all*²⁸. It notes that in the best secondary schools core PE of two hours each week was viewed by senior leaders as a basic entitlement for all pupils. This is re-iterated at p54 and at p41 is the observation that *Significantly, in schools where the achievement of pupils in PE is outstanding, all of them provided at least two hours of core PE each week.*
261. There is very restricted space available on the main school site at Cotham Lawn Road. Accordingly in order to provide pupils at the school with two hours of PE each week, it is necessary to provide lessons off site. This view was corroborated by a calculation done by reference to *Area guidelines for mainstream schools: Building Bulletin 103* (June 2014) produced by the Department for Education. This indicates that the outdoor space requirements for new schools, school refurbishment projects or conversion projects²⁹. Including the land, the School would just meet the indicated requirement; without it it fell far short.
262. Provision used to be made by using the playing fields at Stoke Lodge on four mornings a week. This continued until April 2014, at which time the School Governors took the decision to cease to use the playing fields in the light of a risk assessment undertaken by S5 (the school's Business Manager) and A2 (the school's Facilities Manager). This was, in the light of the open access to the site, because of issues as regards
- uncontrolled dogs
 - dog excrement on pitches
 - potential risk of harm to students and staff from uninvited members of the public; and
 - risk of students absconding.
263. Alternative provision has been made by the use of the Combe Dingle Sports Complex. However this did not meet the entirety of the school's needs and is very expensive (£25,000

²⁸ The title is explained by the fact that the previous OFSTED guidance had been entitled *Working towards 2012 and beyond*. 2012 was a significant date as being the year of the Olympic Games in London.

²⁹ I observe that although BB 103 represents guidelines for new schools and similar, evidently it may be relevant for assessing the situation at existing ones. I note also that the introduction to the text states these guidelines will not necessarily have to met in every case and should always be flexibly applied in the light of particular circumstances.

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per year). Moreover, the school was still having to pay £20,000 per year for the maintenance of the Stoke Lodge Playing Fields, even though it no longer used them.

264. B4 was asked by Mr Mayer about the facilities at Combe Dingle that were currently used for PE. She considered that these were compliant with the School's Child Protection and Safeguarding Policy, even though she accepted that a lanyard was not required by visitors and the gate to the complex was open and not locked during the day. She considered that the School took reasonable steps to safeguard children undertaking PE. They were fully supervised and managed as she had explained
265. As regards the requirement to provide PE lessons, B4 accepted that timetabling was at the discretion of the School. Nonetheless it had to provide a broad and balanced curriculum. This was an inner City school which had decided to offer 2 hours of PE. If it did not do so, she considered it would not be delivering a broad and balanced curriculum.
266. B4 accepted that there were occasions when pupils went out of school for extra curricular activities. A risk assessment had to be carried out. There generally had to be a teacher:pupil ratio of 1:15 (1:10 in respect of smaller children) and it was also possible to use DBS cleared parents to assist. There would be cost implications if this increased level of supervision were to be used in order to provide for PE on the application site. The level in respect of ordinary PE lessons was 1:30. B4 considered that the School could not afford to make use of the Playing Fields by way of an increased teacher:pupil ratio. But even putting aside the cost, she considered fencing to be the only solution. She was not aware of views expressed by Bristol City Council before she was in post as to the appropriateness of fencing off the site or in relation to the possibility of shared access between the School and the community.
267. She said that teaching a schools games lesson was not comparable to running a junior football club. She observed that a junior sports club will normally have multiple adults (paid and volunteers) who are DBS check and will be able to help. That help may well include coaching, supervision and clearing litter and dog excrement from the pitch. By contrast, a school class of 30 will be supervised by a single teacher. She did not consider it reasonable to expect a single teacher to do all these things; in particular, to clear the field of dog excrement. Moreover with a single teacher there would still be risks arising from the dogs themselves and free access and egress from the site.
268. She made the point that the school was fully insured as regards its existing arrangements so that, by extension, their insurer was happy.
269. As regards the arrangements at the Combe Dingle Sports Complex, she was satisfied that they provided a well-maintained environment for the School's students to take part in supervised sporting activity without disruption. The whole site was fenced to deter unauthorised access and pitches were free of dogs and the resulting problem of dog excrement. Students could take part in sports in a safe and clean environment. On arriving at Combe Dingle, Cotham School's coaches have dedicated parking spaces and the children are monitored as they cross the driveway at a crossing point with "School children: Slow" traffic sign on the wall. All coaches and other vehicles arriving can be seen from the Coombe Dingle reception (which is

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always staffed) as well as from the Grounds Managers's office³⁰. Combe Dingle staff monitor who is on the site. On arrival, Cotham School staff report to reception for the fact that they are on the site to be recorded before use is made of the facilities. The grounds are privately owned and not open to free public access. Members of the public or the community must book facilities in advance if they wish to rent them. Match spectators may occasionally be present during the School's use of the facilities, but access to the facilities is still tightly monitored to ensure the security of the site and its users is not compromised. University Security officers check the facilities throughout the day and the area around Combe Dingle is also patrolled by a local police patrol car. B4 is clear that the Combe Dingle Sports Complex provides a significantly safer environment than Stoke Lodge in which to teach the School's curriculum.

270. Asked by Mr Mayer what the School would do if the village green application were granted, she said that the school would be put in an incredibly difficult position given the cost of Combe Dingle.
271. F1 is xxxxxxxxxxxxxxxxxxxxxxx and in this capacity supports the objection made by Cotham School to the registration of the land as a town or village green.
272. She xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. She is xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. Cotham School is an Academy which is both a Charity and a Company registered at Companies House. As a governor she is essentially a director of the company. She is concerned that the school should be able to provide for the total needs of pupils in providing a mixed and balanced curriculum including safe and secure sport facilities.
273. To the knowledge of F1 the land has provided off site provision for PE and sports since 2002, and the school has maintained the playing fields since that time. In 2011, the School entered a 125 lease with Bristol City Council on the basis of the land being used as a school playing field.
274. In her role as xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, in 2014 it was she asked that a health and safety assessment be carried out in respect of the use of the playing fields (which led to the decision of the Governors to stop using them for the provision of PE and sports). Having read the statement of B4, she agreed that open public access to the land would conflict with the school's duties towards its employees and students.
275. F1 worked for nearly 30 years xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxx. Her understanding was that the land was vested with the education department of Avon County Council until 1996 and thereafter by Bristol City Council as education playing fields; and that policy for the land was as playing fields.
276. On behalf of the School she has taken an interest in understanding the use of the land and the opportunity it represents and accordingly has visited the land on several occasions. On several occasions she has taken a series of photographs.

³⁰ I observed the arrival of a bus from the school on my accompanied site visit on 14 July 2016, which took in a visit to the Combe Dingle Sports complex.

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284. Prior to 2004, the land was used for Cotham School Sports Days in two years – 2000 and 2001. In each year events took place over a two day period in June, with the “lower school” (years 7, 8 and 9) competing on one day and the “upper school” (Years 10 and 11, with selected students from the “sixth” form (Years 12 and 13)) competing on the second day. On each day 450 – 550 students, 100 members of staff and a number of parents would have been on the land. At least three quarters of the field was used. M5 thought it very unlikely that any member of the public would have used the land at this time. It would have been possible for the public to access the land during the Sports Day. He would have known the vast majority of parents but couldn’t be absolutely certain about everybody.
285. In the 1990s development of the school on the main site reduced the area of playing field and between 2000 and 2007 the available area was yet further reduced. The upshot has been that the School must use off site locations for all its requirements for grass pitches and athletics. Accordingly, since 2004, Stoke Lodge Playing Fields has been the School’s site for off site provision of PE and sports since around 2001.³¹
286. From this time, the PE department took students to Stoke Lodge on a daily basis. They would go to the site on around four mornings a week in term time; use around 3 pitches; and be there for most of the morning. They got to the land in two 54 seater coaches, being dropped either in West Dene or on the corner of South Dene. The coaches originally stayed but this was not popular with the residents and so they would leave and return at the appointed time. The pupils would be dropped off in school clothes and they changed in the pavilion. Access in 2001 was via point [3]. There was a gate there – just like a garden gate – and you just walked in. The gate wasn’t there when he last had contact with the site, but he didn’t remember when it disappeared. The lesson would be a double period of two hours. The first group of about 90 students would arrive at 9.10 am and leave at 10.35 am and the second group would arrive at 11.10 am and leave at about 12.50 pm or 12.55 pm. “PE” included games – rugby, rounders, softball and football – as well as athletics; and M5 had it in the back of his mind that they used to play hockey: they wouldn’t play hockey on grass these days. Between September and November and February and May, there would be games after school, depending on the light. This would be on 2 or 3 evenings – the norm was 2, in order to reduce transport costs. The games would run between 3.30 pm and about 5 pm (the pupils had to be back at the School by 5.30 pm). The coach procedure was the same. In all the time he was teaching PE on site between 2001 and 2010, no person went on to a pitch during the lesson. There would be 3 or 4 teachers on site – a minimum of 3 if the pupils were all of the same sex, 4 if the pupils were of both sexes. Use of the land would only be called off in extreme weather conditions – less than once a week. If the pitches were waterlogged it would be possible to find somewhere to go on the land. There were a couple of incidents when dogs interfered with the delivery of lessons and of changing for the students. At times there would be no one on the site except for the students. On a typical morning, he might see five or six people walking their dogs.
287. As regards the booking arrangements, his understanding was that there was a block booking by the school of the periods 9 am – 1pm Monday – Thursday for each week in term time.

³¹ Years 7, 8 and 9 would always use Stoke Lodge, although some activities would be carried on in the sports hall; Years 10 and 11 might go to the climbing centre and occasionally to other locations for badminton and squash.

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Further, at the beginning of term or as appropriate there would be a booking of the extra curricular games. The school year was 190 days in length.

288. Following the TVG application in 2011 the School continued using the land on a daily basis until April 2014 when, following a risk assessment, the Governors decided to cease such use. He wasn't aware of any decline in use before 2012.
289. In explaining that decision, M5 explained that over the years the environment in which teaching was carried on had changed. In his time in teaching at the school, in the 1980s there had been a serious sexual assault on a student that had led to a revision of procedures. There had, on the main site, been a short cut that residents used to get to the shops. That was no longer acceptable and it had been closed off. There was now no open access for strangers at the main school site and lanyards had to be worn. All access was gated and deliveries had to be buzzed in. Whenever they went off site in a coach – however short the journey – there had to be a risk assessment. There had been flashers at Stoke Lodge. Although the vast majority of dog walkers kept their dogs on leads and incidents were few and far between, there had been incidents of which three stood out – concerning a dog in the changing room and a dog chasing students. Over the years he had become increasingly concerned about the risks involved in taking students to the land.

Written evidence

290. A2 is the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. He as lived in the area for 45 years and is very familiar with the surrounding streets.
291. He did not consider the area claimed by Mr Mayer to be the neighbourhood on which his application relied to be anything more than a line with Stoke Bishop at its centre. He did not think that a factor unifying the inhabitants of the area, which he did not consider to be a recognised or cohesive area within Bristol.
292. He had played cricket on the land between 2005 and 2010 with one and often more than one match in each year. He did not recall there being any public use of the land when these matches occurred.
293. L1 is employed by Bristol City Council as a xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxx. He started working for Bristol City Council as a member xxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxx in 1990. He was based at Stoke Lodge Playing Fields between xxxx and
xxxx and carried out the maintenance to the site as well as to other sites around North Bristol.
He was at the site every morning at 7 am, every lunch time between 12 and 1 pm and at the
end of day at around 4.30 pm. On some days he would be at the site all day; he would spend
an average of half the working week at Stoke Lodge.
294. Before 2004, the land was used as the playing fields for Fairfield School and for Christchurch School. Fairfield used the playing fields on around 3 days per week and Christchurch would use the fields on 1 day per week. On the occasions that children were using the field, if people were there they would walk around the perimeter of the field and would not walk on the pitches. When he was mowing or maintaining the pitches, people would stick to the edges of the field. On a Saturday and Sunday usually all the pitches in the western end of the field would be used. There would be some occasions when all the pitches would be used and on

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most Saturdays and Sundays there would be some use of the eastern pitches. There would also be weekday evening matches. People never walked on the pitches during matches but would use the perimeter walks.

295. Fairfield School, Christchurch School, Clifton High School for Girls and Stoke Bishop Primary School use the land for sports days. The primary schools would use the full extent of the eastern side of the field. Secondary schools would use the full extent of the eastern side of the field. Secondary schools would use the full extent of the eastern side and would also use the western section of the field for throwing events (discus and javelin). On those days the eastern side was full of children, parents and teachers and he did not see any other users on the field.
296. Cotham School used Stoke Lodge for its sports days (two days each) in June 2000 and June 2001. L1 assisted in the setting up of the fields and line marking for various events, including a 400m running track and for discus, shot put and javelin. A large number of students and staff were involved. He was not aware of any members of the public and he thought that they would have avoided the land on these days.
297. He personally saw little or no use of the fields except by members of the public to walk their dogs. Of this the vast majority would take a perimeter circuit route. It was rare to see any other use. Most of the time he would go out with the gang mower and there would be no other person on the field.
298. Access was gained via West Dene, Parry's Lane and via the Stoke Lodge entrance, with very little access from elsewhere. Access did also occur via Cheyne Road but this was fairly rare. The majority would enter it via a recognised route and would enter having passed the Avon County Council signs in those places. "There were Avon signs on the West Dene entrance, the Parrys Lane Entrance adjacent to Stoke Lodge and at Ebenezer Lane."
299. He took the opportunity to revisit the site and observe any changes in recent times³². He was shocked at the state of the boundary along Ebenezer Lane where for a length of about 100m it is possible to walk into the land. In the time he knew the boundary it was grown with brambles and access was extremely restricted.
300. G2 is employed by Bristol City Council xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. He started working for the Council in xxxx and was based at Stoke Lodge Playing Fields between xxxx2 and xxxx. The pattern of his work in relation to the land was the same as that of L1 between 1995 and 2005.
301. His evidence was to the same effect as the evidence of L1. He remembered that in the early period of his employment, K, a colleague, would block Cheyne Road to prevent access via that route. He did not remember so much as L1 about the use by Cotham School for sports days but remembered about the use for cricket. He recalled that the land was used during the summer for a number of evening and weekend cricket matches. They would use the pitch in the centre of the site adjacent to the pavilion. Before 1995, there was also a cricket pitch on the western side of the site. There were regular matches on weekends on both Saturday and

³² L1's statement is dated 26 April 2016.

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Sunday and also on weekday evenings. Bristol City Council managed the use and groundstaff worked weekends to set up the wickets. He never heard of local people interfering with games.

302. R1 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.
303. During her time at the School she was regularly involved in using the land for games activities, particularly during the summer for athletics and rounders. She had regular, weekly, issues with finding dog excrement on the playing areas, which she had to ask students to avoid. Lessons would start with a pitch/track check which wasted time. It was not always easy to see the excrement until the ball went into the mess or a student trod on it.
304. She also experienced many unpleasant conversations with dog walkers who let their dogs off the lead. The dogs would often chase the girls causing disruption to lessons and scaring the students. They would run away with the rounders ball and, on other occasions, poo on the pitch in front of us. The adult dog walkers were often rude and arrogant when approached by me or other members of staff and some would not accept that even picking up the mess was not enough as this left possibly health risking excrement traces on the playing area.

Evidence on behalf of the University

Oral Evidence

305. F3 xxxxxxxxxxxxxxxxxxxx for the University of Bristol xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.
306. F3 has been employed by the University since xxxxxx and has always been based at the Coombe Dingle Sports Complex, which is about 700 metres (to the north west) of the land which is the subject of the TVG application.
307. From 1984 until the mid-1990s he walked to work from Parry's Lane along Ebenezer Lane and West Dene. Accordingly he took an interest in what was happening on the eastern part of the land. There were then two Avon County Council signs on the land. One was set into the field at the inner edge of a small car park at the northern corner of the site, to the south west of the Parry's Lane entrance. The other was inside a pedestrian gate at access point [3]. He remembered this sign when it was put up – he found it quite amusing and it stuck in his mind. This would have been in the mid 80s. He think that it replaced an earlier wooden sign which he believed was white with black wording. There still existed in the shrubbery behind the pavilion an old wooden sign. It was not however possible to make out the words³³. When he walked to work he took his dog with him. He had to be at work by 8 am. He wasn't aware of people dog walking on the land at this time, although he did not have extensive sight of the land. In early 2000 when he went only rarely to the site, he was not aware of much dog walking. In 2004 it was fairly obvious that people were using the land, but he didn't see much dog walking. From about this time there had always been a few people around the perimeter of the site running or walking with dogs. It would depend on the time of day. There had never

³³ The site inspection on 14 July 2016 confirmed the existence of this sign.

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been so many people as he had seen when the site visit was carried out on 22 June 2016. More recently he had seen very much more dog walking.

308. In 1998/1999, the University were in discussions with the Education Directorate of Bristol City Council in connection with the University taking over the management of Stoke Lodge Playing Fields. There were also discussions with Cotham School about it taking over the use of the playing fields from Fairfield School and renting facilities at Combe Dingle. This is what ultimately happened; plans for a new school to be built on the site were not pursued.
309. The upshot was that SEH started to manage the sports bookings from September 2000³⁴ and maintenance of the playing field in 2005.
310. In 1998/1999, the position was that Shirehampton Colts had for many years been renting pitches from Bristol City Council on the lower or west side of the playing fields. This use is still continuing, although now the rent is paid to the University of Bristol. Shire Colts had played in the Avon Representative League, the Suburban League, the Hanham Minor League and the Avon Youth League. They also held regular 6-a-side tournaments, at which programmes were handed out. F3 produced a fixture list for 2005.
311. In the summer there was also a cricket square located near the oak tree in the centre of that part of the field, but this is no longer used.
312. Between 2000 and 2005 an agreement between Cotham School and the University was drafted³⁵. At this time, F3 started to prepare budget costs in respect of the playing fields, and obtained cost and work schedules from Bristol City Council. He downloaded a plan of the public rights of way in the area as he had a concern about the use by the public of access point [4] (“a gap in the hedge”) at the the end of Cheyne Road. He was satisfied that this showed that the gap was not official, although his assumption was that since there was a bollard there, it was probably put in by the City Council.
313. In about 2000 or 2001 he measured the pitches and marked them up on a plan which he had obtained the City Council. This plan, which he produced to the inquiry, showed eleven pitches.
314. He also set in motion a conditions survey. This focused on the pavilion, but also took note of some of the walls around the property and fence lines.
315. In May 2000, F3 received from Cotham School a preliminary schedule for the use of the playing fields and of the Combe Dingle Sports Complex. In September 2000, SEH took over responsibility for the bookings on the playing field, and co-ordinated use of the playing field by Cotham School and by Clifton High School (who were also used it at this time). Clifton High School had sports days in 2012 and 2013 – 9.30 to 2 on a Tuesday. They had also had Monday evening athletics meetings.

³⁴ It took over the bookings because of the need to co-ordinate the use of the land by Clifton High School (as well as Cotham School) who at that time used the athletics facilities.

³⁵ A copy of the agreement ultimately entered into (in September 2010) was produced to the Inquiry by Bristol City Council.

316. In June 2003, he undertook another conditions survey in order to get recommendations for completing the painting of the pavilion and an asbestos survey completed. In the course of this he took some photographs, which he produced to the hearing. Two of these photographs show a sign hanging from a beech tree on the north western side of the field. His recollection was that this was a white sign with timber edging with mitred joints. It was very old. The only word he thought that he could make out was the the word “Private”. When he had attended the site inspection on 24 June 2016 a member of the public had said to him that the wording of the sign was the same as the Avon County Council sign³⁶. Two other photographs in this series respectively show the front and the back of the Avon County Council sign in the vicinity of access point [3].
317. 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.
318. There certainly was an Avon County Council sign at access point [12] and it appeared to be that produced to the inquiry by F1. (It was had been defaced by being sprayed with the letters “DBK”, as had been a number of other signs in the area). Most of those walking round the land and not entering it at this point would not have seen it. He didn’t recall seeing the Bristol City Council sign – he didn’t have that much reason to go over to that part of the grounds.
319. Also in 2003 he undertook a survey of the perimeter fencing and hedges, primarily undertaken to show where fencing was needed to stop unauthorised persons coming on to the land by pushing through hedges, jumping over walls or entering through gates owners had put in their fences. The survey identified a need for 576 metres of fencing. His reasoning was that this would stop or reduce unauthorised entry to land which was primarily a school playing field in particular because there was a safety issue as regards dog faeces and to safeguard the children. Where dog faeces are present it presents a health risk and groundstaff machinery has to be continually cleaned. F3 produced a plan showing where he considered the fencing had been required. This plan also showed the layout of pitches at that time. There were eleven pitches in an arrangement similar to that which were shown on the plan dating from 2000 or 2001.
320. No fencing work was undertaken at this time.
321. He remembered that at access point [6] there were “tip toe points” where people would have gone from the field into Ebenezer Lane to get their footballs back – there were gaps but they were not as wide as they are today and he only recalled 3 ways through (as opposed to the current 4). The gaps at this point had assumed their present width within the last two or three years. There was however a wider path at access point [5] which people used on a fairly regular basis.

³⁶ It would seem that the sign is visible in the very far distance in a picture dating from July 1997, produced to the inquiry by W1. But the issue is not about the existence of the sign, but what it said.

322. After xxx took over maintenance of the land in 2005, a programme of improvements to the turf was instituted. This involved heavy scarification, aeration and regular mowing of the fields to encourage a good sward of grass. F3 did not spray the fields with a selective weed killer because he consider that it would have been safe with members of the public walking around the edge of the fields and their dogs running on pitches. The groundstaff undertook a basic level of maintenance that was suitable for an unprotected site, which involved about 1,924 hours of work per year.
323. When the University took over the site he would like to have managed it like the Combe Dingle Sports Complex. This was fenced and although the gates were open it was possible to monitor people entering the site from reception. Because it was an open site, he could not do this. It was difficult to discourage people walking dogs. He had reminded people after they have just walked past sign that no dogs were allowed site. He got various reactions – usually a verbally aggressive reaction to the effect that the sign doesn't mean anything and that they've always done this. He had carried on doing this intermittently – only once or may be twice a year; and he didn't go on to the field in recent years as much as he used to do.
324. In June 2005, the University organised a half marathon. The course went twice through the playing fields, between the entrance to Stoke Lodge on Shirehampton Road (access point [1]) and the West Dene entrance (access point [3]). There would have been about 500 people taking part, who were students, staff and some locals. The gate which had hitherto been in place at access point [3] was removed for the half marathon. It had been a black gate with wire mesh, and had a finger latch. It was not at this time lockable, although previous groundstaff may have been able to put a chain on it – he couldn't say. By 2005 the bottom had rusted through and it sat on the ground. It wasn't necessary to operate the finger latch to get through.
325. When Rocklease Rangers had used the land for a tournament in 2004 he allowed parking on the south western part of the field. He had allowed some parking in connection with some filming in 2008 – 2009.
326. Frequently he would visit the site and not see any members of the public. On the occasions when he did see people, walking or running around the perimeter of the fields, they did not hinder SHE's work. They generally kept out of the way of the tractors and machinery. They did have issues with dog walkers and their dogs. He considered that of the members of the public who used the fields, 90% were dog walkers, who used to walk around the perimeter. He had personally had to do an emergency stop at least twice, which was not easy when you had had agricultural machinery such as spikers or mowers behind you. There had been many times when he would hoot the horn to warn people to look after what they were doing. Most people were good and put their dogs on a lead; some people he had to warn. It was a matter of body language – it would not be possible to speak because the engine would be running. He had warned the odd child about use of the goal mouth after it had been treated for wear. He had spoken to his staff about their experiences and it was the same as his. One employee had experience of a dog walker getting aggressive. For the last 6 or 7 years the staff hadn't taken any action about dog walkers. He would hear of incidents from teachers – he had been told of an incident when a dog went into a changing room and the children got upset; and of another incident when a dog went through a number of Cotham School pupils during a lesson. He had not seen members of the public using the land save for perimeter walks. He remembered

a phone call from a local resident who alerted him to the fact that someone was erecting a tent and some kind of stall on the land; he explained that this was not permitted and the person left. Last year he stopped a large teenager who was flying a drone; he was able to point to the Avon County Council sign as authority for his actions. It was near where the “totem pole”³⁷ is. He did stop. He had never come across horse riders.

327. In the early days of the 2000s, access point [9] was a pinchpoint. It was possible to see where some had accessed the land but it was very overgrown and they would have brushed up against brambles – not as it is now. At one time he put a bit of chain link fence against it; on another occasion he put some branches against it but these were pushed out of the way.
328. In 2004 when the University took over the management of the site he put a padlock on the double gates at access point [2] and on the pedestrian gate to the side of it on to Ebenezer Lane. This looked as if it had been fairly well used; there had not been a padlock on the pedestrian gate before. One padlock was cut off; it was replaced with a stronger one. There was a pedestrian gate from the service yard into the field. This gate was then in a bad state of repair and there was not a lock on it. The provision of new padlocks was part of a process whereby all the padlocks in relation to the land could be opened by the same key including the key to the padlock to the gate of the Adult Education Centre. To the best of his knowledge, access point [8] – the gates from the compound on to the field – had been kept locked by Bristol City Council before we took over. After the University took over maintenance, the gates were kept shut but not padlocked. At access point [7] there was access available over the wall into the service yard. F3 erected a makeshift barrier but this only lasted about 6 weeks or so. Thereafter there would have been access via access point [7] at the gates at access point [8]. This access would have got progressively easier over time. Subsequently a branch of a tree grew into the fence leading to the gate at access point [8] and it was necessary to remove a section of fence which then became a new access point. This however was in 2012 after the TVG application. The position between 2004 and 2011 would have been that there was access via access point [7] and the gates at access point [8]. There is now access into the field from the former yard. This happened in about 2010 when a gas converter was built in the yard. Before that it was not possible to drive a vehicle directly from access point [2] on to the field but there was pedestrian access. This disappeared when the gas converter was put in. It was now more convenient to use this as an access point for vehicles.
329. F3 produced a print out of the 14,700 bookings of the land there had been between 2000 and 2016. This showed not only use by the schools involved but also use by the local community clubs and the University for football, rugby and cricket. The print out should be seen as a broad indication of use, not a precise guide. Sometimes a greater number of pitches would be used than had been booked out – for example, if the Shirehampton Colts turned up with more children than they expected. The print out would not show cancellations, and in the course of the season there would be quite a few cancellations. He suggested that it showed that the number and frequency of bookings was such that during weekdays in term time when the land was being used by schools and at weekends when the land was being used by clubs, it would have been difficult for members of the public to have accessed the land save around the perimeter. It was possible to identify from the print out which part of the site had been

³⁷ A tree sculpture on the eastern part of the site.

used³⁸. There was a reduction in use by Cotham School from 2010 onwards. The general pattern of use by the School was in the mornings – two coaches arriving at 9.30 am and another 2 coaches mid-morning. After school matches were usually organised using a mini-bus. There would at most be 3 teams. Sometimes Cotham School had had insufficient staff to be able to use Stoke Lodge and had been able to use an artificial pitch at Combe Dingle. He could think of two occasions when this had happened – his colleagues might have been aware of more.

330. As regards athletics use by schools there were two areas for discuss and javelin throwing, which could be identified on the aerial photographs produced by the school. The land had definitely been used for javelin throwing. Local people would not have been in the vicinity when this was happening. The long jump pits were used – they were cleared out in 2004 and 5 tons of sand put in. They were used until 2012. It was possible to identify two rounders pitches.
331. He was disgusted by the school and University were not involved in provision of dog litter bins on or at the entrance to the site by Bristol City Council – the University had been trying to discourage dog walkers over the years – this, he felt, was encouraging them. They had been installed sometime after 2011. He didn't know whether the bins were well used.

Evidence of a member of the public

332. S6 lives at xxxxxxxxxxxxxxxxx. This is a sixties development off xxxxxxxxxxxx, about 5 – 10 minutes from the site.
333. S6 recalled that H4 had given evidence of use of the land in 1964. He wished to give evidence of his experience when his family moved to xxxxxxxxx in 1967. He was then aged about 2 or 3. He was taken by his parents and elder brother along Bell Barn Road to Ebenezer Lane, which was then called Cross Elms Lane. They would use access points [5] or [6]. They had no difficulty in so doing – there were well defined paths through. When he was at Stoke Lodge Primary School, he would indulge in informal recreation on the land. Later he would go up there own his own and walk up to the top. They were never challenged or stopped, even though there would now and again be a groundsman there. Certainly if they thought that it was not right to use the land they would not have done so. It was a belief that people had for a long time, that they had the right to use the land.

Consideration

334. The core facts of this case are not in dispute. The land has been used for use by schools for games and athletics. It has been used by sports clubs for football, rugby and cricket. It has been used by local people for dog walking and informal recreation. Access for that dog walking and informal recreation has been freely available. At all relevant times two Avon County Council signs were positioned on the land, and still are. There was a third sign Avon County Council sign on the land which must be contemporaneous with the other Avon County Council signs and survived down from the mid 1980s until at least 18 June 2007. Cotham School have a lease of the land and could fence it off, subject to it not having become

³⁸ Each booking referred to either location A, B, C, D or E being used. The “key”, showing which parts of the land these were, was produced to the inquiry by Cotham School.

a town or village green by virtue of long use by local people. However the existence of these core facts has not precluded extensive argument.

The law

335. For land to be registered as a town or village green, the requirements of section 15 of the Commons Act. This³⁹ provides as follows:

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

(2) This subsection applies where—

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

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

(3) This subsection applies where—

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

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

(c) the application is made within [the relevant period] ¹.

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

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

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

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

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

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

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

The application was made under section 15 (2) on 7 March 2011. Accordingly the Applicant had to show that

- a significant number of the inhabitants of a locality, or neighbourhood within a locality
- had indulged in lawful sports and pastimes on the land
- for a period of at least 20 years down to 7 March 2011; and

³⁹ I set out sub-sections (1) to (4).

- their use was *as of right*.
336. The burden of proof is to the civil standard (the balance of probabilities). In *R (Beresford) v Sunderland City Council*⁴⁰, Lord Bingham said:

*As Pill LJ rightly pointed out in R v Suffolk County Council, ex p Steed (1996) 75 P & CR 102, 111: "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ..." It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met*⁴¹.

337. The effects of registration or non-registration in this case are clearly very important for both the School and the local community, and perhaps more widely, so Lord Bingham's point is well made. However it is worth stressing that the intrinsic merits of whether the land should be fenced off or whether it should remain open for use by local people or whether there is some acceptable compromise which might allow both are not matters either for me or, in due course, for Bristol City Council as decision taking registration authority. I am solely concerned with an assessment of whether the legal requirements of section 15 (2) are met.

Significant use

338. The requirement that there be "significant" use was apparently introduced into the law of town and village greens by the Countryside and Wildlife Act 2000 in order to meet the point that had been raised in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council*⁴² that it might be possible to defeat a claim if a substantial number of users had come from outside the claimed locality⁴³. However this may be, the word evidently provided a test for the extent of use required. In *R (Alfred McAlpine Ltd) v Staffordshire County Council*⁴⁴

... "significant", although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language. In addition, the inspector correctly concluded that, whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is provided by Mr Mynors on behalf of the council, when he submits that what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is

⁴⁰ [2004] 1 AC 889 (HL).

⁴¹ See paragraph 2 of his speech.

⁴² [2000] 1 AC 335.

⁴³ See p357F.

⁴⁴ [2002] 2 PLR 1.

in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.

More recently in *Barkas*⁴⁵, Lord Carnwath emphasised the importance of the assertion of community use:

*... his conduct brought home to the owner not merely that a right was being asserted but that it was a village green right*⁴⁶.

339. The suggestion is that most of the use has been by dog walkers who, in order to give their dog the longest possible walk stuck to the edges of the land; and that others – runner, for example – also stuck to the edges of the land. This was the picture of use of the land painted by F3. Against this was the evidence of local people who spoke of going all over the land and, in particular, walking over the area of the pitches when they were not in use. But even on this basis, it is a very large area of land and, although those who used it invariably spoke of seeing others using it in the course of their use, on no view were there generally large numbers of people using it at the same time.
340. It seems to me that the use of the land by local people was significant in any ordinary sense. The land was an attractive piece of open space to which there was ready access by those living in the area. Thus I would expect everyone who had a child or children to take them to the land when the need arose for outdoor exercise or games. Likewise I would expect dog owners to use the land to exercise their dogs. And this, essentially, is the use to which local people have spoken – using the land like a public recreation ground. No single visit would have used the whole of the land but in the course of time they will have ranged all over it. I think that the only thing that might have inhibited them is a sense that they ought not to be on the land, which might have been the case if, for example, their use was subject to frequent challenge. This is an aspect of the matter that I address when I consider the argument on whether the use has been *as of right*, but at this point I merely observe that I do not think that there was any such consciousness. Moreover I do take Mr Mayer’s point that in a Briefing Note that officers of Bristol City Council produced after the *Redcar* case⁴⁷, the risk of an application in respect of the land was recognised:

... the playing field (Stoke Lodge Playing Field) is currently unfenced and allows unfettered community access.

341. At paragraph 340 above I conclude that the use of the land was significant “in any ordinary sense”. I think (see the *McAlpine* case) that it is in its ordinary sense that I must consider the word significant. The difficulty that the Objectors face is that if dog walking and informal recreation are lawful sports and pastimes which may establish a town or village green, then the land has obviously been used for lawful sports and pastimes by people living in the vicinity of the site for lawful sports and pastimes. The law might have taken a different turn,

⁴⁵ *I.e R (Barkas) v North Yorkshire Council* [2015] AC 195.

⁴⁶ See paragraph 65.

⁴⁷ *I.e R (Lewis) v Redcar and Cleveland Council* [2010] 2 AC 70 (SC).

requiring at least some element of community organisation. But this argument was rejected by the House of Lords in the *Sunningwell* case.

342. I should add that, as one would expect in the circumstances, the evidence shows that the land is used as a short cut to and from places on either side of it. This use does not count towards the establishment of a town or village green (walking from A to B is not a lawful sport and pastime) and I have not so counted it in reaching my view that there has been significant use of the land.

Co-existence of the significant use for lawful sports and pastimes with the use of the land by schools and sports clubs

343. I need to begin by considering the extent of the use of the land by schools, clubs and the University. In a manner similar to that in which the objectors argued that local people had made limited use of the land, Mr Mayer argued that the schools and clubs had made limited use of the land.
344. As regards school use, the evidence of M5 as to the use by Cotham School was that the land was used on four mornings a week and the booking record supports this. The statement and record of G1 would suggest that the use was less than this but she did not give oral evidence and was not available for cross examination. More generally the Applicants' witnesses suggested that the land was used less than this by the School⁴⁸. I think that it is possible that there may have been times when Cotham School did not use the site as intensively as four mornings a week and ideally I would have liked some more definitive evidence about this, and clearer evidence about use by other schools. Nonetheless I think that the extent of the use by Cotham School becomes essentially a non-issue when it is recalled that G1 draws the contrast with the use by Fairfield School, which she accepts was greater. H6's evidence is that as well as using the land in the mornings, Fairfield School used it in the afternoons also.
345. Mr Mayer points that in any event, the booking record shows that the School was never using the whole of the field, that the land would not have been in physical used for the whole of the morning and that there would be many periods of the day when they were not using it. This point, made in relation to Cotham School, may still be made even if afternoon use by Fairfield School is factored in.
346. For reasons, I shall explain below, I do not think that the precise extent of the school and club use is determinative of the application.
347. As regards sports club use, in my Report dated 22 May 2013, I summarised the community use obtaining

- ***Shire Colts FC***- four pitches on Sunday am and four on Sunday pm during the football season
- ***Rocklease Rangers FC*** – three to four junior pitches on Saturday am and one full size pitch on Sunday am during the football season

⁴⁸ Most specifically and forcefully, the evidence of B1.

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- **Bristol University** – *four football and one rugby pitch on Wednesday afternoon between 1 pm – 4pm or 5pm*
- **[A club whose name I cannot read]** – *Sunday morning use of the rugby pitch during the winter season as required*
- **Coombe Dingle Crusaders juniors** – *two junior football pitches on Saturdays during the football season*
- **GWR Shunters Cricket Club** – *approximately nine home matches during the summer. Several hours a week in the summer (weekends and evenings)*
- **Various corporate cricket bookings during the summer**

348. Recognising that this is a snapshot, it seems to me that the evidence put before me confirms that picture. M2 described the use by the Shire Colts in similar terms to those set out above. From their objection, it seems that Rocklease Rangers FC also use pitches on Saturday afternoon and Sunday morning. It is possible to see from the booking records produced by F3 that there was use of pitches at all times at the weekends; however use of the entirety of the land – as for the St Brendan’s tournament– was exceptional. Evidently there will have been occasions when more extensive use took place than was recorded and conversely there will have been bookings that were not taken up, but it does not seem to me that this alters the broad picture.

349. Against this background I turn to consider the argument that the extent of the use by schools and clubs is such that the land cannot properly be registered despite significant use of it by local people.

350. The simplest way of putting this argument is to say that whenever a pitch was used by a school or by a sports club it had exclusive use of that part of the land for that period. Further no-one claiming to walk a dog or fly a kite interrupted the game. Thus in respect of that piece of land for that period, use by local people was interrupted. Because pitches of one sort or another covered almost the entirety of land and because in the relevant period there would have been literally thousands of interruptions, a claim to registration fails because the necessary 20 years use has not been shown.

351. If this were the correct analysis, it is apparent that the application would be bound to fail. However I do not think that it is the correct analysis. The evidence went to show that, subject to occasional issues with dogs⁴⁹, 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. The evidence generally indicated that there was plenty of room elsewhere on the land when it was being used by schools and clubs. More specifically, although none of the parties undertook to analyse for the benefit of the inquiry the complete booking record that F3 produced, and which would have enabled a more precise view to be taken about the matter, it did seem generally to evidence

- the levels of use to which I have spoken above; and

⁴⁹ I consider this aspect in detail when I consider the claim that use has not been *as of right*.

- the fact that there would always be space on the field for local people to use.
352. As regards the sports clubs, it sounds as if members of the public might have been quite interested in watching a game or part of a game from time to time and there is no evidence that they were discouraged from doing so. It seems to me that the situation was one where the use by local people could and 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).
353. I take the point that no local resident would have interrupted schools or club use and no doubt he or she would, if they had thought about it, appreciated their lack of entitlement to do so, but I do not think their mental state is relevant. (I take the point in this context that a local resident would not have interrupted an informal game of football being carried on by other local residents. This would evidently be a matter of courtesy). Perhaps a more relevant question is what would have happened if the School or a sports club turned up to use a pitch and it was then in use by local people on an informal basis. I think that it is obvious that the local people would have vacated the pitch. However a consideration of the legal priority of the use takes us back to the idea of deference (ie that the non-entitled users defer to the entitled), a concept that was rejected by the House of Lords in *R (Lewis) v Redcar BC*.
354. So as stated above and as a matter of fact, it seems to me that school and sports club use co-existed with use by local residents throughout the relevant twenty year period.
355. That does not perhaps entirely resolve the matter. Mr Blohm raises the concern that, if the land were registered as a town or village green, it would fix the entitlement of the school and sports clubs at historic levels. Thus, for example, the school might not be able to use the land on five mornings a week or, perhaps, in the afternoons: at any rate to use the land more intensively. Reasoning back from this being a result unlikely to have been intended by law, it could be argued that the present state of things indicates a state of affairs, indicated as possible by Lord Hope in *R (Lewis) v Redcar BC* where *the two uses cannot sensibly co-exist at all*⁵⁰. Mr Mayer of course argues from the historic position and says that there is no reason to think that, if local people continued to use the land, there would be any difficulty in its use by the School and by clubs (recognising, of course, that the School might not choose to do so).
356. It seems to me that, if the land were registered as a town or village green, local people would have no basis for complaint if the land were used more intensively by the School and by clubs. By complaint I mean legal action claiming that their village green rights had been infringed by the more intensive use. Realistically it seems to me that the sort of use that local people historically have made of the land could continue in the context of increased use by schools and sports clubs, whatever that increased use might be. I say “whatever that increased use might be” recognising that it would not be practically possible for all the land to be continuously used during the hours of daylight. I do not know what the practical maximum would be, but it seems obvious that it would still give space and time for use of the land by local people.

⁵⁰ See paragraph 76 of his speech.

357. It is because of the view that I take set out in paragraph 356 above that, as explained at paragraph 346 above, I do not consider it necessary to seek to reach a conclusion about the precise level of use by the schools and by sports clubs insofar as precision is possible⁵¹.

358. Finally I need to refer to a passage in Gadsden and Cousins on *Commons and Greens* (2nd edition; 2012) which Mr Ground referred me to and relied on. It is as follows:

*Clearly suggests that golf can coexist with other recreational pastimes. Apart from when the golfers are briefly playing on a particular part of the course, players of the game do not actually occupy the Lewis land. There is therefore no problem with recreational use of the land by local residents for much of the time. When, however, land is used for games such as football or cricket, the position is different. Such games are played in a more concentrated area for concentrated periods and cannot properly be played if local residents are trying to use the relevant part of the land at the same time. Where such games are not interrupted by local residents, in practice they will have been excluded from the land for significant periods of time and the deference shown will be of a different kind to the common courtesy shown to the golfers in Lewis. This means that applications to register such land are likely to fail because the use would not be "of such amount and in such manner as would reasonably be regarded as being the assertion of a public right", although the parts of the land from which the inhabitants were not excluded could still be registered.*⁵²

359. As regards the last sentence a footnote adds *Such as the edges of the playing fields and areas between the pitches (although the result would be a very odd green).*

360. It will be seen that I do not agree with this passage. The use of the land by golfers was not regarded by the House of Lords as *de minimis*. Accordingly I do not see how they are to be distinguished from footballers and cricketers, albeit I readily see that the latter occupy the land for longer. Moreover the logic of the writer's position leads him to accept the registration of the land around the pitches even though the pitches themselves are not. This does not seem a sensible outcome particularly since in practical terms it probably would secure what the applicant wanted: thus, in the present case, the School would not be able to fence off the land if the edges and areas between the pitches were registered as a town or village green.

As of right

Introduction

361. As set out at paragraph 335 above, qualifying use must be as of right. This means that, in the Latin phrase, it must be *nec vi, nec clam, nec precario* (not by force, not secretly and not by permission). Use is by force not simply in circumstances where physical force is used to gain entry but also where the use is contentious⁵³. I say more about the meaning of as of right below.

⁵¹ I would, I suppose, be seeking to identify the period within the relevant 20 years when the land was most intensively by schools and clubs and determine what the level of use was at that time.

⁵² See paragraph 14-20.

⁵³ See *Eaton v Swansea Waterworks Co* (1851) 17 QB 267.

362. The objectors argue that the use in the twenty years to the date of the application was not *as of right*, either because it was permitted (*precario*) or because it was contentious (vi).
363. I think it is helpful to begin by considering use in the period before the relevant twenty year period.
364. It is unclear is how this use began. It is unlikely that the Misses Butlin would have permitted or tolerated general public access to the grounds of their house, albeit the part of their land was laid out as a cricket pitch before the Second World War, and perhaps dog walkers would have used that. Thus the use with which I am concerned is likely to have begun both after the Second World War and after the land had been taken into public ownership. 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 door⁵⁴). 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*⁵⁵.
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 use⁵⁶. 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 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.

The Avon County Council notices

⁵⁴ See paragraph 85.

⁵⁵ See paragraph 87.

⁵⁶ There has of course been no suggestion that any time there was signage **permitting** use.

367. To determine what the effect of these notices is in law it is first of all necessary to construe what they say.
368. I think that it is clear that the notice begins (the first 13 words) by forbidding trespass and then continues by giving examples. The examples are just that – a list, which is not comprehensive, of particular forms of trespass that the member of the public reading it should not commit.
369. There is, I consider, an intrinsic ambiguity in the lower text case. The person drafting it wanted to invoke the provisions of section 40 of the Local Government Act 1982. That Act created an offence of causing or permitting nuisance or disturbance to the annoyance of persons who lawfully were using educational premises. Accordingly he referred to the section in his lower case text. But he prefaces it by reference to the exercising of dogs or horses, flying model aeroplanes, parking vehicles or the use of motorcycles. The member of the public does not know whether these five activities are offences against the Act or not. In fact, they are not, as he would have been able to discover by consulting the statute book; nonetheless I think it likely that many members of the public would have concluded the opposite. This however is as may be. The fact that exercising a dog did not constitute an offence under section 40 does not mean that it was not contentious as an example of trespass. Thus the notice is saying that, in particular, the five activities identified in lower case plus causing or permitting nuisance or disturbance are contentious.
370. I recognise that there is an alternative reading, which was urged upon me by Mr Blohm and Mr Ground. They say that the activities identified in the lower case text are the ones which constitute trespass. Thus walking (without a dog) and playing games on the land are not forbidden. Thus some activities are contentious (those identified in lower case text) are contentious and some, not being forbidden, are impliedly permitted. I accept that some local people using the land may have read it in this way. I note the argument but it seems to me incorrect, not giving the words *In particular* their appropriate meaning.
371. If Mr Blohm and Mr Ground were right, Avon County Council would have been doing something quite subtle – forbidding one set of activities and permitting another (particularly walking without dogs and informal recreation not causing a nuisance). There is no evidence that this was its intention, although I accept that the Council might have achieved something which it did not intend. Moreover although some local people may have read it in this sense, I do not regard it as the natural thinking⁵⁷.
372. I do not accept that the notice is ambiguous but it does seem to me that the meaning that I prefer is supported by the context. It seems to me, in the light of H5's evidence, 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 first time granting a limited consent⁵⁸.

⁵⁷ As set out in my record of the evidence, I did hear some evidence of what local people thought that the signs meant. I think this evidence is of limited value because those giving it were conscious of there being an answer which was more favourable to their case than other. They may not have deliberately been trimming in what they said, but the risk of their doing so at least unconsciously was real.

⁵⁸ It may occur to the reader that the signs may have fallen to be construed in other village green cases. I am aware of no such cases in Bristol, but in South Gloucestershire there have been two. In report

The meaning of as right

373. As stated above, qualifying use must be *as of right*. Obviously if those using the land actually do have the right, their use will not be *as of right* but *by right*; the core concept lying behind use which is *as of right* is that it is use by those who behave as if they did have right. If, however, this is the core concept, the phrase has a precise legal definition – use which is *as of right* must be use which is *nec vi nec clam nec precario*. The use of Latin emphasises that this is a concept going back to Roman Law. It translates as not *by force*, *not secretly*, *not by permission*. Of the three limbs of the definition, relevant to consideration of the effect of prohibitory notices of the kind that I have held the Avon County Council signs to be is the first limb: *nec vi* or not *by force*.
374. The primary meaning of access that is *vi* or *by force* is access by physical force e.g. by breaking down a wall or cutting through a fence. However it is sufficient if use is contentious. In *Smith v Brudenell-Bruce*⁵⁹ Pumfrey J defined contentious use as follows:
- It seems to me a user ceases to be 'as of right' if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with a dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either with physical obstruction or by legal action.*
375. It is obvious from this that a notice may make use contentious. This was explained at the highest level and by reference to its origin in Roman Law by Lord Rodger of Earlsferry in *R (Lewis) v Redcar*⁶⁰. In the light of my conclusion as to the meaning of the Avon County Council signs I need to consider whether they have had this effect.
376. Although a notice may make use contentious it has been less clear what may be less clear what is the position if a notice is ignored.
377. In analysing the position, it is helpful to begin by taking the example of an open site which is fenced off with a wire fence. Local people mistakenly consider that they have a right to go on the land, and make a hole in the fence with wire cutters. The first to go through will be taking access by force. It is surely the case that those who in succeeding days use the gap that is created will also be taking access by force. But if we imagine that local people continue to use the gap thereafter and no further challenge issues, it is not so easy to describe their continued use as *by force/contentious*. The obvious analysis is that a challenge was issued, accepted and the landowner has subsequently acquiesced in the continued use: which is intrinsically peaceable. Local people behave as if they have the right.

dated 28 June 2010 an application to register playing fields belonging to Sir Bernard Lovell School, David Ainger construed the signs as a general prohibition of trespass, albeit his conclusion was in respect of a number of signs, of which the Avon County Council sign was one type. In a Report dated 17 October 2008 into an application to register land known as Hoopers Farm Playing Field, Winterbourne, Charles Mynors viewed the sign as being intended generally to deter trespassers.

⁵⁹ [2002] 2 P & CR 4.

⁶⁰ See paragraphs 88 to 90 of his judgment.

378. A similarly analysis may be made if, instead of surrounding the land with a wire fence, the landowner puts up lots of notices saying: *Keep out! It is forbidden to trespass on this land*. Initially access will be by force, but the landowner may be viewed as acquiescing if he takes no further action.
379. There is dicta of high authority which supports this analysis.
380. In *R (Godmanchester Town Council) v Secretary of State for the Environment*⁶¹, the House of Lords had to construe section 31 of the Highways Act 1980. This provides that land may become a highway if it has been used by the public for twenty years. The relevant use has to be *as of right*; moreover the claim will fail if the landowner shows that there was *sufficient evidence that there was no intention ... to dedicate it* ("the proviso"). In his speech, Lord Hoffmann emphasised the difference between use being *as of right* and a landowner being able to satisfy the proviso. He said:
- ... there may be a notice which says "*No right of way. Trespassers will be prosecuted*". Nevertheless, for upwards of 20 years members of the public may have ignored the notice and used the way, openly and apparently in the assertion of a right to do so. Their user will satisfy section 31(1) but the landowner, even on the most objective test, will have satisfied the proviso⁶².
381. By saying that *[t]heir user will have satisfied section 31 (1)*, Lord Hoffmann was saying that that use by the public which ignored the notice was *as of right*.
382. In *R (Beresford) v Sunderland City Council*⁶³, Lord Walker of Gestingthorpe said:
- It has often been pointed out that "as of right" does not mean "of right". It has sometimes been suggested that its meaning is closer to "as if of right" (see for instance Lord Cowie in Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SLT 1035., 1043, approving counsel's formulation). This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who puts up a notice stating "Private Land—Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."*
383. This passage contemplates that a landowner may not be able to argue successfully that use by members of the public which ignores a prohibitory sign is not *as of right*.
384. It is these dicta, in particular, which led me in my Report dated 22 May 2013 to advise the registration authority to conclude that, despite the existence of the Avon County Council signs, use by local people of the land had been *as of right*. As Mr Mayer points out, I recorded at paragraph 70 of that Report *that It seems to me that the present case is a classic one of*

⁶¹ [2008] 1 AC 221.

⁶² See paragraph 24.

⁶³ [2004] 1 AC 889.

acquiescence. This however was before the recent case of *Winterburn v Bennett*, decided by the Court of Appeal⁶⁴

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

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

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

386. I note that in *Winterburn* it might have been argued that use was contentious on the basis of protests by the landowner in addition to the signs. However it is clear that the judgment is on the basis that the signs were sufficient by themselves. I also note that David Richards LJ did not refer to either the *Godmanchester* or *Sunderland* cases. However although the position is that the Court of Appeal may not have had drawn to its attention relevant authority⁶⁵, that authority represents *obiter dicta* and not *ratio decidendi*⁶⁶. Thus it seems to me that the basis does not exist for Bristol City Council to do other than loyally follow the judgment of the Court of Appeal.

387. Thus the position is that in principle in the present case the signs may render the use of the land by local people contentious and not as of right. I say in principle because the further question arises as to whether the Avon County Council signs were sufficient to render use of the land contentious. I consider this on the basis that there were signs at entrance points [1], [3] and [7]. I consider it unlikely that there was a further Avon County Council sign of the same type as the other on the beech tree. F3 clearly describes another sort of notice. I think also consider it unlikely that a metal Avon County Council, clearly designed to be installed on

⁶⁴ [2016] EWCA Civ 482.

⁶⁵ I cannot tell from the transcript what authorities were referred to it.

⁶⁶ It was not necessary for what Lord Hoffmann and Lord Walker said necessarily to be right for the House of Lords in each case to reach the decision that it did.

two posts, was nailed to a tree. I think that H5's recollection was faulty in that he recalled installing such a notice in such a way. It may be that there the sign that F3 recalled was an Avon County Council sign (perhaps of the same vintage as the illegible one referred to at paragraph 307 above) and on which he recalled the word "Private". I think however it is not possible to reach any firm conclusion about this sign on the evidence before the inquiry. Further I do not think that it would be appropriate to work on the basis that there were two additional Avon County Council signs at the entrance to Stoke Lodge. This is because, as I have indicated I do not think that H5's recollection is altogether reliable; I do wonder if there would have been two such signs. The entrance has been comparatively recently (since the application) been reconfigured and certainly no further sign is extant or is physically evidenced. There was no other evidence led before me of a sign or sign at this point.

388. I should refer at this stage to another point that H5 made, namely to the four files that were formerly held by the Parks Department but which have since been destroyed. I can readily accept that such files did exist. What is less clear is what they would have said. In the absence of the material contained in the missing files, I do not think that knowledge of their existence carries the matter further.
389. I consider that the three Avon County Council signs were at the time of their erection as a matter of fact sufficient to make the use of the land contentious. I bear in mind that no notices were erected at points [4] and [5]. However many people would necessarily have walked passed the signs at access points [1] and [3], and of course quite a few did. Moreover I have accepted that local people have gone all over the land. The corollary of this is that they would have seen one of the signs. I appreciate that not everyone may have "registered" the signs but given that there are of reasonable size and in prominent positions on the land that is not the fault of Avon County Council. I have note that of the evidence questionnaires submitted with the application, half referred to the existence of signs. I think that the other half will not generally be people who were not aware of the signs because they never saw them (because, for example, they used only access points [4] and [5]) but people who never "registered" the signs. Thus I think the reasonable landowner would have considered that he had done enough to render use contentious i.e. by posting notices at what he would perceive to be the principal entrances to the site. There was a suggestion that they may from time to time have been obscured by vegetation but as of my site visits they were clearly visible and there is no reason to think that they were not clearly visible at all times throughout the relevant period⁶⁷.
390. The other point that I need to consider is the argument that the signs were obsolete following the abolition of Avon County Council. I think that there are two points here. First, I think that if someone comes across an old and decrepit sign saying "Trespassers Keep Out" he might from all the circumstances consider that it was of no continuing application. Second, although the fact that a sign says "Avon County Council" rather than "Bristol City Council" does not mean that the day after Bristol City Council takes over from Avon County Council the notice ceases to have any effect, someone might well wonder, say, ten years after Avon County Council ceased to exist whether any particular sign that it had put up had continuing effect. These may be interesting points but it seems to me that they do not fall for determination in the present case. The two Avon County Council signs that are still in place, though clearly not

⁶⁷ F3 produced a photograph dating from 2003 which showed it to be clearly visible.

new, are not decrepit; and the one that was at access point [12], although subject to some graffiti before it was removed, was similarly not decrepit as shown in the photograph dating from 2007. Further, at the beginning of the twenty year period, Avon County Council was still in existence.

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.
392. I need to recognise that if the registration authority accept my advice as set out in paragraph 391 above, their decision might be challenged on the basis that *Winterburn* is wrong and that the use in this case was as of right. Accordingly it is appropriate for me to go on to consider whether it is possible that use of the land in the relevant twenty year period has been contentious not because of the signs alone but **also** because of other actions of the landowner or those acting on his behalf.
393. It will be recalled that there has always been open access to the land from access points [3] and [5] and, when the gates were not locked, from access point [1]. Access may have been impeded for a brief period by a tree trunk at access point [4] but I do not think that much significance should be attached to this⁶⁸; similarly to the fact that the gap at access point [9] may have been repaired at some point – most people would have been unaware of this. If an argument is to be made it must be that dog walkers were warned off with sufficient frequency to make it clear that, in combination with the signs, use of the land was being rendered contentious. I put it this way because there is no evidence of people other than dog walkers being warned off in the relevant period; and it will be recalled that it was the argument of Mr Blohm and Mr Ground that use by walkers and those using the land for informal recreation (without dogs) was permitted. (They would not have been able to make this argument if the non-dog walkers had been warned off). The picture I derive from the evidence is of anti-social dog walkers being warned off - and one might expect this to have happened where anti-social behaviour happened in the sight of Bristol City Council or University employees. Specifically H5 spoke of anti-social dog walkers, which had culminated in an assault on a colleague. But it does not seem to have happened very often; and it must have happened with less frequency if the standing instruction after the assault was not to challenge dog walkers. That this is so is borne out by the fact that those who gave oral evidence were generally unaware of any such challenges – and that evidence is congruent with the written evidence. I note that B2 accepted that there may have been some friction vis a vis the dog walkers; and for example among the Applicant's 58 additional statements is that of T1 who spoke of having used the land for at least 19 years for a variety of recreational uses

... despite being told by some annoying little busybody that I was trespassing as the land belonged to Avon County Council (and this some 10 years after Avon had been abolished).

⁶⁸ It better grounds an argument that use was permissive. I consider this further below (see paragraph 412).

394. This is apparently one incident in about 2005. However some friction and the occasional incident as recorded above do not in my judgment amount to the use of the land being contentious, seen in the overall context of toleration of dog walkers.
395. The instruction not to challenge may not have survived the University taking over the land, but it is clear from F3's evidence that although there may have been some challenges, they were not very frequent. The evidence that **is** at odds with this conclusion is the statement of R1. It is in fact, to a degree, at odds with some of the rest of the objectors' evidence which "talked down" the extent of the dog walking. However this may be, I did not have the benefit of oral evidence from R1, which Mr Mayer would have had the opportunity to cross examine. In these circumstances I cannot place weight on it to significantly modify the view that I have otherwise formed.
396. Because I think that the warnings off were not very frequent and because they were principally aimed at one category of user – anti-social dog walkers – I consider that they did not have the effect of making the use of the land generally contentious. Thus on the basis that the signs were not sufficient by themselves to render use of the land contentious, I do not think that the objectors are able to rely on the signs **plus** the warnings off as founding an argument that the use was contentious in the relevant period.
397. There is one other matter that might conceivably alter the position, which is the erection of the Bristol City Council sign in 2009. It seems to me that the sign is, to a degree, ambiguous. I accept, of course, that I have to construe it in a common sense way and in its context.⁶⁹ It is indeed from the context that the ambiguity arises – placed as it is on the boundary between the grounds of Stoke Lodge House and the playing fields. Thus it seems to me that a reader may not be sure whether it relates to the grounds of the house or the playing fields. The possibility of confusion is enhanced if the sign being mounted on a single pole, it was possible for it to be rotated so that it will not always have been facing those leaving the grounds of Stoke Lodge House. However, on balance, I think that the reasonable landowner would consider that he had put up a sign that would be construed by local people as applying to the playing fields and not the grounds of Stoke Lodge. Thus someone considering the sign, even if it had been re-orientated, would consider that it was likely to apply to the playing fields. That, in its context (whatever its orientation may have been) it was taken as applying to the playing fields by at least one person emerges from the letter set out at paragraph 22 above: the lady must have been referring to the playing fields because she refers to the land on which she walks as being a pleasant and open space, which is not an apt phrase to describe the grounds of Stoke Lodge⁷⁰.
398. Accordingly the point I need to consider is whether, together, the facts of
- the existence of the Avon County Council signs at the beginning of the 20 year period and thereafter until the sign at access point [12] was replaced by the Bristol City Council sign; and

⁶⁹ See *Betterment Properties (Weymouth) Ltd v Dorset County Council and Taylor* [2010] EWHC 3045 (Ch) per Morgan J at paragraph 116.

⁷⁰ Following the reply to her letter set out at paragraph 23 above, this lady's use will have been permissive; but that will not have been the general position.

Original Names Redacted for Publication Purposes

- the presence of the Bristol City Council sign thereafter

are sufficient to have made use of the land contentious within the relevant twenty year period.

399. This is on the basis that, by virtue of the Avon County Council signs, at the beginning of the period local people would have appreciated that they were trespassers but would have considered that the landowner was acquiescing in their use.
400. 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 accept that a significant number of users will have seen this sign. Nonetheless a significant number would not have seen it. And someone who read the sign and pondered the situation might have wondered why one Avon sign was being replaced and not the others⁷². 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.
401. If I were wrong about this, it would mean that use which is as of right ceased some time after March 2009 and that qualifying use did not continue to the time of the application in accordance with section 15 (2). However, Mr Mayer submits that this does not matter. He says that the land is registrable on the basis of section 15 (3). This needs a little unpicking.
402. Section 15 (2) provides that qualifying use has to continue down to the date of the application.
403. Section 15 (3) in its current form and as set out at paragraph 335 above provides that, in the alternative, qualifying use does not have to continue down to the time of the application but down to a date which may not be more than one year before the date of the application.
404. This is intended to deal with the situation where a landowner gets wind of an application and puts up notices, although it applies to any situation where qualifying use ceases within the period of a year from the date of the application.
405. In any particular case an applicant may not know eg whether a notice has been effective or not. Accordingly in a case where it is shown that a notice was so effective within the one year period, it would seem to be within the intention of the legislature to allow registration if such a notice has been effective, but an applicant has “called it wrong” and applied under section 15 (2) rather than section 15 (3). This is so even though by the time the matter falls to be considered, the time for making a fresh application under section 15 (3) has long passed.
406. In the present case, this argument of itself will not avail Mr Mayer. On the basis that qualifying use ceased at sometime in 2009 after 26 March 2009, that cessation will have been less than 2 years before the date of the application (7 March 2011) but more than one year

⁷¹ It may be noted that H4’s recollection was that he did intend to replace all the signs.

⁷² It is tempting in consideration of the sign to take into account the fact that what the City Council really wanted to do was to **permit** people to use the land, albeit making sure that they acquired no rights (see paragraphs 22 and 23 above). But I think the matter has to be looked at objectively.

before. On the basis that the law on 7 March 2011 was the same as it is now and that qualifying use ceased in 2009 after 26 March 2009, the application would have been out of time.

407. However the law was not then the same. Before it was amended by the Growth and Infrastructure Act 2013, section 15 (3) provided for a two year grace period. So if the applicant had called it differently on 7 March 2011 and applied under section 15 (3) and it was subsequently held that use had ceased in 2009 after 26 March 2009, he would have been in time⁷³.
408. I think that paragraph 407 above does accurately state the law. Further, I consider that if registration is permissible on the basis of section 15 (3) where an application is made on the basis of section 15 (2), it is permissible on the basis of section 15 (3) as it applied at the date of the application and not at the date that registration is being considered. In effect I consider that the applicant had a vested right to have the application considered on the substantive law as stood at the date of the application: see paragraph 122 of the speech of Lord Rodger of Earlsferry in *Oxfordshire County Council v Oxford City Council and Robinson*⁷⁴. On this basis, the erection of the Bristol City Council sign in 2009 can have no bearing on a decision to register the land, because if use which is as of right ceased in 2009, the land would still be registrable on the basis of section 15 (3) rather than 15 (2)⁷⁵.
409. There two further discrete points on as of right.
410. On 26 July 2005 there was a meeting between a body called the Friends of Stoke Lodge, the University of Bristol and Bristol City Council. Among those present was Mr Mayer. The minutes record:

The Council did not categorise Stoke Lodge as a public park and indeed there were signs at some (not all) the accesses confirming that it was a sports site. It did not advertise the site as a public park, did not direct outdoor event promoters to it. However it permitted public use provided it did not impede sports use or damage the facilities ...

⁷³ I do not think that it can be suggested that the amendment to section 15 (3) was retrospective, so that an application which was made within time but relying on the two year grace period might have been invalidated because it was outwith the new one year period. This is certainly not the view of DEFRA which considered that the amendment applied to applications made after the application came into force: see paragraph 3 of *Guidance to Commons Registration Authorities in England on sections 15A to 15C of the Commons Act 2006* (February 2014).

⁷⁴ And see also section 16 of the Interpretation Act 1978. Of course Parliament may have provided otherwise, but it did not. I do not think that it is necessary to consider the impact of the Human Rights Act 1998, which might otherwise impact on the situation.

⁷⁵ The relevant 20 year period would be 1989 – 2009 rather than 1991 to 2011 but there is no suggestion that this would make any difference.

411. The signs of course were, as I have held, making use of the site contentious. The statement seems to me to be recording the Council's acquiescence in use of the site, not recording a permission granted which now (apparently for the first time) was being communicated⁷⁶.
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 unaware⁷⁷ 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 permission⁷⁸. Note that the issue of any inference of permission arising from the positioning of dog litter bins on or near the land does not arise because these bins were installed after the application for registration of the land as a town or village green.

Statutory incompatibility

413. I should begin by setting out the relevant statutory powers and duties:
414. A local authority is under a duty to secure that there sufficient schools for providing secondary education are available for their area. For this purpose, a local authority may establish and maintain secondary schools. These powers are now contained in the Education Act 1996; before 1996 they were contained in the Education Act 1944⁷⁹.
415. By section 507A of the Education Act 1996
- (1) A local authority in England must secure that the facilities for primary and secondary education provided for their area include adequate facilities for recreation and social and physical training for children who have not attained the age of 13.*
- (2) For the purposes of subsection (1) a local authority may–*
- (a) establish, maintain and manage, or assist the establishment, maintenance and management of–*
- (i) camps, holiday classes, playing fields, play centres, and*

⁷⁶ The idea that there was a permission is not of course consistent with the Ideas and Options paper referred to at paragraph 25 above.

⁷⁷ And in particular, that the University were involved in moving the tree.

⁷⁸ A simple resolution of the situation would be to say that there was an implied consent arising from the situation at access point [4] and more generally before the erection of the signs, and which was terminated upon the erection of the signs. As set out at paragraph 365 above, however, I do not think that this is the correct analysis.

⁷⁹ See sections 14 and 16 of the 1996 Act; and sections 8 and 9 of the 1944 Act.

(ii) other places, including playgrounds, gymnasiums and swimming baths not appropriated to any school or other educational institution, at which facilities for recreation and social and physical training are available for persons receiving primary or secondary education;
(b) organise games, expeditions and other activities for such persons; and
(c) defray, or contribute towards, the expenses of such games, expeditions and other activities.

416. This relates to children who have not attained the age of 13; section 507B makes similar provision in respect of qualifying young persons between 13 and 20.
417. By virtue of section 120 of the Local Government Act 1972, a local authority can acquire land by agreement for the purposes of any of its functions *under this or any other enactment* as well as, more generally, *for the benefit, improvement or development of their area*. These functions include its functions under the Education Act 1996. By section 121 a local authority is authorised to acquire land compulsorily for a number of purpose for which it is authorised to acquire land, which includes for the purpose of its functions under the Education Act 1996. By section 122, a local authority may appropriate land from one purpose to another⁸⁰.
418. As regards the statutory duty of an Academy to provide outdoor space, by section 94 of the Education and Skills Act 2008, the Secretary of State may by regulations prescribe standards for independent educational institutions, of which academies (specific provision for which is contained in the Academies Act 2010) are one. By regulation 3 of the Education (Independent School Standards) Regulations 2014 (SI 2014 No 3283), the relevant standard is provided by paragraph 29 to Schedule 1 of the Regulations:
- (1) The standard in this paragraph is met if the proprietor ensures that suitable outdoor space is provided in order to enable—*
- (a) physical education to be provided to pupils in accordance with the school curriculum; and*
(b) pupils to play outside.
419. In *R (Newhaven Port and Properties Limited) v East Sussex County Council*⁸¹, the Supreme Court held that land of a port held for statutory purposes by a statutory port undertaker was not registrable as a town or village green because those statutory purposes which were incompatible with its use as a town or village green. Evidently the principle may be applicable in respect of the land of other statutory bodies⁸². What however is not clear is the application of the principle to the land of local authorities, which are all statutory bodies.

⁸⁰ In this case the appropriation of part of land from temporary housing to education (see paragraph 17 above) would have been under the predecessor of section 122, namely section 163 of the Local Government Act 1933.

⁸¹ [2015] AC 1547 (SC).

⁸² As will be seen, there is now a decided case where it has been applied.

420. It will be helpful to begin by considering the judgment of Lord Neuberger and Lord Reed, which was the majority view⁸³.
421. At paragraph 76 they explain that there is nothing express in the Commons Act 2006 that restricts the operation of section 15 in respect of the land of a statutory undertaker.
422. At paragraphs 78 to 80 they consider the English law of dedication and prescription. In English law, for a public highway or private easement to be established by long user, the general law is that the owner needs to have capacity to create such a right. If the owner of land which others wish to register as a town or village green does not have to have capacity to create such a right, it cannot come into being. It is within this context that the question of statutory incompatibility has been addressed in the English law of public highways and easements. Thus it was not of direct assistance in seeking to ascertain whether statutory incompatibility might arise as an issue in circumstances where, as with section 15, the establishment of the rights did not depend upon the capacity of the relevant landowner to create those rights.
423. At paragraphs 81 to 90, they consider the position as to the creation of highways and easements in Scots law. Here it was arguable that the true position was that although capacity was not generally relevant, nonetheless a highway or easement could not come into being by reference to long user if it was over the land of a statutory authority and incompatible with the powers of that statutory authority.
424. At paragraph 91, they reach a conclusion. The law relating to the English and Scottish law of highways is only of relevance by analogy. They go on to say: *It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded upon would be incompatible with those purposes.* There was an Irish case to similar effect (*McEvoy v Great Northern Railway*⁸⁴).
425. Against this background, they found that there was an incompatibility between registration of a town or village green under the 2006 Act and the statutory regime which conferred harbour powers on the landowner to operate a working port. The heart of the judgment on this aspect of the case is set out at paragraphs 92 to 96:

92 In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based on incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does

⁸³ Lord Carnwath expressed a different view of the matter.

⁸⁴ [1900] 2 IR 325.

not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.

*93 The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: “does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?” In our view it does not. **Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes ...***

94 There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates: section 33 of the 1847 Clauses Act. NPP is obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore: section 57 of the 1878 Newhaven Act , and articles 10 and 11 of the 1991 Newhaven Order

...

96 In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence (emphasis supplied⁸⁵).

426. It is clear that what Lord Neuberger and Lord Reed are doing in their judgment is determining the position of a statutory undertaker. Moreover their words might suggest that the principle of statutory incompatibility applies solely to a statutory undertaker. I do not think that the principle is so limited, both because I cannot see why it should be so limited and also because Lords Neuberger and Reed seemed to recognise its wider application. This is apparent from paragraphs 98 – 101 of the judgment. The judgment was responding to the objection to the principle of statutory incompatibility raised by the registration authority, namely that it had never been applied to land held by local authorities. Lord Neuberger and Lord Reed said:

98 The County Council referred to several cases which supported the view that land held by public bodies could be registered as town or village greens. In our view they can readily be distinguished from this case. In New Windsor Corpn v Mellor [1975] Ch 380, the Court of

⁸⁵ Mr Blohm in his written submissions on behalf of Bristol City Council as landowner says that this is the ratio of the case on the statutory incompatibility point. I agree with him.

Appeal was concerned with the registration of Bachelors' Acre, a grassed area of land in New Windsor, as a customary town or village green under the Commons Registration Act 1965. The appeal centred on whether the evidence had established a relevant customary right. While the land had long been in the ownership of the local council and its predecessors, it was not acquired and held for a specific statutory purpose. It had been used for archery in mediaeval times and had been leased for grazing subject to the recreational rights of the inhabitants. In recent times it had been used as a sports ground and more recently it was used as to half as a car park and half as a school playground. No question of statutory incompatibility arose.

99 *The Oxfordshire*⁸⁶ case concerned the Trap Grounds, which were nine acres of undeveloped land in north Oxford comprising scrubland and reed beds. The land was, as Lord Hoffmann stated (in para 2) “not idyllic”. More significantly, while the city council owned the land and wanted to use a strip on the margin of it to create an access road to a new school and to use a significant part of the land for a housing development, there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility.

100 Thirdly, the County Council referred to *R (Lewis) v Redcar and Cleveland Borough Council* (No 2) [2010] 2 AC 70, which concerned land at Redcar owned by a local authority which had formerly been leased to the Cleveland golf club as part of a links course but which local residents also used for informal recreation. The council proposed to redevelop the land in partnership with a house-building company as part of a coastal regeneration project involving a residential and leisure development. Again, there was no question of any statutory incompatibility. It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green.

101 *In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour (emphasis supplied).*

427. In considering this passage, it is helpful to begin with the passage that I have emphasised. Clearly Lord Neuberger and Lord Reed envisage that there is some land of a local authority which could properly be registrable as a town or village green. Potentially some help is afforded in understanding what land may be registrable by looking at the three cases that they considered.

428. The key passage in their consideration of *New Windsor Corporation v Mellor* is as follows:

⁸⁶ I.e. *Oxfordshire County Council v Oxford City Council and Robinson* [2006] 2 AC 674.

While the land had long been in the ownership of the local council and its predecessors, it was not acquired and held for a specific statutory purpose. It had been used for archery in mediaeval times and had been leased for grazing subject to the recreational rights of the inhabitants. In recent times it had been used as a sports ground and more recently it was used as to half as a car park and half as a school playground. No question of statutory incompatibility arose.

429. New Windsor Corporation was an historic local authority which did not owe its creation to statute. As Lord Denning put it *From time immemorial it has belonged to the Mayor, Bailiffs and Burgesses*⁸⁷. As Lord Neuberger explained, it had been used for archery and was subject to recreational rights. It seems clear that as well as no question of statutory incompatibility arising, no question of statutory incompatibility was capable of arising.
430. As regards the Trap Grounds case, although many points were argued there was indeed, as Lord Neuberger and Lord Reed put it *no suggestion that [the City Council] had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility*. Obviously if the suggestion was not made, there was no possibility of the Courts considering it. Nonetheless Lord Neuberger and Lord Reed were aware that the City Council wanted to develop a significant part of the land for housing purposes and they do not flag the possibility that this might properly found an argument based on statutory incompatibility which one might have expected them to do had they thought that such a possibility might have arisen. One cannot know but one suspects that why they felt able to deal with the case so comparatively is the absence of suggestion that it had been acquired for a specific statutory purpose that might give rise to statutory incompatibility. As far as I am aware there is nothing in the reports of the judgments in the Trap Grounds case at first instance, in the Court of Appeal and in the Supreme Court which make it clear on what basis the land was acquired. It is nonetheless clear from the Inspector's Report that the land was acquired for housing. It seems to me that, on the face of it, if the principle of statutory incompatibility is to have application in relation to land held by local authorities, it should have applied in that case.
431. *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* is potentially more helpful in identifying a category of land held by a local authority that may properly be registrable. The land in question was a local authority golf course. It was not argued that local people had been permitted to go on the golf course⁸⁸. The Supreme Court held that golf course use was compatible with the non-permitted use by local people in the sense that the registration was able to proceed on the basis that the golfers would be able to continue playing golf. In fact by the time the case was considered the local authority wanted to develop it for housing, as Lords Neuberger and Reed were aware. So the Supreme Court evidently did not regard this subsequently arising statutory incompatibility as preventing registration.

⁸⁷ An examination of the decision in the case of the Chief Commons Commissioner shows that they derived title from a nineteenth century enclosure award (see p5) but they had originally owned it long before that.

⁸⁸ Mr Blohm made this point.

432. In the light of the above it seems to me that is possible to argue that the concept of statutory incompatibility applies to all land of local authorities. This would be because in all cases it might be the case that future use and development could be incompatible with the current use. Even where land was held for the purposes of public open space, it might become appropriate in the future to build on part of it⁸⁹. Nonetheless this analysis does not seem to me to be plausible in the light of what Lords Neuberger and Lord Reed said in *Newhaven*. I think that the argument could only work on the basis that all that they were saying about the three cases that they considered was that statutory incompatibility was not argued in those cases and that for that reason they could not provide any precedent. However if they had thought that the concept of statutory incompatibility had a very general application to the land of local authorities one would have expected them to say so.
433. A contrasting view would be that the concept of statutory incompatibility had no application to the land of local authorities, being limited to the land of statutory undertakers. It seems to me that this view is also implausible since I cannot see why it should be so limited.
434. In this connection I think it is useful to have regard to paragraph 94 (and the following paragraphs) of the *Newhaven* decision set out above. As I read it, Lords Neuberger and Lord Reed were not saying that, where one is considering the land of a statutory undertaker, the concept of statutory incompatibility **necessarily** applies (ie as matter of law) but that, where one is considering an entity such as a port or harbour it obvious that it applies. If this is the correct interpretation then it is obvious that the concept is not limited to statutory undertakers but might apply to other statutory bodies, such as local authorities. Further, whether it does apply or nor depends on the facts (supplied in the *Newhaven* case by an examination of the statutory powers). The position may not be as obvious in the case of a local authority as it is in the case of a statutory undertaker (or the particular statutory undertaker considered in *Newhaven*). I am confident that this nuanced view (as opposed to the “extreme” positions articulated in paragraphs 23 and 24 above) is the correct one.
435. Developing this theme, it seems to me that if there is in practice nothing that is consistent with its statutory purposes that a statutory holder of land can do with that land if it subject to rights of recreation by the public, the principle of statutory incompatibility applies. If on the other hand, there is something that he can do with the land, the principle will not apply.
436. In the absence of authority, I would have thought that the test is whether there is any such incompatibility at the date of the application. I appreciate that it could be argued that the test is whether it is reasonably foreseeable at the date of the application (or immediately before) that there might be statutory incompatibility; and also that the date for assessing incompatibility is the date the application falls to be determined, not when it is made. However the difficulty with the first proposition is that it is always foreseeable that in some wise that the land might be used in a way that is incompatible with registration – in this case, for example, as a school. As regards the date for assessing incompatibility being the date of

⁸⁹ Land held as public open space might be an exception to the principle. It would not in any event be registrable because use by the public would be *by right* and not *as of right*.

determination, this would appear to enable the local authority so to organise matters that there certainly is a statutory incompatibility at the relevant time, even though there was not at the date of the application⁹⁰. My conclusion would accordingly be that, on the approach set out at paragraph 435 above, at the date of the application (7 March 2011) there was no incompatibility because the land was being used both by the school and by local people for lawful sports and pastimes.

437. The proposition that in these circumstances there is no statutory incompatibility to preclude registration derives support for the judgment of Ouseley J in *Lancashire County Council v Secretary of State*⁹¹. In that case, the decision maker had held that land was not held by Lancaster City Council for educational purposes, and Ouseley J held that she was entitled so to hold. On the basis that the land was held for educational purposes, he held that the key question was

Can [the education authority] carry out its educational functions even if the public has the right to use [the land registered as a town or village green] for recreational purposes?

438. He said that the answer would be *Yes*, even if the education authority could make no educational use of the land at all.

439. *R (NHS Property Services) v Surrey County Council*⁹² concerned land potentially registrable as a town or village green that was owned by a statutory body, NHS Property Services Limited, and which was held land for health service purposes. Gilbert J pointed out

*No-one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use*⁹³.

440. Accordingly he held that the principle of statutory incompatibility applied and that the land was not registrable as a town or village green.

⁹⁰ In *Oxfordshire County Council v Oxford City Council and Robinson*, Lord Hoffmann rejected an argument that would have allowed (on the law as it then was) an application for registration of a town or village green to be defeated by posting signs making use contentious after the date of the application and before its determination on the basis that Parliament could not have intended the Act to work in that way.

⁹¹ [2016] EWHC 1238 (Admin).

⁹² [2016] 4 WLR 130. Judgment in this case was handed down on the last day of the inquiry (13 July 2016), so the parties did not have the opportunity then to address me on it. I do not take the view, as will be seen, that, it materially alters the approach to be taken in a case of the present kind. Accordingly I have not felt it necessary to seek the parties further representations on the matter; and none of them have themselves sought to make representations to me about it.

⁹³ See paragraph 134 of his judgment.

441. This is a different approach to that adopted by Ouseley J. However Gilbert J did consider the position as regards land for educational use. It will be helpful to set out paragraph of his judgment immediately following that set out at paragraph 439 above:

135 Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used. By contrast, it is easy to think of functions within the purview of education, whereby land is set aside for recreation. Indeed, there is a specific statutory duty to provide recreational facilities, which may include playing fields, and other land, for recreation, the playing of games, and camping, among other activities—see section 507A Education Act 1996.

442. Thus Gilbert J was specifically saying that land held for educational purposes under section 507A of the Education Act 1996 may be registrable: thus, of course, explaining why in his view the principle of statutory incompatibility would not apply to the land in the *Lancashire* case. He also envisaged that land held by a local authority under “general” powers would be registrable i.e. where it was held under section 122 of the Local Government Act 1972 for the benefit of its area.

443. It is possible that Gilbert J might also have taken the view that in some circumstances land the recreational use of which **might** lead to a conflict with the particular purpose to which the statutory body indented to devote the land could lead to the principle applying but, if so, he did not say so; and if he had said this it would seem to bring his approach into conflict with that of Ouseley J. In fact, he suggests that Ouseley J’s judgment was correct⁹⁴.

444. These are difficult matters, but it seems to me to that on the basis that the registration authority looks at the matter at the date of the application, the principle of statutory incompatibility does not apply whether one adopts the approach of Ouseley J or Gilbert J. The matter is less clear if the principle were to apply at the date the registration authority come to consider the application.

445. It seems to me that the approach of Gilbert J emphasises the basis of the principle as one of statutory construction⁹⁵. I get the impression that he considered that it was simply a question of looking at the relevant statutory powers and duties and considering their compatibility with registration as they stand. If this be correct the date on which one examined statutory incompatibility would only matter if the statutory use changed after the application. In the present case it is true that the land has vested in an Academy since the application, but the nature of the powers and duties of the Academy are similar to those of Bristol City Council as education authority before it. Accordingly I do not think that applying his approach, a different conclusion is reached if one looks to the date of the determination of the application. It seems to me that if the Academy could demonstrate that they could not provide the physical education which they were required to provide without using the land in a way incompatible

⁹⁴ See paragraph 130 of his judgment.

⁹⁵ See paragraphs 128 and 130 of his judgment.

with recreational use by local people (ie by fencing it off), Ouseley J contemplates that the principle of statutory incompatibility might apply⁹⁶. At the moment of course they **do** provide such physical education (at the Combe Dingle Sports Complex). B4 says that the situation is unsustainable, pointing to the cost; and of course there can be no guarantee of the Combe Dingle facilities continuing to be available. I am not discounting that evidence if I say that although it seems to me that it is possible that the School might not be able to carry on with its current arrangements at Coombe Dingle, it is difficult to see that it would not be able to make some alternative arrangements if it became necessary. Narrowly, I think that the position **as of now** is that there is no statutory incompatibility as envisaged by Ouseley J; and it seems to me wrong in principle that future incompatibility might be sufficient to hold that the principle of statutory incompatibility applies in the present case.

446. Mr Ground advanced a more sophisticated argument on statutory incompatibility.

447. Under the Academies Act 2010, an Academy cannot dispose of a playing field without the consent of the Secretary of State. The Secretary of State has indicated that he is unlikely to agree to such a disposition if it would leave the school unable to meet its outdoor space guidelines⁹⁷ Registration of a village green is, it said, a disposal for the purpose of the legislation⁹⁸.

448. If the Secretary of State issued a direction that the disposal be not made it

... would place Cotham [School] in the impossible situation of being required to comply with a number of incompatible duties: a duty to permit unfettered access to the inhabitants of the neighbourhood, a duty not to cease using the land for academy purposes and a duty to safeguard its pupils. The specific statutory duty in relation to this land could not be complied with if there was TVG registration because disposal would not be able to comply with the mechanisms of the Academies Act 2010. The playing fields would be lost to Academy purposes and the control of the Secretary of State would be taken away by the TVG registration.

449. I have difficulty in following this argument. I do in fact doubt that registration of a TVG is a disposal for the purpose of the relevant provision. **If** it does the Secretary of State will have to make decide whether or not to consent. This is as may be; I am not concerned with that situation but with whether the land is not registrable before that stage is reached on the basis of the principle of statutory incompatibility. If there is no such incompatibility on the law as enunciated in the *Newhaven* case, *Lancashire* and *Surrey* it does not seem to me that the position is changed because of the need for the Secretary of State's consent. If I do consider the position the Secretary of State did decline to give his consent, it surely gives rise to a

⁹⁶ See paragraph 81 of his judgment.

⁹⁷ See paragraph 17 of Disposal or change of use of playing field and school land. More specifically, he will be unlikely to grant his consent if the result will be failure to meet the outdoor space guidelines. That would be the case here – see the evidence of

⁹⁸ By paragraph 17 (8) of Schedule 1 to the Academies Act 2010 references to a disposal of land include references to a change of use of the land in cases where the land is no longer to be used for the purposes of an Academy.

situation where, upon that decision, registration becomes void (and not before). It seems to me that if there be merit in the argument, it is one to be made after registration.

450. Mr Blohm put a similar point to me relying on the statutory restriction on disposal of playing fields contained not in the Academies Act 2010 but under section 77 of the School Standards and Framework Act 1998 (which is in similar terms to the relevant provision in the Academies Act 2010). The Act of 1998 would apply if the matter of statutory incompatibility falls to be considered at the date of the application. He tests the matter by asking the question *If it was the intention of Parliament that a local authority could not apply to create a TVG over land used as a school sports field without the approval of the Secretary of State, can Parliament have intended that long use by the public (without the approval of the Secretary of State) can create a TVG?* He answers this question in the negative and thus argues for statutory incompatibility. However, trying to follow this somewhat convoluted argument, it does not seem to me that voluntary registration of a village green is necessarily to be equated with involuntary registration on the basis of long user or that Parliament should necessarily consider that the Secretary of State would necessarily consider that the registration of a village green over a school playing field would be unacceptable if, in fact, such registration was compatible at the relevant time with use by the school.
451. Standing back, it seems to me that, if the correct time to look at the matter is the date of the application, the proposition that there is statutory incompatibility in the present case lacks conviction because at that time both the school and local people were using the land in a way that was not incompatible. If the correct time to look at the matter is now – i.e. the time at which a decision on the application falls to be made – I think it has some force because registration will evidently preclude the School from using the land for physical education. Accordingly, I think that the date at which the issue falls to be examined may be key to this issue. I consider that a Court would hold that the relevant date is the date of the application and therefore, however the matter ultimately be rationalised, I think that the argument on statutory incompatibility would fail.
452. I should add for completeness two matters:
- (i) if the correct time for looking at statutory incompatibility is the date of the determination, it may be relevant to have in mind that the land was acquired by Cotham School subject to any town or village green rights that there may have been over it;
 - (ii) permission to appeal was granted in the *Surrey* case and is being sought in the *Lancashire* case so there is likely to be some further authority on statutory incompatibility in due course.

Neighbourhood and locality

453. When I considered this aspect of the matter in my Report dated 22 May 2013, I said:

In Oxfordshire County Council v Oxford City Council and Robinson, Lord Hoffmann said that there could be reliance upon a neighbourhood within two localities⁹⁹. In the present case the application site is within the Stoke Bishop Polling District, but use comes not just from that

⁹⁹ See paragraph 27 of his speech.

*polling district but the Westbury-on-Trym Polling District and Kingsweston Polling District. In R (Mann) v Somerset County Council, HH Judge Robert Owen QC held that two polling districts were capable of being localities for the purpose of section 15. In his application Mr Mayer identified with a red line an area within the three polling districts which he said identified where the great majority of users lived; he described this area as the locality on which he relied. It seems to me that in fact it represents the **neighbourhood** within the three identified localities on which he relies. As such, in R (Cheltenham Builders) v South Gloucestershire Council¹⁰⁰, Sullivan J said that to be a neighbourhood an area had to have a sufficient degree of cohesiveness¹⁰¹. It is not suggested by the objectors that the neighbourhood identified by Mr Mayer lacks that necessary degree of cohesiveness and the objectors do not contest Mr Mayer's application on this basis or of any failure to demonstrate a relevant locality or neighbourhood within a locality. I do not think that it is necessary for the registration authority – or for me on its behalf - to be astute to take any point on whether use has been by the inhabitants of a qualifying locality. The area identified by Mr Mayer evidently has some geographical coherence being drawn in relation to main roads and other natural boundaries and the fact that it might not be easy to determine the precise boundary of the neighbourhood would not be an objection to it¹⁰². It is worth observing that when points are taken by objectors on the basis of locality or neighbourhood within a locality¹⁰³, it rarely proves possible to sustain them¹⁰⁴.*

454. Mr Mayer confirmed that I had understood the application correctly so that the red line that he had drawn should be taken to be a neighbourhood and not a locality.
455. Mr Ground argues that the area that Mr Mayer has defined lacks any degree of cohesiveness and is arbitrary – just a line drawn on a map reflecting where the users come from.
456. Obviously one expects there to be a correlation of some kind between the area where users come from and the relied on locality or neighbourhood within a locality¹⁰⁵. It must however be possible that the users cannot be related to any area with a sufficient degree of cohesiveness – which is what Mr Ground says is the position in the present case.
457. On the OS Landranger map for Bristol, the word Stoke Bishop is printed at the east end of the land the subject of the application. There is no doubt that a geographical area called Stoke Bishop exists and has done so for hundreds of years. It has shops which include “Stoke Bishop” in their names and there is a church, village hall, memorial fountain and a war memorial. To its north west is Westbury on Trym and to the south west is Sneyd Park. As S3

¹⁰⁰ [2004] JPL 975.

¹⁰¹ See paragraph 85 of his judgment.

¹⁰² See *Leeds Group PLC v Leeds City Council* [2011] Ch 363 (CA).

¹⁰³ See eg *R (Laing Homes Limited) v Buckinghamshire County Council* [2004] 1 P & CR 36 at p573; *R (Oxfordshire and Buckinghamshire Mental Health Foundation NHS Trust) v Oxfordshire County Council* [2010] 2 EGLR 171 (High Court).

¹⁰⁴ Note that the footnotes to this passage are within the original text.

¹⁰⁵ This has recently been the subject of a judicial review case in which I am involved and where judgment has been reserved: *R (Allaway) v Oxfordshire County Council*.

explained, Sneyd Park is historically part of Stoke Bishop, and forms part of the ecclesiastical parish of Stoke Bishop. Pausing there, this might suggest that the ecclesiastical parish of St Mary Magdalen, Stoke Bishop might have been relied upon as a locality in the case. However the north west boundary is Ebenezer Lane, so that it excludes Woodland Grove and West and South Dene to the north of the land. By contrast, the Stoke Bishop Ward includes all these roads. The Stoke Bishop Ward in fact does represent a locality that includes most of the dwellings where the inhabitants live on whose use the Applicant relies. The **neighbourhood** on which he relies by contrast

- excludes Durdham Down
- includes part of Sea Mills
- includes an area north of Coombe Lane.

458. I think that nothing turns on the inclusion of Durdham Down, since nobody lives there. I do not think that Sea Mills is appropriately included in the neighbourhood because although some users evidently come from there, it is a very distinct area on the other side of the River Trym.

459. As amended by the deletion of Sea Mills, it seems to me that what the claimed neighbourhood is trying to do is to identify an area which may appropriately be called Stoke Bishop. I think that Stoke Bishop does have reasonably clear boundaries as reflected by its two “official” delineations – the ecclesiastical parish and the ward: to the west the River Trym, to the south the River Avon and to the east Durdham Down (whether Durdham Down be regarded as “in” or “out” not making any difference in this regard). Where there is less clarity is where Stoke Bishop ends to the north and Westbury on Trym begins. The Applicant has taken the main road that curves round Stoke Bishop to the north, which includes some users who might otherwise be excluded. I do not think that that because the Applicant has arguably cast his net too wide, it invalidates the neighbourhood that he has identified. In *Oxfordshire County Council v Oxford City Council and Robinson*, Lord Hoffmann said

*“Any neighbourhood within a locality” is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries*¹⁰⁶.

460. Accordingly I do not think that the application should fail because no neighbourhood within a locality has been demonstrated. With the deletion of Sea Mills, I think that the area defined by the Applicant is a cohesive neighbourhood.

Other arguments

461. There are no arguments other than those set out in paragraphs 338 - 460 above and there considered why the land should not be registered as a town or village green.

Conclusion

¹⁰⁶ See paragraph 27.

Original Names Redacted for Publication Purposes

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.
463. I am grateful to everybody who assisted the smooth running of the inquiry and I am grateful to all the advocates for their submissions. I should particularly thank Mr Mayer for the immaculate documentation for which he and his team were responsible.

PHILIP PETCHEY
14 October 2016

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

REPORT

Preliminary

1. I have been appointed as an Inspector by Bristol City Council (acting as registration authority) to consider two applications under section 15 of the Commons Act 2006 which have been received by the Council to register land known as Stoke Lodge Playing Fields. The two applications are:
 - (i) dated 13 September 2018 by Ms Emma Burgess; and
 - (ii) dated 22 July 2019 by Ms Kathy Welham.
2. In my capacity as Inspector I am asked to prepare a report for the consideration of the City Council together with my recommendation as to whether the land should be registered or not. I am also asked to determine whether it is necessary that before I prepare my report there should be a public inquiry.

The background to the applications

3. In 2011 Mr David Mayer applied to Bristol City Council, as registration authority, to register Stoke Lodge Playing Fields as a town or village green. The Playing Fields were owned by Bristol City Council which, in its capacity as landowner, objected to the registration. Cotham School, which used the Playing Fields, also objected to the registration, as did two other users of the fields.
4. Under section 15 of the Commons Act 2006, in order for the Playing Fields to be registered as a town or village green, it was necessary for the registration authority to be satisfied that the land in question had been used by the inhabitants of a locality, or a neighbourhood within a locality, for a period of twenty years for lawful sports and pastimes; and that that use had been *as of right*. The relevant period of use was 1991 to 2011 (i.e. the 20 years to the date of the application).
5. As registration authority, the City Council appointed me as Inspector to consider the application and to report to it with my recommendation as to whether the land should be registered or not. The procedural history thereafter is somewhat complicated and is set out paragraphs 2 – 6 of the *Report* which in due course I made to the City Council in October 2016. The short point is that in order to enable me to make a recommendation, I decided that it was appropriate that there should be a public inquiry. Such inquiry took place over 9 days in June and July 2016.
6. Many issues were in contention at the public inquiry but, in end, it was my judgment that the matter turned upon whether the existence of three notices on the land had the effect of making use of the land by local people contentious and not *as of right*. I took the view that they did have this effect; and that accordingly the land should not be registered as a town or village green. I relied upon a case decided in the Court of Appeal as to the effect of notices which, of

course, was binding upon the City Council in making a decision upon the application (*Winterburn v Bennett*¹).

7. The three notices had been erected in 1991 by Avon County Council, which had been abolished in 1996. It will be seen that on the basis that the existence of the signs made use of the land by local people contentious and not *as of right*, the use of the land between 1991 and 1996 when Avon County Council was abolished could not have been *as of right*. Mr Mayer's application was bound to fail on this basis. However it could be argued, and was argued, that the use of the land between 1996 and 2011 **was** *as of right*. On this point, in my report to the City Council, I said:

*I think that there are two points here. First, I think that if someone comes across an old and decrepit sign saying "Trespassers Keep Out" he might from all the circumstances consider that it was of no continuing application. Second, although the fact that a sign says "Avon County Council" rather than "Bristol City Council" does not mean that the day after Bristol City Council takes over from Avon County Council the notice ceases to have any effect, someone might well wonder, say, ten years after Avon County Council ceased to exist whether any particular sign that it had put up had continuing effect. These may be interesting points but it seems to me that they do not fall for determination in the present case. The two Avon County Council signs that are still in place, though clearly not new, are not decrepit; and the one that was at access point [12], although subject to some graffiti before it was removed, was similarly not decrepit as shown in the photograph dating from 2007 ...*²

8. Apart from the issue as to whether the use was *as of right*, another issue that I considered was one based on the concept of what has become known as "statutory incompatibility", namely that the registration of the land was incompatible with it being held by the City Council as land for the purpose of education. Seeking to apply the leading cases on the point, namely *R (Newhaven Port and Properties Limited) v East Sussex County Council*³ (in the Supreme Court) and *Lancashire County Council v Secretary of State*⁴ and *R (NHS Property Services) v Surrey County Council*⁵ (both decided in the High Court), I decided that there was no such incompatibility. However at the time of my report, permission to appeal was being sought in the *Lancashire* case and had been granted in the *Surrey* case. Thus there existed the possibility that the outcome of those appeals might affect my decision on this point.
9. The Public Rights of Way and Greens Committee of the City Council considered my report and recommendation at a meeting on 12 December 2016. It decided to reject my recommendation and to register the land as a town or village green. That decision was challenged by Cotham School by way of judicial review. As well as taking the point that, in the light of my report, the Committee should have decided to reject the application, the School also argued that the application should have been rejected on the basis of statutory incompatibility. By the time the case came on for hearing before Sir Wyn Williams (sitting as a Deputy Judge of the High Court) on 21 November 2017, the Court of Appeal had recently heard argument on the appeals in the *Lancashire* and *Surrey* cases (the two appeals were heard together) but had not delivered judgment. Sir Wyn heard argument but postponed delivering his own judgment until after the Court of Appeal had given its judgment (on 12

¹ [2017] 1 WLR 646 (CA).

² Paragraph 390.

³ [2015] AC 1547 (SC).

⁴ [2016] EWHC 1238 (Admin).

⁵ [2016] 4 WLR 130.

April 2018). This enabled him to take into account written submissions on the question of statutory incompatibility which were submitted to him by the parties after the judgment of the Court of Appeal had been handed down.

10. In his judgment, delivered on 3 May 2018, Sir Wyn upheld the challenge. However in the light of the Court of Appeal's judgment in *Lancashire/Surrey* he rejected the argument that the application should be rejected on the basis of statutory incompatibility.
11. Following the quashing of the registration of the land, on 14 September 2018, Emma Burgess made a fresh application to Bristol City Council as registration authority to register the Playing Fields as a town or village green. The relevant 20 year period in respect of her application was 1998 to 2018 (i.e. the twenty years to the date of her application). She submitted the use of the land was as of right on the basis that Avon County Council had been abolished in 1996 and the signs that it had erected on the land had no legal effect after that date.
12. Bristol City Council and Cotham School⁶ objected to the application. Among the points that they took was that the School had erected new signs on the land on 24 July 2018 and that, whatever was the position before, after 24 July 2018 the use had been contentious and not *as of right*. Ms Burgess contested that the signs were effective but if they were, then, on the face of it, the Objectors had a good point because (i) the application was made under section 15 (2) of the Commons Act 2006 and (ii) by virtue of section 15 (2) (b), in order to qualify for registration, qualifying use has to continue to the date of the application. There is however (also on the face of it) a ready response to this objection: an application can be made under section 15 (3) of the Commons Act 2006. By virtue of section 15 (3) (c) and (d) an application can be made for up to a year after qualifying use has ceased. Thus if the notices did have effect, one might think that the application could be considered under section 15 (3) instead of 15 (2). However Ms Burgess could not know that Bristol City Council as registration authority would treat her application in this way. In the light of this, on 22 July 2019, Katharine Welham made a further application to register the land as a town or village green relying on section 15 (3) (c) and (d) of the Commons Act 2006. This explains why Bristol City Council as registration authority have been asked to consider two applications rather than a single one.
13. By the time that Ms Burgess came to make her application, permission had been given for an appeal to the Supreme Court in the *Lancashire/Surrey* case. Accordingly, the City Council as landowner and the School submitted that a decision on Ms Burgess's application should be deferred until after judgment had been handed down in the *Lancashire/Surrey* appeal. By the time that Ms Welham came to make her application, argument in the *Lancashire/Surrey* case had just been heard; however judgment had not been handed down. This occurred on 11 December 2019. The judgment was evidently potentially important because it reversed the judgment of the Court of Appeal in the *Lancashire/Surrey* case. Bristol City Council as landowner and the School were able to take it into account in their objections to Ms Welham's application, arguing that it necessarily should lead to its rejection. In separate submissions, they argued that Ms Burgess's application should be rejected for the same reason. Both Ms Burgess and Ms Welham have responded in writing to the Objectors' case on statutory incompatibility.

⁶ The School now holds a long lease of the land.

Documentation

14. The City Council as registration authority have helpfully prepared a paginated bundle containing the essential documents. References in this Report to page numbers without other attribution are to this bundle.

The bundle contains the following substantive material:

In relation to Ms Burgess's application

Ms Burgess's application (pp 1 – 9)

Objection to Ms Burgess's application by Cotham School (pp 11 – 17)

Objection to Ms Burgess's application by Bristol City Council as landowner (pp 18 – 23)

89 objections to Ms Burgess's application by members of the public (pp 42 – 135)

Response by Ms Burgess to the objections of Cotham School and Bristol City Council (pp 24 – 41)

Response by Ms Burgess to the objections by members of the public (pp 136 – 162)

Submissions by Ms Burgess on the issue of statutory incompatibility (pp 185 – 193)

Submissions by Cotham School on the issue of statutory incompatibility (pp 229 – 235)

Submissions by Bristol City Council as landowner on the issue of statutory incompatibility (pp 236 – 238).

In relation to Ms Welham's application

Ms Welham's application (pp 163 – 183)

Objection to Ms Welham's application by Cotham School (pp 239 – 251)

Objection to Ms Welham's application by Bristol City Council as landowner (pp 252 – 268)

27 Objections to Ms Welham's application by members of the public (pp 287 – 318)

Response by Ms Welham to the objections of Cotham School and Bristol City Council (pp 269 – 286)

Response by Ms Welham to the objections by members of the public (pp 319 – 340)

In relation to both applications

Letter dated 25 June 2020 on behalf Cotham School (pp 341 – 342)

Letter dated 30 June 2020 from Ms Burgess and Ms Welham responding to letter dated 25 June 2020 on behalf of Cotham School (pp 343 – 346)

E mail dated 2 July 2020 on behalf of Bristol City Council as landowner responding to letter dated 25 June 2020 on behalf of Bristol City Council as landowner (pp 347 – 349)⁷.

⁷ I also note e mails from the Applicants and interested parties at pp 352 – 356.

Should there be a public inquiry?

15. I consider first whether it is necessary that there should be a public inquiry before I can make a recommendation to the City Council as registration authority.
16. In respect of applications for the registration of new town or village greens, Bristol City Council as registration authority have approved an *Outline Procedure* (2012). The relevant part of the procedure provides
 - (a) *Straightforward cases where there is no conflict of evidence, or no significant objection will be dealt with on the paperwork. The decision will be taken by the delegated officer (Strategic Director of Corporate Services) or [the Public Rights of Way and Greens Committee] as appropriate. Whether or not an independent inspector needs to be appointed prior to determination, particularly where the Council is the landowner, is a matter for PROWG.*
 - (b) *In other cases there will be a public inquiry, i.e. a hearing, open to the public where both sides are able to present their evidence and make representations ... Where the Council is landowner the inquiry will be conducted by an independent legally-qualified inspector ...*
17. In the present case, Bristol City Council as registration authority have asked me to decide whether it is necessary for there to be a public inquiry.
18. In a case in which in which important facts are in dispute and where the resolution of those factual issues is determinative of the application it will usually be necessary for there to be a public inquiry.
19. In respect of the land which is the subject of the applications which I have been asked to consider there has already been a lengthy public inquiry. This was in respect of an application relating to the period 1991 – 2011 rather than 1998 – 2018 but “on the ground” it is evident that the use has carried on in the same way. Thus the dispute is not about whether local people have used the land for sports and pastimes but is essentially twofold, namely whether
 - (i) statutory incompatibility operates to preclude registration; and
 - (ii) use of the land has been *as of right*.
20. The first issue turns on the legal basis on which the land is held. This is not in dispute.
21. As regards the second issue, what Ms Burgess and Ms Welham are saying is that the abolition of Avon County Council in 1996 makes all the difference and that thereafter the use by local people was *as of right*. I shall have to judge whether this submission is correct but the fact that Avon County Council was abolished in 1996 is not in issue.
22. The documentation identifies a further aspect of whether the use of the land has been *as of right*. Bristol City Council as landowner and Cotham School argue that, if it was not contentious before, the use of the land became contentious when Mr Mayer’s application was objected to and was the subject of a public inquiry. The facts surrounding the objections and the public inquiry are set on in my *Report* dated 14 October 2016 and are not controversial.
23. On all the issues I have detailed written submissions.
24. In these circumstances I have decided that it is not necessary that there should be a public inquiry.

25. I recognise that in doing so I shall deprive myself of the benefit of oral submissions by the parties. However my decision does result in a saving of costs to the parties. It will also mean that it will be possible for a decision to be reached more quickly than otherwise which is a significant benefit in circumstances where the dispute began nearly ten ago.
26. In reaching my conclusion as to the need for a public inquiry I have had regard to the City Council's *Outline Procedure*. It seems to me that it does not anticipate every circumstance and, in particular, did not anticipate the present situation where there has already been a lengthy public inquiry to establish the facts. I do not think it constrains me to hold a public inquiry in circumstances where there are good reasons for not doing so.
27. I have also noted the suggestion made by both Ms Burgess and Miss Welham that there are significant factual issues that need to be considered at a public inquiry⁸. Although I accept that some factual issues arise in respect of some of the matters in respect of which submissions have been made to me by the parties, I have not identified any factual matter going to the two main issues which potentially affects their determination.
28. I have also noted the objections by members of the public to both applications. These seek to emphasise the facts as these objectors perceive them to be; they do not present a version of the facts that is significantly different to that relied upon by the City Council as landowner and the School. All of them are concerned about the practical effects of registration in terms of the functioning of the school. These are not matters for the registration authority: registration occurs if the statutory criteria are fulfilled (and not otherwise). Whether or not it is a good idea that the land should be registered is not a matter for the registration authority.
29. I now set out my conclusions in respect of the two main issues.

Issue 1: statutory incompatibility

30. It is argued by Bristol City Council as landowner and Cotham School that the land cannot be registered as a town or village green because registration would be incompatible with the educational purposes for which they hold the land; just as in *R (Lancashire County Council) v Secretary of State for the Environment* land held by Lancashire County Council could not be so registered because it was incompatible with the educational purposes for which they held the land.
31. In *Newhaven*, the Supreme Court had determined that land held by port authority could not be registered as a town or village green. This was because of "statutory incompatibility" between the regime under which the land was held as a port and its status if it were registered as a village green. To the question *Does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?* the Supreme Court gave the answer *It does not*⁹.
32. It will be evident that this answer gives rise to a further question, one which *Newhaven* did not address, namely, *Does section 15 of the 2006 Act apply to land which has been acquired by a local authority (whether by voluntary agreement or by powers of compulsory purchase)*

⁸ See pp 286 and 345.

⁹ See the speech of Lord Neuberger of Abbotsbury PSC and Lord Reed JSC (with whom Baroness Hale of Richmond DPSC and Lord Sumption JSC agreed).

and which is held for statutory purposes that are inconsistent with its registration as a town or village green? On a simple view, the same answer – *It does not* – would be returned to this question. If land held by a statutory undertaker for its statutory purposes is not registrable then, on the face of it, land held by a local authority for its statutory purposes is not registrable – for the very same reasons. However, every reader of the speech in *Newhaven* would have appreciated, that this could not be the right answer, because in paragraphs 98 to 100 of their speech, Lords Neuberger and Reed referred to three cases where land was held by local authorities and had been registered as a town or village green. The Respondent registration authority cited these cases in its argument that statutory incompatibility had no application to the registration of village greens. In their speech, Lord Neuberger and Lord Reed consider each of these cases in turn, beginning their discussion by saying that *In our view they can readily be distinguished from this case*¹⁰. Of *New Windsor Corporation v Mellor*¹¹ they observed that:

... the Court of Appeal was concerned with the registration of Bachelors' Acre, a grassed area of land in New Windsor, as a customary town or village green under the Commons Registration Act 1965 . The appeal centred on whether the evidence had established a relevant customary right. While the land had long been in the ownership of the local council and its predecessors, it was not acquired held for a specific statutory purpose. It had been used for archery in mediaeval times and had been leased for grazing subject to the recreational rights of the inhabitants. In recent times it had been used as a sports ground and more recently it was used as to half as a car park and half as a school playground. No question of statutory incompatibility arose.

33. I may add that at the time it acquired the land the Borough of New Windsor would not have been a statutory authority but have had an existence by virtue of a Royal Charter¹².

34. Of *Oxfordshire County Council v Oxford City Council*¹³, they observed that:

*... [it] concerned the Trap Grounds, which were nine acres of undeveloped land in north Oxford comprising scrubland and reed beds. The land was, as Lord Hoffmann stated (in para 2) “not idyllic”. More significantly, while the city council owned the land and wanted to use a strip on the margin of it to create an access road to a new school and to use a significant part of the land for a housing development, **there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility** (emphasis supplied).*

35. It is certainly true that the point was not argued and that the specific powers under which the land was held were not identified in the judgment. On the other hand, it is clear that the local authority wanted to develop the land for housing and that its registration as a village green would frustrate this.

36. Of *R (Lewis) v Redcar and Cleveland Borough Council (No 2)*¹⁴, they observed that:

... [it] concerned land at Redcar owned by a local authority which had formerly been leased to the Cleveland golf club as part of a links course but which local residents also used for informal recreation. The council proposed to redevelop the land in partnership with a house-

¹⁰ See paragraph 98. The discussion of the three cases is at paragraphs 98 to 101.

¹¹ [1976] Ch 380 (CA).

¹² Indeed this would have been the position when the litigation began. As I understand it, the Royal Borough of New Windsor ceased to exist on 31 March 1974, being replaced by a statutory authority established under the Local Government Act 1972 (the Royal Borough of Windsor and Maidenhead). This change in status is not reflected in the law report.

¹³ [2006] 2 AC 674 (HL).

¹⁴ [2010] 2 AC 70 (SC).

*building company as part of a coastal regeneration project involving a residential and leisure development. Again, there was no question of any statutory incompatibility. **It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green** (emphasis supplied).*

37. Again it is true that the point was not argued but registration of the land would have impeded the provision of residential and leisure development.

38. The conclusion of Lord Neuburger and Lord Reed was as follows:

*101. In our view, therefore, these cases do not assist the respondents. **The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility.***



This conclusion evidently goes beyond distinguishing the three cases on the basis that the statutory incompatibility was not argued.

39. In *R (Lancashire County Council) v Secretary of State for the Environment* it was argued successfully that statutory incompatibility applied to land held for statutory purposes (in that case, education) held by a local authority. In reaching that conclusion, the majority (Lord Carnwath and Lord Sales) had to consider once again the effect of the three cases where local authority land had been registered as a town or village green. I note that at the outset of their speech they said: *Our task in the present appeal is not to make policy judgments, but simply to interpret the majority judgment in Newhaven and apply it to the facts of these cases.*

40. The speech expressing the view of the majority¹⁵ was that of Lord Carnwath and Lord Sales. Their view of the cases considered by Lord Neuburger and Reed was as follows:

*50. In relation to each of these cases, Lord Neuburger PSC and Lord Hodge JSC referred in entirely general terms to the statutory powers under which a local authority might hold land and were at pains to emphasise that the land in question was not in fact held in exercise of any such powers which gave rise to a statutory incompatibility. **That was the basis on which they distinguished the cases.** It is clearly implicit in this part of their analysis that they considered that land which was acquired and held by a local authority in exercise of general statutory powers which were incompatible with use of that land as a town or village green could not be registered as such (emphasis supplied).*

41. I bound to say that this does seem to me to be a complete explanation; Lord Carnwath and Lord Sales do not “spell out” why they thought that Lord Neuburger and Lord Hodge considered that there was no statutory incompatibility in the *Trap Grounds* and *Lewis* cases.

42. As to the principle itself they observed:

It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act. There is no indication in that Act, or its predecessor, that it was intended to have such an effect¹⁶.

43. In *Lancashire*, the Supreme Court held that the land was acquired for and remained appropriated to educational purposes, in exercise of the County Council’s statutory powers as

¹⁵ Lady Arden and Lord Wilson dissented.

¹⁶ See paragraph 61.

education authority. The statutory provisions upon which County Council relied as showing incompatibility were:

- (1) section 8 of the 1944 Education Act which imposed a duty on local education authorities “to secure that there shall be available for their area sufficient schools” for providing primary and secondary education, sufficient in number, character and equipment;
 - (2) sections 13 and 14 of the Education Act 1996 which require local authorities to contribute to the development of the community by securing efficient primary and secondary education;
 - (3) section 542 of the 1996 Act which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations (SI 2012/1943)) suitable outside space for physical education and outside play;
 - (4) section 175 of the Education Act 2002 which requires the education authority to “make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children”.
44. The land was divisible into four different areas. Areas A and B were used as for outdoor activities and sports in connection with Moorside Primary School; Areas C and D were identified as a replacement school site.
45. Applying the legal principle that they had identified as set out above at paragraph 19 above to the specific facts of the case, Lord Carnwath and Lord Sales said:

In our view, applying section 15 of the 2006 Act as interpreted in the majority judgment in Newhaven, LCC ... can show that there is statutory incompatibility in each of their respective cases. As regards the land held by LCC pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of Area B as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place. Secondly, however, and more generally, such rights are incompatible with the use of any of Areas A, B, C or D for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes (see Newhaven, para 96). The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law.

46. I turn to a consideration of the facts of the present case.
47. In 2010, Parliament passed the Academies Act 2010. This empowered the Secretary of State for Education to enter into academy arrangements with any person. The arrangements were, in summary, that that person provided education without charge and that the Secretary of State provided funding for that provision. The Act provided that existing maintained schools could convert themselves into academies, and, if they did, the Secretary of State could make a scheme for the transfer of land of the maintained school from the local authority to the Academy. In the present case Cotham School, which before had been a maintained school, turned itself into an academy and the land on which it stood and its playing fields (which are

the subject of the application for registration as a town or village green) were transferred to the Academy. This was by virtue of a scheme made by the Secretary of State under section 8 of the 2010 Act.

48. It will be helpful now to take a step back. There are many independent schools in England that is, schools which are not owned and operated by local authorities. They are subject to regulation and inspection under Acts of Parliament but they are not provided by virtue of Acts of Parliament, and their owners (generally charitable trustees) are not under a statutory duty to provide education such as is imposed on a local authority¹⁷. On the face of it¹⁸, land which they own will, in appropriate circumstances, be subject to registration as a town or village green. Academies are a new form of independent school. In the present case, Cotham School had a pre-existence as a maintained school and the land which it currently owns was previously owned by Bristol City Council as education authority¹⁹; however it might have been a school established by any person and not have had a pre-existence. I do not think that there would be any statutory incompatibility between the basis on which land was held by an entirely new academy and registration of that land in otherwise appropriate circumstances as a town or village green. Similarly, I do not think, subject to one matter, that there is any statutory incompatibility between the basis on which land is held by an academy which was formerly a maintained school and has now become an academy and the basis on which land is held by an academy which had no such pre-existence. In both cases, section 8 of the Education Act 1944, sections 13 and 14 of the Education Act 1996 and sections 175 of the Education Act 2002 have no application. Nor does section 542 of the Education Act 1996 (which prescribes open space standards for maintained schools) have any application.

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

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

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

(b) pupils to play outside.

50. Thus if any person is to run an Academy accordingly to law, he or she or it **must** comply with this standard. However this is rather different to a statutory requirement to provide educational facilities on a particular piece of land: I do not think that it properly can be so construed.

¹⁷ As to which, see paragraph 43 (1) and (2) above. I appreciate that it could be argued that they have such a duty by virtue of their status as charity trustees. On the basis, it could be argued that no land of a charity could be registered as a town or village green. As far as I am aware, this point has never been argued in the courts and, in the absence of clear authority I do not think this can be made one of the building blocks of the argument in this case.

¹⁸ But see footnote 11 below.

¹⁹ The reversion of the lease of the playing fields is of course still owned by the City Council.

51. At paragraph 48 above I said that, “subject to one matter”, I did not think that there was any statutory incompatibility between the basis on which land is held by an academy which was formerly a maintained school and has now become an academy and the basis on which land is held by an academy which had no such pre-existence. I turn now to consider that one matter.
52. It seems to me that if the position were that Cotham School had remained a maintained school and the land on which it stood and the playing fields the subject of the present advice had remained in the ownership of Bristol City Council, the situation about which I am asked to advise would be indistinguishable from that in the *Lancashire* case. The position that currently obtains is that the reversion of the 125 year lease is still owned by Bristol City Council. Is it perhaps the position that the land is not registrable as a town or village green not by reference to the 125 lease vested in the School but by reference to the reversion of the lease vested in Bristol City Council?
53. In my judgment the answer to this question is that the land is not not²⁰ registrable by reference to the reversion of the lease. It seems to me that before a scheme was made by the Secretary of State under Schedule 1 to the Academies Act 2010, the land was held by Bristol City Council under the duties identified under the same sections as were identified in the *Lancashire* case. It seems to me that the position thereafter is different. It ceased, in practice, to have any statutory duties in respect of the land. It so happens that under Schedule 1 to the Academies Act 2010 the land continues to be used for the purposes of education but there is no necessary requirement for this by virtue of the mechanism by which the transfer of the immediate interest in the land was effected. As far as Bristol City Council were concerned, it might have been required to transfer the land to provide a site for a new hospital. On what basis, then, does Bristol City Council continue to hold the reversion to the land? In my judgment, it is not by reference to any specific power; it is by reference to the sort of unspecific power that the majority had in mind in *Newhaven* in the three cases which it considered at paragraphs 98 to 100 of that case.
54. In reaching this conclusion, I am conscious that if the land in the *Lancashire* case is properly not registrable, it can be argued that there is no sensible reason why the land in the present case should also properly be not registrable. There is however a significant difference between the two situations. In the first the relevant land is directly owned by a local authority under specific statutory duties to use it for the purposes of education. In the second, it is directly owned by an independent school which is not under a statutory duty to provide education. It is under a duty to provide educational facilities but that is by a reference to contract with the Secretary of State (and not directly a statute) and the duty is not specific to the land which it owns. I am also conscious that it may be argued that I have taken too narrow a view of the concept of statutory incompatibility. I recognise that a Court might so conclude. However it will be seen that my approach does reflect that in *Newhaven* as interpreted in *Lancashire* because it does identify a category of local authority land which is not subject to statutory incompatibility.
55. What I have written above is on the basis that the time to consider statutory incompatibility is the time when the application is made. If it were the case that it was necessary that the land should be registrable throughout the relevant 20 years, it will be apparent that in any

²⁰ The double negative is intended.

particular case it might be that, there being statutory incompatibility at some earlier stage, the land might not be registrable, even though no statutory incompatibility existed at the date of putative registration. In the present case, the position would be that the land would not have been registrable before 2010 (being land held for purposes of education by Bristol City Council) only becoming registrable after the land passed into the ownership (or substantial ownership) of the School. It might be observed that it would be odd for the School (to whom statutory incompatibility does not apply) to rely on the earlier period of incompatibility when it was owned by Bristol City Council. The public purposes as defined by Parliament, about the stymying of which the majority were concerned in *Lancashire*, would not be stymied. On the other hand, it may be observed that it is odd for land to be registrable on the basis of twenty years use when for a significant part of that twenty years it was not registrable because of statutory incompatibility. At paragraph 47 of *Lancashire*, the majority point out that cases on rights of way and easements were of assistance by way of analogy; it might be argued that the incapacity of a relevant owner at any time during the relevant period in those analogous circumstances points up the force of the latter argument.

56. The answer to this aspect of the matter is not spelt out in the Commons Act 2006 nor can it be conclusively deduced from any policy considerations articulated in respect of statutory interpretation. Statutory incompatibility was held in *Newhaven* to fall to be considered at the time of registration. It seems to me that it would require the authority of the Court to extend it so that it became a requirement of registration that statutory incompatibility did not exist at any stage during the relevant 20 year period. Moreover, I am confident that a Court would not take that further step, thereby preventing registration of land as a town or village green at a time when there is no statutory use of the land which would be frustrated by registration. This does not seem to me to make much sense.
57. I am conscious that the Court in *Newhaven* and *Lancashire* has given the Commons Act 2006 a narrow interpretation. It is difficult to predict with certainty that it might not further limit the application of the Act in a future case (like the present, if it had to rule on it). I would expect the School and perhaps the City Council as landowner to argue that the views I have expressed above are wrong. I am conscious both that (i) in any case my advice, given in good faith and with the benefit of my expertise may not be advice with which a Court (as the law in this area shows, potentially the Supreme Court) agrees²¹ and (ii) on many legal questions, two competing views may be taken. Ultimately the City Council as registration authority has to take a view about the matter. In doing so, it will note that the matter is not in my view determinative i.e. as explained below, I consider that the application fails for other reasons.

Issue 2: as of right

58. I consider first the effectiveness of the Avon County Council notices after 1996.
59. I begin by reminding myself that the relevant twenty year period in respect of both applications is 1998 - 2018²².

²¹ The three-fold disagreement in the Supreme Court in *Lancashire* demonstrates just how difficult this area of (judge-made) law is,

²² September 2018 in respect of Ms Burgess's application and July 2018 in respect of Ms Welham's application. Since there is before the registration authority an application in which the relevant 20 year period ends before the erection of new notices in 2019, it is unnecessary to consider a possible amendment to Ms Burgess's

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

5 Existing local government areas

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

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

61. Accordingly, at the beginning of the relevant period, Avon County Council did not exist and had not existed for more than two years.
62. As explained above, the submission of Ms Burgess as regards the Avon County Council signs is that they are not relevant to her application because at the beginning of the 20 year period that applies to her application (1998), Avon County Council did not exist. She argues that by an operation of law (the abolition of the Council), a necessary fact to render the signs effective (the existence of the Council) had ceased to obtain. If one postulates the signs doing service for the landowner in person attending at the land and warning trespassers off, on the day before the abolition of the Council there was such a person present and warning trespassers off; on the day after, there was no such person but a new owner. That new owner, it may be argued, never contested the use but acquiesced in it.
63. This submission has the merit of simplicity. Further, it will be noted that it is either correct or incorrect; it involves no shades of grey. If it is correct, the existence of the signs and thereafter will be irrelevant and the argument which was decisive in leading to the rejection of Mr Mayer's application will not obtain.
64. In considering Mr Mayer's application, the continuing effect of the signs after 1996 (the abolition of the County Council) was not determinative; it was enough that they had the effect of making the use between 1991 and 1996 contentious. However the use relied upon by Mr Mayer did continue after 1996 and in my *Report* dated 14 September 2016 I did express a view about it which is set out at paragraph 7 above. It will be helpful to repeat it here:

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

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

application so that it would be made under section 15 (3) or for the registration authority to consider any period down to a date other than that of the application.

66. Bristol City Council as landowner and Cotham School rely on the view set out in my Report. The City Council add:

*14. Avon County Council was abolished and its educational functions were transferred to Bristol City Council as part of a re-organisation of local government on 1 April 1996. There was no suggestion in the statutory provisions that this was anything other than an administrative alteration that was not intended to alter any of the arrangements or decisions made by Avon whilst in existence that related to its statutory functions. Any reasonable local resident would have known that Avon was being abolished and its functions and responsibilities transferred to Bristol. No reasonable person could have concluded that Avon's statement, policies and notices were to cease effect at midnight on 31 March 1996*²³

67. Revisiting this point, I have not changed my mind as to the continuing effect of the notices after 1996. In order to make use contentious by reference to signs, there is no requirement upon the landowner to identify himself. Moreover it is unrealistic to think that any person visiting the land on the first day of its ownership by Bristol City Council would have thought that his legal position had changed. This, of course, is looking at the matter subjectively. As a matter of objective fact, the position was that the powers and responsibilities had passed to Bristol City Council by operation of law. The effect of this is that Bristol City Council succeeded to the shoes of Avon County Council. I consider that this means that if Avon County Council objected to the use of the land by local people, Bristol City Council continued to do so as its successor. The supersession of the County Council by the City Council was not, of course, a secret matter and all the relevant documentation would have been in the public domain. A member of the public investigating the position would have appreciated that Bristol City Council had taken over from Avon County Council by operation of legal instrument and that there was no reason for considering that the attitude of the City Council was any different to that of the former County Council: it had not in fact altered its position from objection to acquiescence.
68. If the analysis above is correct, then the position as regards the contentiousness of the use of the land by local people did not change in 1996.
69. Further, that analysis would suggest that the notices were still effective in 1998 when began the relevant period on which Ms Burgess and Ms Welham rely. Indeed, it seems to me that if, as a matter of law, the notices did not cease to be effective in 1996, there is no basis for suggesting that they would have ceased to be effective in 1998. Nothing changed in the intervening period to 1998 after the abolition of Avon County Council and, in particular, the notices had not become decrepit. If this is correct, this finding is fatal to both applications because neither Ms Burgess or Ms Welham can have established use which for the relevant 20 years was *as of right*; the use at the beginning of each period relevant period was contentious by reference to the signs.
70. In fact I would go further and say that it is my conclusion that the use continued to be contentious - on the same basis as it was contentious in 1998 - down to 2009, when one of the Avon County Council signs was replaced by a Bristol City Council sign²⁴.

²³ See p 20.

²⁴ I noted in my *Report* dated 14 October 2016 that there was no positive evidence that the sign that was replaced existed beyond 2007. Nonetheless it would appear on the balance of probabilities that it did continue to

71. After 2009 the situation becomes factually more complicated. In 2009, as noted, one of the Avon County Council signs was replaced by a Bristol City Council sign which was not as effective as the sign it replaced²⁵. Ms Welham points out that in 2012 the City installed dog waste bins and that in 2016 it installed a play park with access from the playing fields.
72. Were it necessary to decide the point, I consider that the use continued to be contentious until at least 2012. I can see the force of the argument that says that the installation of dog waste bins – although a small thing by itself - might suggest to a user of the land that Bristol City Council as landowner was no pursuing a different approach to that of Avon Council (abolished more than 15 years earlier); and that he or she might consider from the availability of the land for use when the School and sports clubs were not using it that the City Council were permitting use. I note in this context that the City Council (albeit, in the alternative) argue in respect of Ms Burgess’s application²⁶ that it should be implied from the way that the land was used that they had implied permission.
73. I would approach the question of the use after 2012 in this way. One can see an argument that nothing significant changed in 2012 and that the use continued to be contentious. One can also see an argument that the position did change in 2012 and the use was permissive. In either case, use would not be *as of right*. What I find it impossible to hold is that in some way the signs and the litter bins cancelled one another out so that the City Council were now no longer objecting or permitting but (as they were required to do if use was to be *as of right*) **acquiescing**. Accordingly there was not qualifying use in the period 2012 to 2016. As to the period after 2016, see the discussion of Issue 3 below. Whatever the position down to 2016, it seems to me that use was contentious thereafter.

Issue 3: the public inquiry in 2016

74. In its objection to Ms Burgess’s application, the City Council say:

... between 2011 and 2018 the local inhabitants who supported Mr Mayer’s original application were in conflict with the Council as landowner as to whether Mr Mayer was entitled to have the land registered. One of the grounds of objection of the Council and the other objectors was that the use of the land by local inhabitants was not at any time as of right because it was contentious during the relevant period. The Council’s view and the inquiry itself was a well-publicised local cause celebre. Few people who might have been affected by it would not have known of it or the views expressed by the Council, which Mr Mayer and his supporters sought to rebut. If the signage was itself insufficient to render the use contentious, the Council’s public stance at the public inquiry did so²⁷.

75. In support of this submission, the City Council refer to *R v South Gloucestershire Council, ex parte Cheltenham Builders*²⁸.

exist until it was replaced in 2009. In any event, it makes no practical difference whether the situation “on the ground” changed in 2007 or 2009.

²⁵ See paragraph 397 of my *Report* dated 14 October 2016.

²⁶ See p 21 of the Bundle. The point does not seem to be repeated in its objection to Ms Welham’s application.

²⁷ See paragraph 17 at p 20.

²⁸ [2004] 1 EGLR 85.

76. The School makes the same point in its objection, also referring to the *Cheltenham Builders* case²⁹.
77. The City Council and the School both repeat this objection in respect of the application by Ms Welham³⁰.

78. Ms Burgess's Response is as follows:

*... the Council's resistance of the 2011 TVG application does not demonstrate that the use was contentious post 2011. The council's case before the previous Inspector concerned, inter alia, whether the use was "as of right" between 1991 – 2011. Such opposition merely indicated that the Council was of the view that the local inhabitant's use of the land had not been as of right **during this time**. The fact that the Council's barrister cross-examined some of the applicant's witnesses merely accepts that the use had been as of right between 1991 – 2011. It did not indicate that the use post 2011 was contentious³¹.*

79. She seeks to distinguish the *Cheltenham Builders* case.

80. Ms Welham's Response is in identical words³².

81. I should begin by observing that the City's statement that the inquiry was *a well publicised cause celebre* is in my judgment correct and I note that it is not challenged by Ms Burgess or Ms Welham. I heard 28 witnesses and throughout the inquiry there was a high level of public interest. Accordingly, the objection will not fail, if it does fail, on the basis that whatever was conveyed to the public was not sufficiently widely disseminated. I accept the City's assertion that *Few people who might have been affected by it would not have known of it or the views expressed by the Council...*

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

83. It is even more artificial if the case of the landowner at the inquiry is that the use by local people is not *as of right* by reference to signs erected on the land and those signs are still *in situ*. That of course is the position in the present case³³. In addition, it was clear at the inquiry that the City Council and the School were objecting because they were concerned with the incompatibility, as they saw it, between the use of the land as a town or village green and its use as a school playing field; and based a legal argument upon that suggested incompatibility.

²⁹ See paragraph 7 of its objection at p 51.

³⁰ See paragraph 36 at p 311 and paragraph 32 at p 297 of their respective objections.

³¹ See paragraph 14 at p 28.

³² See paragraph 24 at p 278.

³³ Noting, of course, the replacement of one of the Avon County Council signs in 2009.

Whether or not that argument was correct – a matter, of course, which I have considered above - it made it clear that the continuing use of the land by local people was contentious. If the use was contentious it was not *as of right* and the period of use. If use of land between 2016 and 2018 was not as of right, neither Ms Burgess nor Ms Welham have established the requisite 20 years' use to support registration.

84. I consider that my conclusion is supported by the judgment of Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire Council*. The facts in that case were rather different to the facts of the present case but underlying the conclusion was a consideration of whether an objection to a village green application could render use continuing thereafter contentious (so that a second application based on use *as of right* down to the date of the second application was bound to fail). Sullivan J held that it could render subsequent use contentious.

Implied permission

85. As an alternative to its argument that use of the land was not as of right because it was contentious, Bristol City Council as landowner argue that the use was not as of right because it was permissive:

20. The previous inquiry heard substantial evidence as to the use of the land, which was substantially marked out as planning fields, and used as such by schools and sports clubs until 2014. That usage was by arrangement with the Council, and the nature of the arrangement entitled the user to exclusive use of the relevant part of the land for the duration of the period that they were to use it.

21. The nature, frequency and extent of this use were overt acts on the part of and authorised by the landowner. The public were aware of the nature of those acts, namely that the users were being granted exclusive use of defined areas for defined periods of time, and that in consequence they were being excluded from it correspondingly, and would be excluded from whatever areas over whatever periods the Council chose to use for educational purposes, including the whole.

22. In consequence they would have thought, had they thought about it, that they were able to use those parts of the land that they did use because they were being permitted to do so by the implied licence of the landowner³⁴.

86. Obviously, this argument is advanced as an alternative; use cannot at one and the same time be contentious and permissive.
87. For completeness, I should address this argument.
88. There is no reason why a party to proceedings cannot advance arguments in the alternative; he or she cannot know what view the Tribunal will take of his or her first argument and therefore it is appropriate for him or her to consider the position if it is rejected. However in the present case it seems to me that the City Council as landowner cannot realistically maintain an alternative argument here. The evidence shows that the Council's predecessor put up signs contesting the use of the land. Those signs may or may not have been effective but it is hard to see how Avon County Council, consistently with those signs, could have regarded a person

³⁴ See.p 21.

coming on to the land as other than a trespasser. If Avon County Council so regarded him or her, the County Council cannot have been impliedly giving him or her consent to come on to the land. Moreover as *R (Lewis) v Redcar and Cleveland Council (No 2)* showed there is no reason why co-existence between the use of land for sports and pastimes by local inhabitants and for sporting activity has the result that that use by local people is permissive (i.e. the fact that local people used the land for walking their dogs when the golfers were not using it for golf did not carry the implication that their use was permissive). Further, I note that an implied permission argument was run in *R (Lancashire County Council) v Secretary of State for the Environment* (albeit at a late stage) and in circumstances where the landowner did not itself use the land. The Supreme Court emphasised that *passive acquiescence, even by a statutory authority with power to permit recreational use, is not enough*³⁵. I note *R (Mann) v Somerset County Council*³⁶, referred to by Bristol City Council; I agree with Sir Wyn Williams in *R (Cotham School) v Bristol City Council* that this is a case which turns very much on the facts as found by the Inspector [in that case] and the inferences drawn by him.³⁷ If I were wrong in considering that the use was contentious in 1998 and thereafter I do not consider that it was permissive. As I have explained above, I do accept it is possible that the position changed in 2012 so that between 2012 and 2016 use was indeed permissive.

Other arguments

89. At paragraph 19 above I say that the dispute is essentially twofold – as to statutory incompatibility and whether the use of the land has been *as of right* because contentious; and I have addressed these arguments at paragraphs 30 to 88 above, together with the alternative suggestion that use was not *as of right* because it was permissive. I note that at p 5 of its initial submission, the City Council took a point as to whether use had been by the inhabitants of an identified locality. I considered the question of whether use had been by the inhabitants of a locality or neighbourhood within a locality at paragraphs 453 to 460 of my *Report* dated 14 October 2016. I think that no point of substance arises on this aspect of the applications which should lead to them being rejected. If it were necessary for the registration authority to consider a locality or neighbourhood within a locality different to that identified in the applications, it seems to me that it would be appropriate for it to do so. Cotham School note that since the public inquiry an application has been made to register a public footpath across the land³⁸. The point is that in my *Report* dated 14 September 2016 I may have over-estimated the use of the land by members of the public for lawful sports and pastimes because some of that use may have had reference to a putative public footpath. I cannot envisage this point making any difference to my conclusion as to the significance of the overall quantum of use. However this may be, exploring the issue would, on the face of it, involve factual matters which would appropriately be the subject of oral evidence. In circumstances where the issue as to whether the use that did take place was *as of right* is determinative, it seems to me that it disproportionate in terms of effort and costs to seek to explore this issue further.
90. The submissions disclose an argument as to whether the replacement signs erected in July 2018 by the School were effective. Ms Burgess submits that they were not because they were inconsistent with the terms of the lease of the land to the school by Bristol City Council. For their part, Bristol City Council as landowner and the School dispute this and point to the agreement of the City Council to the erection of the signs. I note also that there is a point that

³⁵ See paragraph 42 at p 21.

³⁶ [2017] 4 WLR 170.

³⁷ See paragraph 86.

³⁸ See paragraph 15a at p 16.

one of the signs was taken down after failing to obtain advertisement consent. None of these matters is relevant to Ms Welham's application for reasons explained above. I do not propose to examine them further in this *Report*.

Conclusion and Recommendation

91. For the reasons set out above:

I do not consider that either application fails because of statutory incompatibility (see paragraphs 30 to 57 above)

However I do consider that the Avon County Council signs continued to be effective after 1996 so that the use of the land by local people in 1998 and thereafter was not *as of right* (see paragraphs 58 to 72 above);

If the use was not contentious before 2016, it became contentious at that time as a result of the wide publicity given to the objection to registration of the City Council as landowner and the School by virtue of the public inquiry (see paragraphs 74 to 84 above);

The possibility exists that between 2012 and 2016, use of the land was not contentious but by virtue of an implied permission. However if this was the case, use in this period was permissive and not *as of right*. Either way, it was not *as of right* (see paragraphs 73 above).

Because use of the land was not *as of right* during the relevant periods, one of the statutory requirements for registration has not been met. In the circumstances, both applications should be rejected.

Procedure

92. My *Report* will now fall to be considered by officers. On the face of it, subject to any other matters arising, it will then be presented to the Public Rights of Way and Greens Committee. In the ordinary way it would be available for the parties to see not fewer than five days before the meeting of the Committee at which it is to be considered. It is a matter for officers but it seems to me that there would be merit in specifically giving the parties the opportunity to comment and in respect of a longer period (say 21 days). Although, by now, one might think that all that might be said on the issues, **has** been said, experience suggests that, given the opportunity to comment, the Applicants and Objectors would both take that opportunity. Officers might feel able to field those comments themselves or they might wish to refer them to me for comment before, at last, referring the matter to the Committee.

93. The merit of this procedure is that it ensures that everything that is relevant is taken into account in the Committee's decision and that if, as must at least be contemplated, proceedings for judicial review are brought in respect of the decision, the issues are narrowly defined.

94. It is appropriate to say something about the prospect of judicial review if the Committee accepts my recommendation. Although there can be no certainty about it, I am confident that such a challenge would fail and I think that the Applicants would struggle to obtain permission to bring the proceedings. As I have indicated, it is possible that the Objectors would succeed in persuading a court that, in addition to the applications being properly

rejected on the basis that the requisite use was not *as of right*, they should also be rejected on the basis of statutory incompatibility.

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

PHILIP PETCHEY

2 March 2021

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

REPORT

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

Introduction

1. Bristol City Council is the statutory body charged by statute with maintaining the register of village greens. I am a barrister in private practice with expertise in the law of town and village greens. In this capacity, I have often advised registration authorities and have often acted on their behalf as an Inspector, holding a public inquiry into an application before reporting and making a recommendation. I have also often advised and acted for applicants who have sought to register land as a town or village green; and for objectors, who have argued that land should not be registered as a town or village green.
2. I have been appointed as an Inspector by Bristol City Council (acting as registration authority) to consider two applications under section 15 of the Commons Act 2006 which have been received by the Council to register land known as Stoke Lodge Playing Field or Fields¹ and to advise the Council whether that land should be registered as a town or village green. The two applications are:
 - (i) dated 13 September 2018 by Ms Emma Burgess; and
 - (ii) dated 22 July 2019 by Ms Katharine Welham.
3. The application of Ms Burgess was supported by evidence forms completed by 104 people. There were objections to it by Bristol City Council (as landowner) and Cotham School and by 88 members of the public.

¹ Hereafter I refer to it in the singular.

4. The application of Ms Welham was supported by evidence forms completed by 62 people. There were objections to it by Bristol City Council (as landowner) and Cotham School and by 27 members of the public.
5. I was asked as a preliminary matter to decide whether it was necessary that there should be a public inquiry before I advised the City Council. By a decision dated 2 March 2021², I decided that it was not. It is possible that matters might have arisen thereafter which did make it appropriate for there to be a public inquiry but in my view nothing has so arisen. The core facts of this matter are not controversial and there is not therefore a need for evidence to be subject to cross-examination. Accordingly, my advice is on the basis of the extensive written material that has been submitted to me.
6. For land to be registered as a town or village green, the requirements of section 15 of the Commons Act. This³ provides as follows:
 - (1) *Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.*
 - (2) *This subsection applies where—*
 - (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
 - (b) *they continue to do so at the time of the application.*
 - (3) *This subsection applies where—*
 - (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
 - (b) *they ceased to do so before the time of the application but after the commencement of this section; and*
 - (c) *the application is made within the relevant period..*
 - (3A) *In subsection (3), “the relevant period” means—*
 - (a) *in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b);*
 - (b) *in the case of an application relating to land in Wales, the period of two years beginning with that cessation.*
 - (4) *This subsection applies (subject to subsection (5)) where—*
 - (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
 - (b) *they ceased to do so before the commencement of this section; and*
 - (c) *the application is made within the period of five years beginning with the cessation referred to in paragraph (b).*
7. The application by Ms Burgess was made under section 15 (2) on 13 September 2018. Accordingly she had to show that

² See, further, paragraphs 24 and 26 below.

³ I set out sub-sections (1) to (4).

- a significant number of the inhabitants of a locality, or neighbourhood within a locality
 - had indulged in lawful sports and pastimes on the land
 - for a period of at least 20 years down to 13 September 2018; and
 - their use was *as of right*.
8. The application by Ms Welham was made under section 15 (3) on 22 July 2019. It was made on the basis that qualifying use had ceased on 24 July 2018⁴. Accordingly she had to show that
- a significant number of the inhabitants of a locality, or neighbourhood within a locality
 - had indulged in lawful sports and pastimes on the land
 - for a period of at least 20 years down to 24 July 2018; and
 - their use was *as of right*.

Procedural history

9. The consideration of whether Stoke Lodge Playing Field should be registered as a town or village green has a long and somewhat chequered history.
10. On 7 March 2011, David Mayer on behalf of Save Stoke Lodge Parkland made an application to register the Field a town or village green. Objections to the application were received from Bristol City Council in its capacity as landowner, the University of Bristol, Rockleaze Rangers Football Club and Cotham School. Mr Mayer responded to those objections and subsequently there were further exchanges of representations. In its capacity as registration authority the City Council initially considered that it would be necessary for there to be a non-statutory public inquiry and, on this basis, invited me to hold such an inquiry⁵. In August 2012 I issued draft directions for such an inquiry. However, I did observe in those directions that the factual matters in dispute appeared to be limited. This prompted the City Council in its capacity as landowner to suggest that it might not be necessary for there to be a public inquiry or, at least, a full public inquiry and accordingly I explored whether this might indeed be possible.
11. On the basis of a number of concessions made by the objectors as to the issues arising, in particular relating to the effect of prohibitory notices⁶, I advised the City Council as registration authority that it would not be necessary for there to be a public inquiry and that the matter could be determined on the basis of written representations. Further representations were made and on 22 May 2013 I issued a report to the City Council (“the 2013 report”) recommending that the land be registered as a town or village green because I considered that the statutory criteria had been met. In particular, I considered that use of the land had been *as*

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

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

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

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

12. Bristol City Council as landowner changed its position on notices and further suggested that there should be a public inquiry in order to hear evidence about that matter; for its part, Cotham School suggested that a public inquiry was needed in order to investigate the extent of the use by schools and by sports clubs. Further, once it became likely that there was going to be an appeal in the *Newhaven* case, the City Council as landowner further suggested that further consideration of the matter be deferred until the outcome of that appeal was known.
13. I decided that it would be appropriate for further consideration of the matter to be deferred. One possible outcome of the appeal in the *Newhaven* case would have been that it became clear that the application should fail. In these circumstances, of course, I would have advised the registration authority to reject the application and there would not have been a need for a public inquiry.
14. The Supreme Court gave its decision on 25 February 2015⁹. Following submissions from the parties, I decided that, on its proper interpretation, the decision did not require the application to be rejected. In all the circumstances, I decided that it was appropriate for there to be a public inquiry. This would enable evidence to be led on the statutory incompatibility point, as well as in respect of the use of the land and as to the notices. I had at an earlier stage reached the view that it would be appropriate to allow the City Council as landowner to alter its position as regards notices.
15. The public inquiry sat on 20 – 24 June 2016, 27 – 28 June 2016 and 13 July 2016.
16. Many issues were in contention at the public inquiry but, in end, it was my judgment that the matter turned upon whether the existence of three prohibitory signs on the land had the effect of making use of the land by local people contentious and not *as of right*. I took the view that they did have this effect; and that accordingly the land should not be registered as a town or village green. In doing so, I relied upon the decision of the Court of Appeal in *Winterburn v Bennett*¹⁰.
17. On the issue of statutory incompatibility, the position was that there had been further relevant litigation in the High Court exploring the scope of *Newhaven Lancashire County Council v Secretary of State*¹¹ and *R (NHS Property Services) v Surrey County Council*¹². The case of *Lancashire* was particularly pertinent since it involved land held for educational purposes. In the light of this further guidance, I took the view that the application did not fail because

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

⁸ [2014] QB 186 (CA).

⁹ [2015] AC 1547 (SC).

¹⁰ See footnote 7 above.

¹¹ [2016] EWHC 1238 (Admin).

¹² [2016] 4 WLR 130.

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

18. The Public Rights of Way and Greens Committee of the City Council considered my report and recommendation at a meeting on 12 December 2016. It decided to reject my recommendation and to register the land as a town or village green. That decision was challenged by Cotham School by way of judicial review. As well as taking the point that, in the light of my report, the Committee should have decided to reject the application, the School also argued that the application should have been rejected on the basis of statutory incompatibility. By the time the case came on for hearing before Sir Wyn Williams (sitting as a Deputy Judge of the High Court) on 21 November 2017, the Court of Appeal had recently heard argument on the appeals in the *Lancashire* and *Surrey* cases (the two appeals were heard together) but had not delivered judgment. Sir Wyn postponed delivering his judgment until after the Court of Appeal had given its judgment (which happened on 12 April 2018). This enabled him to take into account written submissions on the question of statutory incompatibility which were submitted to him by the parties after the judgment of the Court of Appeal had been handed down.
19. In his judgment, delivered on 3 May 2018, Sir Wyn upheld the challenge. However, in the light of the Court of Appeal's judgment in *Lancashire/Surrey*, he rejected the argument that the application should be rejected on the basis of statutory incompatibility. He did however accept that the City Council had erred in law in its rejection of my recommendation that the application for registration should be rejected. Accordingly, its decision was quashed.
20. On 25 June 2018, in the light of the guidance of the High Court and my report and recommendations, the City Council resolved to reject the application.
21. On 14 September 2018, Emma Burgess made a fresh application to Bristol City Council as registration authority to register the playing field as a town or village green. The relevant 20 year period in respect of her application was 1998 to 2018 (i.e. the twenty years to the date of her application). She submitted the use of the land was *as of right* on the basis that Avon County Council had been abolished in 1996 and the signs that it had erected on the land had no legal effect after that date.
22. Bristol City Council and Cotham School objected to the application. Among the points that they took was that the School had erected new signs on the land on 24 July 2018 and that, whatever was the position before, after 24 July 2018 the use had been contentious and not *as of right*. Ms Burgess contested that the signs were effective but if they were, then, on the face of it, the objectors had a good point because (i) the application was made under section 15 (2) of the Commons Act 2006 and (ii) by virtue of section 15 (2) (b), in order to qualify for registration, qualifying use has to continue to the date of the application. There is however (also on the face of it) a ready response to this objection: an application can be made under section 15 (3) of the Commons Act 2006. By virtue of section 15 (3) (c) and (d) an application can be made for up to a year after qualifying use has ceased. Thus, if the notices did have effect, one might think that the application could be considered under section 15 (3) instead of 15 (2). However, Ms Burgess could not know that Bristol City Council as registration authority would treat her application in this way. In the light of this, on 22 July 2019, Katharine Welham made a further application to register the land as a town or village green relying on section 15 (3) (c) and (d) of the Commons Act 2006. This explains why Bristol City Council as registration authority have been asked to consider two applications rather than a single one.

23. In the meantime, the *Lancashire/Surrey* cases had gone to the Supreme Court. The Court delivered its decision on 11 December 2019¹³. It allowed the appeals taking the view that the Court of Appeal had taken too narrow a view of the scope of statutory incompatibility.
24. On 2 March 2021, I made a report to the City Council. I advised that it was not necessary that there should be a public inquiry and that the land should not be registered as a town or village green. This was on the basis that the notices that had operated to render use not as of right between 1991 and 2011 continued to be effective after 1996, so that use by local people in 1998 and thereafter was not *as of right*¹⁴.
25. I had thought that in March 2021, I had all the material before me on which to make a recommendation. This proved not to be the case. In the light of my report Ms Burgess and Ms Welham adduced additional arguments and submitted additional material in support of them. The objectors also made further representations.
26. The detailed facts relating to the applications are set out in my report dated 14 October 2016 ("the 2016 report"). As noted, the core facts are not controversial. Some additional evidence has been submitted by the applicants and is set out and considered as appropriate below. I do not consider that this additional material requires there to be a public inquiry.
27. The 2013 and 2016 reports are appended to this report.
28. I now make this report to the City Council as registration authority in the light of all the material which the Applicants and Objectors wish to submit to me.

Matters of law

The burden of proof

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

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

¹³ See [2021] AC 194 (SC).

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

¹⁵ [2004] 1 AC 889 (HL).

¹⁶ See paragraph 2 of his speech.

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

As of right

31. It is necessary that the use by local people relied upon by the Applicants is as of right. This means that it must be *nec vi, nec clam, nec precario* i.e. not by force, nor stealth, nor the licence of the owner¹⁷.
32. The primary meaning of access that is *vi* or by force is access by physical force e.g. by breaking down a wall or cutting through a fence. However, it is sufficient if use is contentious. In *Smith v Brudenell-Bruce*¹⁸ Pumfrey J defined contentious use as follows:

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

33. It is obvious from this that a notice may make use contentious. This was explained at the highest level and by reference to its origin in Roman Law by Lord Rodger of Earlsferry in *R (Lewis) v Redcar*¹⁹. Although a notice may make use contentious what may be less clear is what is the position if a notice is ignored.
34. In analysing the position, it is helpful to begin by taking the example of an open site which is fenced off with a wire fence. Local people mistakenly consider that they have a right to go on the land, and make a hole in the fence with wire cutters. The first to go through will be taking access by force. It is surely the case that those who in succeeding days use the gap that is created will also be taking access by force. But if we imagine that local people continue to use the gap thereafter and no further challenge issues, it is not so easy to describe their continued use as by force or contentious. The obvious analysis is that a challenge was issued, accepted and the landowner has subsequently acquiesced in the continued use: which is intrinsically peaceable. Local people behave as if they have the right.
35. A similarly analysis may be made if, instead of surrounding the land with a wire fence, the landowner puts up lots of notices saying: *Keep out! It is forbidden to trespass on this land.* Initially access will be by force, but the landowner may be viewed as acquiescing if he takes no further action.
36. There are *dicta* of high authority which supports this analysis.

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

¹⁸ [2002] 2 P & CR 4.

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

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

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

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

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

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

40. This passage contemplates that a landowner may not be able to argue successfully that use by members of the public which ignores a prohibitory sign is not *as of right*.
41. It is these *dicta*, in particular, which led me in the 2013 report to advise the registration authority to conclude that, despite the existence of the Avon County Council signs, use by local people of the land had been *as of right*. As the applicants have pointed out, I recorded at paragraph 70 of that Report that *It seems to me that the present case is a classic one of acquiescence*. This however was before the decision of the Court of Appeal in *Winterburn*, which, it seems to me, changed the legal position as it had previously been understood.
42. Thus, despite the *dicta* in *Godmanchester* and *Beresford*, the position now is that *Winterburn* is high recent authority which is directly in point and which establishes that use which ignores prohibitory notices is not *as of right*. In his judgment in *Winterburn*, David Richards LJ said:

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

²⁰ [2008] 1 AC 221.

²¹ See paragraph 24.

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

43. I note that in *Winterburn* it might have been argued that use was contentious on the basis of protests by the landowner in addition to the signs. However, it is clear that the judgment is on the basis that the signs were sufficient by themselves. I also note that David Richards LJ did not refer to either the *Godmanchester* or *Sunderland* cases. However, although the position is that the Court of Appeal did not have had drawn to its attention relevant authority²², that authority represents *obiter dicta* and not *ratio decidendi*. Thus, it seems to me that the basis does not exist for Bristol City Council, as registration authority, to do other than loyally follow the judgment of the Court of Appeal as to effect of signs, which is *ratio decidendi*. The applicants suggest that *Winterburn* does not establish any general principle. It seems to me that it does.

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

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

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

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

50. *In my judgment there can be no doubt that Taylor²³ and Winterburn constitute authority for the proposition that where an owner of land has made his position about its use clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right" – see the paragraphs from Taylor quoted at paragraph 40 above and paragraph 40 in Winterburn itself. That is so, in my judgment, whether the claim relates to registration of a town or village green or the acquisition of a private right.*

47. Thus, the position is that in principle in the present case the signs may render the use of the land by local people contentious and not *as of right*. I say in principle because the further question arises as to whether the Avon County Council signs were sufficient to render use of the land contentious. I considered the evidence about this in the 2016 report and concluded that they were²⁴. There seems to

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

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

²⁴ See paragraphs 387 – 389.

me no basis now for me to reach a different conclusion in respect of the sufficiency of the notices²⁵. Obviously unless anything changed the notices will have gone on making use of the land contentious after that time until there was some material change (or for some other reason they were ineffective).

48. In *Beresford*, the House of Lords held that for a permission to be effective it had to be revocable²⁶. This position was overruled by the Supreme Court in *R (Barkas) v North Yorkshire County Council*²⁷. In *Barkas*, Lord Neuberger made it clear that if a person is not a trespasser by virtue of a communicated consent, his use is not *as of right*:

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

49. Finally, I need to refer to *R (Mann) v Somerset County Council*²⁹. In that case, on part of the land which was the subject of an application for it to be registered as a town or village green occasionally there had been a beer festival and a funfair to which admission had been charged. The Inspector implied from this a permission when access was freely available. The High Court upheld the Inspector’s approach. The contrast is with *R (Lewis) v Redcar*, where land was used (on a full time basis) as a golf course. The Supreme Court held (contrary to the view of the Inspector) that this use could co-exist with use by local people and the land be registered as a town or village green. It is fair to say that it was not argued from the golf course use that use by local people was permissive³⁰ but it would be remarkable to hold that *Lewis* was decided *per incuriam*. I think the answer is to see *Mann* as decided on its own facts, the argument not extending as far as the situation of a golf course in *Lewis*.

Consideration

Introduction

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

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

²⁶ See per Lord Scott at paragraphs 49 – 50.

²⁷ See the speech of Lord Neuberger at paragraph 15.

²⁸ See paragraph 29.

²⁹ [2017] 4 WLR 170.

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

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

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

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

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

Issue 1: statutory incompatibility

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

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

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

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

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

³¹ [1975] Ch 380 (CA).

³² [2006] 2 AC 674 (HL).

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

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

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

- (1) section 8 of the 1944 Education Act which imposed a duty on local education authorities “to secure that there shall be available for their area sufficient schools” for providing primary and secondary education, sufficient in number, character and equipment;
- (2) sections 13 and 14 of the Education Act 1996 which require local authorities to contribute to the development of the community by securing efficient primary and secondary education;
- (3) section 542 of the 1996 Act which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations (SI 2012/1943)) suitable outside space for physical education and outside play;
- (4) section 175 of the Education Act 2002 which requires the education authority to “make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children”.

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

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

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

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

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

operates an independent school is rather different to the interference with a statutory functions of an education authority. It does not seem to me that the Courts would hold that the land of an independent (private³³) school could not be registered as a town or village green³⁴.

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Issue 2: the signs

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

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

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

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

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

79. However in, it would seem, 1985 or 1986³⁶, Avon County Council put up three notices which made it clear that the Council were contesting the use and no longer acquiescing in it³⁷. Accordingly when an application was made to register the playing fields as a town or village green relying on the twenty year period 1991 – 2011, I took the view that the use had ceased to be *as of right* and that there was not qualifying use throughout at least part of the relevant twenty year period, namely the period between 1991 and 1996 during which Avon County Council existed³⁸. As I have explained, the law is that sufficient steps have to be taken by a landowner to communicate to users that their use is contentious. In the circumstances I considered that it was. In addition to use being *as of right*, it also has to be significant. It seemed to me clear that it was – users would have been aware of the signs. It also has to be by the inhabitants of a locality or neighbourhood within a locality. I considered that both these requirements had been met. Accordingly the one objection to registration was that the use had not been *as of right*. I advised that this one objection was decisive and, as explained in detail above, in due course the City Council decided to reject the application.

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

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

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

5 Existing local government areas

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

³⁶ See paragraph 233 of the 2016 report.

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

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

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

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

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

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

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

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

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

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

14. Avon County Council was abolished and its educational functions were transferred to Bristol City Council as part of a re-organisation of local government on 1 April 1996. There was no suggestion in the statutory provisions that this was anything other than an administrative alteration that was not intended to alter any of the arrangements or decisions made by Avon whilst in existence that related to its statutory functions. Any reasonable local resident would have known that Avon was being abolished and its functions and responsibilities transferred to Bristol. No reasonable person could have concluded that Avon’s statement, policies and notices were to cease effect at midnight on 31 March 1996³⁹.

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

³⁹ See p 20.

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

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

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

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

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

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

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

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

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

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

4.2 Informal use

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

4.3 Vandalism/security problems

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

97. Section 5 contained the following:

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

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

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

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

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

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

100. The Chairman said that

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

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

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

102. I do not know if the Ad Hoc Committee met again; if it did, it did not again consider the issue of informal access⁴⁰.

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

104. It was reported that

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

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

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

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

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

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

105. Members were reminded that

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

106. The Committee resolved:

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

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

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

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

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

109. These facts supply the background, insofar as it is known, to the erection of the Avon County Council signs at the Stoke Lodge Playing Field. The detailed background is not available, the relevant files having been destroyed⁴¹.

110. In my first report, relying on the oral evidence of somebody who was concerned with their erection, I said that the signs at the Stoke Lodge Playing Field were erected in about 1985/86⁴². The Applicants suggest that it is likely to have been earlier i.e. following the resolution of the Agricultural Working Group on 6 April 1983. One sees the point: if signs were erected at Kensington Meadows it is perhaps likely that they were in the same form as those erected at Stoke Lodge⁴³; and that if some signs in the same form were being erected at that time, it is likely that other signs (which we know were erected at some time) were erected at the same time. It seems to me, nonetheless, that the reasoning involves a number of assumptions which may not be correct. However, in the circumstances, I do not think that the precise date of the erection of the signs is significant.

⁴¹ *Ibid* at paragraph 237.

⁴² See paragraph 233 of the 2016 report.

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

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

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

113. In the 2016 report, I construe the meaning of the signs. As the law requires⁴⁴, I did this on an objective basis. On such an objective approach, I took the view that they were forbidding trespass and that the specific activities identified were examples of that (“in particular”). I noted that the signs would not accurately have stated the effect of the act since the exercising of dogs was not *per se* an offence⁴⁵. I have not changed my view as the objective meaning of signs. It is this that is relevant – how they would have been interpreted by a reasonable reader. It was possible that they subjectively put a different meaning upon them – considering perhaps that it was only dog walking to the annoyance of others that was forbidden – but that was an interpretation that was not warranted by the actual words used. In my first report as I have noted I placed emphasis on the words *In particular*; I might also have noted the words *Requests for authorised use should be made to the Director of Education*. The signs envisaged that e.g. requests for the flying of model aircraft would be made to the Director.

114. If I go back to the meeting of the Agriculture Working Group on 6 April 1983, it is possible that the Group did not intend to prevent activities such as dog walking but only activities which caused a nuisance. If so, and if the signs that were erected were the same as those erected at the Stoke Lodge Playing Field, then the signs may have gone further than was warranted by the Group’s resolution and, conceivably, this affected the way in which the notices were to be construed. But if that was so (and there are two big “ifs” involved as well as a particular point of construction), it does not mean that the signs in respect of the Stoke Lodge Playing Field are not to be given their objective meaning. Given that objective meaning, I consider that they made use of the Playing Field contentious. Insofar as it is relevant, I think that the County Council must be taken to have intended to make it contentious. The Applicants have shown that in 1983 there was a lot of discussion within the County of dual use of playing fields and, in that context, of informal use by the public. Evidently the County Council wanted to facilitate community use of its playing fields. But the minutes nowhere show that it was deciding to tolerate it⁴⁶; and they do show that it was very alive to the difficulties of informal access. Thus the evidential basis for suggesting (if relevant) that the signs at the Stoke Lodge Playing Field did not reflect what the County Council actually intended does not exist.

115. It is, of course, still necessary to consider what happened after 1985/6⁴⁷ to see if, for any reason, at some date thereafter use ceased to be *as of right*.

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

⁴⁵ See paragraph 369.

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

⁴⁷ Or 1983, if the signs were erected then.

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

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

118. In 1990, local management of schools was introduced under the provisions of the Education Reform Act 1988. As I understand it, this was under the framework of the Education (No 2) Act 1986 but provided for schools to be responsible for their own budgets. Avon County Council positively resolved that as part of this process, governing bodies would be free to determine the use to be made of their premises. I do not think that this added to the powers of Fairfield School; the significance of it, such as it is, is that Avon County Council were saying that their policy, for the future, was not to determine the use to be made of school premises⁴⁸. Once again I do not think that this has any bearing upon whether the use of the playing fields was as of right between 1987 and 1996. What seems to me to be significant is the fact that Fairfield School did nothing to affect the "status" of the land, namely the fact that use of it had been rendered contentious by the erection on it of appropriate signs.

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

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

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

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

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

⁴⁹ Subsequent agreements were in the same terms.

121. In 2009, Bristol City Council replaced one of the Avon County Council signs⁵⁰. The background evidence about this is set out in my first report:

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

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

It seems to me that the sign is, to a degree, ambiguous. I accept, of course, that I have to construe it in a common sense way and in its context.⁵¹ It is indeed from the context that the ambiguity arises – placed as it is on the boundary between the grounds of Stoke Lodge House and the playing fields. Thus it seems to me that a reader may not be sure whether it relates to the grounds of the house or the playing fields. The possibility of confusion is enhanced if the sign being mounted on a single pole, it was possible for it to be rotated so that it will not always have been facing those leaving the grounds of Stoke Lodge House. However, on balance, I think that the reasonable landowner would consider that he had put up a sign that would be construed by local people as applying to the playing fields and not the grounds of Stoke Lodge. Thus someone considering the sign, even if it had been re-orientated, would consider that it was likely to apply to the playing fields. That, in its context (whatever its orientation may have been) it was taken as applying to the playing fields by at least one person emerges from the letter set out at paragraph 22 above: the lady must have been referring to the playing fields because she refers to the land on which she walks as being a pleasant and open space, which is not an apt phrase to describe the grounds of Stoke Lodge⁵².

⁵⁰ Its wording was as follows:

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

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

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

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

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

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

... currently unfenced and allows unfettered community access.

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

127. The reason why Informal Cabinet was briefed that there was a need proactively to take steps to keep people off the land to prevent future registration was in the light of *R (Lewis) v Redcar*, decided earlier in the year. Before that decision, the Council had taken the view, in the light of the advice of leading counsel, that registration of its playing fields would not have been possible by virtue of their dual use⁵³. However *Redcar* had rejected that argument. Thus, all other things being equal, there was a risk of any and all of the playing fields of the City Council which were subject to dual use being registered as town or village greens on the basis that the City Council had acquiesced in their use. However the Briefing Note did not take into account the existence and effect of the Avon County Council signs at Stoke Lodge. It seems to me that, if the City Council **had** been acquiescing in use by local people, the Briefing Note could be taken as evidence of the City Council's continued acquiescence. However, if as I consider to be the case, the Avon County Council signs did make the use, the failure of the City Council to do anything following receipt of the Briefing Note in September 2010 is not evidence of continued acquiescence; it is simply a failure to do anything from which, in my judgment, nothing can properly be inferred. It did not affect whatever effect the Avon County Council signs had.

128. On 1 September 2011, Cotham School became an academy and was granted by the City Council a 125 year lease of the playing fields⁵⁴. The terms of the lease provided that it was

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

⁵⁴ See paragraph 58 above.

... subject ... to the existing rights and use of the property including use by the community⁵⁵.

129. The insertion of this provision suggests that the City Council thought that the community might have some sort of entitlement to use the land. One may note that the original application to register the land as a town or village green was made in March 2011⁵⁶; it seems to me would have been prudent to recognise in any such lease the possibility of town or village green rights arising. The effect of the provision was that, if there were or are any such rights, the School could not have been able to complain to the City Council about their assertion. But the lease does not tell me anything about the quality of the use of the land by the community (i.e. whether it was or was not *as of right*). Even if, when it entered the lease, the City Council thought that there were or might be town or village green rights, this does not mean that there actually were any rights⁵⁷.

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

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

132. There was another relevant occurrence in 1990.

133. There was evidence before the first inquiry that the employees of the council would block off Cheyne Road access. This action can be dated to after 1987. The principal concern seems to have been motorbikes getting on to the field, The evidence is not entirely clear⁵⁸ but it seems that a tree trunk which had fallen nearby was used to obstruct the gap; for a time it may be that this stopped the motorbikes but permitted access to pedestrians. There then came a time when the tree trunk was pushed against the opening. What happened next is described in an article in the Bristol Post for 8 January 1990 entitled ‘*Guerilla tactics*’ to clear footpath.

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

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

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

⁵⁵ See clause 2.1.

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

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

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

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

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

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

135. A picture is captioned

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

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

Messrs Veale Wasbrough

...

Dear Sir

Access onto Stoke Lodge Playing Field

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

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

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

...

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

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

139. The applicants observe:

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

and

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

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

141. David Richards LJ makes it clear that the objecting landowner does not need to go further and prevent the activity to which he objects. Accordingly a landowner can post signs, make the use contentious and leave access to his land unimpeded. He or she does not need to keep gates locked. He or she will not be acquiescing in any use. It seems to me that if following the erection of signs, he or she leaves unlocked gates which were previously locked, he or she will not be acquiescing in the use. This might indeed be rational behaviour; a landowner might not subjectively be concerned whether his land is used or not as long as that use does not ripen into a legal right⁵⁹.

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

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

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

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

146. In 2012 the City installed dog waste bins and that in 2016 it installed a play park with access from the playing fields. I can see the force of the argument that says that the installation of dog waste bins – although a small thing by itself - might suggest to a user of the land that Bristol City Council as landowner was no pursuing a different approach to that of Avon Council (abolished more than 15 years earlier); and that he or she might consider from the availability of the land for use when the School and sports clubs were not using it that the City Council were permitting use⁶⁰. From the

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

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

Applicants' point of view to hold that the use was permissive after 2012 would be fatal to the application. For use to have been *as of right* it needs to be acquiesced in or tolerated. I find the idea of positive acquiescence not amounting to permission a difficult concept. Accordingly, I approach the question of the use after 2012 in this way. One can see an argument that nothing significant changed in 2012 and that the use continued to be contentious. One can also see an argument that the position did change in 2012 and the use was permissive. In either case, use would not be *as of right*. What I find it impossible to hold is that in some way the signs and the litter bins cancelled one another out so that the City Council were now no longer objecting or permitting but (as they were required to do if use was to be *as of right*) **acquiescing**. Accordingly, there was not qualifying use in the period 2012 to 2016. As to the period after 2016, see the discussion of Issue 3 below. Whatever the position down to 2016, it seems to me that use was contentious thereafter⁶¹.

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

COTHAM SCHOOL
STOKE LODGE PLAYING FIELD

MEMBERS OF THE PUBLIC ARE WARNED NOT TO TRESPASS ON THIS PLAYING FIELD

In particular the exercising of dogs or horses, parking vehicles, flying model aircraft/drones, playing golf, the use of motorcycles and the carrying on of any activity which causes or permits nuisance or disturbance to the annoyance of persons lawfully using the playing field will render the offender liable to prosecution for an offence under section 547 of the Education Act (1996)⁶²

REQUESTS FOR AUTHORISED USE SHOULD BE DIRECTED TO COTHAM SCHOOL

Cotham School accepts no liability to users for any unauthorised use of the playing field.

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

Issue 3: the public inquiry in 2016

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

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

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

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

the Council, which Mr Mayer and his supporters sought to rebut. If the signage was itself insufficient to render the use contentious, the Council's public stance at the public inquiry did so⁶³.

150. The School support this objection.

151. As I understand it, the applicants contend that as a matter of law, the matters upon which the objectors seek to rely cannot have made the use of the land contentious. I do not think that this can be right. It is of course correct that what is relied upon involves no physical action in respect of the land, whether by fencing or by the posting of notices. But this cannot be a requirement of making use contentious. If I imagine a situation in which all users and potential users are told orally by the landowner or his agent that their use is contentious, I see no reason why this should not suffice. The School point out that David Richards LJ in *Winterburn* said [*p*]rotest against unauthorised use may, of course, take many forms⁶⁴.

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

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

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

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

⁶³ See paragraph 17 at p 20.

⁶⁴ See paragraph 40.

⁶⁵ [2004] 1 EGLR 85.

⁶⁶ [2010] EWHC 30

⁶⁷ See paragraph 139.

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

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

157. In this regard the applicants say:

*... the Council's resistance of the 2011 TVG application does not demonstrate that the use was contentious post 2011. The council's case before the previous Inspector concerned, inter alia, whether the use was "as of right" between 1991 – 2011. Such opposition merely indicated that the Council was of the view that the local inhabitant's use of the land had not been as of right **during this time**. The fact that the Council's barrister cross-examined some of the applicant's witnesses merely accepts that the use had been as of right between 1991 – 2011. It did not indicate that the use post 2011 was contentious⁶⁸.*

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

159. It is even more artificial if the case of the landowner at the inquiry was that the use by local people was not *as of right* by reference to signs erected on the land and those signs were still *in situ*. That of course was the position in the present case⁶⁹. In addition, it was clear at the inquiry that the City Council and the School were objecting because they were concerned with the incompatibility, as they saw it, between the use of the land as a town or village green and its use as a school playing field; and based a legal argument upon that suggested incompatibility. Whether or not that argument was correct – a matter, of course, which I have considered above - it made it clear that the continuing use of the land by local people was contentious.

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

⁶⁸ See paragraph 14 at p 28.

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

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

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

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

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

Conclusion and Recommendation

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

166. My conclusions on these issues are as follows:

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

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

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

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

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

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

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

PHILIP PETCHEY

14 March 2023

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

NOTE

Preliminary

1. A copy of my Report dated 14 March 2023 has been supplied to the interested parties and they have commented upon it. I am now asked to consider those comments and give the PROWG Committee the benefit of my further advice in the light of them¹. I should say at once that the comments have not caused me to change my mind. My recommendation continues to be that the land in question should not be registered as a town or village green for the reasons that I gave in my report.

Introduction

2. If the use of land is contentious it is not *as of right*. If a landowner puts up a prohibitory notice or notices he potentially makes use of the land contentious. In the present case the landowner put up prohibitory notices. In my report I conclude that in the circumstances of the putting up of these particular notices, use of the land was not *as of right*. Because use of the land was not *as of right*, I advised the registration authority that should not be registered as a village green because it is a requirement of registration that use is *as of right*.
3. In any particular case, there may be reasons why a notice might **not** make use of land contentious.
4. It might be that the notice is not clear. I consider that the notices in the present case were clear.
5. It might be that there were not sufficient notices put up so that it could be that there were many people who used the land who did not or could not appreciate that their use was contentious. I consider that in the present case sufficient notices were put up to make the use not *as of right*.
6. In two reported cases, the Court said that if people ignored a prohibitory sign and carried on using the land and the landowner took no further steps to stop them using the land, then the landowner acquiesced in the use which accordingly ceased to be contentious and became, instead, contentious. This view was rejected by the Court of Appeal in *Winterburn*. What the Court of Appeal decided in *Winterburn* is binding on the registration authority.
7. The prohibitory notices were put up in the present case by Avon County Council. The relevant period to be considered is 1998 – 2018. Avon County Council was abolished in 1996. The Applicants say that the notices ceased to be effective when Avon County Council was abolished. I do not think that this argument is correct.
8. On top of all this, in June and July 2016 there was a public inquiry, lasting eight days, into whether the land should be registered as a village green. I consider that this in itself made the use of the land at this time contentious. Local people were saying that the land had become a village green and the landowner was strongly resisting that claim. There is a distinction between resisting a claim to register a village green and resisting use of the land claimed as a

¹ I am not asked to advise about matters of procedure.

village green but it is a fine one and I consider that the circumstances of the public inquiry made it clear that the use itself was contentious.

9. The landowners claimed that the use of the land for a school under the relevant statutes was incompatible with use of the land as a village green and accordingly the land could not be registered as a town or village green. There is nothing in the statute governing the registration of village greens about land not being registered on the basis of statutory incompatibility; the relevant law is set out in two decisions of the Supreme Court. The limits of the concept are not clear. In my report I say that a court might extend the concept to the circumstances of the present case but the circumstances are distinguishable. The ownership of the land is divided between the school (lease) and the local authority (freeholder). Registration of the land of an independent school would not of itself be incompatible with its use under any statute; nor would it be incompatible with the non-use of the land by the local authority. It is only when the two elements are brought together that the argument arises. I am unconvinced by it.

Specific points

Paragraph 27 of the Applicants submissions in respect of my Report

10. The applicants argue that my interpretation of *Winterburn* and its application of it to this represent a fundamental misreading of the case. I have explained in my reading of it at paragraphs 41 to 46 of my Report and I disagree with the criticism. It is necessary for the Committee to take a view about this. If I were wrong, then the Avon County Council signs would have been ineffective. Subject to arguments about the effect of the public inquiry and as to statutory incompatibility the land would be registrable; and subject to arguments about statutory incompatibility ought to have been registered in 2018 upon the application by Mr Mayer.

Paragraph 35 of the Applicants' submissions in respect of my Report

11. In 2011 Mr Mayer made an application to register the land; in 2016 I submitted a report into Mr Mayer's application recommending that the land be not registered; in 2016 the registration authority rejected the recommendation in my report and decided to register the land. That decision was challenged by the School and the decision was quashed on the basis that the authority had not properly considered my report. It is correct to say that the judge did not specifically uphold what I said in my report about the effect of the notices.
12. Accordingly, strictly speaking, in my report on the current applications, I was wrong to say that the judgment of Wyn Williams J *upheld my interpretation of the signs and advice that use in the period 1991 – 2011 had not been as of right*.
13. What I should have said is that Wyn Williams J *did not disagree with my interpretation of the signs and advice that use in the period 1991 – 2011 had not been as of right*.
14. There are however non-disagreements and non-disagreements. If Wyn Williams J had thought that what I had said about signs was wrong, one would have expected him to say so; potentially if he thought what I had said was wrong, he might have upheld the decision of the registration authority.
15. Moreover, the matter did not stop there. The registration authority went on to re-consider Mr Mayer's application in the light of my report. It decided not to register the land. It was thereby

endorsing my report and recommendations. That decision was not thereafter subject to judicial review.

Paragraphs 36 to 40 of the Applicant's submissions in respect of my Report

16. In the submissions of the Applicants that I addressed in my Report, they developed a new and additional argument that, despite the Avon County Council notices, the use of the land at all times was being acquiesced in so that user was not contentious². This new argument had nothing to do with the intrinsic effectiveness of the signs and had not been made to me in my consideration of Mr Mayer's application. If it is correct it follows that, on the face of it, the land should have been registered upon Mr Mayer's application³. It is a complicated argument, involving an interpretation of reports and minutes of Avon County Council and a consideration of the legal position of the School as it was affected over time by various Education Acts. I dealt with that argument in detail and point by point in my Report; if I were now to respond to paragraphs 36 to 41 of the Applicants' submissions on my Report I would only be rehearsing once again what I said in my Report.

Paragraph 41

17. The Applicants criticise the way I address events "on the ground". There are a number of matters which would indicate that the use of the land was not contentious but was being permitted. This is not a *bizarre* conclusion as the Applicants suggest in their submissions on my Report; the question is how these matters are to be addressed in the context of the prohibitory notices. I conclude that the use of the majority remained contentious and that the use of some was indeed permitted. This would mean that the use of nobody was *as of right*. I reject the argument that somehow by virtue of these matters, the County Council was *acquiescing* in the use (so that the use, if it were acquiescing, would be *as of right*). I do not consider that the recent statements of [REDACTED] and [REDACTED] advance a consideration of this aspect of the matter.

Paragraphs 52 to 54 of the Applicants' submissions on my Report

18. At paragraph 158 of my Report dated 14 March 2023 I said of the proposition that the public inquiry was a well publicised cause celebre that the Applicants did not contend to the contrary. The reason for saying this is that the Applicants' submissions to me dated 21 December 2022 contained a considerable amount of material about the significance of the 2016 inquiry but did not take the simple point that it was not a cause celebre. However at paragraph 14 of their submissions they point out that they had contended to the contrary in their earlier submissions, from which they had not resiled. I am sorry that I misunderstood the position. The Applicants starting point of course remains a submission that even if the public inquiry was a *cause celebre*, it would not mean that the use of the land thereafter was contentious. I have dealt with that argument in my report dated 14 March 2023 and do not want to add anything further about it here.
19. As to my conclusion that the 2016 inquiry was a well publicised cause celebre, it seems to me that my conclusion on this point is a matter of judgment on the material that was presented to me. In the light of material indicating that it **was** a well publicised cause celebre, the Applicants are, of course, asserting a negative. It would have been open to them, if they had wished, to produce witness statements from people using the land in 2016 who were ignorant

² It is summarised at paragraph 89 of my Report dated 14 March 2023.

³ Although, as the Applicants accept, I could not make a recommendation to the registration based on facts of which I was ignorant: see footnote 3 of their submissions to me dated 26 October 2022. The correctness of the registration is, however, subject to the argument about statutory incompatibility.

of the public inquiry⁴. Their failure to do so does not count against them, of course; it merely shows that they have not, by reference to such material, displaced the conclusion that can reasonably be drawn from the material relied upon by the landowners. Looking at the matter realistically, it is hard to imagine such witness statements (if they could be assembled) raising any doubt as to what is, in the circumstances a common sense conclusion. What may appear to be a common sense conclusion may in any particular case be displaced; I do not think that it has been in this case.

20. In my Report at paragraph 158 I noted that the Cotham School and Parent had plotted on a map the eleven locations around the playing field pre-2018 where campaign signs were posted. The Applicants now submit that two of these locations do not relate to campaign signs and I accept that this may be the case. However in all this one must not lose sight of the wood for the trees. As regards the other nine, it seems to me that they do indicate an appreciation in the neighbourhood that the use of the Field was contentious and to seek (as the Applicants do) to construe them as not relating to a dispute as to a claimed entitlement to use the Field is tendentious. The nine signs are examples of evidence that the use of the Field was contentious.

Paragraph 56 of the Applicants' submissions on my Report

21. The School's lease of the Field was subject to

... all existing rights and use of the Property including use by the community.

The Applicants assert that the effect of this is that, as a matter of law neither the School nor the City Council could lawfully object to the use of the Field by the community; if, as they clearly did, the School and City Council objected to the use of the Field they had no power to do so and any such objections fall to be disregarded⁵. In 2011 the community had no rights to use of the Field so that part of the provision in the lease can have no application. It seems to me that the lease was recognising that the Field was subject to use by the community. This did not stop the lessee (the School) or the lessor (the City Council) subsequently objecting to that use.

Paragraphs 58 to 60 of the Applicants' submissions on my Report

22. The Applicants' say that the installation of dog waste bins in 2012 did not cause use of the Field to be permissive. In my Report I acknowledge that this may be the case (see paragraph 142). But if this is so, the use simply went on being contentious.

Paragraph 42 of the Applicants' submissions on my Report: scope for disagreement

23. It will be helpful if I here deal with a point taken at paragraph 42 of the Applicants' submissions. It is made in relation to the conclusion in my Report dated 14 March 2023 on signs but also has potential relevance to my conclusion in respect of the effect of the 2016 inquiry.
24. In my Report dated 14 March 2023, I explained the law as best I could and sought to apply that law to the facts as I considered them to be. If I have got the law wrong a decision made

⁴ Clearly 11% of those who have made witness statements in support of the current applications will have known about the inquiry in 2016 (see paragraph 52 of the Applicants' submissions on my Report). The statements of the remaining 89% evidently did not expressly address whether they knew or did not know about it. It is hard to imagine that the remaining 89% were ignorant of it but that is not a matter about which there is evidence.

⁵ See also paragraph 49 (ii) of the Applicants' submissions on my Report.

on the basis of that erroneous explanation of the law is liable to be quashed. The decision of course remains that of the Committee and if they are persuaded for whatever reason that I have got the law wrong, they will so decide and resolve accordingly. In doing so they will not need any reminding that they are lay people and that the registration authority has instructed me because of my expertise in this area of law; and they will also see that I have sought clearly to explain what the law is. Ultimately I am either right or wrong, and they have to take a view about that.

25. As to the interpretation of the facts, there may, at least in theory, be scope for greater disagreement. It is open to a decision maker to disagree with an Inspector's finding as to fact for reason given and, more broadly, with an Inspector's interpretation of the facts for reason given. I say "for reason given" because if a decision maker disagrees with an Inspector without giving reasons the decision making process will be flawed and the decision liable to be quashed.
26. For reasons I have given, I think that the land in the present case should not be registered as a town or village green. Further, it is appropriate that I should say that in my view the scope for the registration authority to reach a different decision is limited if it applies the correct law. It is not for me to suggest a way through the law and the facts whereby they might conclude that the land is registrable as a town or village green; and for such a conclusion not to be challengeable in law: it is for the Applicants to do this if they can. What I can say is that it seems to me that what the Applicants have done in their representations is to assert that I have got a great number of things wrong without suggesting what, if I had (in their view) got everything right would be the facts and law on which the registration authority would properly conclude that the land should be registrable.

Statutory incompatibility

27. Bristol City Council as landowner and Cotham School consider that statutory incompatibility applies to the current situation. Cotham School press upon me the analogy between the position of the Secretary of State for Health in the *Surrey* case and the Secretary of State for Education in the present case. However, on the face of it, if statutory incompatibility applies in the present case it is because of statutory incompatibility vis a vis Cotham School or Bristol City Council or both combined. If the Secretary of State for Education is to be considered relevant it does seem to me that the application of the concept statutory incompatibility is being extended. I do not discount the possibility of a court so extending the concept but I do not consider it appropriate to advise the registration authority to do so in the present state of the law.

PHILIP PETCHEY

18 May 2023

Appendix 6.9

Appendix 9 to the PROW Consultant's Report to Committee

Response by Professor Alan Preece (Applicant)

Further to the report prepared by Robin Carr Associates 4th October 2024 on behalf of Bristol City Council

Regarding the Application for Definitive Map Modifications for Claimed Public Rights of Way at Stoke Lodge Fields, Stoke Bishop, Bristol

I concur with, and am grateful to, Inspector Robin Carr for his careful assessment of the four ROW claims I submitted in May 2018 on behalf of the community, and for his recommendation that the four routes should be considered by the PROW&G Committee for application of a Map Modification Order.

I have been a neighbour of Stoke Lodge, and a user of the claimed ROWs for 52 years, and at the time was Chair of the Stoke Bishop Neighbourhood Partnership and was asked to take steps to preserve the ability to cross Stoke Lodge as short cuts to the local shops and schools. In particular the Inspector helpfully annotated the routes in a more logical and useful way.

Section 1. Use of the routes and their destinations

In light of the contents of the Inspector's report and in direct response to the PROW Team's request, I have analyzed the witness statements to ascertain the origins and destinations of the use of each path to evidence the highway-to-highway use, which is summarized below, but detailed in a series of Excel spreadsheets attached to the end of this response as **Attachment 1. (pages 12-18)** I have also sought help from those involved with the recent TVG applications to see whether there was any evidence uncovered in the process that could be brought to the attention of the PROW team.

Route 1.

As set out in the application, **Route 1** (between Druid Hill roundabout and Cheyne Road) forms part of the Bristol Greenwalk route from Clifton Suspension Bridge to Penpole Lane, Shirehampton. It also facilitates access by residents of Cheyne Road, Stoke Paddock Road and Bell Barn Road (and roads further afield) to the main centre of Stoke Bishop at Druid Hill with its shops, Post Office, garage, restaurants and Village Hall. The reverse route is the main way that residents from that part of Stoke Bishop walk through to Trymside, Sea Mills and the Blaise Estate.

- **Identified by 52 Witness statements, using the route for an average of 24 years, of which 48 statements were for destinations outside Stoke Lodge and only 4 used it to access the field solely.**

Route 2.

As set out in the application, **Route 2** (between West Dene and Shirehampton Road) was originally the Cedar Park School route for children to get to the Old School Kitchen on the Lodge (the school kitchens were demolished prior to 1993). The path over the field connects via the car park of Stoke Lodge House to Shirehampton Road. This is a very popular route for children from the Coombe Lane, West and South Dene roads and surrounds to Stoke Bishop CofE school (formerly called Cedar Park School). It also provides access for local residents to the bus stop and recently-added pedestrian crossing which facilitates access to the school and Shirehampton Road shops. The reverse route connects to walking routes around Coombe Dingle Sports Complex, Canford Cemetery, Canford Park and the Blaise Estate.

- **Identified by 34 witness statements, using the route for an average of 27 years, of which 24 claims were from and to destinations outside the field, with further 10 using it to access Stoke Lodge House.**

Route 3.

As set out in the application, **Route 3** (between Cheyne Road and Shirehampton Road) is a much-used short cut from Cheyne Road, Stoke Paddock Road, Bell Barn Road and Coombe Bridge Avenue through to the bus stop and Stoke Bishop CofE school.

- **Identified by 18 witness statements of which 8 claimed to use it as a route to the highway, the remaining 12 were accessing either Stoke Lodge House or the Play Park, and for a lower number of years – 19. (Note: In recent years the Playpark has hugely increased the use of this route).**

Route 4.

As set out in the application, **Route 4** (between West Dene and Cheyne Road) connects Cheyne Road, Stoke Paddock Road, Bell Barn Road and beyond to both West Dene and Ebenezer Lane, including the no.3 bus route at the end of West Dene. It also provides access for residents of West and South Dene, Woodland Grove and Coombe Lane to the Shirehampton Road shops (including supermarkets, hairdressers, veterinary practice and Mill House pub).

- **Identified by 31 witness statements from users over an average of 21 years and mostly originating at West Dene end. All were travelling highway to highway, mostly to access shops, dentist, vets, river Trym and a one-time garden centre.**

Section 2. Additional commentary on signs requested by Officers

Officers have requested additional information about whether any actions were taken to prevent or deter the public from using the route as a public right of way during the relevant period of use for any of the claimed rights of way. This note and annexes will explain that no such action was taken and that signs put up in the mid-1980s (and a BCC sign in 2009) were not effective due to ambiguity and other factors. The note considers:

1. The Avon County Council signs
2. Routes 1, 3 and 4 – the Cheyne Road entrance
3. Routes 2 and 4 – the West Dene entrance
4. Routes 2 and 3 – the BCC sign
5. Acquiescence by Cotham School in the use of the claimed routes
6. Final comments

1. The Avon County Council signs

- 1.1 In the mid-1980s, signs were installed at the West Dene entrance and in the car park near Stoke Lodge house by the previous landowner, Avon County Council (ACC). The ACC signs stated (see annex 1):

**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***

- 1.2 The wording of the signs gives a warning not to trespass (it is not a prohibition), some commentary about activities that might, if they were conducted by people on the field and 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). The wording

clearly contemplates that people will be on the field despite the initial warning. The wording does not suggest that walking a long-used path across the field is prohibited.

- 1.3 At paragraph 369 of his 2016 report, the TVG Inspector considered the ‘intrinsic ambiguity’ in the wording of the ACC signs and concluded 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. None of this indicates any objection to walking across the playing field in the manner that, with longstanding use, leads to the establishment of a right of way. The only relevant wording would be the general warning not to trespass, but users are likely to have considered themselves to be walking routes that were known to have been in public use for decades, rather than trespassing (see Mr Carr’s report at paragraph 10.9) and the ACC signs would not have been effective to interrupt their ‘as of right’ use. Mr Carr comments at paragraph 12.22 that it would be reasonable to conclude that the signs were insufficient to meet the requirements of section 31(3) of the Highways Act 1980. In addition, as set out below, they were not maintained by BCC as landowner.
- 1.4 In relation to the text of the ACC signs, the reference to section 40 of the Local Government (Miscellaneous Provisions) Act 1982, ceased to apply to Stoke Lodge Playing Field from 1 November 1996. Although it was replaced by similar provisions under section 547 of the Education Act 1996, from November 1996 the sign appeared to threaten users with an offence that was not applicable to them. In addition, from 1 April 1996 the signs were inappropriate in directing requests for pitch hire to the Avon County Council Director of Education, since Avon County Council no longer existed. By 1 November 1996 virtually all the wording on the ACC signs was inapplicable or inappropriate, as well as being ambiguous and ineffective in the current context.
- 1.5 Wider changes in education law are also relevant. Since 1 September 1987 control of, and decisions about, the use of school premises has been delegated to the governing bodies of maintained schools¹, subject only to any direction made by the local education authority. The minutes of the County of Avon Education Committee dated 23 January 1990 (annex 2) record that in preparation for the introduction of Local Management of Schools, the Education Committee made a direction 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’. ACC could have chosen to exercise control over community use of routes

¹ 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).

across playing fields in its direction but specifically chose not to do so, and left it for schools to make any decision on this matter.

- 1.6 Following the demise of Avon County Council (ACC), Bristol City Council (BCC) assumed legal responsibility for education and ownership of Stoke Lodge Playing Fields from 1 April 1996. It 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. Both ACC and BCC had the legal authority to direct Cotham School in relation to use of the claimed rights of way, but neither ACC prior to 1 April 1996 nor BCC as landowner from 1 April 1996 ever made a direction restricting or prohibiting use of any of the routes across Stoke Lodge Playing Fields.
- 1.7 In his report Mr Carr refers (at paragraphs 10.8 and 12.22) to the requirement that a landowner must 'maintain' signs in order for them to be effective, but BCC did not at any time maintain the ACC signs (according to the TVG1 evidence, the sign installed in the car park of Stoke Lodge house in June 2009 was introduced after the previous ACC sign had been missing for some time). It is worth noting that BCC did replace other ACC signage shortly after ACC was abolished. The minutes of the Leisure Services Committee for 24 September 1996 (see pages 2 and 6 of annex 3) 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 six months after the change of control from ACC to BCC. No equivalent updating or maintenance of the ACC signs was ever undertaken by BCC. It was therefore entirely reasonable for users of the routes across Stoke Lodge to assume that the signs had no effect.
- 1.8 In summary, the ACC signs were not effective to interrupt use of the claimed routes. Their ambiguous wording meant that they were not effective to communicate to users that walking the claimed routes was anything other than 'as of right', and they were never maintained after installation by ACC or by BCC. As explained below, events that post-date the installation of the ACC signs demonstrate that the landowner and the school with control of the land did not object to or interrupt use of the claimed routes. From 1 April 1996 onwards, the landowner (BCC) made no effort to communicate anything to users of the routes, and in 2010 recognised that use of the land was 'unfettered' (see below at 4.3).

2. Routes 1, 3 and 4 – the Cheyne Road entrance

2.1 In relation to routes 1, 3 and 4 as referred to in the application and at Appendix 4a and b, evidence was produced as part of the TVG applications of two incidents when the Cheyne Road entrance was temporarily blocked. These incidents were not intentional on the part of the landowner and did not indicate any intention to disrupt use of the entrance or route.

2.2 First, in late 1989/early 1990 the entrance was blocked with pruning debris by groundsmen. The branches etc were subsequently removed and taken away by local residents. A newspaper report of the removal was included at Appendix 4a to the application. A dated version plus transcription for ease of reading is at annex 4. This article is from the Bristol Evening Post dated 8 January 1990, and includes the following statements:

‘This access to Stoke Lodge has been in use for at least 40 years... It is a favourite short-cut to Stoke Lodge, the shops and the playing fields. I have used it for 35 years since I played on the fields as a girl and others say it has been in use much longer. There was a stile there... We have seen a solicitor about this but it was taking so long to sort out.’

‘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.’

A letter from an ACC officer, JR Blackmore, to Veale Wasborough solicitors (Appendix 4b to my application) dated 4 January 1990 refers to the same incident. It is understood that Mr Clarke (referred to in this letter) had approached Veale Wasborough about the registration of a public right of way across the field (again supporting that the route had already been in long use before early 1990). It is clear from this letter and the spokesperson’s comment that ACC did not object to pedestrian access to the fields. No fence or gate (as referred to in the article and letter) was in fact installed (perhaps because of the change in legislation referred to at paragraph 1.5 above); a bollard was installed sometime later to discourage motorcycles from accessing the field, without impeding pedestrians or buggies.

2.3 Evidence was provided to the TVG1 inquiry that a second blockage occurred when a very large branch fell off the oak at this entry point. One of its 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 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.

- 2.4 Evidence was produced in relation to the most recent TVG applications about the nature of use of the Cheyne Road entrance. Please see the witness statements of Ken Falcon dated 10 March 2023 (annex 5) and of Ian Creer dated 10 April 2023 (annex 6). Mr Falcon lived at Stoke Paddock House (1 Cheyne Road) from April 1984 until February 2007 and speaks of his ‘as of right’ use of the entrance to cross the field to West Dene, to Stoke Lodge or to Parrys Lane at the top of the field. Mr Creer has lived at 2 Cheyne Road since 1985 (and continues to do so) and speaks of his use of the entrance to walk to West Dene, Shirehampton Road or Parrys Lane. Numbers 1 and 2 Cheyne Road are directly adjacent to Stoke Lodge Playing Field and to the Cheyne Road entrance, as can be seen in the photos attached to Mr Falcon’s statement.

3. Routes 2 and 4 – the West Dene entrance

- 3.1 In relation to routes 2 and 4, at paragraph 12 of the TVG Inspector’s report he 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.’

- 3.2 During the meeting of the Public Rights of Way and Greens Committee in December 2016 in relation to the TVG application, Councillor Abraham recalled an incident in which the gate at the entrance from West Dene was locked by a new caretaker acting without Council authority. This partial closure led to considerable public protest, as a result of which, after just three or four days, the ACC Education team instructed the grounds managers not to lock the gate. Use of the route was not subsequently interrupted or interfered with. These comments are recorded in the handwritten notes of the PROWG meeting (see the extract at annex 7), although the discussion was excluded from the formal minutes of that meeting.

- 3.3 Further details of this incident are set out in two witness statements, dating the brief and partial unofficial closure to late 87/early 88 (see annex 8). Any interruption of access was unofficial and short-lived, and would not have been evident to users generally. It was not an intentional interruption by the landowner; the caretaker’s action was not official policy and was reversed almost immediately.

4. Routes 2 and 3: the BCC sign

- 4.1 In mid-2009 Bristol City Council erected one sign at the edge of the car park near Stoke Lodge house. This sign stated (see annex 1):

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.

- 4.2 The wording of the 2009 BCC sign has clear differences from the ACC signs. It did not refer to playing fields or education; it did not cite a 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 education land 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 routes across the playing fields (in the absence of BCC making a formal direction, as explained above). The sign was not commissioned or approved by Cotham School but was produced on the instructions of a BCC officer, as would be appropriate for a BCC-branded sign for Stoke Lodge house and its immediate surroundings. 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'. My understanding is that the sign could only have been intended by BCC to refer to the grounds of Stoke Lodge house, and this is reflected in the differences in wording between the ACC signs and the 2009 BCC sign.
- 4.3 It is also clear from the Cabinet Briefing Paper dated April 2010 (see annex 9) that was produced a few months later by the same BCC officer team that the sign was not intended to have any relevance to use of the playing fields and that officers considered that there were no restrictions on use of the fields or routes across them. At paragraph 2.41, it is stated that 'The playing field is currently unfenced and allows unfettered community access'. This report was written only 10 months after the installation of the 2009 sign; if the sign was intended to impact public use of routes across the field, 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.
- 4.4 The wording of the sign was also ineffective due to ambiguity. It refers to 'private grounds' but was originally sited at the edge of the public car park used by learners visiting the Adult Learning Centre at Stoke Lodge and would have appeared to be addressed to users of the car park. The statement that 'the exercising of dogs on these grounds is forbidden' appears to imply that other forms of use (e.g. walking through the car park) were not. As Mr Carr has stated at

paragraph 12.22, it would be reasonable to conclude that the sign was insufficient to interrupt use of the claimed routes.

5. Acquiescence by Cotham School in the use of the claimed routes

- 5.1 As explained above, the governing bodies of maintained schools have had control over the use of school premises (subject to any direction from the local education authority) from at least 1 September 1987. From 1 September 1999 onwards, the School Standards and Framework Act (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. Control of the land rested with the school using the land (Fairfield High School up to 1 September 2000, then Cotham School). The SSFA also provides power for a governing body to enter into a Transfer of Control Agreement with a third party to manage their premises ‘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’.
- 5.2 Cotham School entered into Transfer of Control Agreements on an annual basis from at least February 2004 onwards, with the final one (annex 10) dated 1 September 2010. 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 even in 2004 this was not a new situation, and implies both knowledge of informal use and acceptance of that ongoing use).
- 5.3 Following a public consultation in summer 2010, BCC’s official view (having recognised the ongoing accrual of potential TVG usage in its Cabinet Briefing Paper) was that Stoke Lodge Playing Fields 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. They did not do so. On 1 September 2010 Cotham School entered into a further year-long Transfer of Control Agreement with the University of Bristol in which it again stated that ‘the site is open, at present, to the public and dogs’.
- 5.4 On Cotham School’s conversion to academy status in 2011, it was granted two leases to continue to use the land and buildings it had used as a maintained school. These leases followed templates set by the Department for Education but the Stoke Lodge lease was altered by agreement between Cotham School and BCC such that 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 accrued or accruing ‘as of right’ use of the claimed routes.

- 5.5 Cotham School took no steps whatsoever as a maintained school up to 1 September 2011 to permit or prohibit use of the claimed routes. Nor did it take any such action on or after 1 September 2011 as an academy school with a leasehold interest, until it erected updated versions of the ACC signs on 24 July 2018 (after the relevant date for these applications). Indeed, the School’s Chair of Governors, [REDACTED] gave evidence to the TVG1 public inquiry in 2016 (recorded by the TVG Inspector at paragraph 279) that ‘in the past the use of the playing fields had been satisfactory from the School’s point of view’. Such use would include use of the four claimed routes.

6. Final comments

- 6.1 The evidence shows that use and enjoyment of the claimed routes ‘as of right’ was known to the landowner (and to the school users of the field). Both before and after the installation of the ACC signs, the landowner (ACC and later BCC) accepted public use of the claimed routes and did not seek to restrict or interrupt it, and the signs themselves were ineffective. As the user of the land from 1 September 2000, Cotham School likewise was aware of public use and did not seek to restrict or interrupt it.
- 6.2 As set out in this note, examples from 1987/88, 1990 and 2010 all underline the landowner’s approach and support registration of the routes. The documentary evidence of Transfer of Control Agreements reached by Cotham School between 2004 and 2010 also supports registration of the routes, and the lease agreed between BCC and Cotham School on 1 September 2011 expressly states that the school’s rights are subject to ‘all existing rights and use of the Property, including use by the community’.
- 6.3 Finally, I note that Department for Education and Employment/Home Office guidance (published in December 1997) titled ‘School Security: Dealing with Troublemakers’ makes clear that rights of way can be acquired across school premises – see section 3.9 of the extract at annex 11. Both the landowner and Cotham School would have been aware of this guidance which points out actions that can be taken by schools to discourage this. No such actions were taken by BCC as landowner or by Cotham School.
- 6.4 The fact that public rights of way may be acquired in these circumstances is also recognised in regulations (as Mr Carr has pointed out) and it is a matter of public knowledge that such rights of way exist in practice (including, for example, across the playing fields of Harrow School). There is no statutory incompatibility to consider on this matter. Further, in the Harrow School

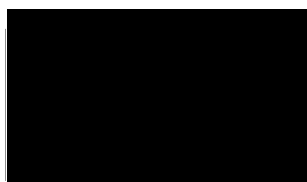
case, the path runs across tennis courts that had subsequently been built, and across marked out grass pitches. Harrow School applied for diversion of the footpaths under section 119 of the Highways Act but diversion orders were refused in 2017 after a six-day public inquiry (despite the potential benefits cited by the school) because of the negative impact that diversion would have on public enjoyment of the routes². Similar examples of public footpaths across school playing fields exist closer to home: for example, through the playing fields of the Collegiate School in Stapleton and the QEH sports ground at Failand.

Final Comments

The importance of achieving a MMO has been clearly demonstrated by events within 7 months (Feb 2019) of my application, with the erection of a 2m fence, using locked access points that did not align with most of the pathway entrances, and lockable gates. In particular, throughout the COVID pandemic, access to the field as a whole was denied, and the walking routes were all closed off. The Chair of governors refused to respond to my (and many others) request to allow us to meet government advice to exercise in open space as near to home and as far away from others as possible. Since that time even the gates were always locked at times when access to schools and shops would be useful. The fence and locked gates were forced on the public by the school despite DfE and Ofsted stating clearly that a fence was not a requirement for safeguarding as claimed, and confirmed this multiple times. This restricted public access to a narrow incomplete footway around the perimeter, was impeded by dangerously slippery mud and obstructed by brambles and nettles. There are numerous documented falls caused by this totally inadequate and unusable footway. Partial relief came when the TVG was registered, and much of the fence removed, but that is at threat now with Cotham's determination to spend public money to reverse the registration.

At this time, there is a palpable effect on mental well-being that having a green open safe route to the school and the shops promotes, compared to the impact of a longer traffic-ridden trudge along streets.

Submitted by



Prof. Alan W Preece 28/10/2024

² The decision is available at:
https://assets.publishing.service.gov.uk/media/5a82c92340f0b62305b9455c/fps_m5450_6_1_2_m5450_4_1_3_od.pdf

Attachment 1.

ROUTE 1 (Blue)(A - D) Cheyne Rd. to Parrys Lane (Druid Hill)

Postcode	From	To	Years	Home	Destination	File	Abbreviations
BS9 2DJ	2005	2018	13	SPR	Scouts, school. SB shops	Blue 1	BBR Bell Barn Rd
BS9 2DH	1999	2018	19	CR	SB Hall		BC Briarcliffe
BS9 2DH	1980	2018	38	CR	SB Garage,P.O.,The Grove		CBA Coombebridge Ave.
BS9 2DH	1985	2018	33	CR	SB Shops		CG Clover Ground
BS9 2DH	1991	2018	27	CR	SB Hall, Shops		CL Coombe la.
BS9 2DJ	1983	2018	35	SPR	SB Shops,		CR Cheyne Rd
BS9 2DH	2007	2018	11	CR	SB Shops,		DC Druid Close
BS9 2DH	2007	2018	11	CR	SB Shops,Restaurants, Hairdresser		DR Druid Rd
BS9 1ET	1971	2018	47	OSA	Sea Mills, Blaise, Trym, BBR	Blue 2	DSA Druid Stoke Ave
BS9 2LT	1993	2018	25	CBA	SB Shops		EC Ellebridge Close
BS9 1LH	1991	2018	27	DR	Trym, Blaise		KC Knoll Court
BS9 1SE	1994	2018	24	OSA	Stoke Lodge (access only)		LA Lyndale Ave
BS9 1SE	1994	2018	24	OSA	Stoke Lodge (access only)		MD Mariners Drive
BS9 1SE	1957	2018	61	OSA	Cheyne Rd, Pub		OSA Old Sneyd Ave
BS9 1RZ	1997	2018	21	DC	Trym,		PG Parrys Grove
BS9 2DH	2007	2018	11	CR	City Centre		PL Parrys Lane
BS9 1DA	1973	2018	45	SHC	Cheyne Road , SPR	Blue 3	QG Queens Gate
BS9 1DA	1973	2018	45	SHC	Trym, Dingle		RR Reedley Rd
BS9 1DJ	1987	2018	31	SPR	City, SB Shops		SB Stoke Bishop
BS9 1LH	1989	2018	29	DR	BBR Blaise		SD South Dene
BS9 1LH	1989	2018	29	DR	BBR Blaise		SHC St Hilary Close
BS9 2DF	1985	2018	33	BBR	SB Hall, Church		SL Sandyleaze
BS9 2DF	1985	2018	33	BBR	City Centre		SML Sea Mills La.
BS9 1QX	1999	2018	19	KC	CR Friend in Previous home		SPR Stoke paddock Rd
BS9 2DH	1999	2018	19	CR	Parrys lane		SS Sunnyside
BS9 1AN	2013	2018	5	PL	Bell Barn Road		WD West Dene

BS9 1TT	1997	2018	21	PG	Blaise		WG	Woodland Grove
BS9 1LH	1991	2018	27	DR	Trym, Blaise			
BS9 1SE	1997	2009	12	OSA	Home via Dingle round trip	Blue 4		
BS9 1DD	1996	2018	22	DSA	Bell Barn Road			
BS9 2BD	2012	2018	6	WG	Friend Druid Hill	Mixed 1		
BS9 1QQ	1946	2018	72	MD	Visit to previous home CR			
BS9 2BD	1974	2018	44	WG	Druid Hill			
BS9 2LT	2000	2018	18	CBA	SB Shops, Scouts	Blue 2A		
BS9 2LT	2000	2018	18	CBA	SB Shops, Restaurants			
BS9 2DB	2002	2018	16	BC	SB Shops, Friends			
BS9 1BU	2002	2018	16	ELB	Stoke Lodge (access only)			
BS9 1BS	1997	2018	21	LA	Westbury Shops (??? Access)			
BS9 1BG	2010	2018	8	RR	Dentist on BBR			
BS9 1BQ	1997	2018	21	SS	CR as part of circular route			
BS9 1EH	1975	2018	43	DH	Family in BBR			
BS9 1EH	1975	2018	43	DH	Dingle. Blaise			
BS9 2TD	2002	2018	16	RR	Dentist on BBR			
BS9 1TT	2017	2018	1	PG	Trymside Shops	Blue 3A		
BS9 2DT	2011	2018	7	SH	Shop and Friends			
BS9 2DT	1980	2018	38	SH	Friends			
BS9 4UN	2010	2018	8	CG	OSA Friends			
BS9 2DH	1960	2018	58	CR	SB Shops	Mixed 1		
BS9 2DH	2013	2018	5	CR	SB Shops, Stoke Hill			
BS9 2DE	2015	2018	3	BBR	Post Office Stoke Hill			
BS9 2DE	2015	2018	3	BBR	Stoke Hill			
BS9 2DE	2012	2018	6	BBR	DSA			
52 Witnesses		Average	24.38	yrs use	48 through to highway			
		Max	72		3 access to field only			
		Min	1		1 indeterminate			

ROUTE 2 (Red)(E - J) West Dene to Shirehampton Road

Postcode	From	To	Years	Home	Destination	Note	File	Abbreviations	
BS9 2BD	2002	2018	16	WG	Stoke Lodge House (SLH)	access to SLH	Red 1	BBR	Bell Barn Rd
BS9 2BQ	1997	2018	21	WD	Shirehampton Road, Cedar Park			BC	Briarcliffe
BS9 2BQ	1997	2018	21	WD	SHR shops, Cedar Park Sch.			CBA	CoombebridgeAve.
BS9 2BQ	1969	2018	49	WD	SHR, SLH			CG	Clover Ground
BS9 2BQ	2010	2017	7	WD	Cedar Park School			CL	Coombe la.
BS9 2BW	1981	2018	37	SD	Cedar Park School, Shops			CR	Cheyne Rd
BS9 2BQ	1997	2018	21	WD	SLH	access to SLH		DC	Druid Close
BS9 2BQ	1997	2018	21	WD	Bus stop, Shops			DR	Druid Rd
BS92AY	1997	2018	21	CL	SLH	access to SLH		DSA	Druid Stoke Ave
BS9 1BS	1965	2018	53	LA	WoT, Library, Social			EC	Ellebridge Close
BS9 2BB	1981	2018	37	WG	SLH	access to SLH	Red 2	KC	Knoll Court
BS9 2BB	1988	2018	30	WG	SLH	access to SLH		LA	Lyndale Ave
BS9 2BB	1981	2018	37	WG	SLH	access to SLH		MD	Mariners Drive
BS9 2BB	1988	2018	30	WG	SLH, Shirehampton			OSA	Old Sneyd Ave
BS9 2BW	1972	2018	46	SD	SLH, Cedar park Sch, SHR shops			PG	Parrys Grove
BS9 2BW	1997	2018	21	SD	SLH, SHR shops			PL	Parrys Lane
BS9 2BL	1978	2018	40	CL	SLH	access to SLH		QG	Queens Gate
BS9 2BL	1978	2018	40	CL	SLH, SHR shops			RR	Reedley Rd
BS9 2BW	1972	2018	46	SD	SLH	access to SLH	Red 3	SB	Stoke Bishop
BS9 1DD	1996	2018	22	DSA	Coombe Dingle, Canford Park		Red 4	SD	South Dene
BS9 1DD	1996	2018	22	DSA	Coombe Dingle, Canford Park			SHC	St Hilary Close
BS9 1TZ	1949	2018	69	QG, WD	Cedar park Sch		Mixed 1	SL	Sandyleaze
BS9 2BQ	2000	2018	18	WD	SLH			SML	Sea Mills La.
BS9 1TZ	1980	2018	38	QG	Friend in WD			SPR	Stoke paddock Rd
BS9 1DE	2004	2018	14	DSA	WoT			SS	Sunnyside
BS9 2AY	1995	2006	11	CL	SLH	access to SLH		WD	West Dene
BS9 1BU	1979	2018	39	EC	WoT, Henlease			WG	Woodland Grove
BS9 2AY	2004	2018	14	CL	Croquet, Cedar Park				

BS9 2BW	2008	2018	10	SD	Cedar park School	
BS9 2BW	2008	2018	10	SD	Cedar park School	
BS9 1BS	1997	2018	21	LA	West Dene - relatives	
BS9 1BG	2000	2018	18	RR	SLH	access to SLH
BS9 0JW	2015	2018	3	SL	Cedar Park Sch	
BS9 1DN	1998	2018	20	SML	WoT shops and family	

34 Witnesses	Average	27.15	yrs use	24 claimed used through to SHR
	Max	69.00		10 claimed it as access to SLH
	Min	3.00		

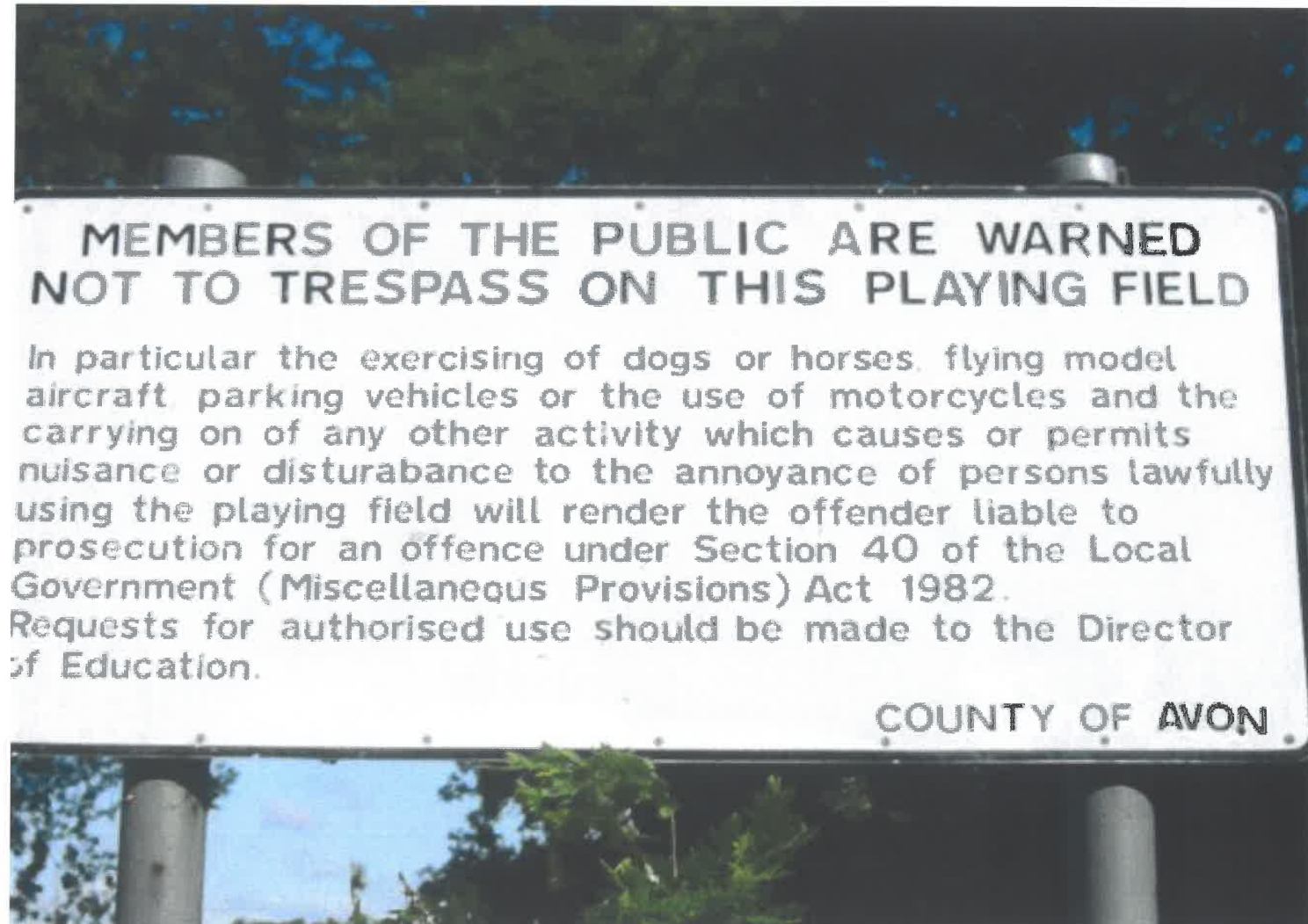
Route 3 (Green)(B-G) Cheyne Road to Shirehampton Rd

Postcode	From	To	Years	Home	Destination	Note	Abbreviations	
BS9 1SE	1994	2018	24	OSA	Shirehampton Road - Cheyne Road- Stoke Bishop		BBR	Bell Barn Rd
BS9 1SE	1994	2018	24	OSA	Shirehampton Road - Cheyne Road- Stoke Bishop		BC	Briarcliffe
BS9 2LT	1993	2018	25	CBA	SLH	access only	CBA	CoombebridgeAve.
BS9 1BS	1997	2018	21	LA	Shirehampton Road to Cheyne road circular		CG	Clover Ground
BS9 2DH	1991	2018	27	CR	SLH	access only	CL	Coombe la.
BS9 2DJ	1983	2018	35	SPR	SLH and to Shirehampton road for shops		CR	Cheyne Rd
BS9 2DH	2008	2010	2	CR	SLH	access only	DC	Druid Close
BS9 2DH	1980	2018	38	CR	SLH	access only	DR	Druid Rd
BS9 2DH	2005	2018	13	SPR	SLH	access only	DSA	Druid Stoke Ave
BS9 2DH	2005	2018	13	SPR	SLH	access only	EC	Ellebridge Close
BS9 1QX	1996	2011	15	CR	SLH	access only	KC	Knoll Court
BS9 2DF	1985	2018	33	BBR	SLH	access only	LA	Lyndale Ave
BS9 2DA	1982	2018	36	BBR	SL	access to field	MD	Mariners Drive
BS9 2DA	2010	2018	8	BBR	SL	access to field	OSA	Old Sneyd Ave
BS9 2DB	2002	2018	16	BC	SLH and Shirehampton Road		PG	Parrys Grove
BS9 2DA	2013	2018	5	BBR	SL	access only	PL	Parrys Lane
BS9 2DA	2015	2018	3	BBR	SL	Access only	QG	Queens Gate
BS9 2DA	2014	2018	4	BBR	SB shops		RR	Reedley Rd
							SB	Stoke Bishop
							SD	South Dene
							SHC	St Hilary Close
							SL	Sandyleaze
							SML	Sea Mills La.
							SPR	Stoke paddock Rd
							SS	Sunnyside
							WD	West Dene
							WG	Woodland Grove
18 witnesses		Average	19	yrs use	6 claimed pass through to CR or SHR			
		Min	2		12 were accessing either field or SLH			
		Max	38		18			

ROUTE 4 (Yellow) (B - H) West Dene to Cheyne Road

Postcode	From	To	Years	Home	Destination	File	Abbreviations
BS9 2BQ	2006	2018	12.00	WD	Trymside Shops, Vets	yellow 1	BBR Bell Barn Rd
BS9 2BQ	2006	2018	12.00	WD	Trymside Shops,		BC Briarcliffe Coombebridge
BS9 2BQ	1997	2018	21.00	WD	Shops. Vet, dentist, Pub	Yellow 2	CBA Ave.
BS9 2BQ	1997	2018	21.00	WD	Shops, station, pub		CG Clover Ground
BS9 2BQ	1969	2018	49.00	WD	SHR shops		CL Coombe la.
BS9 2BW	1981	2018	37.00	WD	SHR Shops, dentist		CR Cheyne Rd
BS9 2BQ	1989	2018	29.00	WD	SHR shops, BBR, Trym		DC Druid Close
BS9 1BQ	1989	2018	29.00	WD	SHR shops, Dentist		DR Druid Rd
BS9 2AY	1997	2018	21.00	WD	SHR Shops		DSA Druid Stoke Ave
BS9 2LT	1993	2018	25.00	CBA	Work via Parrys Lane & CBA		EC Ellebridge Close
BS9 2BW	1997	2018	21.00	SD	SHR Shops and Vets		KC Knoll Court
BS9 2BW	1972	2018	46.00	SD	SHR shops, vets, chip shop, garden centre		LA Lyndale Ave
BS9 1QX	1999	2002	3.00	CR	Elmlea school wv		MD Mariners Drive
BS9 1QX	1999	2002	3.00	CR	Elmlea school wv		OSA Old Sneyd Ave
GL3 9ED	1984	2016	32.00	CR	Westbury and Stoke Lane shops		PG Parrys Grove
BS9 2DJ	2005	2018	13.00	SPR	Coombe Dingle and Westbury		PL Parrys Lane
BS9 2DJ	2005	2018	13.00	SPR	Coombe Dingle S F		QG Queens Gate
BS9 2DH	1980	2018	38.00	CR	Shops and Social		RR Reedley Rd
BS9 2DH	2007	2018	11.00	CR	WoT, Reedley Rd church		SB Stoke Bishop
BS9 2DJ	1987	2018	31.00	CR	Henleaze		SD South Dene
BS9 2DH	2013	2018	5.00	CR	WoT for work	Mixed 1	SHC St Hilary Close
BS9 1DE	2004	2018	14.00	DSA	WoT	2nd batch	SL Sandyleaze
BS9 2AY	1990	2018	28.00	CL	Trymside shops		SML Sea Mills La.
BS9 2AY	1990	2018	28.00	CL	Trymside shops		SPR Stoke paddock Rd
BS9 2BW	2008	2018	10.00	SD	Trymside shops		SS Sunnyside
BS9 2BW	2008	2018	10.00	SD	Trymside shops		WD West Dene
BS9 1BS	1997	2018	21.00	LA	WoT for work		WG Woodland Grove

BS9 2DA	2014	2018	4.00	BBR	Child to nursery
BS9 3SN	1999	2018	19.00	RR	Trymside shops
BS9 2JR	1980	2018	38.00	SML	Stoke Lane shops
BS9 2DB	2010	2018	8	BC	West Dene
31 witnesses		Av	21.47	Yrs use	All witnesses used this way pathway as through route between CR and WD
		Min	3.00		
		Max	46.00		



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B304



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.

COUNTY OF AVON
EDUCATION COMMITTEE

23RD JANUARY 1990

MEMBERSHIP:

a	Berry	P	J Norris
P	Dando	P	Pascoe
P	Mrs Davey	P	Mrs Perry
P	Davies	P	Power
P	Drew	a	Roberts
P	Easton	P	Singh
P	Fogg	P	Mrs T Smith
a	Fyfe	P	R Thomas
P	Mrs Gillard MBE JP	a	Mrs Underwood
P	Dr Grant	P	Vaughan
P	Greenfield	P	Mrs Wheadon
P	Hamilton	P	Pat Dunmore (substitute for Councillor Berry)
P	Jackson	P	Calway (substitute for Councillor Roberts)
P	John	P	Portch (substitute for Councillor Mrs Underwood)
P	Lingard	P	Turvey (substitute for Councillor Fyfe)
P	Mrs Miles		
P	Mrs Nicholls		
P	Nicoll		

Added Members

P Mr Earp
P Mary Feltham
P Mr Henderson
a Professor Jamieson
a Reverend Mason
P Mr McKerron
P Mr Nicholas
P Canon Protheroe

Also present

P Councillor Pat Hockey (ex officio)
P Councillor Wyatt (ex officio)

169 ELECTION OF CHAIR

RESOLVED - that Councillor V Jackson be elected
Chair for the duration of the
meeting.

(Councillor Jackson in the Chair)

170 ELECTION OF VICE CHAIR

It was agreed not to elect a Vice Chair for this meeting.

(b) whether the Premature Retirement Scheme be reviewed;

(c) whether actual salary or the current statutory limit should be the basis of the redundancy pay calculation.

185 LOCAL MANAGEMENT OF SCHOOLS - NON-SCHOOL USE OF SCHOOL PREMISES (Item 10)

The Committee considered a report which had also been presented to the Community Leisure Committee seeking consideration of policy issues relating to the use of school premises for non-school purposes, in the light of the introduction of the Local Management of Schools (LMS) in April 1990. In particular, the Education Committee was being requested to determine whether the Heat and Light Budget and Management of Lettings should be delegated to all Primary and Secondary Schools from April 1990.

The issues had been considered initially by the Joint Policy Advisory Sub-Committee on the Community Use of County Council premises prior to recommendations being made thereon to the Education and Community Leisure Committees. An update report of the Joint Policy Advisory Sub-Committee detailing comments and recommendations on the report was also considered.

The Committee was advised that the recommendations in the main report and the update report had received the approval of the Community Leisure Committee at its meeting on 22nd January 1990.

It was noted by the Committee that a further report would be prepared regarding the issues of procedures and charges for the lettings of playing fields.

RESOLVED -

(i) that the Heat and Light Budget and Management of Lettings of buildings including caretakers' overtime costs be delegated to all Primary and Secondary Schools with effect from 1st April 1990;

(ii) that the policy option 2 outlined in paragraph 5.9 of the report be directed to the schools proposed in paragraph 5.9.3 and the method of dealing with the budgets and charging as outlined in paragraph 5.11 of the report be approved;

- (iii) that the Resources Co-ordination Committee be requested to approve as appropriate to virement proposals within the Education Committee's Budget and Budget to the Community Leisure Committee's Budget as outlined in paragraph 5.11 of the report;
- (iv) that in respect of lettings, the charges be referred to the Resources Co-ordination Committee for approval, and also that it be noted that the Director of Education intends to include information in notes of guidance to be issued to schools on the following topics:-
 - (a) Membership and Terms of Reference of Community Sub-Committees;
 - (b) Specimen Terms and Conditions for lettings;
 - (c) Arrangements for political and other public meetings;
 - (d) Details of registered Youth and Community Groups and arrangements for lettings to new Youth and Community Groups;
 - (e) That it be noted that in future all expenditure and income from District Councils and other Bodies, for dual use/joint provision centres will be accounted for at school level;
 - (f) That support be given to the lobbying of Government Departments to clarify the law on School Governors' control of premises.

186 LOCAL MANAGEMENT OF SCHOOLS - RESPONSE OF SECRETARY OF STATE FOR EDUCATION AND SCIENCE (Item 11)

The Committee considered a report seeking to inform both this Committee and the Resources Co-ordination Committee of the response of the Secretary of State to the Authority's proposed LMS Scheme and also requesting the two Committees to consider appropriate variations to the

COUNTY OF AVON
COMMUNITY LEISURE COMMITTEE
22nd January 1990

EDUCATION COMMITTEE
23rd January 1990

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LOCAL MANAGEMENT OF SCHOOLS : NON-SCHOOL USE OF SCHOOL PREMISES

Update Report of the Joint Policy Advisory Sub-Committee on the Community Use of County Council Premises

1 Purpose of Report

To advise Members of the comments and recommendations of the Joint Policy Advisory Sub-Committee on the Community Use of County Council Premises on the report on Non-School Use of School Premises.

2 Background

The Joint Policy Advisory Sub-Committee at its meeting on 21st December 1989 was advised that the Education Committee on 23rd January 1990 was to consider a report on the Non-School Use of School Premises which would include recommendations on charges for 1990/91. The Sub-Committee decided that it should hold a meeting prior to the Education Committee meeting in order that it could consider the report prior to Education Committee making decisions on the issues on the report.

2 Comments of the Joint Policy Advisory Sub-Committee

2.1 The Sub-Committee considered the report at its meeting on 17th January 1990 together with an update report which was circulated at the meeting and is attached (Appendix 1) that outlined recommended standard charges to apply in 1990/91. The Sub-Committee sought clarification of various points in the report and received officers responses. As a result of these responses the Sub-Committee wishes to draw the following points to your Committee.

2.2 Fixing of Charges

The County Solicitor and Deputy Clerk (Acting) confirmed that as the County had in the past operated a Countywide lettings system the charges had always been approved by the Resources Co-Ordination Committee. Arrangements would be made for the Resources Co-Ordination Committee to approve the charges set out in the update report.

2.3 Dual Use Agreements

The County Solicitor and Deputy Clerk (Acting) reported on developments regarding the validity of the dual use agreements. He advised Members of an arrangement operated by another County Council in South Wales which would enable these schemes to continue to operate should the present arrangements be proved to be illegal.

Members endorsed the action proposed in recommendation 8.6 of the original report.

2.4 Proposed Directive

The Director of Education confirmed that in addition to the proposed directive he would be circulating to schools additional notes of guidance which would include reference to the following topics:-

- 1 Membership and Terms of Reference of Community Sub-Committees
- 2 Specimen Terms and Conditions for Lettings
- 3 Arrangements for political and other public meetings
- 4 Details of registered youth and community groups and arrangements for lettings to new youth and community groups.

3 Recommendation

The Joint Policy Advisory Sub-Committee on the Community Use of County Council Premises supports the approval of the recommendations in the original and update reports subject to:-

- 1 the charges being referred to the Resources Co-Ordination Committee for approval; and
- 2 it being noted that the Director of Education intends to include the information outlined in paragraph 2.4 above in notes of guidance to be issued to Schools

Authors

County Secretary and Deputy Clerk (Acting)

Background Papers

Report and Update Report to Joint Policy Advisory Sub-Committee on the Community Use of County Council Premises 17th January 1990

Any person wishing to inspect the background papers used in the preparation of this report should seek the assistance of the contact officer for the meeting who is Peter Langley and who is available by telephoning Bristol 290777 Ext 6384 or by calling at the office of the Chief Executive and Clerk, Floor 6, Avon House, Bristol (during normal office hours).

COUNTY OF AVON

JOINT POLICY ADVISORY COMMITTEE ON COMMUNITY USE OF
COUNTY COUNCIL PREMISES

10

17 January 1990

LOCAL MANAGEMENT OF SCHOOLS : NON-SCHOOL USE OF SCHOOL PREMISES

Purpose of Report

To request the Policy Advisory Committee to consider the attached report which is to be submitted to the Community Leisure Committee on 22 January 1990 and the Education Committee on 23 January 1990.

Considerations

- 2.1 The attached report makes recommendations regarding the policies for non-school use of school premises following the introduction of Local Management of Schools in April 1990.
- 2.2 The report recommends that for 1990/91 only, standard charges should apply for certain users of school premises. An update report will be presented to this Committee outlining the proposed standard charges.

Recommendations

The Committee is requested to:

- 3.1 Make recommendations to the Education and Community Leisure Committees regarding the attached report, and
- 3.2 Make recommendations to the appropriate Committees regarding the standard charges to apply to certain lettings of school premises during 1990/91.

C Saville
Director of Education

D W Liddle
Director of Community Leisure

D G Morgan
County Treasurer

A G Darg
Director of Property Services Acting Director of Administration & County Solicitor

Background Papers

None

COUNTY OF AVON

EDUCATION COMMITTEE
23 January 1990

COMMUNITY LEISURE COMMITTEE
22 January 1990

LOCAL MANAGEMENT OF SCHOOLS : NON-SCHOOL USE OF SCHOOL PREMISES

Purpose of Report

- 1.1 To request the Education and Community Leisure Committees to consider policy issues relating to the use of school premises for non-school purposes, in the light of the introduction of Local Management of Schools (LMS) in April 1990.
- 1.2 To request the Education Committee to determine whether the Heat and Light Budget and Management of Lettings should be delegated to all primary and secondary schools from April 1990.

Background : Previous Committee Considerations

- 2.1 The issues outlined in this Paper have been considered by the Education Committee on a number of previous occasions. On 13 February 1989, the Education Committee decided to undertake a consultation exercise about the future arrangements for community use of school premises following the introduction of Local Management of Schools. The detailed consultation exercise has not taken place, because it was felt that the issues outlined in the report of 13 February 1989 needed further consideration before any meaningful consultation could take place. That further investigation has indicated that several of the options outlined in that report could not be achieved in practice. This report concentrates on those options which can be achieved and delivered in the immediate future. Members should note, however that, as part of its consultation on LMS generally, the Education Committee invited Governors of all schools to comment on community use and LMS. The general feedback from that consultation was that Governors wished to have control over the lettings of their premises, and wished to be free to be able to determine their own lettings charges.
- 2.2 From April 1990, the Education Committee has agreed that 91 schools (30 secondary and 61 Primary) should have full Local Management status in accordance with the LMS Scheme. At its meeting on 14 October 1989, the Education (Policy Implementation) Sub-Committee considered the arrangements which were to apply from April 1990 for all primary and secondary schools which will not have full Local Management status at that date. The Sub-Committee agreed that those schools should have delegated to them all the Non-Staffing budgets from April 1990, with the exception of Heat and Light and Lettings. The Sub-Committee felt that the issue of the delegation of the Heat and Light budget and Lettings should be a matter for decision by the full Education Committee, as part of that Committee's consideration of the future arrangements for community use of school premises following the introduction of Local Management of Schools.

- 2.3 There has also been consideration at the Policy Advisory Sub-Committee on College Budgets regarding the relationship under the Education Reform Act between schools and adult/further education. At its meeting on 5 December 1988, the Policy Advisory Committee expressed its wish that Adult Education should not suffer as a result of the introduction of Local Management of Schools.
- 2.4 The Joint Policy Advisory Committee on the Community Use of County Council Premises at its meeting on 21 December 1989 made recommendations regarding the lettings charges to apply in all County Council premises from April 1990. The Committee excluded primary and secondary schools from the recommended charges pending consideration of this report. The Committee will consider this report on 17 January 1989 and make recommendations to these Committees.

3. Legislative Background

3.1 Education Reform Act 1988

As Members are aware, the Education Reform Act requires that all Local Education Authorities should produce a scheme for Local Management of Schools to come into operation from April 1990. There are two main aspects to the Local Management of Schools Scheme, namely

- (a) The introduction of Formula Funding for all primary and secondary schools from April 1990, which means that from that date each primary and secondary school will have its share of the Aggregated Schools Budget and its expenditure will need to be managed in accordance with that budget share
- (b) The delegation of control over the spending of that budget to the Governors of certain primary and all secondary schools, which must be in operation in all those schools by April 1993.

3.2 Education (No. 2) Act 1986

Section 42 of this Act requires that by the school's Articles of Government, the Governing Body of every County and maintained school should have control over the use of the school's premises at all times except during school hours, subject to any direction given to them on the matter by the LEA. The Governing Body must also, by statute, have regard to the desirability of the premises being made available for the community when not required by the school.

3.3 Implications

The aspects of the Education Reform Act 1988 relating to the introduction of Local Management of Schools, and the Education (No. 2) Act 1986 have significant implications for use of school premises by persons or organisations, other than the school itself. The main implications of the two Acts are summarised as follows

- (a) The Governing Body of a county school should have control over the use of the school's premises outside school hours, subject to directions which may be issued by the LEA, and having regard to the desirability of community use of its premises. The issuing of directions should not be tantamount to the LEA having control of the premises.

- (b) The statutory position with regard to Voluntary Controlled and Voluntary Aided schools, as set out in the 1944 Education Act remains unchanged. The Governing Bodies of these schools have control over the use of the school's premises outside of school hours, subject to certain limited directions which the LEA may give to those Governing Bodies as to the use of the premises on certain occasions for specified Education purposes.
- (c) Each primary and secondary school, regardless of whether it is locally managed, must receive its share of the Aggregated Schools Budget. The school's budget may not be used to subsidise community use.
- (d) LEAs may delegate the overall management of all non-school activities on a school site to the Governing Body.
- (e) If LEAs do not chose to do that, they must ensure that the individual school's budget is compensated in full for any non-school use.
- (f) LEAs may specify conditions to Governors on charging or lettings policies within the provision of the 1986 Act, but in doing so they must ensure that the school's budget shall not subsidise any non-school use.

These statutory requirements mean that the Education Committee must consider

- (i) Whether it wishes to delegate overall management of all non-school activities to the school Governing Body of a locally managed school, and if it does not
- (ii) The directions which it would wish to issue to Governors of locally managed schools with regard to charging or lettings policies, and whether these directions should differ between a locally managed school and a school which does not have full Local Management status
- (iii) The financial arrangements by which the Committee would wish to implement such directions
- (iv) The implications for current and future dual use and joint provision schemes.

Current Policies for Non-School Use of School Premises

1. The County Council and the Education Committee has a policy of encouraging community use of its premises within existing budgetary constraints and provided that the interests of the school are not adversely affected by such community use. When schools are used for purposes other than by the school itself, there may be additional costs incurred, primarily relating to heat and light, caretaking, cleaning, repair and maintenance and wear and tear on furniture and equipment. In the past, the costs of such use have been met from the Education Committee's budgets in these areas and they have not traditionally been divided between school use and non-school use.

4.2 Non-school use of school premises can take various forms.

4.2.1 Use of School Premises Outside School Hours

This mainly takes place under the aegis of the Education Committee's lettings policy. The current lettings system is complex; anyone wishing to hire school premises must first have the approval of the school Governing Body, and except in the case of certain voluntary schools they must pay the appropriate charge which has been set by the County Council. Charges are standardised throughout the County. Several years ago, the County introduced a system of multi-let sessions in certain schools on particular evenings. This was designed to encourage community use while keeping the costs of lettings to a minimum by concentrating use at certain times. These multi-let sessions were designed around adult education use of school premises, and on these occasions discounts are available to a wide range of community groups and registered youth groups. On the multi-let sessions, the discounts apply to each individual group regardless of the number of groups using the premises. This means that although the charges for lettings are standardised throughout the County, there can be significant variations in what is actually paid by any user group, depending on whether the use takes place on one of these multi-let sessions. The actual costs of such use at individual schools can vary considerably depending on the type of heating, the number of rooms in use and the hours of use. The County charges are based on an average assessment of cost throughout the year, and so they do not reflect the true cost of individual lettings.

The main types of use of school premises outside of school hours, which apply through the lettings policy are as follows:

(a) Adult Education

The Adult Education Service is the principal non-school user of school premises outside of school hours. Each individual adult education use is not charged on the appropriate lettings charge. Rather, there is a block recharge for adult education as a proportion of the expenditure on school buildings. This is not credited to individual school accounts. The level of the recharge has traditionally been considerably lower than the actual costs of such use. Therefore, the costs of adult education use have been largely hidden within the schools' expenditure on heat and light, caretaking and cleaning, etc.

(b) Voluntary Youth and Community Groups

These groups are the second main user category.

On multi-let sessions, these groups use school premises at discounted rates. For example, a registered youth group may use a school sports hall on a multi-let session for £19.50 per annum, although the standard charge for a sports hall is currently £19 per hour. On multi-let sessions, other users except for commercial users pay 50% of the hourly charge. On non multi-let sessions, youth and community groups are required to pay higher rates except in the case of sporting associations who use gyms and halls at the 50% rate, when no heating is required.

There is an appeal mechanism by which groups can appeal to the County against the charge.

(c) School Use

Within certain limits, schools also make use of their premises outside school hours and this is free of charge.

(d) Other County Council Use

There are other County Council users, for example, the County Youth Service and other Education use, such as holiday play schemes and weekend music centres. These are also subject to charge at reduced rates. There is also statutory use, eg elections, elected members surgeries, etc.

(e) Commercial Use

The final type of use outside school hours is by commercial organisations, and these are required to pay the full charge currently.

4.2.2 Use of School Premises During School Hours

With falling rolls and the requirement of the DES to remove surplus places from teaching use, a considerable amount of accommodation in schools has been closed for teaching purposes in recent years. There are two categories of such closure:

- (i) Those where the accommodation is declared surplus permanently to the schools use. In this case the current procedure is for the Education Department to seek other Education use, and if none materialises, the accommodation is passed to the Property Services Department to seek other County Council use. If no other County Council use is found, the Property Services Department disposes of the accommodation or leases it to an outside user.
- (ii) The second category of closed accommodation is where the accommodation has been closed for teaching purposes, but has not been declared surplus to the school's use. This could be because the accommodation is integral to the overall school accommodation, or because the closure for teaching purposes is only temporary pending an anticipated rise in pupil numbers.

The main users of closed accommodation are:

- (a) Playgroups/Mother and Toddler Groups, which are primarily, but not always, using accommodation which has not been declared surplus to a school's requirement.
- (b) Other Education use, for example the Education Committee's sponsored parents' meetings rooms, which take place in a small number of schools. Other examples of Education use of school premises are for adult education offices, Education Welfare Offices, Education Psychology Offices, etc. These other Education

users are primarily using accommodation which is permanently surplus to the school's requirements. In most of these cases, however, the heating system is such that the heating costs for this total accommodation are charged to the schools' accounts.

- (c) Other County Council users, for example Social Services Department and Community Leisure Department have offices in accommodation which has been declared surplus to schools' requirements. Again in most cases the heating system is such that energy costs are charged to the schools' accounts. Where other costs are separately identified, there are appropriated recharges.
- (d) Voluntary groups. A limited number of voluntary groups occupy surplus school accommodation, largely by virtue of a lease or a licence from the Property Services Department, although some community groups occupy accommodation which is still technically part of the schools accommodation, largely on the basis of a local agreement with the Head Teacher and Governors of the school.
- (e) A very limited amount of closed school accommodation is used by commercial organisations, primarily on a licence or lease basis from the Property Services Department.

4.2.3 Other Accommodation on a School Site

- (a) In a few schools, accommodation was specifically provided for adult education centres and in most of these cases the accommodation is heated through the schools heating system.
- (b) A similar situation applies in the case of Youth Wings which are provided in a number of secondary schools.
- (c) Another significant occupier of, and consumer of energy, on school premises is the School Meals Service and most school kitchens, where they are integral to the school accommodation, are not separately metered or fed from a separate energy source. Under the competitive tendering arrangements, the premises will remain a client side responsibility.
- (d) On a number of school sites, there are caretakers houses. With few exceptions these are quite separate from the school premises. In all cases, the energy costs are separately metered. The caretaker's house is not part of the school's accommodation for the purposes of this report.

4.2.4 Dual Use and Joint Provision Schemes

In a limited number of schools, agreements have been reached with District Councils, other minor authorities or external bodies, for the joint provision and dual use of certain specified facilities at schools. This applies mainly to sports centres, which are used by the school during school hours and then available for community use outside of school hours. These are the subject of management agreements under which the running of

the facilities out of school hours is carried out by a Management Committee comprising representatives of the School Governors (who may not be County Councillors), the District Council, the other bodies (if any) and the users. Decisions on both the use of the premises and the charges for that use are taken either by the Management Committee or by the District Council. As they are not separately metered, or the subject of separate heating systems, the school's heating bill, for example, includes both the cost of the centre, when in use by the school, and also when in use by the community. There is a system of recharges between the County and the appropriate district councils for such centres, with the recharge being based largely on floor area and hours of use. The proportion which is to be paid for by the District Council or other body is set out in the management agreement. These financial arrangements can be accommodated with relatively minor adjustment under Local Management of Schools. The legal basis on which these schemes operate has recently been called into question, because counsel has advised another LEA that S.42 of the Education (No. 2) Act 1986 does not permit Governors of schools to divest themselves of control of the premises to a body like a Management Committee of the type Avon establishes. That LEA - Gloucestershire - is proposing to lobby the Government with a view to clarifying the Law to permit such Committees, or similar bodies, to be established. If Members do not object, your officers propose to join that exercise. In the meantime, it is suggested that the status quo remain until it is beyond doubt that the system requires alteration.

Future Policy Considerations

5.1 Costing Non-School Use of School Premises

Given that the Education Reform Act states quite explicitly that a schools budget shall not subsidise non-school use, it is necessary for the costs of schools' use and the cost of non-school use of school premises to be clearly identified and for schools to be compensated in full for the costs of non-school use. The current practice of hidden subsidies cannot apply any longer. The Education Committee must therefore first determine the relative proportions of the various budgets which are applicable to school use and non-school use.

5.2 The main budget headings where expenditure could be attributable to non-school use are as follows:

- Heat and Light
- Caretaking
- Cleaning
- Lettings Income and Recharges
- Furniture and Equipment
- Repair and Maintenance

5.3 An analysis of historical expenditure on these budgets indicate that it is not possible to divide the furniture and equipment and repair and maintenance budgets.

5.4 The main budgets where it can be demonstrated that additional expenditure occurs as a result of non-school use are therefore heat and light, caretaking overtime and cleaning, and allied with these the income and recharges can also be analysed.

- 5.5 An analysis of the cleaning budget cannot be finalised until all the variations to the contract have been examined. It will be several weeks before this information can be provided.
- 5.6 An analysis has been undertaken of the 1989/90 budgets for heating and Caretakers' overtime and expenditure assessed to reflect:

- (a) use during school hours by schools and non-school users including School Meals Service and permanent other users, and
- (b) use outside school hours by schools and non-school users.

The principle that underlies the analysis is that where currently Adult Education and another user are occupying the building during the same hours the costs incurred in opening the building have been attributed wholly to Adult Education.

This indicates the following breakdown of expenditure.

Budget Heading	Total Budget 1989/90	School Use In & Out of School Hours	School Meals Service	Youth Wings (CL Use)	Permanent Other Users During School Hours	Adult Education	Other Ed. Users Lettings	Nov '88 Prices Voluntary Youth & Community Lettings	Dual Use Centres
	£'000	£'000	£'000	£'000	£'000	£'000	£'000	£'000	£'000
Heat & Light and Caretaking Overtime	4,718	3,481	415	10	60	436	50	218	48
Income & Recharges	(271)					(78)		(193)	(48)
NET TOTAL	4,447	3,481	415	10	60	358	50	25	-

The proportion of the budgets relating to school use will be allocated to all primary and secondary schools from 1 April 1990 in accordance with the resource allocation formula. How the remainder of the budgets are dealt with is dependent on the Committee's decisions on future policies for community use.

5.7 Future Community Use Policies

Having identified the relative proportions of these budgets which are attributable to school use and non-school use, the Committee must decide its policy on delegation to school Governing Bodies of both locally managed and non-locally managed schools. It is appropriate to consider a single policy for both categories of primary and secondary schools.

There are essentially two options open to the Committee.

5.8 Option 1

- 5.8.1 The Committee could delegate the overall management of all non-school activities to school Governing Bodies, and with this delegation each school would receive two separate budget allocations.

- (a) the school's budget share, in accordance with the LMS formula

- (b) the school's allocation from the "non-schools" budget.

Under this option the Governing Body would be free to determine how to spend its "non-schools" budget share, which would effectively be its community education budget. This would create community schools and would represent a significant change of policy for the Education Committee. This option is strongly supported by several of the LMS pilot secondary schools.

- 5.8.2 There would however be significant problems arising from the method of distribution of the "non schools" budget. If based on historical patterns of use, the "non schools" budget would be concentrated on a relatively small number of schools, mainly secondary schools. This would effectively freeze the existing patterns of use. Further development of adult education and community provision could prove difficult. It would also result in additional costs to the Authority in that a separate subsidy budget would have to be identified for all new or changed use. The alternative method of distribution would be to develop a formula or to base the allocation on applications from schools which would be required to draw up a programme of activities for approval by the Authority.

- 5.8.3 Whichever approach to distribution were adopted, this option would have far reaching implications for Adult Education and Community Leisure Department. It would require a lengthy process of consultations as it would involve a major policy change.

Option 2

- 5.9.1 The second option would be for the Authority to issue directions under the 1986 Act to schools regarding non-school use, whilst ensuring that schools were compensated in accordance with the 1988 Act for the costs of such use. This would mean that the net budgets identified in paragraph 5.6 together with the cleaning budgets when identified, would be transferred to the various services, eg the Adult Education Service and the Community Leisure Department. Those services would then use their budgets to ensure that schools were reimbursed for any costs incurred as a result of their use of school premises, ie Adult Education would pay schools for their use, Community Leisure would allocate support to Voluntary Youth and Community Groups to enable them to pay schools for their use. This option would be more consistent with the current policies of Avon LEA and the Committee is recommended to adopt this approach for the immediate future.

- 5.9.2 Section 42 of the Education (No.2) Act 1986 (with regard to the Governors control of use of school premises outside of school hours being subject to LEA directions) has been included in the Articles of Government for all County and Maintained Special Schools in Avon. The purpose of this section is understood to be to enable the Authority to fulfil its statutory responsibility for ensuring adequate further education provision within its area, and it allows the County Council to continue its policy of making available, so far as is possible, school premises for community use. Of particular importance is the availability of premises for the Authority's own services to the community, including

adult education and youth services. In issuing any directive, the Authority must recognise that it is the Governing Body which has responsibility for determining the patterns of use of school premises, subject to direction by the Authority and that schools must not be disadvantaged financially as a result of community use arrangements. It is therefore important a balance is struck, on the one hand between freedom to manage for school governors, and on the other hand, ensuring that the Authority's community use policy is protected and the following directive is proposed to ensure that this balance is maintained.

5.9.3 Proposed Directive

In exercise of its statutory responsibility to ensure adequate facilities for further education, the County Council requires school governing bodies to ensure that

- (a) Subject to the provision within the 1944 Education Act regarding voluntary schools, the school premises are available out of school hours when not in use for school purposes, for adult education, which will be provided under the auspices of the Education Committee; youth and community services, which will be supported under the auspices of the Community Leisure Committee; other educational activities of the Authority; and other statutory use, as defined in the Authority's lettings handbook
- (b) The premises be made available for such purposes on a cost neutral, ie at the economic cost only, to recognise that
 - i) schools' formula budgets should not be subsidising such use, and
 - ii) the Authority's policy is to encourage community use of County Council premises.
- (c) Arrangements for such use be agreed as far in advance as practicable to minimise interruption to activities and inconvenience by users.
- (d) A Community Sub-Committee is established by each Governing Body representative of the various services and users identified in (a) above and responsible for encouraging the wider community use of the school premises and managing and co-ordinating that use on behalf of the full Governing Body.
- (e) In respect of any facility provided by the Authority exclusively for further education in schools or any other County Council purposes, which is located on the school campus but outside the control of the school Governors, the Governing Body should ensure that access is afforded to the users of the premises. No net cost should fall upon the school budget as a result of this arrangement.

Except as outlined in this directive, Governing Bodies would be free to determine the use to be made of their premises and to establish appropriate charges.

Charging Policies

As can be seen from 5.9.3 (b), it is proposed that use of school premises for adult education, use by registered youth and community groups, for other Education and other County Council and statutory use be charged at the economic cost only. It will be necessary to establish the economic cost of such use at each school. Members should note that the economic cost of individual schools will vary according to their particular circumstances and therefore it will no longer be possible to have standardised lettings charges throughout the County unless the Authority is prepared to compensate each school for the difference between any standard charge and the true economic cost of use of that school.

However, it will not be possible to establish the economic cost of each individual school before 1 April 1990 and the DES has accepted that the Authority can make special arrangements for the first year.

Therefore, for 1990/91 only, it is proposed that the following arrangements apply for non-school use of all primary and secondary schools.

(a) Control of the heat and light budget, and management of lettings, including Caretakers' overtime costs, will be delegated to all primary and secondary schools from April 1990.

(b) Based on the 1989/90 Budget at November 1988 prices,

i) Schools Use

Primary and secondary schools will be allocated £3,481,000 on the appropriate formula basis as the schools' share of the heat and light and Caretakers' overtime budget.

Other Users

ii) Schools will receive an additional allocation based on assessed costs for the School Meals Service (£415,000) permanent other daytime Education and other County Council users (£60,000)

iii) A sum of £358,000 will be vired to Adult Education for adult education lettings.

iv) A sum of £50,000 will be held for other Education use and lettings to include music centres, holiday playschemes, playgroups, etc, and statutory use.

v) A sum of £35,000 will be vired to the Community Leisure Committee's budget for assisting voluntary youth and community groups lettings of school premises and the use of Youth Wings by the Community Leisure Department.

vi) The cleaning budget will be treated in the same way, once the relative proportions have been identified.

(c) The Adult Education Service is already committed to its programme of activities for the remainder of the 1989/90 academic year which will

cover the period April-July 1990. The costs of this programme will be analysed, and deducted from the sum which it is proposed to vire to Adult Education. Schools will then receive direct reimbursement for the cost of adult education in the summer term 1990 when they receive their final formula allocation in March 1990.

- (d) For the period September 1990 - August 1991, the Adult Education Service will be expected to pay schools a standard charge for their lettings, based on the County average of the economic cost of making school buildings available for non-school use.
- (e) For the period April 1990 - March 1991, the Youth Service, Registered Youth Groups and registered Community Groups, other Education Department and County Council uses and statutory users will be required to pay schools for lettings on the basis of the appropriate County standard charge.
- (f) Governing Bodies of all primary and secondary schools will be free to determine the charges to be applied to all other users, provided that they do not use their schools' budget to subsidise such use.

5.12 From 1 April 1991, the users specified in 5.11 (e) above will be required to pay the true economic cost of their use to individual schools and this will apply in the case of Adult Education from September 1991.

5.13 The Policy Advisory Sub-Committee on Community Use of County Council premises at its meeting on 15 December 1989 has made recommendations regarding the charges for 1990/91 for all County properties except for primary and secondary schools. If the proposals in paragraph 5.11 are accepted it will be necessary for Members to agree the standard charges which should apply to primary and secondary schools for the period April 1990 - March 1991. An update report on proposed charges will be presented to the Policy Advisory Sub-Committee on 17 January 1990 and to the Community Leisure and Education Committees on 22 and 23 January 1990 respectively.

6. Dual Use and Joint Provision Schemes

As stated earlier in this report, the Education (No. 2) Act 1986 and the Education Reform Act 1988 have implications for Schemes of dual use and joint provision of facilities between the County Council and District Councils or other bodies. As shown in paragraph 4.2.4, the 1986 Act may have changed the legal position and clarification is now urgently required. As far as the 1988 Act and in particular the introduction of LMS is concerned, the major implications are for the funding of such schemes. As a matter of principle, it is proposed that all expenditure and income from the District Council should be accounted for at school level. This may have implications for the detail of the management agreements, but this is of relatively minor concern against the more major questions raised by legal interpretations of the 1986 Act. In considering the funding of dual use schemes, it must be remembered that the schools' budget should not be subsidising the costs of the community use of such premises and it may be appropriate to consider the feasibility of installing separate meters for these facilities, given that they are relatively few in number.

7. Playing Fields

The position regarding the lettings of playing fields is complicated by the phased introduction of the Competitive Tendering arrangements and the fact that commitments have already been entered into for the summer 1990 cricket season. It is therefore proposed that the existing arrangements apply for the summer term 1990 and a further

report be presented on the procedures and charges to apply for the remainder of the 1990/91 financial year.

RECOMMENDATIONS

The Education Committee and Community Leisure Committee are requested to:

- 8.1 Agree that the heat and light budget and management of lettings of buildings including Caretakers' overtime costs be delegated to all primary and secondary schools with effect from 1 April 1990. (Education Committee only).
- 8.2 Approve the policy option 2 outlined in paragraph 5.9, the directive to schools proposed in 5.9.3, and the method of dealing with the budgets and charging as outlined in paragraph 5.11, and if so agreed
- 8.3 Request the Resources Co-ordination Committee to approve as appropriate the virement proposals within the Education Committee's Budget and from the Education Committee Budget to the Community Leisure Committee's Budget as outlined in paragraph 5.11.
- 8.4 Consider the recommendations from the Joint Policy Advisory Sub-Committee on Community Use of County Council Premises regarding standard charges to be applied to certain lettings in primary and secondary schools during 1990/91
- 8.5 Note that in future all expenditure and income from District Councils and other bodies, for dual use/joint provision centres will be accounted for at school level be noted.
- 8.6 Support the lobbying of Government Departments to clarify the law on school Governors' control of premises.

C Saville
Director of Education

D W Liddle
Director of Community Leisure

D G Morgan
County Treasurer

A G Darg
Director of Property Services

J Orton
Acting Director of Administration & County Solicitor

Background Papers

Education Act 1944

Education (No. 2) Act 1986

Education Reform Act 1988

Circular 7/88 Local Management of Schools

Education Department Lettings Handbook

Director of Education's Files on Community Use and LMS

AGENDA ITEM NO 23

LEISURE SERVICES COMMITTEE
24TH SEPTEMBER 1996

CAPITAL PROGRAMME - CHILDREN'S PLAY
(Report of the Director of Leisure Services)

Purpose of Report

- 1 To seek the Committee's approval to the proposals for capital expenditure 1996/97 on children's playgrounds.

Background

- 2 Members will be aware a report was brought to the July meeting of Leisure Services committee to seek approval for the allocation of resources for the Leisure Services capital programme 1996/97 (minute number 65.6/96 refers). It was resolved:

(2) that the capital programme for the Leisure Services Committee for additional projects for 1996/97 be approved as follows:

(i) Children's Play - subject to a further report	£100,000
(ii) Tourist Information Centre - telephone system	£15,000
(iii) Colston Hall box office - (subject to (3) below)	£35,000

- 3 The above amounts are subject to capital receipts but the Director of Corporate Resources has confirmed there is sufficient money to cover design costs. Members should note with caution, that if the full capital receipts are not forthcoming by the beginning of November, there may be difficulties in spending the capital in 1996/97.

4 The Leisure Services directorate commissioned a play deprivation study from ROSPA, to develop a rationale upon which provision of children's play equipment could be made. The study has been presented to Leisure Services Committee and the Bristol Play Panel. Ward details have been circulated to members of the City Council. A number of comments, corrections and observations have been received but most councillors have welcomed the initiative.

5 There is still much work to be done, to link the findings of the strategy with the development of a strategic plan aimed at achieving value for investment, community involvement and effective distribution of fixed play sites. Currently there are 201 sites of varying size and effectiveness, of those 83 are designated Housing play areas. In the case of the Housing areas, a proportion of the maintenance and renewal costs is met by the Leisure Services Committee.

6 One of the major tasks of the new children's play team will be to undertake work to assess and develop a new strategic plan for fixed sites. At this stage however, the proposals contained within this report can only be based on the deprivation study, the poverty report, past history of investment and distribution, as well as community interest.

7 The proposals for improvement listed below are expressed in more detail in appendix 1.

- i) Napier Square, Avonmouth
- ii) Fishponds Park, Frome Vale
- iii) Valley Walk, Hartcliffe
- iv) St Andrews Road, Montpelier
- v) Signage around the city

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Policy Implication

Resource Implication

Financial:

Land:

Personnel:

Other Approval

Recommendation

Members will be aware that the past allocation of resources on improvements to play areas have been made against other criteria. One such criterion has been the presence of a fund raising group with substantial funds to invest. In some cases phased schemes have been adopted as a way of developing playground services to date. Not all such schemes have been completed even though designs have been done. Whilst mindful of the committee's decision to adopt a more needs based approach some consideration could be given to completing these schemes should the decision to make available the £100,000 be too late to ensure expenditure in the current year. Uncompleted phased schemes are those at:

Arnes Park	High Kingsdown
Brandon Hill	Hillfields
Clifton Down	St Andrews Park
Cottle Road	Springfield Road

Policy Implications

There are no specific policy implications affecting this report.

Resource Implications

Financial:	Schemes are dependent upon capital allocation being available.
Land:	The land is owned by the City Council and is under the control of the Leisure Services Committee.
Personnel:	Nil.

Other Approvals Necessary

None.

Recommended -

- i) That the director of Leisure Services be authorised to commission the designs as outlined in paragraph 7;

ii) That upon confirmation of the capital receipts, the £100,000 allocated as follows:

- a) Napier Square
Avonmouth
- b) Fishponds Park
- c) Valley Walk, Hartcliffe
- d) St Andrews Road,
Montpelier
- e) Signage around the city

subject to discussion over the individual costs per site and the timing of the allocation.

iii) should the decision to allocate the funds be too late to ensure expenditure, that schemes from the following list be considered:

Arnos Park
Brandon Hill
Clifton Down
Cottle Road
High Kingsdown
Hillfields
St Andrews Park
Springfield Road

Local Government (Access to Information) Act 1985
Background Papers

None.

Author: Jon Wheatley
Divisional Director - Young People & Sports Services

0243c

PROPOSED

NORTH DISTRICT

Avonmouth

Napier Square

This play a significantly

EAST DISTRICT

Frome Valley

Fishponds

This is a w
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all aspect

SOUTH DISTRICT

Hartcliffe

Valley Walk

This is a
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APPENDIX 1

PROPOSED LOCATIONS FOR CAPITAL EXPENDITURE

NORTH DISTRICT

Avonmouth Ward

Napier Square

This play area has good potential for development. It would add significantly to the amenities in the area.

EAST DISTRICT

Frome Vale Ward

Fishponds Park

This is a well used park. It is close to a major shopping area which made a large effort in 'Bristol in Bloom'. There is strong community interest in all aspects of the park and its use.

SOUTH DISTRICT

Hartcliffe Ward

Valley Walk

This is a well used site with potential to develop it further. It will be an opportunity to provide better facilities for children in high rise accommodation.

David Brown

1144

CENTRAL DISTRICT

Ashley Ward

St Andrew's Road, Montpelier

This site is well used and would benefit from sympathetic refurbishment.

CITYWIDE

All Sites

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 with a playground.

01/06/2021

image0.jpeg

BOLD RESIDENTS' ACTIONS SPEAK LOUDER THAN WORDS

'Guerilla tactics' to clear footpath

By Bruno Clements

FEELINGS ran so high over a blocked Bristol short-cut that a commando-style raid was mounted to clear it.

About 30 Stoke Bishop people crowded into a van on Saturday morning, using an indirect route to arrive at the controversial spot in Chayne Road without causing suspicion.

The van was backed up to the access and the gap in the boundary hedge cleared in 30 minutes.

Police arrived only after the van, laden with wood and debris, had been driven away to a tip.

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

Punch-up

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

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

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

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

A spokeswoman 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.



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

B378

BBC says sorry in four-letter row



Dave Allen

THE BBC today apologised for comedian Dave Allen's swearing on a TV show which shocked some viewers and led to a flood of complaints.

It admitted a warning should have gone out before the show, telling viewers some of the language might cause offence.

"It didn't happen on this occasion, and on reflection that is a matter of regret," said Mr James Moll, head of BBC TV night entertainment.

Kingswood MP Rob Hay-

ward intends to raise the matter with Home Secretary David Waddington and has tabled a Commons question asking him to discuss the issue with the BBC.

The Tory MP, who has also written to BBC Director General Michael Checkland, said: "On what was a mainstream comedy programme, he went through the full gamut of Anglo-Saxon swear words in a way which I think most people would find unacceptable."

"It was worse than the language I heard in the bar after a rugby match this weekend."

The MP hit the headlines last year after he attacked the BBC for the use of bad language in its Christmas broadcasts.

No internal action is likely to be taken against Mr Allen, but he will probably be told to tone down his language in the other programmes in his new series.



Rob Hayward

Shame of Scout worker and sex videos

By Maurice Fells

CHURCHGOER and Scout worker Kenneth Rawle showed sex videos to boys who visited his home to play with a train set, a court heard today.

He also talked to them intimately about sex, said Mr Gerald Addis, prosecuting, at Bristol Magistrates' Court.

Rawle, a 68-year-old retired aircraft worker of Chakeshill Drive, Brentry, admitted two charges of inciting boys aged 12 and 13 to commit acts of gross indecency with him.

He asked for four other offences dating back to 1983 to be considered.

Mr Addis said: "A number of boys were regular visitors to this house to play with a model railway layout. Rawle used these opportunities to show them soft porn videos."

Religious

He said the boys refused to take part in any physical activity.

Miss Jo Atherton, defending, said a medical report showed Rawle did not have a psychiatric problem.

"These offences were probably committed because he does not have enough to do with his time. He obtained the videos at the boys' instigation," she said.

Miss Atherton added: "He is a very religious man who goes to church and does a lot of work with the Scouting movement."

"Mr Rawle has offered to give up this work, but the Scouts would not hear of it."

Rawle was put on probation for a year and ordered to pay £21 costs.

Robbery charge

Roland Jimenez, aged 18, of Hazelbury Drive, North Common, Warmley, Bristol, has been committed to Bristol Crown Court accused of robbery at the Anchor Store, Kingswood. Jimenez is also accused of burglary and was remanded in custody by Avon North magistrates.

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'Guerilla tactics' to clear footpath

By Bruno Clements

FEELINGS ran so high over a blocked Bristol footpath that a commando-style raid was mounted to clear it.

About 20 Stoke Bishop people crowded into a van on Saturday morning, using an indirect route to arrive at the controversial spot in Cheyne Road without causing suspicion.

The van was backed up to the access and the gap in the boundary hedge cleared in 30 minutes.

Police arrived only after the van, laden with wood and debris, had been driven away to a tip.

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

Punch-up

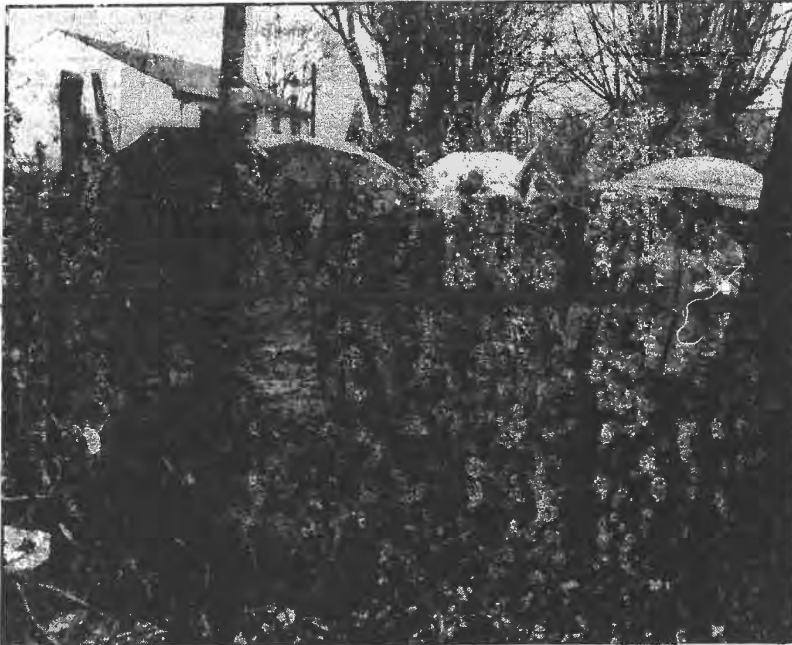
"I have used it for 35 years since I played on the fields as a girl and others say it has been in use much longer. There was a stile there."

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

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

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

A spokeswoman for Avon County Council, which owns the land, said there were worries about motorcyclists being ridden on to the fields and a fence with a kissing gate is to be put up.



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

Church woman mugged for £5

A 73-year-old Bristol woman was mugged on her way to church yesterday morning.

The woman from Boverton Road, Filton, was approached from behind by two youths in Church Road, Filton, at 8.10 am.

They pushed her to the ground and snatched her handbag containing

Teacher tells of ordeal in holiday coach crash

By Karen White

A BRISTOL holidaymaker has described the moment the coach she was travelling on overturned on a French motorway, injuring 14 passengers.

Jane Warburton, aged 32, of Belmont Road, St Andrews, was among a party of seven from Bristol returning from the French ski resort of Courcheval when the accident happened.

The bus, which was carrying 43 passengers, hit a central barrier and overturned 23 miles outside Paris in the early hours of the morning.

Several passengers were taken

"I was asleep when it happened — we had couchettes in the coach," she said.

"I felt the coach move sharply and then it tipped to the side quite gently."

Returned

"I kept thinking it was going to come to a halt but it ended up on its side, luckily on a grass verge with quite soft soil."

Other passengers are already home or on their way by plane or coach.

It has not been confirmed yet what caused the accident but a spokesman for the Foreign Office in London said they were not aware of any investigation by the French authorities into the conduct of the driver.

There was no one available for comment at Essex-based Watson Enterprises, which owns the coach.

But Bladen Lines, of London,

Celebrate 1990 in style...

with 1989 prices

Enjoy an excellent Six-Course Supper with a true Dinner Party atmosphere.

NEW YEAR OFFER

MONDAY £12.50

TUESDAY-SATURDAY £13.50

Also Traditional Four-Course Sunday

Luncheon £9.50

Advanced reservations essential 10% service charge on final bill



Bristol Post article 8 January 1990

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

A spokeswoman 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.

[REDACTED]
Cheddar
Somerset
BS27 3LW
Tel: [REDACTED]
E-mail:
ken [REDACTED]

Statement of [REDACTED]

My name is [REDACTED]. From April 1984 until February 2007, I lived at Stoke Paddock House, 1 Cheyne Road. 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

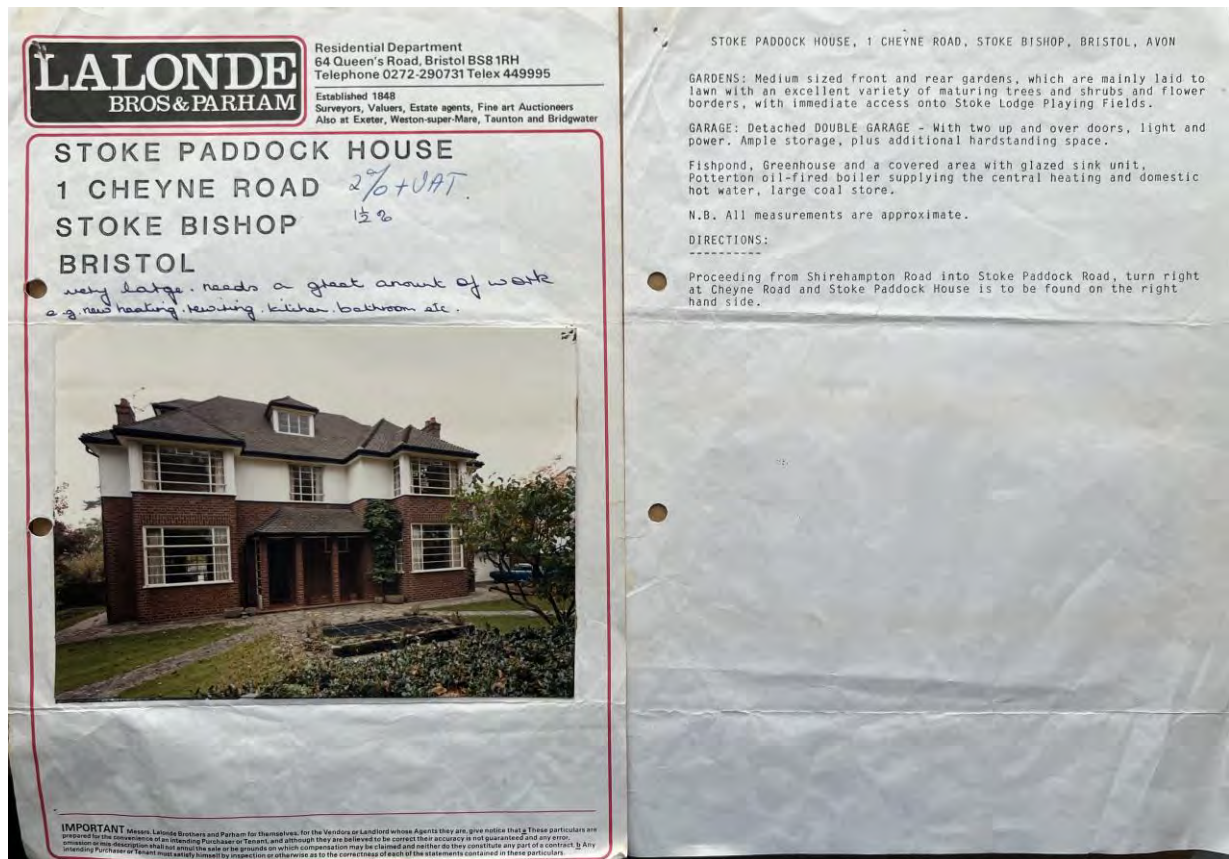


Image 1: Estate Agent's brochure from 1983 advising "immediate access onto Stoke Lodge Playing Fields".



Image 2: May 1984 showing direct opening/access into Playing Fields directly from garden of Stoke Paddock House.



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

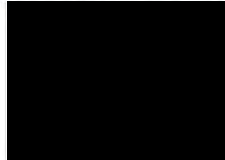
WITNESS STATEMENT OF IAN CREER

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 solid black rectangular box used to redact the signature of the witness.

Dated:

9 Jul 2021

7

GENERAL FEELING BY COUNCIL - ALLOWED OR
DID NOT ENFORCE

ANNE - MORE RECENTLY

PARA 889 - ~~AA~~ SUFFICIENT TO MAKE USE
OF LAND) CONTENTIOUS

NOT SATISFIED) CONTENTIOUS MORE
RECENTLY -

ABRAHAM

- ACROSS CITY - CONCERN DOG FOULING
- GATE STOCK LODGE LOCKED
- SIGNS MAY HAVE BEEN PUT UP THEN
- EMBARGO 3/4 DAYS

COUNTY COUNCIL - EDUCATION OWNERSHIP
TOLD NOT TO LOCK GATES.

CASE PROVEN - PAINTS PICTURE

ALEXANDER - GAME CHANGER HOW MANY
YEARS -

1985 - LOST "AS OF RIGHT" - 2009

- KENT VISITED SIGN - DECADES OF
EROSION

- "FORCE" NOT PHYSICALLY

- IGNORING SIGNS OR CONTRADICTION/
MSG - LITTLE HINTS THROUGHOUT PARK

543
B365

**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 PETER ABRAHAM

1. I, [REDACTED] of [REDACTED] Hutton Close BS9 3PT have lived locally since 1983 and my family and I have been regular users of Stoke Lodge. I was first elected to Bristol City Council (BCC) in 1966 and was elected as a founder member of Avon County Council but returned to BCC in 1983 to represent the Stoke Bishop Ward retiring this May 2021.
2. 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.
3. I recall that in the mid 1980s (1987/88) a new caretaker was appointed at Stoke Lodge and without any consultation with the public or fellow Councillors or myself started to lock the gates to the playing fields. This caused great concern to many local people. Together we made strong representations against this and the lockout was reversed.

I believe that the facts stated in this witness statement are true.

Signed:

[REDACTED]

Dated:

6th June 2021.

B373

**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 HILARY CORFIELD

1. I, [REDACTED] of [REDACTED] The Avenue, Sneyd Park, Bristol BS9 1PA have lived in the Stoke Bishop area for 56 years. 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. I have enjoyed the use of Stoke Lodge ever since I moved to the area as a small child in 1964. I played and exercised there until 1978, when I was away for a time studying etc. In the early 1980's, I returned to the area with my husband before starting our family and we have lived here continuously ever since.
3. I can very clearly remember a specific incident, which I believe was in either 1987 or 1988. When I arrived at the West Dene entrance to Stoke Lodge to play with my son as usual, I was mystified to find the old gate which was metal, rusty and rested on the ground in a wide-open position, had been closed and locked with a padlock and chain. The gate consisted of a tubular frame with an interior of a metal mesh of maybe three inch squares. There was a gap in the mesh where the handle would have been when it was new; I don't know if the handle was still there or if it had rusted away because it was never used; the gate was not used. On that day, that is where the chain and padlock were, through the handle gap.
4. The reason I can remember this is because whilst I was distracted wondering why the gate was closed and if this meant that the long rumoured school was going to be built, my little boy, who would have been about two, put his feet in the mesh and tried to climb up the gate. I

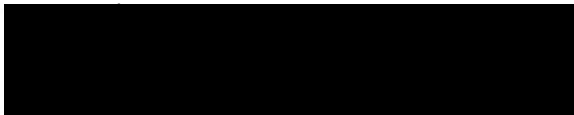
B374

lifted him off and to my horror his hands were orange, as a result of a sweaty little hands on rust. I can remember being very worried that he would put his hand in his mouth. I didn't have anything to clean it with, so I used the inside of the bottom of my skirt. I couldn't get it all off, so immediately started walking straight to my Mum and Dad's nearby to wash his hands. I remember being very anxious and trying to keep my eye on his orange hands as I hurriedly pushed the buggy. What had been a very pleasant, usual thing to do, had become a bit of a nightmare; I was cross, worried, sad and baffled. The reason I think it was 1987 or 1988, is because for me to worry so much, this must have been my first child.

5. Sweaty hands would indicate that this was late spring, summer or early autumn; my son was born in November 1985, so my saying it was 1987 or 1988 seems to be right. My second son was born in late autumn 1988 and my third in 1993, but I don't remember having another child with me; just the little orange hands, the gate, thinking that if the school was going to be built it would be ready for our children and also being really sad that if we were to be kept out, my children wouldn't have the freedom of Stoke Lodge that I did when I was a child.
6. However, it was a complete flash in the pan, because next time I drove past Stoke Lodge which would certainly have been within a matter of days if not the next day, there were adults, children and dogs on the field and everything looked normal again, which it was. It remained that way until recently. I never knew why the gate had been locked on that day, nor did I ever see it locked or even closed again and I don't even remember being aware of it. I presume at some point it either completely disintegrated or was taken off, presumably for safety reasons because of the rusted metal.

I believe that the facts stated in this witness statement are true.

Signed:



Dated:

5th June 2021.

BRISTOL CITY COUNCIL

BRIEFING NOTE

**For:
Informal Cabinet**

22nd April 2010

Title: Community Access to School Playing Fields

Department: Children and Young People's Services

**Officer presenting report: Michael Branaghan, Service Manager
Capital, Assets and Access**

RECOMMENDATION

That:

- a) The investment into Purdown and Stoke Lodge should be allowed to continue.
- b) Schools should be approached individually to see whether they are willing to allow open access to the playing fields and an evaluation of the cost implications for those schools established and reported back to informal cabinet for further evaluation and possible wider scrutiny and discussion.
- c) In undertaking an evaluation of the cost implications for open access arrangements the revenue and capital implications are identified and possible funding sources identified.

1. INTRODUCTION

- 1.1. Tenders have been received for the construction of the playing field at Fairfield School on Purdown and the erection of a bridge link across Muller Road (from Fairfield School to the new playing field). Authority to award the tenders, valued in total £496,930, is subject to delegated approval.
- 1.2. Additionally, funding is available to complete a major refurbishment of the Cotham School playing fields at Stoke Lodge. This is to be funded from Section 77 funding and a grant from Sport England.
- 1.3. The Executive member has indicated that the schemes should be frozen until a decision on the future of open access to school playing fields is made.

2. BACKGROUND INFORMATION

- 2.1. There has been a growing concern within local communities about the loss of green space within the city. Although the city has an

extensive green heritage, there are still a number of communities where there is insufficient access to quality green space. Work, undertaken by the Parks Team within the Neighbourhoods Department, to develop the Area Green Space Strategy (and associated Green Space Plans) has identified a number of CYPS sites that might contribute to accessible open space provision.

2.2. The following Neighbourhood Partnership Areas are under the minimum quality standard of 18m² per person (and where no resident is further than 400m from an accessible open space) as established within the strategy. These are:

- Bishopston, Cotham and Redland;
- Cabot, Clifton and Clifton east;
- Ashley, Easton and Lawrence Hill

2.3. During the delivery of the Secondary School Investment Strategy, through the Building Schools for the Future Programme and earlier capital schemes (including the development of Fairfield School), representation has been made by local communities about the loss of access to green space and some school playing fields associated with the investment initiative.

2.4. In November 2009, four cases were highlighted by Informal Cabinet:

- Fairfield School – the loss of green space to the proposed development of playing pitch facilities at Purdown;
- St Bede's – the loss of access to playing fields following the removal of gated access to school playing fields (this issue has since been resolved by the creation of additional community access to existing public open space adjoining the school);
- Stoke Lodge Playing Fields – the proposed exclusion of public access to school playing pitches;
- Bishop Road Playing Fields – the exclusion of the public to school playing fields

2.5. This report seeks to address the issues raised and identify an acceptable way forward which meets the needs of the schools and local communities.

2.6. The report is structured into seven key areas to address the questions that open access would generate:

- What is the DCSF view on community access to school playing fields?

- What powers does the local authority have to direct a governing body to provide open access to school playing fields?
- What impact would open access have in terms of the potential for registration of land as a town green or village green under the Commons Act 2006?
- What are the health and safety implications of a decision to provide open access to school playing fields?
- What are the crime/antisocial behaviour impacts of adopting open access to school playing fields?
- What are the potential revenue implications of a decision to provide open access to school playing fields?
- What are the implications for Stoke Lodge and Purdown if investment were frozen in favour of open access?

DCSF GUIDANCE ON COMMUNITY USE

2.7. The DCSF have published guidance to local authorities in their document 'The Protection of School Playing Fields and Land for Academies - July 2007'. In this publication the DCSF consider that school premises are a resource not only for pupils, but also for the wider community. With this in mind, local authorities and schools are encouraged to seek out opportunities to develop their community role in a formalised access arrangement to protect the playing field from wear and tear, and possible abuse. A summary of the DCSF perspective is provided in Appendix A.

2.8. Many schools in Bristol do allow structured community access to playing fields. This demonstrates that solutions are possible, but need to be progressed on a bespoke basis that recognises the needs of local communities; the status of individual schools; and their vision/values etc.

THE LOCAL AUTHORITY'S POWER OF DECISION

2.9. The control of school premises is subject to the provisions of the School Standards and Framework Act 1998¹ (SSFA). This includes playing fields (both detached and not detached) in educational use. Appendix B summarises the Local Authorities powers in terms of community, foundation and voluntary schools.

2.10. The SSFA states that the occupation and use of school premises (both during and outside school hours) within a community school is under the control of the governing body² and is subject to any directions given by the Local Education Authority³.

¹ School Standards and Framework Act 1998 Schedule 13

² School Standards and Framework Act 1998 Schedule 13 paragraph 1

³ School Standards and Framework Act 1998 Schedule 13 paragraph 1(3)

- 2.11. In practical terms the direction given by the Local Authority to community and voluntary controlled schools relates only to how the school premises should be used. The direction does not take away the governing body's responsibility, but can cover matters such as making sure that the community use of the school's facilities does not affect the day-to-day use of the facilities by pupils (e.g. making sure the outdoor sports pitches are not overused).
- 2.12. A decision to agree open access to school playing fields by a foundation school or voluntary school would be at the discretion of the governing body.
- 2.13. When a local authority is considering an open access policy to school playing fields it is Counsel's opinion⁴ that the Authority should seek to persuade the governing body that they themselves should willingly adopt a policy of open access.

THE LEGAL STATUS FOR SCHOOL PLAYING FIELDS

- 2.14. The Commons Act 2006⁵ allows for the registration of land as a town green or village green where:

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

- 2.15. If an open access policy were to come into effect on school playing fields (this potentially could include informal recreational use⁶), and remain so for a period of twenty years or more the prerequisite qualification for registration would potentially be met. Appendix D summarises earlier Counsel Advice on the potential mitigation for the establishment of registration rights under the Commons Act 2006. Unfortunately, this advice has been superseded by a judgement of the Supreme Court on 3rd March 2010 in the Redcar case⁷. This case has set a precedent which offsets previous mitigation to registration.
- 2.16. The judgement of the Supreme Court is important in two respects:
- It has made it materially easier to register new greens;
 - It has further explained the consequences of the registration of a new green.
- 2.17. The outcome of the decision is that registration is now possible, after twenty years open access use, even though the land owner had given revocable permission for such access. The implications for a landowner requiring the land in the future for development purposes are that such future aspiration will be frustrated where a period of twenty years or more has elapsed since community

⁴ Nigel Giffin QC, Bristol City Council: Access To School Playing Fields, 14th December 2009, par 7, pp 2, fn 3

⁵ Commons Act 2006 s15

⁶ *R v Oxfordshire CC ex p. Sunningwell PC* [2000] AC 335

⁷ *R v Redcar and Cleveland Borough Council & anor* [2010] UKSC 11

access was available. Landowners now need to proactively take steps to keep people their land to prevent future registration.

- 2.18. For the City Council, this implies that there is no option for revocable permission after twenty years community use of a school playing field if there is a desire to utilise the playing field for other development uses in the medium/long term future. Subsequent registration would impact on the ability to declare a playing field surplus in the future. This would reduce opportunities for future capital receipts.

HEALTH AND SAFETY ISSUES

- 2.19. There is a duty of care owed to pupils in a school in relation to their physical safety. It is possible that if members of the public were to make use of a school playing field they may leave behind detritus that could pose a risk to the health and safety of pupils using the field for sport as part of the delivery of the curriculum. Such detritus could include broken glass, dog faeces and 'sharps'. There is also the possibility that the grounds themselves, or equipment (such as goal posts and artificial cricket wickets) could be damaged creating additional health and safety risks.
- 2.20. Appendix E identifies the potential liability arising from open access.
- 2.21. There would be a need to undertake individual risk assessments for each school playing field where open public access was permitted. Although some risks will be similar, there are some which would be bespoke and related to the proximity of the field to residential dwellings or other facility such as a public house or off-licence.
- 2.22. It is inevitable that the each school would be required to undertake an inspection and risk assessment on a daily basis (and possibly several times a day where access was occurring on a 24 hour a day basis).

CRIME AND ANTISOCIAL BEHAVIOUR

- 2.23. Where a school playing field adjoins school building assets there are issues relating to the possibility of crime/anti social behaviour occurring by virtue of the open access to the school via the playing fields.
- 2.24. The issues that arise can be considered under three eventualities:
- Staff, pupils and visitors being subjected to violence, threats of violence, and harassment by individuals gaining access to the school playground and buildings from the open access playing fields during school hours;
 - Staff, pupils and visitors being alarmed or distressed by acts of violence, criminal activity occurring on the playing field or in the school grounds (by individuals gaining access to the

school playground and buildings from the open access playing fields) during school hours;

- Non CRB checked individuals using the open access to playing fields to gain access to vulnerable people in school.

2.25. Where the playing field is required for school activity, there may be difficulties experienced with the exclusion of the general public from the playing field. This is easily resolved when the playing field is gated and fenced, but places teaching staff and pupils at risk when members of the public have to be challenged for interfering with the delivery of the curriculum.

2.26. In terms of the security and safety of buildings, the mitigation would be through compartmentalisation of the school from the field by security fencing. In many cases this would require a capital investment from the school or the local authority.

2.27. The City Council's Underwriter has indicated that there is an expectation that school buildings would need to be segregated from the open access area by suitable secure fencing to provide mitigation against risk of damage etc to school buildings and contents.

INSPECTION REGIME AND REVENUE IMPLICATIONS

2.28. The need to establish an inspection regime was considered in paragraph 2.22. Appendix F summarises the issues that relating to the need for an inspection regime. Schools have indicated that if they are responsible for the additional pitch inspection it would be time consuming and have a financial impact on the individual school budget.

2.29. Colleagues from the Parks Service in City Development have been consulted on the maintenance requirements for open access. The cost of an operative and vehicle to undertake general site inspections etc, for 190 days each year would potentially cost between £6,650 (primary) to £14,250 (secondary) per school during school time. Open access beyond the 190 days would be substantially more costly (See Table One in Appendix F).

2.30. The existing maintenance costs for school playing fields are based on a bespoke regime negotiated between the school and the grounds maintenance contractor. The cost reflects the frequency of maintenance for each feature (grass is usually cut on a ten day frequency), the facilities on site and the level of security on the site. Secure sites tend to have less detritus than unsecured sites and therefore require less litter collections and a less intense inspection regime prior to mowing.

2.31. As part of the maintenance regime, the grounds maintenance contractor is usually responsible for undertaking an inspection of the grass surface prior to mowing. This is to ensure that there is no harmful detritus that may cause third party injury or damage to machinery and equipment.

IMPLICATIONS FOR THE STOKE LODGE AND THE PURDOWN CAPITAL PROJECTS

2.32. Within the current Capital Programme are two key investment areas in relation to school playing fields.

- Fairfield School - Purdown Playing Fields £496,930;
- Cotham School - Stoke Lodge Playing Fields £1.6m

Fairfield School - Purdown Playing Fields

2.33. The Purdown scheme is for the construction of playing fields and the construction of a bridge to provide a link from the Fairfield School, across Muller Road, to the facility to be provided on Purdown (See Appendix I).

2.34. The fencing to be provided is either 'estate type fencing' or ball court fencing. This is dependant on location of the fence on site (See Appendix G and H). There is no other fencing proposed on the site.

2.35. Tenders have been received for this project and await approval under officer delegation and an order to be placed. This is on hold until a decision can be made concerning open access.

2.36. If the development of this project were suspended, there would be a need to continue funding of off-site facilities rental for formal games. There would also be a need for revenue funding for coach hire. Additionally, capital funding would be required to make permanent modifications to the frontage of the Fairfield School buildings to accommodate turning and parking facilities for coaches to pick-up students to take them to the off-site provision.

2.37. The changes to the site would require planning consent for the coach drop-off and pick up, and for the modifications to internal roads and building frontage. The estimated cost of the modifications would be £250,000.

Cotham School - Stoke Lodge Playing Fields

2.38. Stoke Lodge (including the north western side of the site) was acquired for education purposes in 1947. The south east site was an earlier acquisition for temporary housing purposes in 1946 and transferred to education in 1950.

2.39. Stoke Lodge Playing Field was formerly used by Fairfield High School when it occupied the premises at Fairlawn Road. When the school relocated to the new site in Allfoxton Road the management of the site moved to Cotham School.

2.40. In august 2009 Cotham School entered into a short term agreement with Bristol University which allows the University to utilise the field for sport activity. The University, during the period of the agreement, undertake the management of the facility as part of the remuneration for this exclusivity.

2.41. The playing field is currently unfenced and allows unfettered community access.

2.42. The Stoke Lodge Playing Fields project proposes a major refurbishment of the field including the development of community facilities to the edge of the pitch, changing room improvements and pitch improvements. The scheme includes fencing to the perimeter of the site. It is will be funded from a section 77⁸ consent for an investment of £1m (from the proposed disposal of a portion of land at the former Romney Infant/Junior Schools) that has DCSF approval⁹. Additionally, a £600k Sport England Grant has been awarded for the scheme.

2.43. If this project is suspended, the grant would be withdrawn and a new consent would need to be filed with the DCSF for the £1m investment to be targeted to another school playing field improvement scheme. The Cotham School would continue with their arrangement with the University.

3. FINANCE

Capital Funding

3.1. There has been a suggestion in the past that the capital funding allocated to the above schemes could be utilised to fund revenue elements of the site inspection and cleansing regime. CIPFA rules prohibit the allocation of capital funding to revenue work streams. Additionally, the two funding sources: the Section 77 funding; and the Sport England Grant are specific allocations to the Stoke Lodge scheme and would not be available for revenue funding work stream elements or unidentified capital projects.

Revenue Funding

3.2. The community use of school playing fields is not eligible use of the Dedicated Schools Grant which funds the education of pupils at the school. As such funding for the daily inspection/clean and costs for repairing vandalism would need to be provided by the Council (e.g. through the devolved Neighbourhood Partnership Budget).

3.3. Where the playing field form part of a PFI school and are opened up for community use, there would be a significant additional charge as the access to premises is controlled through a legal agreement with specific 'community time' access already being utilised by the schools as part of their extended school provision.

3.4. Some schools have indicated that charges made for community access to their facilities is an important funding stream for the school. This income is often used to subsidise the extended maintenance of the facility where the school allow 'authorised' community access.

4. CONSULTATION WITH SCHOOLS

4.1. A number of head teachers have been consulted over the proposal to provide open access to school playing fields. The Head Teachers' perception is that the need for an inspection, every time

⁸ School Standards and Framework Act 1998 Section 77 (5)

⁹ The School Playing Fields General Disposal and Change of Use Consent (No.3) 2004 order

a pitch is required for the delivery of the curriculum, is a significant resource hungry process.

4.2. The schools have indicated that they believe the health and safety of their children will be compromised especially as the children often use the playing fields first thing in the morning before the start of the school day. If there were a dangerous substance on the field and access was gained prior to the inspection there is a danger that the children may come to harm.

4.3. Schools have indicated a concerned about damage to property and the danger of possible trespass into the playground and school buildings. Many playing fields are not segregated from the main school buildings and would normally only be accessible through the school or a secure gated access. Open access would remove the security of the play ground and class room direct access unless additional investments were made into formal segregation of the playing fields from the school buildings and play grounds.

5. CONCLUSION

5.1. The Council is in a position to give direction or impose an open access policy on community schools and voluntary aided schools (where the playing fields form part of the Council's estate). This is not possible for foundation schools (including Trust Schools) or some voluntary controlled schools. If such a policy were adopted, there is a high probability that an application for registration would take place if the open access has been, or is permitted, for a period of twenty years or more. Previous mitigation against registration has been eroded by virtue of the Redcar case.

5.2. Many schools in Bristol allow structured community access to playing fields demonstrating that solutions are possible. The delivery of an open access strategy will need to be progressed on a bespoke basis to recognise the needs of local communities; the status of individual schools; and their vision/values etc.

5.3. 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.

5.4. Open access will require individual risk assessments to be undertaken for each participating school. Additionally, an investment will need to be made, either by the city council or the school, in terms of revenue to fund inspection and maintenance; and for capital investment in providing secure fencing to segregate playgrounds and buildings from the open access playing fields.

- 5.5. The investment into Purdown and Stoke Lodge should be allowed to continue as the alternative option is not suitable for long term delivery of the outdoor curriculum.

6. RECOMMENDATION

That:

- a) The investment into Purdown and Stoke Lodge should be allowed to continue.
- b) Schools should be approached individually to see whether they are willing to allow open access to their playing fields and an evaluation of the cost implications for those schools established and reported back to informal cabinet for further evaluation and possible wider scrutiny and discussion.
- c) In undertaking an evaluation of the cost implications for open access arrangements, the revenue and capital implications are identified and possible funding sources identified.

APPENDIX A

THE DCSF PERSPECTIVE – A SUMMARY OF ‘The Protection of School Playing Fields and Land for Academies - July 2007’

1.1. The DCSF consider that school premises are a resource not only for pupils, but also for the wider community. With this in mind, local authorities and schools are encouraged to seek out opportunities to develop their community role. This is because community use may bring about a sense of ownership and belonging to the school. In seeking these opportunities, authorities and schools are asked to give priority to activities which support and promote pupils' learning and the wider community generally. This includes homework and after-school club activities; other study support activities; basic skills courses; adult education; youth service activities; and family learning opportunities.

1.2. The DCSF understand that in many locations the school is the main or even only place that can provide the local community with sports and other facilities. The DCSF have decided that, in assessing applications for disposal or fencing of school playing fields under section 77, it is right that the Secretary of State takes into account community use of school playing fields. Where the fencing off of a school playing field displaces or disadvantages authorised community users, the Secretary of State will take into account the circumstances of the closing off of the playing field and of the alternative provision, if any, provided to the former users.

1.3. It is the DCSF view¹⁰ that only authorised community use of playing fields should be taken into account, whether or not such authorised use is covered by formal or informal agreements. Such use may be by:

- local sports clubs for practice or the playing of arranged games;
- local youth and community groups for sport or recreation, for example local scout groups;
- nursery, pre-school and day care groups;
- after school and out of hours groups;
- groups involved with educational programmes run in partnership with schools;
- Charitable groups for fetes, sports days, and other fund raising events on an annual or more regular basis.

¹⁰ ‘The Protection of School Playing Fields and Land for Academies July 2007’, DCSF (2007), par 74. pp23

- 1.4. There may be a misconception in the local community that school playing fields are public parks and, therefore, are open to any public access and use. The DCSF emphasise that school playing fields are provided primarily for the physical education and the enjoyment of children attending the school¹¹.
- 1.5. Although schools and authorities make their playing fields available for authorised community use, the DCSF are aware that unauthorised use may cause damage to these resources. Although it may appear to be harmless to allow children ad hoc use of school playing fields to kick a ball about at evenings and weekends, there is a likelihood that the quality of school sports pitches may suffer as a result. Sports pitches can only be used for a limited amount of time, particularly in extremes of dry or wet weather, and must be allowed periods to recover.
- 1.6. When the Secretary of State considers applications for the enclosure or closure of school playing fields no account is taken of unauthorised uses. Such unauthorised uses include:
- local residents exercising and walking dogs;
 - unauthorised 'kick-around' by local children or as a golf practice range by local residents (unauthorised use of school grounds may also be considered to be trespass);
 - Use as an unofficial picnic, camping, or caravan site.

¹¹ 'The Protection of School Playing Fields and Land for Academies July 2007', DCSF (2007), par 75.
pp23

THE LOCAL AUTHORITY'S POWER OF DECISION

1. The SSFA states that the occupation and use of school premises (both during and outside school hours) is under the control of the governing body¹². This is subject to any directions given by the Local Education Authority¹³.
2. When a local authority is considering an open access policy to school playing fields Counsel opinion¹⁴ is that the Authority should seek to persuade the governing body that they themselves should willingly adopt the policy of open access. If necessary, the Local Education Authority is in a position to direct that there should be open access to school playing fields of community schools (but not foundation schools or voluntary aided schools). Such a direction would need to be specific about what is actually intended by allowing the open access. The exercise of this discretionary power by the local authority could be challenged on normal judicial review (see Appendix C).
3. If the local authority has taken proper account of the relevant considerations, including the views of the governing bodies of the schools concerned, it is unlikely that there would be any viable grounds for a challenge under judicial review¹⁵.
4. The position in relation to foundation schools and voluntary schools is different. For a foundation school the control of occupation and use rests with the governing body and is not subject to any power in the local authority to give direction¹⁶. A decision by a foundation school or voluntary school would be up to the discretion of the governing body to agree to open access to its playing field. This is even though the SSFA¹⁷ requires the governing body, in relation to occupation and use outside school hours, to have regard to the desirability of the school premises being made available for community use. The governing body may still refuse to agree to an open access policy if they had some coherent reason refusal.
5. In the case of a voluntary controlled school, the Local Education Authority has some power of direction¹⁸ subject to a particular provision about weekend use¹⁹. For voluntary aided schools, the Local Education Authority has no powers to direct open space access to playing fields.

¹² School Standards and Framework Act 1998 Schedule 13 paragraph 1

¹³ School Standards and Framework Act 1998 Schedule 13 paragraph 1(3)

¹⁴ Nigel Giffin QC, Bristol City Council: Access To School Playing Fields, 14th December 2009, par 7, pp 2, fn 3

¹⁵ Nigel Giffin QC, op cit, par 7, pp2

¹⁶ School Standards and Framework Act 1998 Schedule 13 paragraph 3

¹⁷ School Standards and Framework Act 1998 Schedule 13 paragraph 3(3)

¹⁸ School Standards and Framework Act 1998 Schedule 13 paragraph 5

¹⁹ School Standards and Framework Act 1998 Schedule 13 paragraph 7(1) and (2)

6. There are opportunities for a dispute between the Local Education Authority and a governing body to be referred to the Secretary of State for determination²⁰. A determination could result in an open access direction made by the Local Education Authority being overturned (and for a failure to agree to the implementation of an open access agreement by a governing body to also be overturned). Such intervention is only likely if the DCSF believed that one party or the other was behaving in a way that was seriously unreasonable.
7. Opportunities to enter into a transfer of control agreement with a third party may be a solution where there is a particular activity proposed on the playing field but Counsel advice²¹ is that it may not be an appropriate solution to achieving open access to a site.

²⁰ Education Act 1996, s 495

²¹ Nigel Giffin QC, op cit, par 12, pp4

JUDICIAL REVIEW

1. The courts may intervene to quash a decision if they consider it to be so demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made in the *Wednesbury* case²²:

"If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere... but to prove a case of that kind would require something overwhelming..."

2. However, the threshold will be a lower one, that of proportionality, when European Union law or Human Rights Act breaches are involved. In general terms, the concept of proportionality requires a balancing exercise between, on the one hand, the general interests of the community and the legitimate aims of the authority and, on the other, the protection of the individual's rights and interests.
3. One approach to assess the risk of judicial review is to ask:
 - Is the Authority's objective legitimate?
 - Is the measure suitable for achieving it?
 - Is it necessary, in the sense of being the least intrusive means of achieving the aim? And
 - Does the end justify the means overall?
4. The onus also lies upon the Authority to show that these conditions can be met²³.

²² Lord Greene Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, HL.

²³ Public Law Project Information Leaflet 3

APPENDIX D

THE LEGAL STATUS FOR SCHOOL PLAYING FIELDS

1. Counsel advice on the 'as of right' access by a neighbourhood or locality and the generation of the subsequent opportunity to seek registration of the land under the Commons Act 2006 may be prevented by virtue of the competing use of the playing field by the school and whether the governing body has acquiesced to the use of the facility by a neighbourhood or locality. If the governing body has, then registration might be possible. If on the other hand actions have been taken to indicate that such access is under licence only and as such the permission is revocable then the risk of registration is substantially reduced²⁴.
2. Such mitigation could be achieved by the placing of signs on the boundary of each site²⁵ stating that 'public use of the playing fields is solely by the permission of Bristol City Council/the governing body of the school), and such permission may be revoked at any time'. Alternatively, closing the land to public use on certain days of the year might effectively demonstrate that such public use only took place with the land owner's permission.
3. Counsel has suggested that there are difficulties in demonstrating implied permission²⁶. There is a danger that if expressed permission is demonstrated by signage, such signage could be forgotten over time and disappear. Additionally, closing land on certain days in the year may be forgotten over time. Each would generate a loophole by which 'as of right' access could be demonstrated over time.
4. The fact that the school would continue to use the playing field during school hours, prior to the Redcar case²⁷, would have been seen as an official restriction of public access during that period.

**PLEASE NOTE THAT THIS ADVICE WAS GIVEN PRIOR TO
THE REDCAR CASE AND THE ADVICE IN PARAGRPH 1 to 4
IS NO LONGER RELEVANT**

5. *The Redcar case makes it easier to register new greens by disapproving the judge-made rule that land cannot be registered as a new green where it has been used by both the landowner for his own purposes and by local people for recreation in circumstances where the local people deferred to the landowner's use. Landowners will need in future to take active steps to exclude recreational trespassers. The judgement has also explained the consequence of registration in terms of future landowner development opportunities²⁸.*
6. The above case changes the original advice given by Counsel in December 2009 where it was believed that under current law there

²⁴ Nigel Giffin QC, op cit, par 18, pp6

²⁵ Nigel Giffin QC, op cit, par 18, pp6, fn 8

²⁶ *R (Beresford) v Sunderland CC* [2004] 1 AC 889

²⁷ *R (on the application of Lewis) v Redcar & Cleveland Borough Council & anor* [2010] UKSC 11

²⁸ Mr Vivian Chapman QC, notes dated 12th March 2010 – referring to *R (on the application of Lewis) v Redcar & Cleveland Borough Council & anor* [2010] UKSC 11

would be no right to register the land as a green²⁹. The only foreseeable exception to this conclusion would be if the law changed or if part or the entire field failed to be used for school activities for a period of 20 years. Counsel advice is that the situation of open access would have to be reviewed every few years³⁰.

²⁹ Nigel Giffin QC, op cit, par 20, pp7

³⁰ Nigel Giffin QC, op cit, par 20, pp8

HEALTH AND SAFETY ISSUES

1. There is a duty of care owed to pupils in a school in relation to their physical safety. The potential liability arising from open access can be considered at two levels:
 - **The liability of the staff at the school.** They would have to exercise reasonable care, in light of the policy, to ensure they take reasonable steps for the maintenance of the field. The authority (in the case community schools) and the governing body (in the case voluntary and foundation schools) would be liable for any breach in this duty of care³¹.
 - **The liability of the council or the governing body (whichever was responsible for the open access decision)** if they were aware that a particular school was not taking proper care in terms of maintenance and failing to keep pupils safe. They would be directly liable for a failure to take remedial action (including the termination of the policy and possible fencing off the site: especially where there is a significant problem with members of the public trespassing and leaving hazardous litter or waste despite not being permitted access)³².
2. Counsel had suggested that there might be a possibility that any insurance cover the local authority may have for the playing fields may require a sizeable excess or that the cover could be invalidated if public access were permitted³³. This has been investigated with the City Council's Underwriter and is not the case. The Underwriter has indicated that there is an expectation that school buildings would be segregated from the open access areas by suitable secure fencing to provide mitigation against risk of damage etc to school buildings and contents.
3. There would be a need to undertake individual risk assessments for each school playing field where open public access was permitted. The risk assessment would be different for each school dependant on proximity to residential dwellings or other facility such as a public house or off-licence.
4. It is inevitable that the each school would be required to undertake an inspection and risk assessment on a daily basis (and possibly several times a day where access was occurring on a 24 hour a day basis). Counsel has stated that the legal duty is not to eliminate risk of injury³⁴ but to take reasonable care in all circumstances in the same way as a reasonable careful parent would³⁵. Parents do allow their children to play games in open grassed spaces to which the public have access,

³¹ Nigel Giffin QC, op cit, par 24, pp9

³² Nigel Giffin QC, op cit, par 24, pp9

³³ Nigel Giffin QC, op cit, par 24, pp9, fn 9.

³⁴ Nigel Giffin QC, op cit, par 27, pp11

³⁵ *Kearn-Price v Kent CC* [2003] ELR 17

and which is not inspected. Often this land is within local authority ownership and there have been few challenges under health and safety legislation or public liability claims.

This AGREEMENT is dated: ~~SEPTEMBER 1ST~~ 2010

BETWEEN:

- (A) Cotham School, Cotham Lawn Rd, Cotham, Bristol, (the “School”); and
- (B) The University of Bristol, whose administrative office is at Senate House, Tyndall Avenue, Bristol BS8 1TH (the “University”).

IT IS AGREED AS FOLLOWS:

1. This is a Transfer of Control Agreement made under Schedule 13 to the School Standards and Framework Act 1998. This Agreement sets out the arrangements terms and conditions whereby the School transfers control of part of the School premises to the University.
2. This Agreement is made with the consent of Bristol City Council under paragraph 2(2) of Schedule 13 to the School Standards and Framework Act 1998.
3. As part of the statutory arrangements for the delivery of secondary education by Bristol City Council the School has exclusive use of Stoke Lodge Playing Fields (“Stoke Lodge”) in Stoke Bishop, North Bristol.
4. Subject to the priority use of the School, the School hereby grants to the University a licence to access and use Stoke Lodge (including the maintenance depot on the eastern end of the site) under the terms of this Agreement for the purpose of engaging in sport or recreation activities.
5. The University shall be entitled to sublicense the rights granted to it by the School under clause 4 to any third parties for the purpose of allowing such third parties to engage in sport or recreation activities. The University shall be entitled to retain any fees generated through such sublicensing.
6. Any sublicenses granted by the University to a third party under clause 5 shall make it clear that the sublicensed rights are subject to priority use of Stoke Lodge by the School.
7. In consideration of the rights granted by the School under clause 4 and the payment of £17,613 plus VAT (payable by the School in 12 monthly instalments), the University agrees to fulfil the School’s maintenance obligations by providing the services listed in the attached Schedule to the reasonable standards described in the Schedule.
8. To cover its potential liabilities under this Agreement the University shall maintain public liability insurance of not less than £5,000,000 and employers liability insurance of not less than £10,000,000.

9. With respect to breach of obligation of this Agreement, breach of duty under statute or at common law or negligence by or on the part of the University in connection with or arising out of the subject matter of this Agreement in respect of which the University is legally liable to the School, the University will accept:

- a. liability for death or personal injury caused by the negligence of the University or for anything else for which the University cannot at law limit or exclude its liability; and

10. liability for any physical damage to Stoke Lodge or third party property resulting from the negligence of the University to the extent of the University's insurance cover under clause 7.

Subject to clause 11, any other liability shall be limited to the value of the consideration given by the University under clause 7.

10. Neither the City Council nor the School will be liable for any injury (including injury resulting in death) or damage to or loss of property which may occur or be sustained by the University or any sub-licensee, employees, volunteers, agents or children attending any session on the site other than occurring as a result of the negligence of the City Council or the School.

11. The University shall not be liable for the following loss or damage however caused and even if foreseeable by the School:

- a. economic loss including administrative and overhead costs, loss of profits, business, contracts, revenues, goodwill, production and anticipated savings of every description;
- b. loss arising from any claim made against the School by any other person save in instances where the loss or damage is due to the negligence of the University; or
- c. loss or damage arising from the School's failure to fulfil its responsibilities or any matter under the control of the School.

12. If any supply made or referred to in the Agreement is or becomes chargeable to VAT then the party receiving the supply will in addition pay the party supplying the services the amount of VAT against receipt of a proper VAT invoice for the supply.

13. The University and any sub-licensee shall comply with any reasonable rules and regulations which the School may make governing the use of Stoke Lodge playing fields and of which the School shall notify the University.

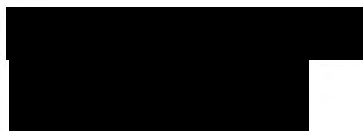
14. In the event that either the University or any sub-licensee fails to observe and perform any of its obligations under the Agreement the rights to use Stoke Lodge shall end (without prejudice to the Schools rights in respect of any breach of the Users obligations under the Agreement) immediately on notice served by the School at any time following such breach.

15. The University shall ensure that suitable arrangements are in place in regard to safeguarding children and child protection with all contracted users of the site. The School reserves the right to terminate the Agreement with immediate effect if the user does not have the arrangements in place.
16. The University shall comply with the provisions of any statute that is relevant to their use and management of the site.
17. The University shall not carry out any alterations or additions to the site.
18. The parties to this Agreement agree that the Agreement is a Licence and does not create a tenancy between the University or any sub licensee and the School Governors or Bristol City Council.
19. This Agreement will start on 1 September 2010 and continue in force for 1 year.

AUTHORISED BY THE PARTIES THROUGH THEIR AGREED SIGNATORIES:

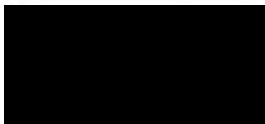
Signed by [insert name]
for and on behalf of
Cotham School

)
)
)



Signed by [insert name]
for and on behalf of
University of Bristol

)
)
)



THE SCHEDULE: Services and Service levels for Stoke Lodge 2009/2010

Grassed areas - general

All areas will be kept to a suitable length of grass, either for the sport played or as an amenity area. This will vary dependent on ground conditions, weather, level of usage etc.

At appropriate growing times during the year the ground will be sprayed with a selective weedkiller.

A basic level of leaf clearing on or near to the winter pitches will be undertaken. Leaf mould will be deposited under the perimeter trees, hidden as much as possible.

Winter pitches

All pitches will have the following operations carried out as necessary:

- Aeration
- Harrowing
- Seeding of high wear areas at the end of the playing season
- Marked with a suitable compound before each match as necessary
- Nets will be provided for games, when booked in, for teams to erect

Cricket Square

The square will have the following operations carried out as necessary:

- Autumn renovation work
- Spring preparation work
- Rolling
- Mowing
- Pitch marking
- End repairs
- A portable scoreboard will be provided

Pavilion

This will be cleaned to a safe useable standard.

Locks will be changed to the University suites and issued to users as necessary

Athletics

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

Notes:

1. What is not covered for maintenance within this agreement but will be reported to Cotham School as necessary, are any problems with the following:

- All perimeter walls, fencing, trees, hedges and gates
- Pavilion repairs, damage, boiler servicing or maintenance
- Upgrading of any services to comply with legislation

2. Dangerous ground sockets will be removed and the school informed and some posts may be re-socketed and concreted into the ground

3. Access to the site for equipment:

- All equipment will be brought onto site from the Coombe Dingle Sports Complex.
- Access will be through gates adjacent to the storage shed/compound off the - Shirehampton Road. Emergency access may be required via the main Stoke Lodge entrance.
- The storage/compound will be utilised by the University/company for the duration of this agreement.

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Summary of key points

3.1 *General*

3.1.1 Trespass is not a criminal offence, but a matter which may be pursued through the civil courts. A particular exception, relevant to schools, where trespass may become an offence, is described in part 3.6. Figure 1 summarises the options for dealing with trespassers.

3.2 *Trespassers on school premises*

3.2.1 Schools are not public places to which any member of the public is entitled to have access (exceptions to this rule are discussed in part 3.9). They are private places, and any person who enters without permission is a trespasser. Trespassers may, therefore, be asked to leave.

3.3 *Who is a trespasser?*

3.3.1 The headteacher, in exercising day to day management of the school, determines who should have access to the premises. Given the nature of a school's functions, a wide range of people may have a valid reason to enter and would therefore not be trespassers:

- registered pupils of a school entering the premises during school hours or at other times for purposes reasonably connected with their status as a pupil. They could, however, be trespassers if:
 - **excluded, whether permanently or on a fixed term basis from the school, unless arrangements had been made for them to return to the school, for example to collect work; or**
 - **entry was in breach of pupils' permission to enter (for example, at hours when pupils were forbidden entry to the school);**
- parents or guardians responsible for a pupil at the school. These might expect to have permission to enter school premises at reasonable times, including when:
- supervising children arriving or leaving the school;
 - **attending a meeting with a teacher, or arranging an appointment for a meeting;**

FIGURE 1: TRESPASS

Description of Trouble	Options for Action	Penalties
Person trespasses on school premises (3.2)	School asks person to leave	
Trespasser refuses to leave school premises, or causes or permits nuisance or disturbance (3.6-3.7)	Police officer, or authorised person removes trespasser LEA/School warns trespasser by letter Police officer, authorised person or LEA brings proceedings	Maximum penalty: level 2 fine (£500 ¹); parent of 16 year old or younger may be bound over
If trespasser causes a breach of the peace (3.8)	Police officer may arrest and charge trespasser	Up to 6 months' imprisonment for failure to comply with any 'binding over' order of the court
Trespasser causes loss or damage, eg by disruption of school activity (3.10)	School may take civil action to seek compensation	Damages may be awarded Court may order offender to pay compensation
Trespasser causes deliberate or reckless damage (3.10)	School reports incident to police; possible offence of criminal damage	If intending to endanger life, or reckless as to danger to life, maximum penalty: life imprisonment Other criminal damage, if tried on indictment: maximum penalty: 10 years' imprisonment
Trespasser persistently enters school premises (3.5)	LEA/school seeks injunction	Court orders trespasser not to enter school premises; if trespasser breaches injunction, the court can impose substantial penalties.

¹ This figure is the maximum prevailing at the date of publication. Maximum fines are regularly updated by Parliament.

helping in the classroom or acting as parent governors;

- others, such as governors, local authority staff, OFSTED inspectors, suppliers and contractors, authorised users of the premises for “out of hours” activities, those attending sports matches, returning officers for local parliamentary or European elections, and prospective parliamentary candidates.

3.3.2 Parents should be aware that they may be trespassers if they enter schools uninvited, or, if invited, behave in such a way that their behaviour is not conducive to the proper function of the school. Boarding schools may have particular arrangements for parents and guardians to visit boarders. A parent or guardian should not, however, expect to be entitled to enter the school at any time.

3.3.3 Local education authorities and governing bodies have a duty of care to visitors to their premises, which in some cases may extend to trespassers. Further advice is at an Annex E.

3.4 *Discouraging trespass*

3.4.1 The following steps can be taken by any school, whatever level of security it is seeking to achieve:

- the governing body’s security strategy can make clear that nobody (including governors, staff and pupils) has an unrestricted right of access to the school premises, except those who have a statutory right to enter premises for certain purposes, eg OFSTED inspectors and HSE inspectors;
- local authorities and governing bodies can consider posting notices at entrances to make clear the terms on which people may enter. Such notices should of course be welcoming, but they might also specify, for example, that:
 - **during the day parents should act as visitors to the school, complying with appropriate school arrangements;**
 - **visitors should present themselves at a specified reception point, following a route to it indicated where necessary by signs;**
 - **suppliers, contractors and commercial deliveries should follow separate arrangements;**
- those who have a broad permission to enter – pupils, staff, contractors, “out of hours” users – can be informed, preferably in writing by standard form letters, of the limitations both in terms of time and place as to their permission to enter the premises.

3.4.2 Such arrangements will not of course deter a determined intruder. But they should ensure that those who do not follow visitor procedures are noticed. They also leave no doubt that the school’s premises are private, and thus provide a clear basis for treating as a trespasser any person who enters the premises without permission.

3.4.3 Even where a person thinks that they have permission to enter the school and thus not to enter as a trespasser, it is open to the school to make clear that this assumption is mistaken or is withdrawn. That can be done by a letter or other form of notice addressed to the person.

3.5 *Persistent trespass: the case for injunction*

3.5.1 In cases of persistent trespass, a school or LEA could consider the possibility of seeking an injunction against the person or people involved. The DfEE is aware of at least one case where a local authority has secured an injunction, and this remedy has been actively and publicly considered in other instances. The threat alone of this sanction may sometimes have proved sufficient.

3.5.2 A court uses an injunction to order a person to do or to refrain from doing a particular act. For example, an injunction could order a named individual not to trespass on the property of a named school. Breach of an injunction is a contempt of court, and the court can bring into force substantial penalties to enforce compliance, including immediate imprisonment in serious cases. Courts will rarely grant injunctions against young people, however, as they are unlikely to appreciate the consequences of breaching the order and have limited means to pay any fine. The judgement in a 1991 Court of Appeal case observed that where the person against whom the injunction is sought is under 17, the possibility of enforcing the injunction by means of a fine should be explored; but that if the minor is still of school age or unemployed, it would be inappropriate for an injunction to be granted.

3.5.3 Schools which wish to use this remedy should seek legal advice, as the procedure for obtaining an injunction can be complex. Local education authorities are likely to be a useful source of advice. Some local authority housing departments also have experience of using this remedy and may be able to provide practical advice.

3.5.4 Schools may wish to be aware of the proposal in the Crime and Disorder Bill, which is before Parliament at the time of writing, for Anti-social Behaviour Orders. It is envisaged that Orders may be used as a last resort against persistent offenders in areas where anti-social behaviour is a problem; and that they may be particularly helpful in dealing with young people against whom it is difficult to obtain injunctions.

3.5.5 The proposal is that the police or local authority would apply to the court for an Order, where a defendant had pursued conduct which had caused alarm or distress to the local community. The court would have the power to place an order on a named individual who would be prohibited from repeating their behaviour. Breach of the Order would constitute a criminal offence. It is currently proposed that Orders would last for two years to provide adequate protection to the community.

3.6 *Refusal to leave school premises: nuisance and disturbance*

3.6.1 If a trespasser refuses to leave school premises, or enters after being required to leave, their behaviour may give rise to a criminal offence under section 547 of the Education Act 1996². Section 547 says that any person present without lawful authority on school premises, and who causes or permits nuisance or disturbance to the users of such premises, commits an offence. This applies whether or not the users are present at the time. The courts adopt a broad definition of ‘nuisance or disturbance’³. This suggests that anything done by a trespasser will be an offence where it disrupts the routine of the school or the duties of its staff.

Definition of a school for the purpose of section 547

3.6.2 The definition of a school for the purpose of this provision is any school maintained by a local education authority (including voluntary-aided schools, boarding schools and pupil referral units) and grant-maintained schools. The definition of premises includes playgrounds, fields and other premises for outdoor recreation, but not teachers’ dwelling houses⁴.

3.6.3 Section 547 does not apply to independent schools, CTCs, non-maintained special schools, sixth form colleges or other further education establishments funded by the Further Education Funding Council. Paragraph 3.8.4 explains the options available to these institutions and the police where a trespasser is causing a disturbance.

3.7 *Section 547 powers to remove and to prosecute trespassers*

3.7.1 Certain people may remove from the school premises anyone whom they reasonably suspect is committing or has committed an offence under section 547. These are:

- a police constable;
- a person authorised by the local education authority; or
- in a voluntary-aided, special agreement or grant-maintained school, a person authorised by the governors.

It is open to the local education authority under the legislation to authorise a person to take this action in respect of a voluntary or grant-maintained school, but the LEA is required to obtain the consent of the school governors before doing so. There is no requirement in section 547 that the person authorised needs to be an employee of the LEA or school – an external contractor, for example from a security company, could be

² 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, and documents giving delegated authority should also refer to the Education Act 1996.

³ Glue sniffing in a school playground out of school hours when no staff or pupils were present has been held to be a nuisance or disturbance (*Sykes v Holmes and Maw* [1985] Crim L R 791). Other examples might be: where a trespasser drives a motorbike onto playing fields and disrupts a PE lesson; or where a trespasser makes a noise outside a classroom preventing a class from being taught.

⁴ This definition is different from that which applies under the Offensive Weapons Act 1996 (see Chapter 6). The main practical difference is that the Offensive Weapons Act 1996 also applies to independent schools.

authorised.

3.7.2 Headteachers need to have a clear understanding with the LEA or governors about the procedures for authorising themselves or some other member of staff, such as the caretaker, to exercise those powers of removal. The authority will not want to authorise staff to use the power who are unwilling to do so. There should also be arrangements for how the power should be exercised – for example, in most cases, it would be appropriate for more than one adult to be present. Any arrangements should be known to the local police, and there should be discussion of the circumstances in which the school would call for police assistance in exercising those powers.

3.7.3 It is important to recognise that section 547 is not intended to deal with the more serious offences and more serious misbehaviour described in chapters 4 to 6. It provides only a limited exception to the principle that trespass is generally a civil rather than criminal matter. Consistent with the relatively low level of misbehaviour which this offence aims to deal with,

- a police officer or other authorised person (see paragraph 3.7.1) may remove a person committing such an offence from the premises. They would be entitled to use reasonable force, to escort them from the premises, if the trespasser declined to leave when required to do so. Authorised staff are not, of course, expected to take such action if they judge that they might put themselves at risk in doing so;
- neither a police officer nor other authorised person would have a power to arrest the trespasser (but see also paragraphs 3.8.4 and 3.8.5);
- any prosecution resulting from the offence will be by summons: the alleged offender cannot be detained in custody or granted bail and be restrained by bail conditions, but must appear in court when summoned;
- the **maximum** sentence, which the court would apply only in the most serious example of the offence, is a level 2 fine – at present, £500. In addition to any sentence imposed on a person aged 16 or under, that young person's parent or guardian may be bound over. This would mean that, in the event of further similar offences, the parent or guardian could suffer financial penalties of up to £1,000 ordered by the court.

Prosecution procedure under section 547

3.7.4 Proceedings for this offence may be brought only by:

- a police constable;
- a local education authority – with, in the case of a voluntary or grant-maintained school, the consent of the governing body; or
- in an aided, special agreement or grant-maintained school, a person authorised by the governing body.

3.7.5 The procedure for initiating a prosecution under section 547 will be familiar to the legal department of a local authority, or any solicitor. A school should therefore seek advice from such a source before bringing proceedings.

3.7.6 For a prosecution to succeed there will need to be evidence to confirm the identity of the trespasser, and evidence that his or her behaviour was a 'nuisance or disturbance'. Schools should ensure that their records of incidents which might result in a prosecution under section 547 cover these points (see part 8.10). Records of earlier incidents may also be useful in assessing the seriousness of a new incident, and may help

the police to gather evidence needed for a prosecution.

3.7.7 Many local authorities make letters available to headteachers, or send such letters themselves, which warn trespassers of the possibility of action under section 547. An example of such a letter is at Annex D, but LEA-maintained schools should check with the LEA the test of any letter they plan to send before doing so.

3.8 *Police involvement in cases of trespass*

3.8.1 In developing their security plans, many schools are deliberately adopting a much more rigorous approach to enforcing their boundaries. Often this will represent a significant change from previous practice, and may run into some resistance from those to whom it is applied, as memories of recent security incidents at schools begin to fade.

3.8.2 Many school sites were designed to provide open access, with several entrances, and local people may have become accustomed to visiting the site. Some open playing fields may have come to be used informally as local recreation grounds. Where schools are trying to change some of these attitudes, they may need the help and support of the police.

3.8.3 The majority of incidents of trespass are non-violent. In practice, therefore, police reaction to trespass on school premises is likely to depend more on the behaviour of those trespassing, and the risk they may represent, than on the commission of an offence under section 547. In that respect, independent schools and sixth-form colleges, to which section 547 does not apply, may in practice be in a position little different from that of state schools.

3.8.4 Although a police officer has no power of arrest for trespass either generally or under section 547, he may have a duty to intervene if there is a breach of the peace, or a serious risk of such a breach. Staff of schools may often know that a challenge to trespassers is liable to lead to a confrontation which could be a breach of the peace justifying the involvement of the police. Police forces should, therefore, be ready to respond to requests for support from schools in dealing with trespassers even where, initially at least, the trespass may be a civil matter.

3.8.5 A police constable also has a general power of arrest. This enables the officer to arrest without warrant for an offence which is not arrestable, provided one of the general arrest conditions is met. These include, among other things, that the constable has reasonable grounds for believing that the person:

- may cause physical injury to himself or others;
- may cause loss or damage the property;
- may commit an offence against public decency;
- has provided a false name and address;
- or it is necessary to protect a child or other vulnerable person from that person.

3.8.6 There may be a case for calling the police where an officer of aggravated trespass has been committed under section 68 of the Criminal Justice and Public Order Act 1994. This might involve a situation where:

- a school has to deal with a large number of trespassers, or persistent trespass by the same people;
- the behaviour or any of the trespassers appears threatening, unstable or potentially violent;

- the circumstances of the trespass (for example, at a time when others are lawfully present) many give rise to a risk of a clash between different groups; and
- others present on the premises may be particularly vulnerable.

When calling the police in such cases, the school should explain the circumstances, more serious than a peaceful instance of trespass, which have led to the police being called.

3.8.7 The police sometimes ask the public to be on guard for particular people, such as escaped prisoners or others who may be dangerous. Where such a person is seen or suspected to be on school premises, schools should contact the police as requested, and should strictly observe any warning about approaching the person.

3.9 *Rights of way across school premises*

3.9.1 There are situations where people get into the habit of walking across school grounds, for instance as a short cut. Schools or LEAs may want to discourage this by putting up notices, or locking gates periodically. If they do not do so, a right of way may become established. Once a right of way exists, anyone may pass over it at any time, and it is **illegal** to obstruct their passage.

3.9.2 Rights of way do not, however, allow someone to roam freely or to leave the route of the way, for instance to enter the school buildings. If a person uses a right of way for any purpose other than as a right of passage, or if they do anything that is not reasonably part of their journey, such as deliberately disturbing people, then they may risk being regarded as a trespasser. Whether a particular action is acceptable depends on what a court would regard as reasonable behaviour. In the open countryside, stopping to look at a view, take a photograph, or talk to a passer-by, would generally be acceptable; on school premises, it might under certain circumstances be regarded as nuisance.

3.9.3 Statutory procedures exist for schools (and others) to seek to have existing rights of way closed or diverted – separate guidance on this has been published by the Countryside Commission and the Department of the Environment. Whilst this can be an expensive and time-consuming process, schools wishing to pursue it should work in conjunction with the LEA and the local highways authority.

3.9.4 Schools should involve the police in difficult cases related to the improper use of rights of way, for example where there are threats of personal violence.

3.10 *Damage caused by trespassers*

3.10.1 A school can seek compensation from a trespasser for any loss or damage attributable to the trespass (for example, some interruption of the school's activities). Any deliberate or reckless damage to another's property, whether or not committed in the course of trespass, might constitute the offence of criminal damage, which carries potentially severe penalties and should be reported to the police.

3.10.2 An action for damages is in practice likely to be an expensive and protracted procedure. It would only be justifiable where:

- serious loss has resulted; and
- the school can be confident that the trespasser has the means to pay any damages which may be awarded.

Legal advice should be sought where this remedy is considered.

3.11 *Informal use of playing fields*

3.11.1 As the advice above makes clear, schools are not obliged to tolerate the informal public use of playing fields (eg 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.

Appendix 6.10

Appendix 10 to the PROW Consultant's Report to Committee

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Our ref: COT00147
Your ref: IE0/1415

6 November 2024

Dear Sir,

Application for a Modification Order to add public footpaths at Stoke Lodge to Bristol City Council's Definitive Map and Statement under Section 53 of the Wildlife and Countryside Act 1981

1. Thank you for your letter to Cotham School in the above matter. We are instructed to respond on behalf of the School.
2. We have instructed specialist Counsel to review the material and report and draft what would be objections to the confirmation of the Order if it were to be made. We reserve the right on behalf of the School to expand or vary the grounds of objection if the Council were nevertheless to make the Order.
3. As the evidence does not establish that it would be reasonable to allege that the routes have become public highway by operation of s.31 Highways Act 1980 or otherwise, it would not be reasonable to make the Order because there has not been a discovery within the meaning of s.53 Wildlife and Countryside Act 1981, see: *R v Secretary of State for the Environment, ex parte Bagshaw* (1994) 68 P & CR 402.
4. The report of Robin Carr FIPROW, MAE has avoided considering the conclusions previously drawn about the evidence in the applications by Mr David Mayer and Miss Katharine Wellham to register the land as a new green under s.15 Commons Act 2006. The Council provided a copy of that report on 9 October 2024; however, section 12.18

was redacted. On 23 October 2024, we requested this information on behalf of the School under the Environmental Information Regulations 2004 ("EIR"). On 24 October 2024, the Council refused to provide this information, relying on the exception under (Regulation 12(4)(d) EIR) i.e., the information concerns material that is still in the course of completion. On 28 October 2024, we requested an urgent internal review of that decision and requested that the Council respond by 4 November 2024 to provide time for any response to be incorporated into our response to the report. On 6 November 2024, the Council refused this request, concluding that the public interest in maintaining the exception relied upon outweighs the public interest in disclosing the requested information. The Council described the redacted section as relating to the recommendation of Robin Carr based on the evidence provided so far. As such, the School has not had the benefit of reviewing the entirety of the report before providing its comments on said report.

5. The conclusions of the Council, insofar as they are relevant to the questions the Council must ask under s.31 Highways Act 1980, are obviously material considerations to which the Council is legally obliged to follow when deciding whether to make this Order unless it first (i) has regard to the desirability of consistent decision taking and (ii) supplies cogent reasons for taking a different view, see: *North Wiltshire DC v Secretary of State for the Environment* (1993) 65 P & CR 137, 145:

"He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision."

6. The obviously important considerations from those previous village green decisions are:
 - a) The consistent conclusion that the members of the public did not use the land in the nature of a right of way, rather wandered all over the land in the nature of a village green right.
 - b) The signs on the land rendered the use by the public contentious and not as of right.
7. Insofar as the Council took a contrary view of the latter point in its Public Rights of Way and Greens Committee meeting on 28 June 2023, that conclusion is under active challenge before the High Court in *Cotham School v Bristol City Council* (PT-2024-BRS-000009), which is listed to be heard between 27-31 January 2024 (with closing submissions on 10 February). The judgment in that matter will resolve important questions of relevance to this matter (in particular the meaning and effect of the signs). Accordingly, the Council may think it appropriate to await the outcome of that process before resolving whether to make this Order.
8. We therefore invite the Council to resolve not to make the Order or to place the matter into abeyance pending the outcome of the village green litigation.

Yours faithfully,

Goodenough Ring Solicitors

GOODENOUGH RING SOLICITORS

THE BRISTOL CITY COUNCIL

CHEYNE ROAD TO PARRY'S LANE & SHIREHAMPTON ROAD TO WEST DENE

DEFINITIVE MAP MODIFICATION ORDER 2024

OBJECTION OF COTHAM SCHOOL

INTRODUCTION

1. The effect of the Order would be to add four new public footpaths over land demised to Cotham School ("the School").
2. The School is an academy school. It is operated and managed by Cotham School Ltd and run as a not-for-profit charitable trust. It is funded by the Department for Education and provides free-at-the-point-of-use education for the residents of Bristol.
3. The School does not have sufficient land on its main site to meet the statutory requirements for outdoor space. Accordingly, and for that purpose, the School is entitled to possess the playing fields at Stoke Lodge Playing Fields, Stoke Bishop, Bristol, BS9 1BN ("the Land") by virtue of a lease, executed with Bristol City Council on 31 August 2011 for a term of 125 years.
4. Pursuant to paragraphs 3(1)(c) and 7(1), Schedule 15 Wildlife and Countryside Act 1981, the School hereby **OBJECTS** to the Order and request the matter be referred to the Secretary of State, so that a public local inquiry may be convened to determine whether to confirm the Order.

GROUNDS OF OBJECTION

The date the use was called into question

5. The School submits that the signs at Points S1 and S2 on Plan 1 (APP1) circa 1985 were sufficient to call into question the right of the public to pass and repass over the land.
6. In order for the right of the public to have been “brought into question by notice as aforesaid or otherwise” (within the meaning of what is now subs.(2)) there must be some act which raises the issue of the status of the way sufficient to bring it home to the public that their right to use the way is being challenged, so that they must be apprised of the challenge and have a reasonable opportunity of meeting it, see: *Fairey v Southamptton County Council* [1956] 2 QB 439, 456-458.
7. The House of Lords accepted that erecting a notice was sufficient to bring the user into question, see *Godmanchester Town County v Secretary of State for the Environment, Food and Rural Affairs* [2008] 1 AC 221 at [24], [38] and [40].
8. The relevant time period for the routes 2, 3 and 4 is therefore 1965-1985. If that is the case, there plainly is insufficient evidence to demonstrate use **by the public** (as opposed to the occasional trespasser) **for the full 20-year period**.
9. The remainder of this Objection is on the premise that the use was called into question when the application was made, with a resulting qualifying period of **1998-2018**.

Ground 1: Use not in the character of a right of way

Legal Approach

10. It is settled that the character of a right of way is distinct from a right to wander over the land in the nature of *jus spatiandi*, see *Attorney General v Antrobus* [1905] Ch 188, 206 “the cases establish that a public road is *prima facie* a road that leads from one public place to another public place”. As Lightman J accepted of the words at s.31 Highways Act 1980 in *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 at [101]:

“The true meaning and effect of the words is that the user must be as a right of passage over a more or less defined route and not a mere indefinite passing over land. It is not possible to have a public right indefinitely to stray or meander over land or go where you like”

11. Lightman J then proceeded to offer guidance for decision makers faced with a situation where the public’s use of tracks on land might be referable to a public right of way or the acquisition of rights to use the land as a green. At [102]-[103] he said:

“If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a presumption. The answer must depend on how the matter would have appeared to the owner of the land ... Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily

be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green)."

Three different scenarios require separate consideration. The first scenario is where the user may be a qualifying user for either a claim to dedication as a public highway or for a prescriptive claim to a green or for both. The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e g, an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e g, fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights."

12. Lightman J's analysis was endorsed by Lord Hoffmann on final appeal as "sensible suggestions", see [2006] 2 AC 674 at [68].
13. Moreover, *Oxfordshire* was also followed by the High Court in *R(Allaway) v Oxfordshire County Council* [2016] EWHC 2677 (Admin) at [51], at [52] Patterson J added this:

"That means that what the inspector described as the principal activity, namely, walking, and walking a dog, jogging or pushing a pram on a defined track on the potential TVG may be recreational use of land as a

green and part of the total such recreational use if, in all the circumstances, it is such as to suggest to the reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land.”

Application

14. The Council, as commons registration authority, has recently considered the public use over the land 1998-2018 and concluded that it was not in the character of a right of way.

15. That was consistent with the recommendation of its independent barrister Inspector in his Report dated 14 October 2016, which considered the period 1991-2011, see para.399

“The suggestion is that most of the use has been by dog walkers who, in order to give their dog the longest possible walk stuck to the edges of the land; and that others – runner, for example – also stuck to the edges of the land. This was the picture of use of the land painted by F3. **Against this was the evidence of local people who spoke of going all over the land and, in particular, walking over the area of the pitches when they were not in use.** But even on this basis, it is a very large area of land and, although those who used it invariably spoke of seeing others using it in the course of their use, on no view were there generally large numbers of people using it at the same time.” [emphasis added]

16. Having born in mind the approach of Lightman J in *Oxfordshire*, the Council accepted the Inspector’s advice that the use of the land was in the nature of a village green use not a public right of way.

17. That is plainly inconsistent with a conclusion that the use was, in the same period, simultaneously, in the character of a right of way.

18. Indeed, the aerial photographs do not bear out a worn path matching the alleged routes, which supports the contention that the Council were right first time around.

Ground 2: No actual enjoyment for a full period of 20-years

Legal Approach

19. In *Wright v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 1053 (Admin) Ouseley J held at [22] that “... *the Inspector has to be persuaded on the evidence that the user in question endured through the whole of the twenty year period, and that this has to cover each of the routes in question*”.
20. Similarly, “[u]se or non-use is a question of fact; the cause of any non-use is not the issue”, see: *Roxlena v Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 2651 (Admin) at [73].
21. The 1980 Act “... *must refer to actual use, not the mere opportunity for the public to enter if they had so wished, and cannot be relied upon as an indication that such use was inferred ...*”, *Easteye Ltd v Malhotra Property Investments Ltd* [2020] EWHC 2606 (Ch) at [143].
22. Accordingly, “[a] period of nineteen-and-a-half years is not the same as a “full period of 20 years”, see *Berry v Secretary of State for the Environment, Food and Rural Affairs* [2006] EWHC 2498 (Admin) at [25].
23. The necessary threshold of evidence was recently summarized by Ouseley J in *Wright v Secretary of State for the Environment, Food & Rural Affairs* [2016] EWHC 1053 (Admin) at [21]:

“[t]he relevant law is not contentious. *Mann v Brodie* (1885) 10 App. Cas. 378 shows that use must be by a sufficient number of people to show that it was use by the public, a number which may vary from case to case. *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11, [2010] 2 AC 70, and others cited in it, deal with the quality of the user. The use had to be **sufficient to bring home to the mind of the reasonable non-absentee**

landowner that the public were asserting a continuous right to use each route in question. The user over the twenty year period did not have to be by the same people.” [Emphasis added]

24. As the Lord Hope held in *Cumbernauld & Kilsyth District Council v Dollar Land (Cumernauld) Ltd* (1992) SLT 1035, the user must be of such an amount and of such a manner “as would reasonably be regarded as being the assertion of a public right” at p.1041.

Application

25. In total, 155 user evidence forms were submitted claiming use of the Application Routes. Of these:

- 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; and
- d. 34 people claimed use of route 4 between 1946 and 2018.

26. Moreover, paragraphs 343-348 of the October 2016 report, the Inspector recorded the use made of the Land by the Claimant, together with clubs, societies and the University of Bristol for physical education, football, rugby, cricket, athletics and occasionally, sports days.

27. At paragraph 350, the Inspector noted (without disagreement) that whenever a pitch was used by a school or by a sports club it had exclusive use of the part of the land for that period and no-one claiming to walk a dog or fly a kite interrupted the game.

28. The Inspector went on to find at paragraphs 351, that:

“The evidence went to show that, subject to occasional issues with dogs, 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. The evidence generally indicated that there was plenty of room elsewhere on the land when it was being used by schools and clubs”.

29. 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.

Ground 3: No enjoyment “as of right”

Legal Approach

30. The phrase “as of right” was found held to have a single unified meaning in the Highways Act 1980 and the Commons Registration Authority 1965, to mean without force, secrecy or permission, see *R v Oxfordshire County Council, ex parte Sunningwell PC* [2000] 1 AC 335, 355H.
31. It is well established that erecting a suitably worded sign can render the public use contentious and thereby not “as of right”, notwithstanding there is not actual force, see *R(Lewis) v Redcar & Cleveland BC* [2010] 2 AC 70 at [88].

Application

32. At the commencement of the qualifying period in 1998, there were three signs on the Land.
33. The signs were erected by Avon County Council at the main entrances to the Land (S1, S2 and S3) to the north, east and south.
34. The signs read as follows:

“MEMBERS OF THE PUBLIC ARE WARNED

NOT TO TRESPASS ON THIS PLAYING FIELD

In particular the exercising of dogs and 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”

35. In 2009, the sign at the southern entrance (S2), was replaced with a new sign. That sign read as follows:

“BRISTOL CITY COUNCIL

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”.

36. Until 23 July 2013, the two Avon County Council signs and one Bristol City Council sign remained visible on the Land and their contents legible.

37. The signs were effective in wording and location to render the user evidence relied upon contentious.

38. That has been the consistent conclusion whenever this point has been previously considered, see:

a. By Council’s Inspector in 2016, IR,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."

- b. By the officers of the Council when advising the Committee to accept that advice their report to the 12 December 2016 Public Rights of Way Committee.
- c. By the High Court in *R(Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin) at [56] (quashing the Council's rejection of that advice):

"However, that was no basis upon which to depart from the Inspector's conclusions given that both the Inspector and the committee were at one as to the legal significance of the signs when Avon County Council first erected them."

- d. By the Council when resolving to accept the Inspector's advice to reject the application on 25 June 2018.
- e. By the Council's Inspector in 2023, IR,148:

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

- f. By the officers of the Council when they advised the Committee to again accept that advice on 28 June 2023.

39. It would be perverse for the Council to now conclude the users were acting “as of right”, in light of those previous findings.

Ground 4: No use “without interruption”

Legal Approach

40. In *Merstham Manor v Coulsdon and Purley UDC* [1937] 2 K.B. 77 Hilbery J considered the expression “without interruption” and said at 85:

"I therefore think that the word “interruption” in the expression in the Act ‘without interruption’ is properly to be construed as meaning actual and physical stopping of the enjoyment, and not that the enjoyment has been free of any acts which merely challenge the public to that enjoyment."

41. In *Lewis v Thomas* [1950] 1 K.B. 438 it was held that in determining whether the user of a right of way has been “as of right without interruption” the following considerations should be borne in mind:

- a. *Interruption* means “interruption in fact.”
- b. The presence or absence of a challenge may well be a relevant circumstance in determining whether truthfully there has been interruption in fact.
- c. The circumstances in which the barring of the way takes place and the absence of any intention to stop anybody going along it – if it be the case – will be a relevant circumstance.
- d. A deliberate barring of a way for an appreciable period will not necessarily lose its effect merely because no one happened to try to use the way during that period.

Application

42. In the alternative to Grounds 2 and 3, the School submits the use of the playing fields was sufficient to amount to an interruption, in that:

- a. It did in fact interrupt the use of the routes;
- b. There was challenge to the use of the Land during the time when the fields were in use for School activities;
- c. The intention was indeed to stop people accessing the land; and
- d. People did indeed try to use the land and avoided the playing fields whilst they were in use.

43. In the alternative, if the Council find the user was not in fact disrupted by the playing of games because people continued 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 of the Local Government (Miscellaneous Provisions) Act 1982 and s.547 Education Act 1996, see: *Network Rail Infrastructure Ltd v Welsh Ministers* [2020] EWHC 1993 (Admin).

Ground 5: Contrary indication

Legal Approach

44. The House of Lords has now held in *R. (on the application of Godmanchester Town Council v Secretary of State for Environment, Food and Rural Affairs & Cambridgeshire CC* [2008] 1 AC 221 that upon the true construction of s.31(1), “intention” meant what the relevant audience, namely the users of the way, would reasonably have understood the landowner’s intention to be.

Application

45. In the alternative to Ground 3, the erection of the signs was sufficient to manifest a contrary to indicate to dedicate the land within the scope of s.31(3) Highways Act 1980.

Ground 6: No capacity of the person in possession to dedicate

Legal Approach

46. By s.31(8) Highway Act 1980 a person or body has no capacity to dedicate land as a highway, if the existence of a highway would be incompatible with the statutory purposes for which the land is held, see: *British Transport Commission v Westmorland County Council* [1958] AC 216. That was a question of fact and assessed by reference to what could reasonably be foreseen.
47. The relevant date to consider that question is the point at which the question to make the order, see *Ramblers Association v Secretary of State for Environment Food and Rural Affairs* [2017] EWHC 716 (Admin).
48. In *Easteye Ltd v Malhotra Property Investments Ltd* [2020] EWHC 2606 (Ch), the issue arose as to whether dedication of a right of way along an alley during the period it was owned by a charity was prevented by s.31(8). The Court held that s.31(8) only prevents a deemed dedication where the secondary use would preclude the landowner from using the land for the purpose for which it is held. If the land can be used for the statutory or public purpose consistently with the secondary use, there is no bar to dedication. The test of incompatibility is one of fact and is judged by what can be reasonably foreseen and guarded against, not that which is possible but improbable.

Application

49. The land over which the land runs is held by the County Council for the purposes of education. The County Council as landowner was (during the period of qualifying user 1984-2004) and remains under a number of duties which bear on its use of the land, these are as follows:

- a. **Section 8 Education Act 1994:** which imposed a duty on local education authorities “to secure that there shall be available for their area sufficient schools” for providing primary and secondary education, sufficient in number, character and equipment.
- b. **Sections 13 and 14 Education Act 1996:** which require local authorities to contribute to the development of the community by securing efficient primary and secondary education.
- c. **Section 542 Education Act 1996:** which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations 2012 (SI 2012/1943) suitable outside space for physical education and outside play; and
- d. **Section 175 Education Act 2002:** which requires the education authority to “make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children”.

50. The School, as leasee in possession, is also under several duties:

- a. **Part 4 Education and Skills Act 2008,** the School is under a duty to comply with “relevant standards”. Pursuant to her powers at s.94 of the 2008, the Secretary of State made the Education (Independent School Standards) Regulations 2014 (SI 2014/3283) which comprise the “relevant standards”

for Part 4 of the 2008 Act. By regulation 3 of the 2014 Regulations, the School must provide suitable outdoor space for physical education and room to play outside.

- b. **Section 173(3A) Education Act 2002**, the School must exercise its functions with a view to safeguarding and promoting the welfare of children receiving education or training at the Academy.

51. The compatibility of land held subject to those duties with the exercise of rights of access was explored in *R(Lancashire County Council) v Secretary of State for Environment, Food and Rural Affairs* [2021] AC 194. That case concerned whether land held for the purposes of education could be registered as a village green under s.15 Commons Act 2006. The Court held that the exercise of a right to indulge in lawful sports and pastimes by local inhabitants would be incompatible with the powers and duties under which the land was held.

52. At [65] Lord Carnwath (with whom Lord Sales and Lady Black agreed) held that the education legislation:

“... requires the education authority to “make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children”. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place.”

53. Whilst *Lancashire* was a case dealing with the rights which arise on registration of a village green rather than the capacity to dedicate land as a right of way, the substantive point is the same. The creation of a public highway would be incompatible with the City Council and School’s safeguarding duties because it would preclude the School from preventing access to the land by the general

public at any time. It would, for example, no longer be permitted to lock the gates or restrict access to the land with dogs.

54. Accordingly, applying the law in *Westmorland* and *Ramblers* (above), the County Council (as landowner) nor the School (as leasee) did not and does not have the capacity to dedicate the way as a highway.

CONCLUSION

55. There is insufficient evidence to demonstrate the assertion of a public right and ample evidence to demonstrate such use as did occur was contentious. Accordingly, no presumption of dedication can arise under s.31 Highways Act 1980 or at common law.

56. In any event, there is clear evidence of a contrary indication to dedicate such that any presumption would be defeated.

57. The School therefore **OBJECTS** to the confirmation of the Order and requires that the question of confirmation be referred to the Secretary of State.

ASHLEY BOWES

LANDMARK CHAMBERS
180 FLEET STREET
LONDON, EC4A 2HG

20 October 2024.

IE0/1415

In the matter of an application for a Modification Order to add public footpaths at Stoke Lodge to Bristol City Council's Definitive Map and Statement under Section 53 of the Wildlife and Countryside Act 1981

BETWEEN:

ALAN WILLIAM PREECE

Applicant

- and -

BRISTOL CITY COUNCIL

Surveying Authority

COTHAM SCHOOL

Objector

SUPPORTING EVIDENCE BUNDLE

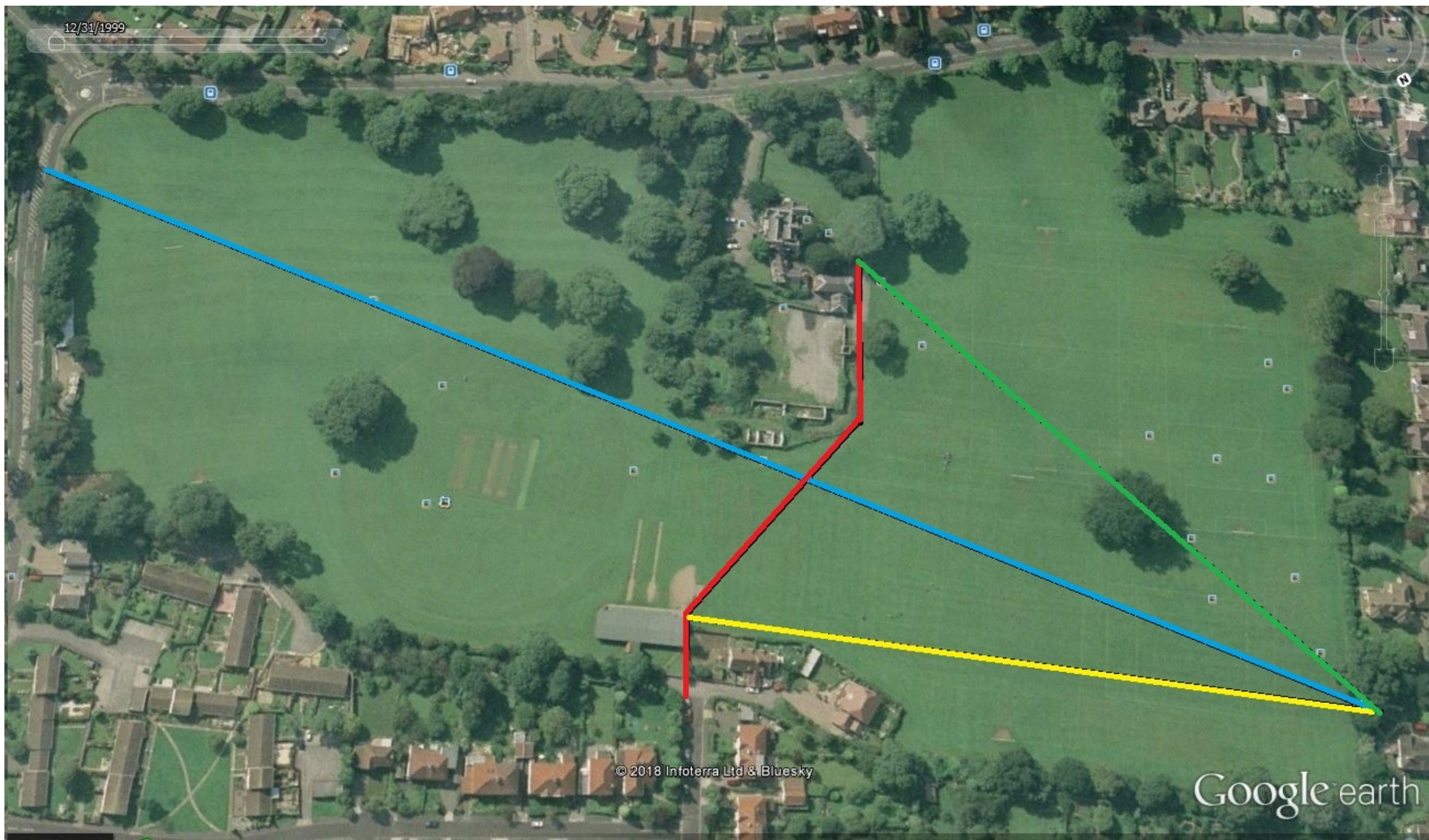
For the Public Rights of Way & Greens Committee meeting

27 November 2024

Tab	Date	Description	Page
		<u>Aerial photographs of Stoke Lodge 1999-2014 from Google</u>	
1		Photograph taken on 31 December 1999	4
		Photograph taken on 31 December 1999 – claimed routes overlaid	5
		Photograph taken on 31 December 2003	6
		Photograph taken on 31 December 2003 – claimed routes overlaid	7
		Photograph taken on 17 April 2005	8
		Photograph taken on 17 April 2005 – claimed routes overlaid	9
		Photograph taken on 7 June 2005	10
		Photograph taken on 7 June 2005 – claimed routes overlaid	11
		Photograph taken on 31 December 2006	12
		Photograph taken on 31 December 2006 - claimed routes overlaid	13
		Photograph taken on 14 April 2007	14
		Photograph taken on 14 April 2007 - claimed routes overlaid	15
		Photograph taken on 31 December 2009	16
		Photograph taken on 31 December 2009 - claimed routes overlaid	17
		Photograph taken on 13 July 2013	18
		Photograph taken on 13 July 2013 - claimed routes overlaid	19
		Photograph taken on 9 September 2014	20
		Photograph taken on 9 September 2014 - claimed routes overlaid	21

Tab	Date	Description	Page
		<u>Video compilation</u>	
2		Video compilation of the aerial photographs of Stoke Lodge in chronological order (1999-2014)	22





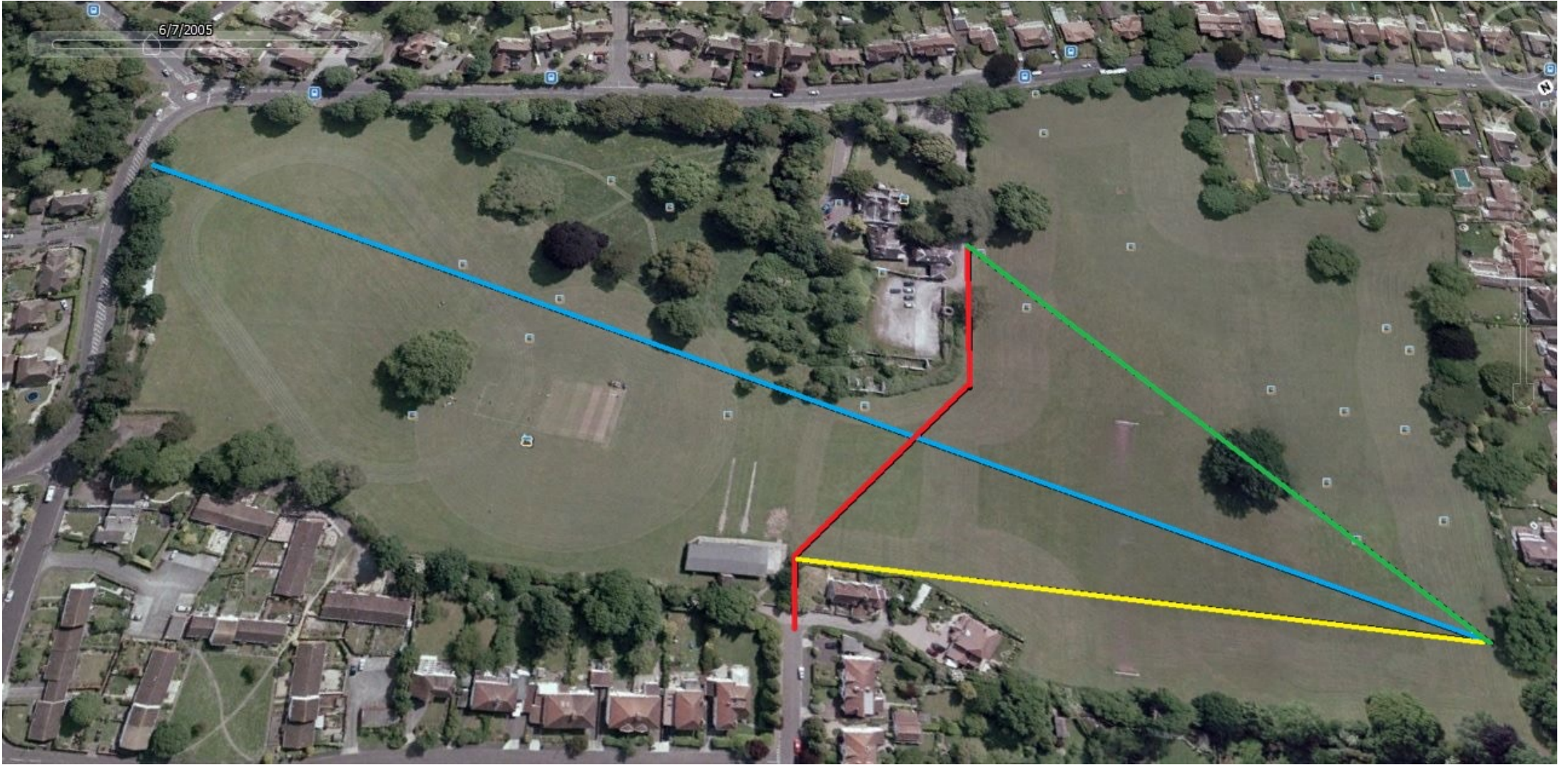




















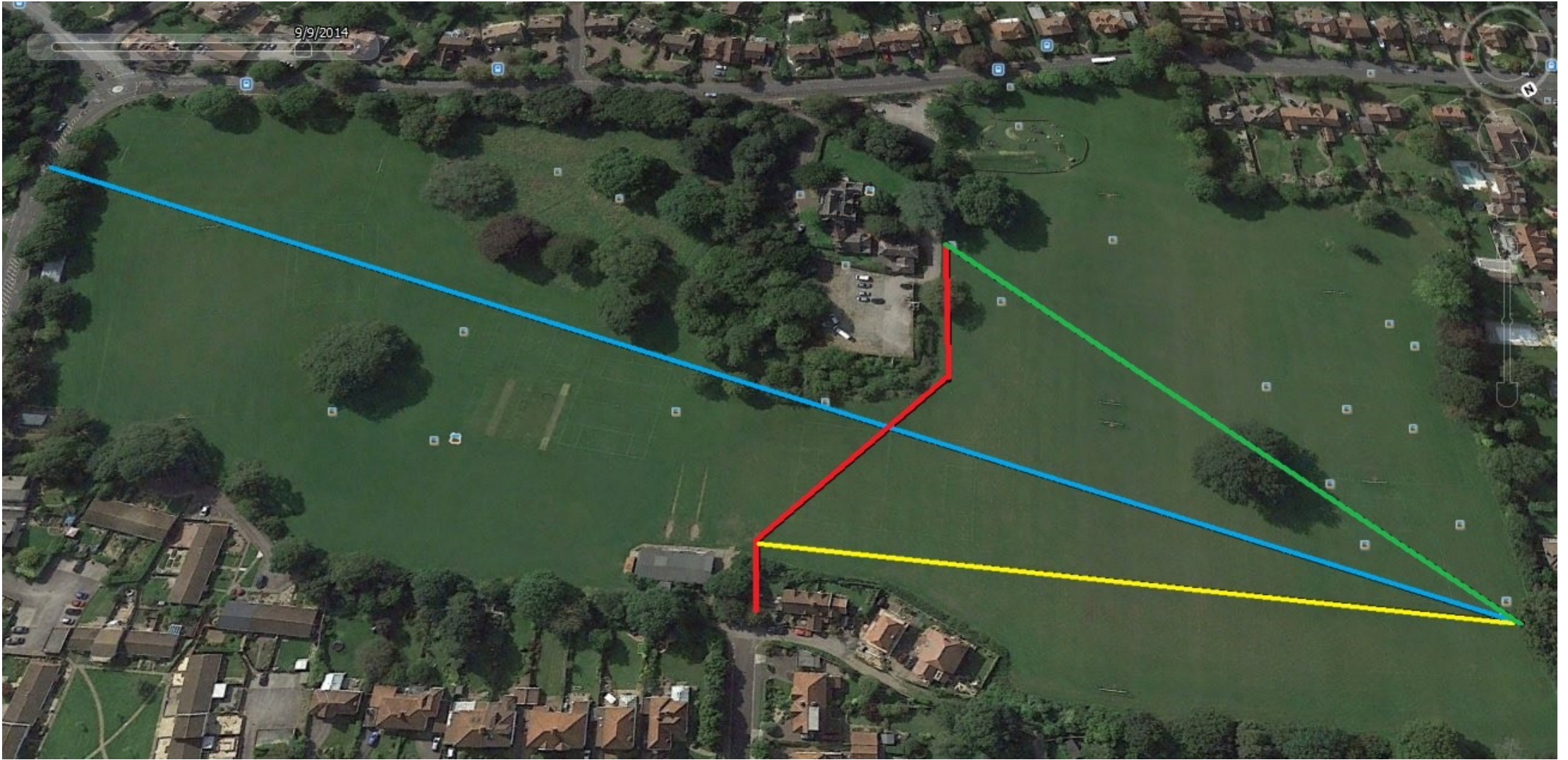








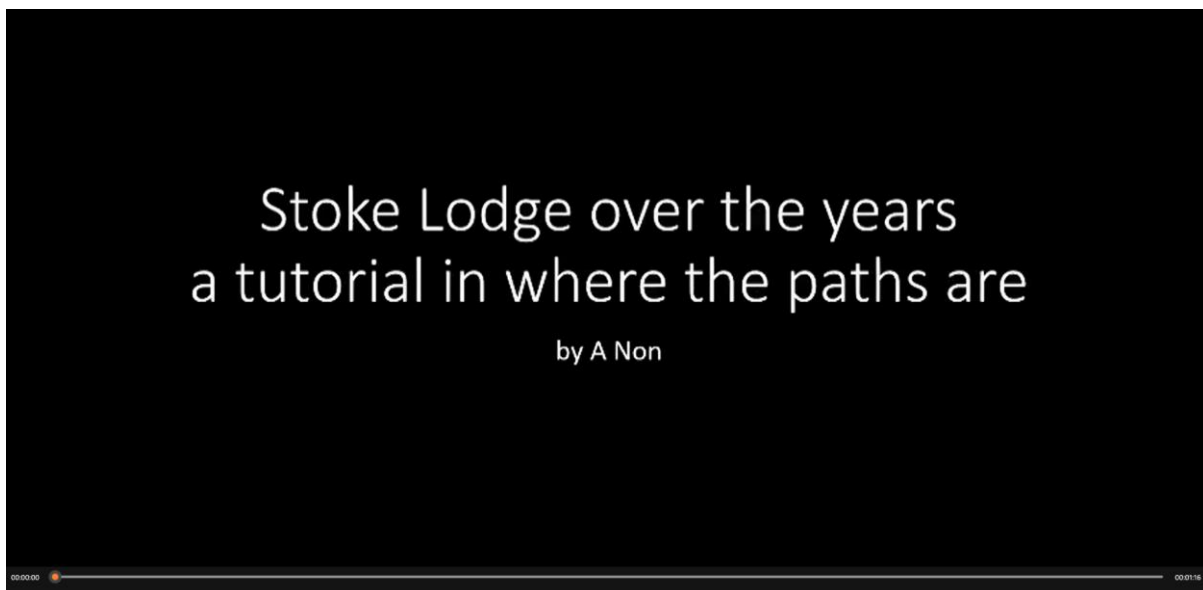




Link to access a video compilation of the aerial photographs of Stoke Lodge in chronological order (1999-2014):

<https://hgrlaw.egnyte.com/dl/Enu9yN8xMY>

Duration: 1 minute 16 seconds



Appendix 6.11

Appendix 11 to the PROW Consultant's Report to Committee

From: [REDACTED]
To: [Rights of way](#)
Cc: [REDACTED]
Subject: BCC Ref 169189 Stoke Lodge
Date: 04 November 2024 21:42:15

This Message Is from an External Sender

This message came from outside Bristol City Council, think before opening attachments or clicking links

Dear Members of the Public Rights of Way and Greens Committee,

As owners of the property at [REDACTED] Cheyne Road, Bristol, BS9 2DH, which includes the stretch of land from the boulders on Cheyne Road to the boundary of Stoke Lodge Playing Field, we would like to make a statement about the longstanding pedestrian access across our land, connecting to Stoke Lodge Playing Fields.

When we purchased this property, we were advised that public pedestrian access existed across this section leading to the field. We had to buy a public liability policy to cover individuals crossing our land on foot, reflecting our understanding and expectation of a public footpath. Since then, our view has remained that pedestrian access here constitutes a public footpath, and we have continued to maintain this understanding through our actions.

We support the proposed footpath designation on the Definitive Map and believe this accurately reflects both historical and current public usage of the access leading from Cheyne Road to the field.

We are grateful for your time and consideration in this matter. Thank you for considering our statement in support of formalising the pedestrian access.

Yours sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

Consumer Intelligence Ltd

[REDACTED]

www.consumerintelligence.com

This e-mail and any attachments are confidential. If you are not the intended recipient please do not disclose, copy, store, distribute or take any action in respect of the content. If you have received this message in error please notify the sender immediately by using the reply function and then delete it. Thank you. Consumer Intelligence Ltd, No: 4954720. Registered in England and Wales. Registered Office Address: Freshford House, Redcliffe Way, Bristol. BS16NL. Trading Office Address: Consumer Intelligence, Shore House, Westbury Hill, Bristol. BS93AA

From: [REDACTED]
To: [Rights of way](#)
Subject: Cheyne Road Submission
Date: 06 November 2024 08:56:06

This Message Is from an External Sender

This message came from outside Bristol City Council, think before opening attachments or clicking links

[REDACTED]
[REDACTED] Cheyne Road
Bristol
BS9 2DH

6th November 2024

Dear [REDACTED]

As the owner of [REDACTED] Cheyne Road, and as requested, below is my submission of the information I would like you to take into account when addressing the Application for a Modified Order to add public footpaths at Stoke Lodge to Bristol City Council's Definitive Map and Statement under Section 53 of the Wildlife and Countryside Act 1981.

Please could you confirm receipt of this email.

For the attention of Bristol City Council PROW team

I am the owner(s) of [REDACTED] Cheyne Road, Bristol BS9 2DH. The extent of the land that I own is shown with red edging on the attached plan. I have owned and lived in this property since June 2012.

I understand that on 27 November 2024, the Public Rights of Way and Greens Committee will consider applications to register public rights of way over Stoke Lodge Playing Field. One of the entry points to the field is near to the top of Cheyne Road and therefore any pedestrian rights of way that pass through the Cheyne Road entrance would start from a public highway and cross the field, or emerge from the field and join with a public highway, using a route in front Numbers [REDACTED] and [REDACTED] Cheyne Road.

Cheyne Road is a road in private ownership and the owners of numbers [REDACTED] and [REDACTED] Cheyne Road own the land in front of their home up to a boundary that forms the midline of Cheyne Road. There is a separate section of land which is not part of Cheyne Road that lies between the end of Cheyne Road and the boundary of the Stoke Lodge Playing Fields part of which land is owned with [REDACTED] and part of which is owned with [REDACTED] Cheyne Road.

Thus, part of the route used by pedestrians crossing to and from the Cheyne Road entrance to Stoke Lodge Playing Field crosses land that is owned by me and by the owners of numbers [REDACTED] Cheyne Road.

I confirm in respect of the part of the hard surfaced section of Cheyne Road which I own and which I currently use to gain access to my property, both with vehicles and on foot, that:

- (a) I am aware of longstanding use, which predates my ownership of [REDACTED] Cheyne Road, on foot by members of the public over that part of Cheyne Road while going to/from Stoke Lodge Playing Field via the Cheyne Road entrance,
- (b) during my ownership of [REDACTED] Cheyne Road such use by members of the public has been 'as of right' (without force, without secrecy and without my permission)
- (c) I have not at any time objected to or taken action to prevent or deter such use by members of the public.
- (d) such use has taken place frequently throughout the day and on a daily basis throughout the time that I have owned [REDACTED] Cheyne Road.

(e) I am not able to say where all members of public whom I have observed walking over the part of Cheyne Road that I own came from in the case of those entering Stoke Lodge Playing Fields via the Cheyne Road entrance or went to in the case of those leaving Stoke Lodge Playing Fields via the Cheyne Road entrance. However, I am aware that some of those members of the public walked to or came from Stoke Paddock Road.

If the Public Rights of Way and Greens Committee decides at its meeting on 27 November 2024 that the Definitive Map should be modified to show the claimed routes over Stoke Lodge Playing Field (applied for by Professor Alan Preece in application IE0/1415 on 30 May 2018) should be registered as footpaths, then I will not object to a modification which shows a public footpath over the hard surfaced made up part of Cheyne Road which I own and which is currently used by me to obtain access to my property both with vehicles and on foot.

Yours sincerely,

A solid black rectangular box used to redact the signature of the sender.

■■■ Cheyne Road
Bristol BS9 2DH

Friday 18th October 2024

For the attention of Bristol City Council PROW team

We are the owners of ■■■ Cheyne Road, Bristol BS9 2DH. We have owned and lived in this property for 39 years, since 1985.

We understand that at the meeting on 27 November 2024, the Public Rights of Way and Greens Committee will consider applications to register public rights of way over Stoke Lodge Playing Field. One of the entry points to the field is at the top of Cheyne Road and therefore any relevant rights of way that pass through the Cheyne Road entrance would start from the highway and cross the field, or emerge from the field and join with the highway, using a route in front of our home.

Cheyne Road is an unadopted highway and the owners of each of numbers ■■■■■ and ■■■ Cheyne Road own the land in front of their home up to a boundary that forms the midline of Cheyne Road. Thus the route used by people crossing to and from the Cheyne Road entrance to Stoke Lodge Playing Field crosses land that is privately owned by us.

We confirm that:

- (a) We are aware of longstanding passage by members of the public over the land in front of our home while going to/from Stoke Lodge Playing Field,
- (b) We believe this to be 'as of right' (without force, without secrecy and without permission) and
- (c) We have no objection to such use.

Such use has taken place frequently throughout the day and on a daily basis throughout our ownership. We have never made any attempt to restrict or prevent such use in order to access Stoke Lodge, nor are we aware of any such attempt being made by anyone else.

We consider the use by members of the public of this route to have been 'as of right' and of a nature that would establish a right of way over this land. This right is currently unrecorded and it would not be possible to regularise the position by recording such a right of way without it connecting to a right of way over Stoke Lodge Playing Field.

If the Public Rights of Way and Greens Committee decides at its meeting on 27 November 2024 that the claimed routes over Stoke Lodge Playing Field (applied for by Professor Alan Preece in application IE0/1415 on 30 May 2018) should be registered, then we consider that the currently unrecorded way over our land should also be recorded on the Definitive Map.

■■■■■

██████████ Cheyne Road
Bristol BS9 2DH
██

████████████████████
Bristol City Council
Highways, Traffic & Parking
PO Box 3399
Bristol BS1 9NE
by email to: rightsofway@bristol.gov.uk

5-Nov-2024

Dear ██████████

Your letter of 15-Oct-2024, ref. 169189: Application for Modification Order to add public footpaths at Stoke Lodge to Definitive Map & Statement

We are the owners of ██████████ Cheyne Road, Bristol BS9 2DH. We have owned this property since 21-Jul-2006; we moved in 7-Jan-2007 and have lived here since.

Cheyne Road is a privately-owned road, at least the 'upper end' that has nos. ██████████ and ██████████ (I cannot speak for the other houses in the road). We at no. ██████████ own the land in front of our property to the mid-line of the road between us and no. ██████████ which is opposite, who also owns to the mid-line of the road on her side.

We understand that likewise the owners of ██████████ and ██████████ own the land in front of their respective properties, also up to the mid-line of the road.

There is a separate grass/mud/tree section of land that is between the end of roadway and the boundary of Stoke Lodge Playing Fields; we understand that this land is part owned by ██████████ and part by ██████████

For the whole time we have lived here members of the public have walked along the 'upper end' of Cheyne Road and over the grass/mud/tree section to access and cross Stoke Lodge Playing Field; we have been told that this went on before we lived here.

Since we have lived here we have many times walked up Cheyne Road (part of the route from A to B) and across the field using route B-C-D during the 'relevant period' and on to the shops/barber/restaurant at the bottom of Stoke Hill and also route B-G, to go to the Adult Education centre.

As far as we know there have never been any objections to these pedestrians or any attempt to deter any member of the public walking this route; certainly neither of us have ever attempted to deter anyone on foot crossing our land, to go on the footpaths of Stoke Lodge Playing Fields or the field generally. Such pedestrians (often with dogs, some with buggies) typically pass several / many times a day.

With respect to the public rights of way footpaths application by Professor Alan Preece enclosed with your letter, having looked into this matter in some detail and considered the implications (also with neighbours), we have no objection at all to the registration including a public footpath over the roadway part of Cheyne Road which we own.

Yours sincerely,

████████████████████
████████████████████

████████████████████

████████████████

████████████████

Appendix 6.12

Appendix 12 to the PROW Consultant's Report to Committee

blue and *yellow* routes and which has been designated a public access point since Avon County Council restored the entrance in 1990. Since 2014 there has been a children's play park at the end of this path, which has increased the footfall recently.

In response to an initial appeal at the Stoke Bishop Neighbourhood Forum residents have contacted me to request copies of the witness statement forms. I have never met many of these people before and support spread entirely by word-of-mouth.

My application is to ask that these four paths which have clearly been used for more than two generations should be regularised and recorded.

I attach 97 witness statement forms from users of the stated paths all of whom are from the locality. Also attached is a list of their names.^{Appendix 5}

I urge the PROW&G committee to support the application.



Professor Alan William Preece
12 South Dene
Stoke Bishop
BRISTOL
BS9 2BW
24 April 2018

Appendix 7

Officer Summary Report to Committee, 27

November 2024

**BRISTOL CITY COUNCIL
PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE**

27th November 2024

CLAIMED FOOTPATHS AT STOKE LODGE FIELDS, STOKE BISHOP

(Report of the Network Operations Group Manager, Growth & Regeneration)

(Ward: Stoke Bishop)

Policy Implications

None arising directly from this report.

Resource Implications

There are no specific resource implications arising from this report, although if an Order is made which receives objections that are not withdrawn, there would be cost implications if the Secretary of State decided to hold a public inquiry or hearing. A way added to the definitive map is publicly maintainable if it can be shown to have come into existence prior to the 1959 Highways Act.

Other Approvals necessary

None

Recommendations

That the Head of Legal Services be authorised to make and advertise a Definitive Map Modification Order to show the footpaths in the Definitive Map and Statement, as shown on the plan attached to this report;

and,

that if the Order is opposed or any objections are lodged and not withdrawn, the Head of Legal Services be authorised to submit the Order to the Secretary of State for determination.

Legal Summary

The statutory test under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 is:

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

If it is concluded that evidence has been discovered, the question to then consider is whether it can be concluded that a public right of way subsists or can be reasonably alleged to subsist.

There are therefore two different tests that may apply – either, whether the public right of way subsists or, whether it can be reasonably alleged that a public right of way subsists.

Court judgments have established that the burden of proof is different for each test:

1. For it to be concluded that a right of way subsists it must be on the balance of probability;
2. For it to be concluded that a right of way can be reasonably alleged to subsist, it must be reasonable to allege i.e. it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

If it is concluded that either test is satisfied so that the Order should be made and advertised for consultation, the Order must not be confirmed unless it can be concluded, based on all the evidence then available, that the right of way subsists on the balance of probability.

Officer Summary

- The purpose of this report is to provide the Public Rights of Way and Greens Committee with sufficient information and guidance to determine an application for an order under S.53 (3)(c)(i) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by the addition of footpaths from Cheyne Road to Parry's Lane (route 1), Shirehampton Road to West Dene (route 2), said route 1 to said route 2 (route 3) and a further route from said route 1 to said route 2 (route 4). The claimed routes presumed to be dedicated are shown as A-B-C-D (route 1), E-F-G-C-H-J (route 2), B-G (route 3) and B-H (route 4) on the plan at appendix 1 to this report.
- The statutory test for presumed dedication is whether a way over any land has been actually enjoyed by the public *as of right and without interruption for a full period of 20 years*. Should this be the case, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention by the landowner during that period to dedicate it.
- The evidence shows that it is reasonable to allege that the claimed routes subsist based on the available evidence of use between 1946 and 2018.
- It would be reasonable to allege that there is insufficient evidence to indicate that landowners had taken overt action to demonstrate to users that they did not intend to dedicate a right of way over the claimed routes prior to 2018.

Officers have engaged an independent consultant (Robin Carr Associates) to prepare a report to assist Bristol City Council (the Surveying Authority) with the determination of the application which seeks to register public rights of way over the routes shown by broken black lines on the plan at appendix 1.

It is the independent consultant's view that there are sufficient grounds for making the requested Definitive Map Modification Orders on the basis that it can be reasonably alleged that public rights subsist. The Surveying Authority must make its own decision based upon the available and relevant evidence as detailed in the independent report. Should the Authority resolve to make an Order, any resulting confirmation will be on the balance of probabilities, allowing any additional evidence to come forward for the final determination.

Appendix 8

Public Forum Comments for PROWG Committee dated 27 November 2024

Public Rights of Way and Greens Committee Supplementary Information



Date: Wednesday, 27 November 2024

Time: 2.00 pm

Venue: City Hall

4. Public Forum

Up to 30 minutes is allowed for this item.

(Pages 3 - 110)

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

Questions - Written questions must be received 3 clear working days prior to the meeting. For this meeting, this means that your question(s) must be received in this office at the latest by 5 pm on 21 November 2024.

Petitions and Statements - Petitions and statements must be received two clear working days prior to the meeting. For this meeting this means that your submission must be received in this office at the latest by 12:00 Noon 25 November 2024.

Members of the press and public who plan to attend a public meeting at City Hall are advised that you will be **required to sign in** when you arrive, and you will be issued with a visitor pass which you will **need to display at all times**.

Issued by: Democratic Services
City Hall, Bristol, BS1 9NE
Tel: 3526162

www.bristol.gov.uk

E-mail: democratic.services@bristol.gov.uk

Date: Wednesday, 27 November 2024



Public Forum - Public Rights of Way and Greens Committee-27th



Number	Name	Subject
1	Ian and Stella Creer	Right of Way application IE0/1415
2	Alison Foster	“
3	Helen Powell	“
4	Paul Spellward	“
5	David Mayer	“
6	Sue Geary	“
7	Philippa Nason	
8	Guy Nason	“
9	Christine Porter	“
10	Nicola Cooper	“
11	John Hollyman	“
12	Roderick MacLeod	“
13	Jon Kennedy	“
14	Robin Parker	“
15	Anthony Reddiford	“
16	Larissa Wilton	“
17	Susan Hollyman	“
18	Alan Preece	“
19	Susan Mayer	“
20	Stewart Geddes	“
21	Chris, Emma, William, Isla, and Maria Law	“
22	Helen and Neil Sachdev	“
23	Rob Crews	“
24	Dorothy Nunn	“
25	Peter Hobbs	“

26	Ghyslaine Hobbs	“
27	Tony Beckingsale	“
28	Elizabeth Baker	“
29	Hilary Corfield	“
30	Elizabeth Warbutton	“
31	Gabrielle Huggins	“
32	Peter and Janet Sears	“
33	Stephen Abbotts	“
34	Stephanie French	“
35	Neil Phillips	“
36	Dan Mason	“
37	Felicity Pine	“
38	Sharon Parsons	“
39	Anthea and Reginald Davey	“
40	Chris Woodford	“
41	Alan Morris	“
42	Judith Young	“
43	Andrew and Catherine Barnes	“
44	Pauline Lemon	“
45	Helen Day	“
46	Jenny and Peter Weeks	“
47	Fiona Evans	“
48	Malcom Davies	“
49	John Moore	“
50	Gail Banham	“
51	G Wright and J Wright	“
52	Geoff Causton	“

53	Ken Young	“
54	John Henn	“
55	Shirley Brown	“
56	Mrs Polly-Anna Cockerham	“
57	Lucy Swithinbank	“
58	Jenny Grenfell-Shaw	“
59	Ewen MacLeod	“
60	Ken Wilkinson	“
61	Susan Elstob	“
62	Hugh Snodgrass	“
63	David Watkins	“
64	Matt Fletcher	“
65	Allister Simpson	“
66	Caroline Simpson	“
67	Chris Harries	“
68	Karen Cole	“
69	Della and Simon Hooper	“
70	Michael Sheehan	“
71	Robert Wilton	“
72	Emily Newman	“
73	Ben Willcocks	“
74	Keith & Gill Edwards	“
75	Mary Alpass	“
76	Stella Creer	“
77	Michelle Mason	“
78	Thomas Henry Cockcroft Alpass	“
79	Jenny White	“

80	Philip White	“
81	Joan Littlewood	“
82	Emma Geale	“
83	Barry Geale	“
84	Mike Whitworth	“
85	Judith Brant	“
86	Ken Pattison	“
87	Graeme Hogg	“
88	Vivien Gellett	“
89	Andrew and Margaret Hiles	“
90	Yvan Costes	“
91	Alexandra Sarah Macara	“
92	Sylvia, Lady Macara	“
93	Kathy Welham	“
94	Alison Chlebik	“
95	Emma Burgess	“
96	Stuart Huggett	“
97	Rolf Hudson	“
98	Jonathan and Diana Wyatt	“
99	Cotham School	“
100	Jonathan Johnson	“

2 Cheyne Road
Bristol BS9 2DH

Friday 18th October 2024

For the attention of Bristol City Council PROW team

We are the owners of 2 Cheyne Road, Bristol BS9 2DH. We have owned and lived in this property for 39 years, since 1985.

We understand that at the meeting on 27 November 2024, the Public Rights of Way and Greens Committee will consider applications to register public rights of way over Stoke Lodge Playing Field. One of the entry points to the field is at the top of Cheyne Road and therefore any relevant rights of way that pass through the Cheyne Road entrance would start from the highway and cross the field, or emerge from the field and join with the highway, using a route in front of our home.

Cheyne Road is an unadopted highway and the owners of each of numbers 1, 1a, 2 and 4 Cheyne Road own the land in front of their home up to a boundary that forms the midline of Cheyne Road. Thus the route used by people crossing to and from the Cheyne Road entrance to Stoke Lodge Playing Field crosses land that is privately owned by us.

We confirm that:

- (a) We are aware of longstanding passage by members of the public over the land in front of our home while going to/from Stoke Lodge Playing Field,
- (b) We believe this to be 'as of right' (without force, without secrecy and without permission) and
- (c) We have no objection to such use.

Such use has taken place frequently throughout the day and on a daily basis throughout our ownership. We have never made any attempt to restrict or prevent such use in order to access Stoke Lodge, nor are we aware of any such attempt being made by anyone else.

We consider the use by members of the public of this route to have been 'as of right' and of a nature that would establish a right of way over this land. This right is currently unrecorded and it would not be possible to regularise the position by recording such a right of way without it connecting to a right of way over Stoke Lodge Playing Field.

If the Public Rights of Way and Greens Committee decides at its meeting on 27 November 2024 that the claimed routes over Stoke Lodge Playing Field (applied for by Professor Alan Preece in application IE0/1415 on 30 May 2018) should be registered, then we consider that the currently unrecorded way over our land should also be recorded on the Definitive Map.

Ian Creer
Stella Creer

2

I would like to write a statement in support of these public rights of way. I regularly walk across Stoke Lodge from West Dene to Shirehampton Road to visit close friends as well as attend courses at the adult education centre. It cuts off a huge walk along a busy road with a narrow pavement and is invaluable to me and my family. We have walked this route for over 2 decades apart from the recent years when the fence was up.

Yours sincerely
Alison Foster

3 Public Forum statement for PROWG Committee 27 November 2024 - Helen Powell Application to record public rights of way at Stoke Lodge Playing Fields

Our community welcomes the expert recommendation, endorsed in the officer's report, that four new public rights of way across Stoke Lodge should be recorded on the Definitive Map.

There is significant evidence of frequent public use of these routes over many decades. Cotham School, in its objections, wants to suggest that this is 'village green' use not 'public right of way' use, but the facts are that:

- Many people use Stoke Lodge in both ways - sometimes they use the field for informal sports and pastimes (village green use) and sometimes they use these historic footpaths across the field to get to the shops, to school, to the bus stop etc. The Committee is entitled to take this large number of witnesses at their word in relation to their use of these routes.
- In quoting extensively from TVG documents, the School's barrister has carefully and deliberately **not** drawn your attention to the fact that all consideration in the TVG processes noted and discounted use that is in the nature of a public right of way - see paragraph 342 of Inspector Petchey's 2016 Report which states: 'I should add that, as one would expect in the circumstances, **the evidence shows that the land is used as a short cut to and from places on either side of it. This use does not count towards the establishment of a town or village green (walking from A to B is not a lawful sport and pastime) and I have not so counted it in reaching my view that there has been significant use of the land.**' It is very regrettable that the School and its advisers would seek to deliberately mislead you in this way.
- As above, the fact that some witnesses also provided evidence for the TVG applications does not contradict their PROW use but in any case, analysis shows that there are 72 PROW witnesses who did not give evidence for any of the Stoke Lodge TVG applications.

Cotham School also seeks to persuade you that there is a statutory incompatibility issue - that is, that you can't have a public footpath on school playing fields. But even within Bristol there are other schools that have this arrangement, including the Collegiate School in Stapleton and QEH on its sports ground at Failand. Even the playing fields of Harrow have a public footpath across them! And as Inspector Carr has pointed out, there is legislation that recognises that footpaths may exist on school premises and provides for their diversion only if specific conditions are met. Please don't let Cotham misdirect you on this - there is no statutory incompatibility since statutes **recognise** the possibility of footpaths on school land.

Cotham School seeks to persuade you that use was interrupted by sport, or that it made efforts to interrupt use, or that walking the routes was a criminal act. All such suggestions are patently absurd, especially in the context that the School's Chair of Governors Sandra Fryer agreed in the TVG1 inquiry that use of the field by the public had been satisfactory in the past. No such efforts were made, nor was use of the routes intentionally interrupted (as opposed to users giving way out of courtesy when a game was in progress - Inspector Carr is very clear on this issue).

Cotham School also seeks to argue that the Avon signs, which warned people not to trespass but went on to envisage that they would be using the land, made use of the routes contentious. As Inspector Carr has made clear at paragraphs 10.9 and 10.11 of his Report, the wording of the signs did not have this effect. In particular, nowhere do these ambiguous signs suggest that walking across the land is in any way contentious. They do not say 'no public right of way' or 'public access prohibited'.

In summary, there is no merit in the objections put forward by Cotham School. The Inspector's recommendation is clear, that there is sufficient evidence to establish that these rights of way should be recorded. There is a great weight of further witness evidence to support the decision to record these routes - paths that are so important to the daily life of our community. We ask the Committee to accept the Inspector's report and resolve to record the routes.

'Stoke Lodge is the hub of its community, criss-crossed by spokes of connections and daily trips, old footpaths that emerge like ghosts in a drought, but are in use all the year, joining

up people's lives, stitching together a shifting but palpable community.'
(Kathy Welham, September 2024)

(Stoke lodge rights of way registration)

I live on Coombe Lane. Over three decades, I have used the path across Stoke Lodge from the West Dene entrance (pavilion) to Shirehampton Road (adult education centre entrance / playpark entrance). ["route 2"] This is a direct route for me to the Shirehampton Road shops and also on my route to Sea Mills Station. As well as significant reduction in walking time compared to going only via paved roads, it provides a green interval in the journey which I have always found beneficial to me.

I regarded this route as an established footpath and I was outraged when it was blocked by the Cotham School fence. It has been most inconvenient and distressing to be deprived of this route. Fortunately, access is now restored.

I believe it is critical to ensure this route remains available for now and the indefinite future, for current and future generations. I therefore urge the PROW committee to register this footpath, and the others under consideration which cross Stoke Lodge in other directions, as a right of way.

(signed) Paul Spellward 19th November 2024

Public Statement by David Mayer.

For the Bristol City Council, Public Rights of Way and Greens Committee Meeting.

On Wednesday, 27th November 2024. Agenda item 4. - Public Forum.

Re: - Public Rights of Way on Stoke Lodge, Stoke Bishop, BS9 2BN.

I am compelled to write to express my support for this Rights of Way Application dated 1st May 2018 and accepted as duly made by BCC on 7th June 2018, together with the contents and recommendation of Robin Carr the Independent Consultants Report, Clause 15 (page 34) dated 14 November 2024 and the supporting recommendation in the Review and Briefing Report prepared by the BCC Rights of Way Officers on page 7, all in support of this Application.

These Public Rights of Way have been properly demonstrated to exist, and evidenced to comply with the qualifying criteria, and qualifying period prior to the date of the Application.

Furthermore, I see no reason to consider the request to delay the process as requested by Cotham on page 809 of the pack, since this has already been considered by the Specialist Consultant and the BCC PROW team and been rejected prior to making their recommendation.

I therefore request that the committee accept the evidence and recommendation of the experts and confirm approval for registration, and put an end to the uncertainty relating to this long-standing application, and enshrine ongoing use of these Public Rights of Way for future generations.

Yours faithfully
David Mayer

This is a statement in support of registering the rights of way across Stoke Lodge.

I use a mobility scooter and the advent of the fence stopped me (and dozens of other people) from crossing from the South Dene entrance to the Adult Learning Centre and to the shops on Shirehampton Road. This made a much more dangerous trip around the roadway on narrow pavements. It also made a much more dangerous commute for School children to get to the nearby schools off Shirehampton Road.

In frosty weather you can clearly see the paths that have been trodden for decades. I feel it is really important to keep these routes unobstructed.

Sue Geary

I am writing in support of the application made by Alan Preece with regards to four public rights of way across Stoke Lodge, which I understand will be considered at the forthcoming meeting.

As a member of the local community, a couple of the routes in question are particularly important to me (which when the fence was erected around the perimeter of Stoke Lodge by Cotham School, was really frustrating, making walking times both considerably longer and muddier).

At least twice a week, I walk from my house and use either the West Dene entrance (picking up three friends on Stoke Grove, Red House Lane & South Dene en route) or the one at the top of Stoke Lodge near the mini roundabout, and head down to the Cheyne Road exit (utilising either the yellow or blue route on the map made available to me), in order to access longer walks with my dog along the River Trym and in Blaise Estate. (Please note that because my dog gets very anxious when she meets other dogs, especially in confined spaces, we avoid the rather narrow bottom half of Ebenezer Lane). In addition, about twice a year, I use the yellow route to attend dentist appointments on Bell Barn Road. I also use the red route (from West Dene across to the Adult Learning Centre) reasonably frequently in order to attend ad hoc courses at the ALC and to get to the Co-op, Tesco and Fish & Chip shop which are all slightly further down Shirehampton Road (and, of course, the same route in reverse on my way back home).

I am aware that this application has wide support locally and therefore ask that the Committee register these routes without further ado.

Many thanks

Dr Philippa A Nason

Dear Democratic Services,

I would like to enter a statement to the Public Forum for the Extraordinary, Public Rights of Way and Greens Committee on Weds 27th November.

Thank you very much for your service to the community, which is appreciated.

Sincerely,
Guy Nason

The statement reads:

I have for a period of about ten years regularly made use of two of the marked paths that cross Stoke Lodge. These are

The path that traverses points J, H to A on the map. Roughly speaking from the West Dene entrance to the Cheyne Road entrance. I walk this path regularly in both directions. This is part of a longer walk I often do which begins at Stoke Lane shops, goes down Stoke Grove into Red House Lane, crosses Combe Lane, across a path through some houses, crosses South Dene, then a short way up Ebenezer Lane to the West Dene entrance. Then walk across Stoke Lodge on the public footpath to the Cheyne Road exit, down Cheyne Road, across Bell Barn Road and enter the western part of the Dingle, then along to the Dingle and enter into Blaise Estate through the main car park. From there walk along Blaise Estate following the atmospheric River Trym, into Henbury Golf Course, then crossing Canford Lane into Canford Park and then back along Abbey Road or through the cemetery. We walk this so frequently that we give it a name 'The Loop'. Walking through Stoke Lodge is quicker and more pleasurable than using nearby roads or, indeed, Ebenezer Lane, which is rather enclosed and does not feel particularly safe during dusk or at night.

The second path is the one that traverses points J to F on the map that links West Dene to Shirehampton Road. This is a fast route to get from the Stoke Lane area to the Shirehampton shops and services. There are many small high-quality businesses there that benefit from custom from 'the other side' of Stoke Lodge and the footpath is well used for these short cut purposes. Further, crossing the Lodge is immensely more pleasurable, safe and traffic free than the road route.

I would strongly support all of these four paths, and their tributaries, to be recorded and registered as public footpaths and it would then be great to see them turn up on Ordnance Survey maps, eg.

We moved to South Dene in 1970 (54 years ago) and using the footpaths, I walked our daughter to both nursery and primary school across Stoke Lodge on a daily basis.

My daughter with her own family later moved to Stoke Lane and brought her sons to Stoke Lodge to play football on a regular basis, gaining access via the footpaths rather than the longer route by road.

My husband and I left the area, but returned some 20 years ago and have walked the footpaths through Stoke Lodge on a regular basis.

We cannot emphasise strongly enough that it is vital to keep the right to use these footpaths and Stoke Lodge playing fields open to the public for Community use.

Christine Porter

10

I have lived at 17a Druid Stoke Avenue for over 30 years and have used the blue footpath which runs diagonally across Stoke Lodge playing field fairly regularly over this period to visit friends living in Canford Lane and Coombe Lane and for walks in the Blaise Castle Estate.
Nicola Cooper

I have been living in Stoke Bishop for nearly fifty years and during this time I have walked from my house in Druid Hill to visit friends and family living in Coombe Bridge Avenue, Grove Road, and more recently in Bell Barn Road. So, using the long right of way across Stoke Lodge in a south-north direction and back has been a regular event in order to make social visits, avoiding use of a car and incidentally getting exercise .

The entrance to Stoke Lodge near my house and the roundabout at the junction of Parry's Lane and Shirehampton Road is also the start of another route leading to the exit at West Dene, which leads to a walk I have regularly made to Canford Park and Westbury village.

I now regularly use the Stoke Lodge paths to avoid the traffic on Shirehampton Road and go to the shops there via the Cheyne Road entrance.

Unsurprisingly, the imposition of a fence erected by Cotham School around the perimeter of the Lodge caused huge inconvenience and annoyance to me as it blocked off access to the routes mentioned above and it is very encouraging that with the TVG status of the Lodge I can now resume my normal routes.

So please do a good job and register the rights of way across the Lodge so that this community can access them all as we have done for so many years.

John Hollyman

This is a statement for the Public Forum in the meeting of the Public Rights of Way and Greens Committee at 2.00 pm on Wednesday 27th November 2024.

Since 1999 I have lived in Ebenezer Lane, adjacent to Stoke Lodge field, and have found the routes across the field very helpful in shortening the walk between my home, Stoke Lodge house (for courses, events and voting in elections), the shops in Trymwood Parade and Sea Mills station. Most of the residents in Ebenezer Lane and South Dene are elderly and/or disabled, and benefit from the routes across the field shortening the walk to and from various places they want or need to get to.

I support the conclusion of Robin Carr Associates in favour of all of the specified routes across Stoke Lodge field being recorded as public rights of way.

Roderick MacLeod

Dear Sirs/Madam,

I am in full support of the rights of way across Stoke Lodge Playing Field.

I have lived near the Cheynne Road entrance for over 20 years and have used Stoke Lodge regularly since we moved in.

* We would walk our child to Rugby (at Coombe Dingle Sports Centre) from Cheynne Road to the Pavillion on Ebineezer Road every Sunday morning for several years.

* We would walk regularly from Cheynne Road to Parrys Lane on our way to Westbury or the shops at Stoke Lane.

* We would walk from Cheynne Road to the Stoke Hill roundabout on our way to Stoke Bishop.

* We regularly walk from Cheynne Road to the Stoke Hill roundabout as part of a walking route to the Downs. We also use the same route as part of a loop from Sea Mills, along the Avon, through Baddocks Wood and Sneyd Park nature Reserve coming home through Stoke Lodge (Stoke Hill roundabout to Cheynne Road).

* With young children, we used to regularly walk from Cheynne Road across the field to the playground for many years.

* As a scout Leader, we've walked the Scouts from Blaise Estate, over Stoke Lodge (Cheyne Road to Stoke Hill Roundabout) back to our premises on Kewstoke Road, many times over the years.

I have never been challenged when crossing the field although access was clearly frustrated when Cotham installed their 2m perimeter fence.

Please registers these paths as rights of way.

Kind Regards

Jon kennedy

14

Sir/ Madam

I was born in Reedley Road 77 years ago and Stoke Lodge fields were a favourite place for me and my three siblings to play.

We regularly used the footpaths and the legal rights of way to visit relatives and friends and of course to access XIV school.

Currently I have a sibling living in Sea Mills Lane so living in Coombe Lane, so these Rights of Way via West Dean enable ease of access.

It would be a crime to withdraw these historical facilities - they are cast in bronze RIGHTS!

Yours faithfully

Robin Parker

Public Rights Of Way And Greens Committee, Bristol City Council

Re. Claimed footpaths at Stoke Lodge Fields, Stoke Bishop

STATEMENT OF ANTHONY REDDIFORD

1. I live at 21 Rayleigh Road, BS9 2AU and have done so for 7 years.
2. I use Stoke Lodge Fields and, in particular, claimed routes 2 and 4 and have done so (for periods when the perimeter fence did not obstruct my route – when I used claimed route 4) since November 2017.
3. I use route 2 to walk from my home to the shops on Shirehampton Road and back along the same route. Whilst other routes are available to me (Bell Barn Road) I much prefer to avoid use of roads partly because the route through Stoke Lodge is much more pleasant and partly so that my dog can be off the lead for at least a part of the walk.
4. I use claimed route 4 as part a circular route around Stoke Lodge Fields when walking my dog or running for exercise.
5. I have used claimed routes 1 and 3 when running for exercise and/or walking my dog but less frequently than I have used routes 2 and 4.
6. When using claimed routes 2 and 4 I frequently (more often than not) see others using the same routes.
7. The only time that I have seen the routes obstructed was during the period when the green perimeter fence was present around the fields between c. 2020 and 2023. Route 3 was no obstructed when the fence was present.
8. I confirm that the contents of this statement are true to the best of my knowledge and belief.

Signed



dated

20/11/2024

Dear PROW Committee.

Please find this email in reference to the importance of the continued ability to use the public rights of way through Stoke Lodge.

As a local family with young children, we use these routes on a very regular basis.

My two daughters, my husband and I access Stoke Lodge on a daily basis to go from our house on Bell Barn Road to Stoke Bishop C of E Primary School. (Using the entrance at Cheyne Road and going across to the Adult Education centre.)

This route provides a safe way for children to walk and cycle their bikes to school which avoids the busy junction at the end of Bell Barn Road and Shirehampton Road.

Not only is it the safest route for them to travel, it greatly increases their mental wellbeing for the day by travelling through green, open space with fresh air. It has a hugely positive impact on how they arrive at school and their mindset for the day.

We use the same route in reverse on the way home.

I also use the full length of Stoke Lodge on my travel to and from work, walking from Bell Barn Road to Parry's Lane. Again, this is a safe way for me to walk but also allows me to relax and decompress after work or prepare to go into work.

It is vital for local families that all PROW across Stoke Lodge are protected for use now and for the generations to come.

Thank you for reading my statement.
Larissa Wilton

I have crossed Stoke Lodge having used all these routes on my walking travels since 1975, almost 50 years ago. However my most used route has been from the Druid Hill roundabout directly down the grounds to Cheyne Road. My purpose on this route was to continue across Bell Barn Road to visit friends in the area or to drop into the path directly opposite into Combe Dingle in order to follow several different routes over the years to Kings Weston, Blaise or left to the river Avon where I could walk alongside its banks. Many times latterly I have turned left from the exit at Cheyne Road of the Lodge grounds to walk along Stoke Paddock Road to purchase from the shops or enjoy a coffee/ meal at the Shirehampton Road cafe.

I also turn off right from this path towards the pavilion exit to walk along West Dene, through the University playing fields, through Canford Cemetery, across Canford Park to Westbury on Trym for a coffee and light shopping.

20 Years ago, my daughter and family moved into Bell Barn Road which is directly across the Stoke Lodge grounds from our house. I was heavily involved in childcare as both parents worked long and late shifts. I used the Druid Hill to Cheyne Road path as a direct route to and from her house. My husband and I share a car so I was able to walk directly, and safely, allowing him the use of the car.

When my grandchildren reached the years of developing independence and freedom, they were allowed to come from their home in Bellbarn Road, up across the Stoke Lodge path where I would wait for them at the wall, watching them cartwheel up at times, and take them safely across the Druid Hill roundabout roads. Unfortunately when Cotham School fenced off the land they blocked this route. My granddaughter, now older, uses this off road, safe route from Bell Barn Road to Druid Hill then down Hollybush Lane to meet her friend in Reedley Road and vice versa.

More recently I have also used the route across Stoke Lodge grounds, avoiding traffic, to turn off left at the carved oak to reach the Adult Learning Centre where I enjoy my weekly Spanish class. A few years ago I similarly walked this route to enjoy a research class on ancestry.

I am now 80 years of age and value these safe routes very much.

Susan Hollyman

Public Forum Statement by Alan Preece (Applicant)
For the Bristol City Council, Public Rights of Way and Greens Committee Meeting.
On Wednesday, 27th November 2024. Agenda item 4. - Public Forum.

Re: - Public Rights of Way on Stoke Lodge, Stoke Bishop, BS9 2BN.

I wish to thank the committee for this special meeting to consider my application which has been before the Council for 7 years, also the PROW Team for their guidance in the process, and the appointed Inspector Robin Carr for a very thorough examination and supportive recommendation.

During this process I have been struck by the universal support from everyone locally that I have met who are all desperate to protect the access to the shortcuts along safe and pleasant tracks to the local shops, buses and other amenities surrounding Stoke Bishop.

Although not an event within the core period of my application, we were all hugely and disappointingly deprived during the Covid crisis, when Cotham who had no use for the field, refused even the meagre opening hours of normal times via the access points through their fence, which even so appear to have been deliberately sited to not coincide with the pathways we are claiming.

This was not mitigated by the provision of something laughingly called the “circular track” which was not maintained and exceedingly dangerous in the winter for the non-fleet-of-foot members of the population. Several accidents occurred from falling down in the mud, including to me.

Cotham in their abstruse and verbose legal arguments are really obscuring the main points of the application and are effectively accusing all the witnesses of lying. They have conflated arguments regarding TVG applications in the past. They have also once again (previously in the TVG Public Inquiry) used Google Earth sequences to show the apparent absence of trackways, but I know from my son’s farm that even a well-used footpath from a busy campsite across his field does not show on Google Earth, because like Stoke Lodge, it is regularly cultivated and mown – but it is on the OS map. Two years of drought clearly showed the tracks on Stoke Lodge when the grass turned yellow in straight lines.

This has all arisen because Cotham School has not wanted to adhere to the terms of its lease, which provides for ‘all existing rights and use, including use by the community’ to continue. Mr. Carr has identified these routes as part of those existing rights, but still Cotham wants to object and take yet more legal action. Cotham School will never respect public access in line with its lease, so please would you register the routes for permanent public use, by accepting the recommendations of the Inspector and the PROW team.

I would also ask you to reject the appeal by Cotham to delay any decision until after the pending TVG court appeal, particularly as the application has been many years in consideration, and as it has always been impressed on me, that TVG and PROW are very different matters.

In August 1990, my family moved from Canterbury, to a new house in Coombe Lane. One sunny afternoon soon after, I took my five year old son to explore the local shops; we set off along Bell Barn Road and soon reached a main road junction, with The Mill House Pub and a Petrol Station on one corner and storage sheds for an adjacent Dress shop on the other, both bustling with vehicles coming and going. We went into Lloyds Bank first to get some cash (still essential back then) and whilst chatting to the Manager, I mentioned the busy road we had just ventured down and how I thought it rather intimidating. He quickly explained an alternative route via Stoke Lodge, telling me it was a preferred route for locals – so we gave it a try on our return journey home.

After that day it quickly became the preferred route to visit Shirehampton Road Shops, including a Video rental store and later the Veterinary Surgery, as well as a neighbouring Pet Shop for our puppy (born in 1993).

The shops on Stoke Hill had other attractions including a friendly Barber shop for my young son; a small Post Office and an old fashioned Hardware store. There was also a large Garage and MoT station; all conveniently within walking distance across the field.

We discovered the bus service on Shirehampton Road was far more reliable than the Coombe Lane route after finding ourselves stranded in the Centre whilst shopping for our first Christmas in Bristol. Our bus had been diverted to another route without warning and unfortunately (as newcomers) we couldn't identify an alternative and not a taxi to be had anywhere – we got home eventually, frozen stiff and vowing to boycott the bus route that had left us stranded.

I have continued to use the well trodden routes across Stoke Lodge for more than thirty years and during this time, have witnessed others doing much the same – A toddler practicing his first faltering steps across the parkland with Dad in-tow; a boisterous young family looking for signs of nature and delighting in naming bird song as they stroll along; a wobbly bike ride for a young child, setting off with Mum to meet a sibling at the local school gates and older children crossing the field on their way to and from senior school. However; it's not just the young who have benefited but our elderly and disabled too and because we all value safe access to and from local shops etc; we are asking for long-term protection now.

In conclusion, it is evident that this Community had established "Rights of Way" long before Cotham School took over use of the Parkland circa 2002. However, even at that time, a concerned local (retired PE Teacher) questioned why the School appeared to prefer the indoor facilities at Coombe Dingle Complex, rarely visiting the parkland except for casual sport. The School management also knew of ongoing public access, before agreeing to the terms of their Lease signed 2011; indeed BCC as land owner had acquiesced for decades and importantly no official complaints concerning trespass and no new signage until 2018; so disingenuous to do so at a later date to justify fencing.

Please ensure continued public access to this much loved community asset, by granting "Public right of Way" for all requested routes across Stoke Lodge. Similar measures have been successfully implemented on other school playing fields and so will not impinge on Cothams future sports use, if they choose to return.

S. J Mayer (Mrs)

Dear Sir/Madam

I wish to state how important I think it is that Stoke Lodge remains unfenced and available to the wider public in the locale. Those defending this have, at all times, taken a reasonable position, and been willing to share the facility with Cotham School. I am informed that this is entirely in line with Ofsted guidance, and that there are numerous examples around the country where this already takes place.

By contrast I have been very concerned how Cotham School have represented their position throughout - not least the costing of the fence, and an attempt to use video recordings when advised otherwise by the police, amongst many other occurrences.

At a time of very limited funding in the public sector, it seems extraordinary to me that the school have decided to use large sums to try to gain exclusive control of Stoke Lodge fields, when those nearby have always been willing to share the facility.

Parts of Bristol Council have not covered themselves in glory either; particularly when they were arguing against their own democratically arrived at decision. I would be interested to know what lies underneath this extraordinary behaviour(?).

Yours,
Stewart Geddes

Dear Sir, Madam, Committee,

I am writing this statement in advance of the Extraordinary, Public Rights of Way and Greens Committee being held on Wednesday, 27th November 2024 2.00 pm to strongly support registering all four public rights of way across Stoke Lodge. We (myself, my wife and our 3 children) have lived at our address over 10 years and regularly use all four routes described to access shops, go to work or school, visit friends, visit local leisure places and facilities. I note also these same routes are used regularly by a large cross section of the public.

The experience in past years of being fenced out was a massive inconvenience and during the winter / autumn months what little footpaths there were around the fence became a muddy quagmire and a hazard to users.

Many thanks for considering this statement,

Best Regards, Chris, Emma, William, Isla and Maria Law

Dear Sir,

I wish on behalf of our household to submit our support for registering paths on the Stoke Lodge Village Green.

My elderly mother (born 1937) who now lives with us, would hugely benefit from safe paths to cross the green, as part of her health and wellbeing regime as recommended by her Physio.

Under the previous regime (with a fence in place), the paths that were around the edge of the green were unsafe for her to use and they were extremely slippery and narrow in the winter, and overgrown with nettles in the warmer months. These paths were unusable for her, and were difficult for us to use too.

With safe footpaths in place, it will be much easier to get from our house to the local amenities such as the shops, hairdressers and pharmacy.

We therefore ask that you consider favourably the request to instate these paths for the benefit of the entire community, but particularly for those who are elderly and vulnerable.

Kind regards, Helen, and Neil Sachdev.

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Dear Sir/madam

Please can we make sure that the public rights of way over Stoke Lodge are recorded and registered.

I use these when I travel from where I live in Stoke Bishop across to Blaise Castle.

It was painful when the fence was still up as I had to go all around it, as such please can we register these long-standing public rights of way.

Many thanks.

Kind regards

Rob Crews

To the Committee,

It is essential that the 4 public Rights of Way across Stoke Lodge should be registered. I have used these paths since 1984 to go to shops & to take friends for a walk. They are a great benefit to the local people.

Kind regards Dorothy Nunn

I write in support of the application to grant Public Rights of Way across the land of Stoke Lodge.

When I graduated in 1967 I was offered a job in the Civil Service and was told I could choose to work in any city in the country where there were government offices.

I chose to work in Bristol as it has ready access to more National Parks and AONB than any other city and had more green spaces within it than many other cities.

When I married in 1973 my wife and I purchased a sheet street map where green spaces were indeed shown in green and we purchased our first home in Sea Mills due to the close proximity of many green recreational spaces, including Stoke Lodge. In 1981 with a young family we moved closer to Stoke Lodge and purchased a house in Woodland Grove, conscious that Stoke Lodge provided a valuable recreational asset.

In the subsequent 43 years we have walked and played across Stoke Lodge countless times. We have used every one of the access points and routes shown in blue, yellow, red, and green, (and others not shown) in every possible combination, innumerable times.

Most of my usage has been simply for recreation as Stoke Lodge provided me and my family with a "green lung". I have however made specific use of these routes to access Stoke Lodge adult learning centre, to attend events at my children's primary school in Cedar Park, and to take an off-road short cut from Stoke Hill to West Dene or Cheyne Road.

I was greatly annoyed when my children's former secondary school built a fence around Stoke Lodge playing field as it restricted my access to what I had always believed to be Public Rights Of Way that did not need to be specifically demarcated as they were in the public ownership of the City and County of Bristol.

It now seems that in order to ensure that the public, and particularly the citizens of Bristol, continue to have unfettered access to these PROW we need them to be designated as such on the Definitive Map.

I therefore add my voice in support of this.

Peter Hobbs

My husband has written a detailed response in support of the application to grant Public Rights of Way across the land of Stoke Lodge.

I would like to add my support and urge the committee to approve this application for the benefit of the citizens of Bristol and general public.

Yours Sincerely

Ghyslaine Hobbs

Dear Sir/Madam

I am writing to affirm that the Village Green status should remain in place so that the public rights of ways over Stoke Lodge can be recorded and maintained and that the fencing previously erected is not allowed to be re-erected.

I often use Stoke Lodge as a way of walking to houses of friends in the Ormerod Road area of Stoke Bishop. From my house in Bell Barn Road, I enter Stoke Lodge at the Cheyne Road entrance and walk across the Green to the far right hand corner exiting by the mini roundabout at the junction of Shirehampton Road / Parrys Lane / Druid Hill. From there I walk down Druid Hill and make my way through various paths to the Ormerod Road area.

When the fence was erected I was not able to do this and had to follow a narrow and at times an almost impassable muddy pathway ranging from 2 metres+ in width down to a couple of feet with nettles and brambles. This was most restrictive and an alternative route had to be used.

The rights of way should be open and unfettered to all. I do hope you will take my statement into account when arriving at your decision.

Thank you

Tony Beckingsale

Stoke Lodge Public Rights of Way

Dear Public Rights of Way and Greens Committee,

I am writing to strongly support the application to register various 'rights of way' across Stoke Lodge.

I walk across Stoke Lodge several times a week (about 5 times) as I visit friends who live in the road called West Dene. My usual route from my home is to walk along Hollybush Lane and enter Stoke Lodge from the entrance near the mini roundabout. I then walk across Stoke Lodge and leave at the entrance by West Dene Road.

I return to my house using the same route as it avoids the traffic and busy roads.

About once to twice a week I walk to Coombe Dingle and Blaise castle for a lengthy walk.

I follow the same route from my home but instead of leaving Stoke Lodge by West Dene I leave by the exit to Cheyne Road. This route takes me across the middle of Stoke Lodge. I return using the same route.

At the moment this route is easy and well used but it was not like this when the fence was erected.

At this time Cotham School had erected a fence and access to the field was only possible through one of four gates.

Cotham School claimed that these gates were unlocked (electronic locks in use) during daytime hours, but this was not always the case. It was not unusual to find that your entry gate was locked, or even more frustratingly, your exit gate was locked requiring you to retrace your steps to find a way out. Contact with the school to ask why usually solicited the response that the gates were always unlocked, which was not the case, or that something must have gone wrong with the locks.

Consequently, this meant that transiting the field was extremely difficult. Thankfully, now that the fence has been largely dismantled, it is easy to take the path across the field.

I therefore strongly support the application to register the various paths as 'rights of way.'

This should allow all the existing users, including myself, to continue to use them without any impediment.

It would also protect them for future users such as my grandchildren. I have walked across Stoke Lodge since I was a child. When I had my own children I have walked across it with them and now I am walking across it with my grandchildren.

It is important that we should not allow commercial interests to usurp the public desires and rights to use a footpath.

Yours faithfully,
Elizabeth Baker (E R BAKER MRS)

Good evening,

For more than 60 years my Mum and I have crossed Stoke Lodge from all routes, but I write specifically about the access from near her house in West Dene to where it meets Shirehampton Road. Our use has been to walk to what used to be the doctor's on Shirehampton Road, to past and present shops, to the vet's and to Sea Mills railway station. This walk became especially important when Mum reached her 80s. We would walk across the field, have a rest on the seats by the house, then walk down the road to the shops before returning for another rest and a little picnic, before walking back across the field. Mum could manage this and loved it.

Then the fence went up as Mum approached 90. We attempted to walk round the field on the slippery walkway and found ourselves in a position where she couldn't go forward and she couldn't go back. Thankfully a lady stopped to help me get Mum safely through the undergrowth onto the existing path there and back to West Dene. Mum was really shaken and she was frightened to try it again, so we didn't. We were told to leave the University fields on the other side of Coombe Lane when we tried walking there instead and so that was it, until the fence came down at Stoke Lodge.

Since the fence was removed Mum, now 95, has been able to go through the gate, walk to our favorite seat outside the house at Stoke lodge, have a juice and a kitkat and then walk back to West Dene. We can walk from her house with her great children to the play area near the Stoke Lodge house and she can sit in the sun and watch us playing. If the fence goes back up that will be impossible (again). All the vital years as she was becoming more frail, we missed doing this simple activity because we were prohibited by a six foot fence. I honestly wonder if she would have been this frail had she not had to stop her regular walks for a number of years because of that fence. Walking is vital for all, it is especially important if you are elderly, but it has to be safe and it has to be joyful and, in that way, has enormous benefits for mental and physical health, no matter how old you are.

Please, please register the paths we have walked for over 60 years as public rights of way, so everyone, no matter if they are toddlers or near centenarians can enjoy this beautiful open space. Thank you.

Yours sincerely,

Hilary Corfield

Dear Sir/madam,

I regularly use the routes across stoke lodge, either to enjoy the green space with its trees, or to visit friends in Stoke Paddock Road accessing the park from parry's lane/shirehampton road.

Yours Elizabeth Warbutton

Dear Sirs

I used to walk my children to Stoke Bishop Primary School when they were young and at the same time exercise my dog. I would often use the entrance in Cheyne Road and walk right up the middle of the field to the exit at the top of the field. I would often walk around the perimeter of the field with several other dog walkers. This was felt that it was a public right of way and should remain so. Everyone needs green spaces and this area is the only available now in the area; all others have been built on.

Regards
Mrs Gabrielle Huggins

FAO Public Rights of Way and Greens Committee 27th November 2024

We are encouraged to note the Officer's report recommends that public rights of way across Stoke Lodge playing field - currently a Village Green - be recorded and write in support of this recommendation.

Having lived in Stoke Bishop for 33 years we have been pleased to use these rights of way on a frequent and regular basis. To say we were dismayed and frustrated to be denied freedom of access by the erection of an unsightly and somewhat intimidating fence would be a huge understatement. The replacement track around the fence perimeter was often muddy, slippery and overgrown and did not present in any way a safe and suitable alternative.

Over the years the rights of way across the field have enabled us to make foot journeys from our home in the Kewstoke Road area to Coombe Dingle, to the shops on Shirehampton Road to Shirehampton Station and to friends in Westbury on Trym without always having to walk alongside a busy road or the enclosed alleyway/footpath beyond Ebenezer Lane.

Moreover we are able now to walk unhindered with our young grandchildren to visit the playground whenever they visit.

On a general level we note the frequency with which these rights of way are used by parents taking and fetching children to school in Cedar Park - a safer more direct and altogether more pleasant route than Shirehampton Road and which no doubt avoids use of cars.

Since the granting of Village Green status some 18 months ago it has been a great benefit to us once again to be able to enjoy these routes unencumbered.

We therefore hope that the Officer's recommendation is upheld by the Committee

Peter & Janet Sears

Dear Sir or Madam

I lived with my family in Stoke Bishop since 1978 finally leaving last March 2024.

During this whole period until 2010 we enjoyed as a right without interruption full unhindered access to use the footpaths 1 to 4 as shown in Robin Carr's excellent report and associated documents. The footpaths offer a significant and very helpful range of specific shortcuts for our family walking to visit friends, schools, shops, bus services, dentist, GP, public house, at the start of longer walks to the woods, to the Downs and into the City. To use them was also relaxing, healthier and less risky than using the longer routes along pavements bordering busy polluted local roads and we avoided using our car.

I remember when we first moved into Stoke Bishop the friendly groundsman then employed told us access was unrestricted; he was keen to prevent vehicles gaining access though. To this end he had installed a stile, a kissing gate and simple unobstructed openings in the boundary hedges and fences. I remember these were narrowed to keep out the occasional motorbike but not walkers. I note that this point is supported in pages 47/48 of the agenda papers; see letter from Mr Blackmore [Avon Authority] and a press report dated January 1990. There will be Police records of complaints about this type of occasional antisocial activity on the fields.

I do not remember seeing any signage restricting access at any entry/exit points. The only signage that appeared was in 2010 when the fields were seized, barriers and chained gates built and the local community excluded.

People are only now going back to their old ways of using the fields and paths prior to Covid and the exclusion methods introduced.

We also enjoyed unrestricted access to the fields for every sort of leisure and sporting activities, community events and nationwide celebrations....the last one I recall was a Millenium party when all local children were presented with locally made dated pottery mugs, we still have ours! These really brought the 'locals' together. Access was totally unrestricted for those using the fields and the footpaths.

We never had to make any booking, there were no 'rules' to follow. I remember being told by older residents they had been free to use the marvellous space and footpaths across it for over 45 years totally unrestricted.

I believe the coming generations should also have the access we enjoyed so very much.

Yours faithfully,

Stephen D Abbotts

Statement to the Public Rights of Way and Greens Committee

For the meeting on **Wednesday 27th November 2024**. From: Stephanie French.

Subject: Claimed footpaths · West Dene to Stoke Lodge (Shirehampton Road), · Cheyne Rd (Stoke Paddock Road) to Druid Hill, · Cheyne Rd (Stoke Paddock Road) to Stoke Lodge (Shirehampton Road), · Cheyne Rd (Stoke Paddock Road) to West Dene, Stoke Bishop

Dear Members of the Committee,

I write in support of the request that these well used routes for pedestrians be made public rights of way.

I have used all of these routes across the Parkland for the purpose of getting from Shirehampton Road and Druid Hill to other parts of Stoke Bishop where my friends live/lived (one has moved away recently). I have lived near the centre of Stoke Bishop Village – close by Druid Fountain – since 2006.

The routes I have used most frequently are:

From Druid Hill to West Dene via Stoke Lodge (the paths cross),
and from Stoke Lodge Adult Education Centre (Shirehampton Road) to West Dene.

The route that exits at West Dene bisects Ebenezer Lane upon arrival at West Dene, so it gives a vital link to another access route, providing a way to get to Bell Barn Road and Cross Elms Lane.

In addition to providing access for me to friends the other side of the Village, I have used the routes to check up on the magnificent trees that grace the Parkland, being the Tree Champion for Stoke Bishop since 2010. I use them to criss cross the area from the Adult Learning Centre to the perimeter of the Parkland to keep an eye on the trees that fringe the Parkland. I have tended to use the routes that are shown on the map, rather than wander about the field, because these are the most direct routes between the access points I have used, and they give access to the major trees on the perimeter.

In the years when the routes were blocked by The Fence it all became very difficult. In good weather it was possible, though lengthy, to make a circuit of the Field around The Fence, but during, and following, poor weather this was dangerous, as the ground became water logged and slippery following the passage of many people over it. Inevitably we resorted to using our cars driving the long way around on the roads, as this was safer though less environmentally friendly. The fact that the ground became impassable very quickly just showed how many people were using the routes across the Field, which we should like to become paths.

One of the claimed footpaths was at one time the driveway from Stoke Lodge House to West Dene where the House had an entrance/exit. You can see that this is so because old maps (available to inspect on KnowYourPlace) show the drive and also show the Lodge House at the Parkland boundary on West Dene – now called Stoke Lodge Cottage. This is shown on the 1844 and 1894 Ordnance Survey maps. When the House was sold to the Council in 1947, and thus came into public ownership, I would guess that it became one of the main public routes to the Village from the northern part of Stoke Bishop, and even more so when the House became the Adult Education Centre in 1980 as this was the route to the House and Shirehampton Road and the Village facilities from the north.

On a damp and chilly day last October I was on the Field looking at a tree at the request of a resident, and I was delighted and cheered to see a father taking his two children to Stoke Bishop Primary School (Cedar Park), walking across the Field from West Dene to Shirehampton Road. It was lovely to see after the years of the Fence. They had not had to go the long way around on the busy roads where it is not safe – and if they had had to do that, they would more likely have travelled by car.

If walkers using the routes see a games match in progress on one of the pitches they walk around the pitch – they do not cross the pitch. This is normal out of common courtesy.

Neil Phillips
124 parry's Lane
Stoke Bishop
Bristol
BS6 6NA

20/11/24

Dear Public Rights of Way and Greens Committee

I am writing to express my strong support for the proposal to grant Public Rights of Way to the footpaths across Stoke Lodge fields and surrounding areas. As a local resident (last house on Parry's Lane), I believe this initiative will bring significant benefits to our community.

The establishment of a Public Rights of Way across Stoke Lodge will:

- **Enhance accessibility** by provide safe and convenient access for pedestrians (including children), cyclists, and individuals with disabilities, promoting inclusivity and mobility for all members of our community.
- **Promote safety** by designating a vehicular free pathway, we can reduce the risk of accidents and improve overall safety for everyone (including children) who uses these paths compared to busy public roads.
- **Encourage active lifestyles** by encourage more people to walk or cycle, contributing to healthier lifestyles and reducing traffic congestion and pollution.

I believe that granting this Public Right of Way aligns with our community's values and long-term goals. It represents a commitment to creating a more connected, safe, and vibrant environment for all, residents and visitors.

For years, I was able to walk from my house to local shops (e.g. on Shirehampton Road) without issue. Then Cotham School staff told me to "get off Cotham property" when I was walking across the empty field. Cottam School then completely blocked all access by erecting their fence. The locked gate stated:



I repeatedly contacted Cotham School over several years requesting 'Express Permission' to walk across Stoke Lodge field, but permission was **never** granted. When I raised the issue of Cotham School blocking public access with Bristol City Council, I was told by Cotham not to bother the Council.

I urge you to consider this proposal favourably and take the necessary steps to register the paths across Stoke Lodge as Public Rights of Way. Thank you for your attention to this important matter.

Yours sincerely
Neil Phillips

Dear Public Rights of Way and Greens Committee,

I am writing to express my strong support for the application to register the four public rights of way across Stoke Lodge. My family and I use these paths extensively, particularly the route from Parry's Lane to Cheyne Road, which is an essential part of our daily routines.

These paths provide a safe and direct means of travel, allowing us to walk to my mother's house without the need to navigate a longer and more hazardous route that crosses multiple main roads. The convenience and safety of these paths cannot be overstated, as they connect vital parts of our community and support active travel.

The obstructive fence previously in place was a source of significant frustration for us, as it disrupted these important routes and forced us to take far less practical alternatives.

I urge the Committee to register these routes to ensure they remain accessible for everyone in the community. These paths are not just rights of way; they are lifelines that enhance connectivity, safety, and the quality of life for many residents.

Thank you for considering this application.

Kind regards,
Daniel Mason

Dear Councillors

Re. Public Rights of Way and Greens Committee meeting – Wednesday 27 November 2024

I am writing to urge you to act upon the recommendations of both the independent consultant, and the officer's report to your committee and grant registration of all four footpaths.

I have lived at the top of Shirehampton Road for thirteen years. In order to enjoy the beautiful green space that is Stoke Lodge Village Green, I use one of the footpaths regularly to walk to Bell Barn Road to visit a friend and my Dentist. I also chose to use this green walk to collect medications from the Vet, just around the corner from Bell Barn Road.

During the years after Cotham Academy erected their fence, I was hugely frustrated by being forced to walk, during the winter months, along a very muddy, narrow strip of land around the perimeter fence. The school did not maintain the pathway. This was no way for a school to treat the community and, even given my advanced years, I was happy to take part in the many community efforts to place bark on the paths in order to make them safe.

It has taken seven years for these applications to reach your committee. Please take the right action and grant registration of all four footpaths.

Yours sincerely
Felicity Pine

1. My name is Sharon Elizabeth Parsons and I currently live at Old Sneed Road, Stoke Bishop, Bristol, BS9 1ET.
2. I have lived near Stoke Lodge since 1971 and have many memories over the past 50 years of time spent at Stoke Lodge.
3. As a teenager, I gained access to Stoke Lodge by climbing over the wall by the roundabout at the top of Druid Hill.
4. I used to walk across Stoke Lodge to visit a friend on Coombe Lane. I would exit at West Dene.
5. I used to walk across Stoke Lodge to visit a friend on Bell Barn Road. I would walk through the exit to Cheyne Road.
6. As an adult I still use these rights of way across Stoke Lodge, and access Stoke Lodge by the uneven entrance close to the mini roundabout at the top of Druid Hill.
7. The only time I was prevented from using these rights of way was when Cotham School erected a fence in 2019.
8. I divert around these routes if sport is being played on Stoke Lodge.
9. I fully support the Committee in granting the rights of way.

Kind regards

Sharon Parsons

We have lived in Stoke Bishop for more than 50 years, and in all that time have used several foot paths across the playing fields, mostly from Parrys Lane to Woodland Grove, but sometimes from Parrys Lane to Bell Barn Road, to visit friends. It makes a very pleasant and sometimes shorter walk, and it has been hard going to have to traipse round the fence erected by Cotham School despite OFSTED not requiring its erection, and the terms of the Lease allowing us, we thought, full access. We do hope our old favourite routes can now be safeguarded.

Anthea and Reginald Davey

Chris and Alyson Woodford.
 9 Woodland Grove
 Stoke Bishop
 Bristol
 BS9 2BD.

21 Nov 2024.

To:

BCC Public Rights of Way and Greens Committee, regarding an application for public rights of way at Stoke Lodge Fields, Stoke Bishop.

We strongly support the current application for public rights of way to be granted at Stoke Lodge Fields, Stoke Bishop.

The proposed footpath routes in the application currently provide us with significantly shorter routes to local amenities compared to road side pavements routes.

For example, we use the current routes to walk from home to;

- the local shops and services on Trymwood Parade,
- the bus services on Shirehampton Road,
- the Stoke Lodge educational offerings,
- the polling station at Stoke Lodge.

If the routes were obstructed, maybe with a fence, we would need to use our car more frequently due to the increased distance. This of course leads to more pollution and noise.

Furthermore, the proposed footpath routes provide shorter routes for pupils attending Stoke Bishop Primary School and have the attendant benefits of being traffic free and reducing exposure to vehicle pollution. These benefits would be lost if the current route is obstructed.

Chris and Alyson Woodford.

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Hello,

I would like to submit the following statement to the Public Rights of Way and Greens Committee meeting on Wednesday, 27th November.

Alan

[illegible]

My wife and I live half a mile away from Stoke Lodge playing fields, and have lived there for the last 40 years. We have used the route shown on the map from point D to point B for recreational walks numerous times over the years, as it is a convenient route as part of a number of circular walks. We would value the continued unobstructed use of the route.

Alan Morris

Chair & Committee members

I have the following comment to make on item 5 on the agenda for above meeting.

I previously lived on Shirehampton Road for almost 20 years and now live in Queens Gate. During this time in both homes I have walked from my house and used the footpath from Stoke Lodge to West Dene to visit a friend who lives off Coombe Lane. This is a wonderful short cut rather than walking either or down or up Shirehampton Road in order to get to Coombe Lane.

I believe I completed one of your forms some years ago submitted by Professor Alan Preece.

Judith Young

SUPPORT FOR REGISTERING THE PROPOSED RIGHTS OF WAY ON STOKE LODGE

We are writing to again support the registration of these Rights of Way on Stoke Lodge. Having lived for more than 30 years by the West Dene entrance we and our children have freely used the paths for many reasons including

- Accessing the shops on Shirehampton road and by Stoke Bishop Village Hall,
- Going to Adult Education Classes at Stoke Lodge
- Regular Bridge evenings at Stoke Bishop Village Hall
- Accessing the Trym and Blaise through Cheyne Road avoiding most roads – good for young children
- Playing organised games (Shire Colts) and informal ones.

As has been said many times access was never questioned and the paths were well trod until disrupted by the fence.

I am sure the Committee will want to support the Inspector's view that there is no reason for not registering these footpaths as Rights of Way.

Yours

Andrew and Catherine Barnes

To whom it may concern

I support the application for the rights of way at Stoke Lodge.

I have used the paths for many years from West Dene to Stoke Lodge to attend courses there. Also, the path from West Dene to the corner near the mini roundabout to go to the shops and the bus stop. Also, down to Cheyne Road to access the shops there.

Yours sincerely

Mrs P Lemon

My name is Helen Day. From 1985 to 1993, I resided on Cheyne Road.

During my teenage years, I frequently utilised Stoke Lodge for recreational purposes and access to other roads in the locality. I would often walk from Cheyne Road, proceed straight to the far end, and exit at Parrys Lane to visit friends' houses near the old dairy and on Reedley Road.

Additionally, I would use the exit at the Adult Learning Centre and walk the final part of Shirehampton Road to see friends on Druid Hill. Naturally, they would make the same journey in reverse to visit me.

Walking through Stoke Lodge was far more enjoyable than walking along a road, and even as a teenager, I could appreciate the incredible open space. Many others must have felt the same way, as it appeared to be a popular route.

Less frequently, I would use the exit at West Dene to cut through to Canford Park and the shops. I feel very fortunate to have lived near such a wonderful open space and I sincerely hope that this access and pathways through Stoke Lodge continue to be available for residents in and around the area.

Yours faithfully,

Helen Day

PROW Committee meeting 27 November 2024

CLAIMED FOOTPATHS AT STOKE LODGE FIELDS, STOKE BISHOP

Public Forum statement in support of Registration

We are Jenny and Peter Weeks living at Druid Road, Stoke Bishop, BS9 1LH which is about 700 metres from Stoke Lodge.

We regularly use one of the footpaths under consideration at this PROW meeting. The footpath in question is the one that goes from the SE corner of Stoke Lodge straight across the field to the entrance on to Cheyne Road (the footpath marked in blue on the *pinpoint map for applicant AWP5*). We usually enter Stoke Lodge at the SE corner where there is an entrance from Parrys Lane, we walk across the parkland to Cheyne Road and then continue our walk going down to the River Trym and on towards Sea Mills Harbour. Ever since we came to live here 33 years ago, this has been and still is one of our favourite recreation walks. While the fence was up of course we were prevented from enjoying this our regular walking route and we are pleased that the fence has gone.

In 33 years of using this path regularly since 1991, at no time have there been any signs or notices at either entrance saying that walking across Stoke Lodge is not allowed; that access on foot is forbidden or restricted; that this is not a footpath; or that Stoke Lodge is private.

This footpath is often used by other local residents as part of a recreational walking route. On any day you can see people walking from Cheyne Road to Parry's Lane, and vice versa.

We ask the Committee to register this footpath as a Public Right of Way.

When I was little I moved to Druid Hill, Stoke Bishop with my parents. I moved to Bell Barn Road in 2006 with my husband and had my children. I live close to the end of Cheyne Road.

I use the blue route marked on Stoke Lodge from Cheyne Road to Parry's Lane to visit my parents as it is a pleasant shortcut. When my son was born in 2006 we would walk that route to visit them pushing my son in the pram. We'd lift the pram up the gap to get onto the footpath on Parrys Lane. I had my daughter in 2007. My use continued as the children grew taking the children to see their grandparents or going up to see them. When family visit (my brother and his family) we meet at Mums and often walk through Stoke Lodge from Parrys Lane entrance down to Cheyne Road in a family group for supper at ours.

More recently I have used the same route to walk up (and back) and visit my parents for a cuppa and a chat. Sometimes I walk up so that we can go from their house out to lunch. The last time I used it was on Nov 19th 2024 to go to supper at my parents with my husband and my daughter. We all walked back through Stoke Lodge under the full moon.

I also use the route from Cheyne Road to the play park direction to vote as Stoke Lodge House is my local polling station.

This travel route use is separate to my use of Stoke Lodge for meeting friends on the lodge for a drink or picnic, jogging or walking my dogs.

I feel it is important to formally recognise these historic routes that connect our community and families.

Yours sincerely

Fiona Evans

I live in South Dene and when our 5 children were at Stoke Bishop C of E Primary school during the 1980s our route to and from school was via the Red route from West Dene to Stoke Lodge house. We continue to use this route to take our grandchildren to the play area adjacent to Stoke Lodge House.

As a child, myself, in the fifties living at 11 Cedar Park I would regularly use the Red route to visit friends in West Dene. The path in those days went through the side garden of the cottage at the end of West Dene. I believe that was where the groundsman used to live. When the land dries out in hot summers the outline of this footpath can clearly be seen under the grass.

The Red route footpath was well established before the fifties and as far as I'm concerned continues to be our route to the Shirehampton Road bus stop and shops.

I urge the committee to uphold my right to continue to use this footpath, as I have done since the early fifties.

Malcolm Davies

To Public Rights of Way and Greens Committee (PROW)

In regard to Application for Routes 1, 2, 3 & 4 at Stoke Lodge Fields, Stoke Bishop, Bristol to be authorised as Public Footpaths by Definition Map Modification Order as set out in the Agenda to PROW meeting on Wed 27 November 2024

I am writing to ask the Public Rights of Way and Greens Committee to strongly recommend your approval to authorise the Definitive Map Modification Order to show the routes 1, 2, 3 & 4 as set out on the agenda for the meeting.

I and my family have personally used the route from our house on Parrys Lane to Cheyne Road and back (and onward to cross Bell Barn Road) and reach the banks of the River Trym and thence to walk into the Blaise Castle or Kingsweston estates on numerous occasions over the past 40 years since we moved to live on Parrys Lane in 1985.

We have used the West Dene route to Shirehampton Road and back to attend classes at the Adult Education Classes at Stoke Lodge. More recently we have used Ebenezer Lane and the route across from West Dene with our grandchildren over the last five years to reach both the play park and the shops on Shirehampton Road to buy snacks for the grandchildren.

Regrettably at times Cotham School have closed the fence gates at West Dene and or at Stoke Lodge making our journey around the perimeter of the fence along the bottom of the field. This happened so often and the perimeter outside the fence was so well used that it became very muddy and difficult to traverse with a buggy thanks to the gate closure.

Please approve the route crossing from West Dene to Shirehampton Road via the Stoke Lodge Adult Education Centre now the fence has been removed to avoid any repeat of others scrambling through the muddy mess at the bottom on a narrow path outside the fence where the rainwater can sometimes collect.

Another of our regular walks from home at Parrys Lane to Sea Mills harbour to watch the highest tides come in and out would include walking down from West Dene through to Stoke Paddock Road. With a return trip along Stoke Paddock Road up Cheyne Road and across to West Dene to meet Ebenezer Lane and thence home. In more recent times a weekly visit to my housebound cousin in Sea Mills uses the same route.

Please register these four paths across Stoke Lodge Field. Thankfully the fence erected by Cotham School has been partially withdrawn since the Town & Village Green was approved and the use of the old footpaths has returned to normal. Please let's keep it that way.

John Moore

I have been resident in Stoke Bishop for 44 years. During this time I have used the grounds to walk my daughter to and from both her junior and senior schools, from the Stoke Lodge entrance to Parry's

Lane and on Westbury.

When my daughter moved back from London to Henleaze I used the same entry point to cross to West Dene, through the University sports grounds and on to Westbury to catch a bus, up the hill to Henleaze, in order to visit my daughter and my grandsons.

Following major open heart surgery in 2016, I used the whole of the area for my therapeutic exercise and then, as I do not drive, for a direct route through Stoke Lodge via the University grounds to Westbury on Trym to shop and bank.

To have this facility has been extremely gratifying and was a great loss to me when access was closed

Sincerely

Gail Banham

For the attention of Public Rights of Way and Greens Committee Meeting 27th November 2024

We are writing to advise that we have used paths A-E, A-D and J-E since the mid 1980's. Initially we used path A-E to take children to school (Stoke Bishop C of E primary) as we were then living in Briercliffe Road so path A-E was a route to school. We, therefore, disagree with Ashley Bowes comments that any "wandering" took place. Any parent would agree that the early morning trip to school is not a time to wander! Also path A-D was a direct route to the local post office and barbers/hairdressers on Druid Hill.

Currently we live in West Dene and use paths J-F and J-D as a direct route to the Adult Education Centre and to the shops at Druid Hill. With our grandchildren we now take a direct path to the playground. Sadly this was interrupted for a short time when Cotham School erected a perimeter fence.

As we can see the field from our house we also witness parents taking their children to school following path J-E. Again no wandering is involved contrary to Ashley Bowes claim. As they are using these paths or routes, as a highway for a direct purpose they do not "wander".

In conclusion, we have used Stoke Lodge Playing Fields for recreational purposes but also the paths listed as highways to various destinations.

We would ask you, therefore, please, to pass the recommendation to make modifications to the DMMO showing the foot paths on Stoke Lodge.

G Wright and J Wright

Statement for the Public Rights of Way and Greens Committee meeting 27th November 2024**Stoke Lodge paths designated Public Rights of Way**

I would like to express my support for the four paths in question at Stoke Lodge to be designated Public Rights of Way. I and my family have been using Stoke Lodge since 1978 and it is a vital green space for our community. My wife and I regularly use the path from the junction of Stoke Hill and Parry's Lane, down to the entrance of Cheyne Road to visit friends. If we could not use this path, it would mean a longer walk on the roads round Stoke Lodge so we would probably end up using our car. We also know of several friends who use the paths to attend classes at the Adult Learning Centre and parents who take their children to Stoke Bishop Primary School. I urge the committee to vote in favour of granting the four paths in question Public Right of Way status.

Yours sincerely,

Geoff Causton

To Bristol City Council's Public Rights of Way Greens Committee

I would like to express my support for the Public Rights of Way process to re establish the various paths used by the Public across Stoke Lodge Field over many decades.

Having lived nearby to the Field for over thirty years I can confirm that my wife and I have used the pathways across this large field to get from our home to other areas on the other sides of the field on many occasions, these include;

West Dene to/ from the Stoke Lodge building and on to Shirehampton Road.

West Dene to/ from the corner leading to Stoke Hill and shops

West Dene to/ from Cheyenne Road.

The fence erected by Cotham School, has made such routes impossible to access, or access safely, and impacted on our free movement of getting from A to B.

I trust that this short statement will be submitted as support to re establishing the Public Rights of Way across this, what should be open space, and not allow it to be fenced off against local public's wishes and needs.

Kind Regards
Ken Young

I live in West Dene. I have crossed the field to get to Parry's Lane via Stoke Lodge and to the roundabout Druid Hill / Parry's Lane.

I also use the field for exercise walking around. This was difficult when the fence was up as the paths around the outside of the fence sometimes became very slippery. It is much better now without the fence.

The fence was an unnecessary eyesore. The school is welcome to use the field without the fence. The fence was nothing to do with education and looking after the welfare of the children, it was/is pure greed.

John Henn

As a member of the friendly and supportive community neighbouring Stoke Lodge, I am delighted to see that both the independent inspector and BCC's relevant officers agree that the well-established footpaths across the site should be protected by official recognition, and I trust that the PROWG Committee will vote in favour.

Members of my family have lived in Ebenezer Lane, adjacent to Stoke Lodge, since the 1990s; I have lived close by in South Dene since 2013. Before Cotham School erected a fence around the playing fields in 2019, I regularly used the pedestrian routes identified across Stoke Lodge to walk from the West Dene entrance for a variety of purposes: towards Shirehampton Road to access the Stoke Lodge Adult Learning Centre, to attend events at the school in Cedar Park, to accompany children to the play park, or simply to enjoy the arboretum; towards Druid Hill to use the bus stops, or to walk to the post office and shops on Stoke Hill; towards Cheyne Road to use the local shops and cafés on Trym Parade and Sea Mills Square, or on my way to the railway station at Sea Mills; I walked on all three routes to visit friends who live on the other side of the park.

I was shocked and disappointed when Cotham School staff suddenly arrived on Stoke Lodge in January 2019 with contractors who began erecting a fence despite no prior notice to the local community by either Cotham School or Bristol City Council, both of whom were well aware that the fence would block several footpaths that were awaiting official assessment for registration.

Once the fence was complete, with only five gates (two of which, at the arboretum and near Cheyne Road, were often locked even when the other three were open), my customary routes across the field for everyday activities were made difficult or impossible. I was forced to find inconvenient or uncongenial alternatives. It was necessary to walk much longer distances all around the perimeter to reach the Adult Learning Centre and the play park. Neighbours with children at Stoke Park Primary School were forced to walk there on the narrow pavements alongside Shirehampton Road, at times when it is busy with fast-moving traffic. The narrow paths left between the fence and the border trees and bushes became muddy and dangerous in adverse weather. Even when the gate closest to Cheyne Road was open, it was situated a long way away from the entrance, adding extra distance to the previous route.

Although there were notices at some - not all - of the entry/exit points to the routes across Stoke Lodge, I never considered them to be "inconsistent with the dedication of the way as a highway" for four reasons:

1. The agreement signed between landowner Bristol City Council and leaseholder Cotham School in 2011 includes a specially inserted clause that makes the School's lease on the land "subject also to all existing rights and use of the Property including use by the community".

2 Local residents had had open access to the land for seven decades: no-one ever suggested to me that I was doing something wrong when I used the familiar routes across the field, and I was never prevented from crossing before Cotham School's hostile attitude and physical obstruction.

3. Avon County Council ceased to exist in 1996, after which there was no authority responsible for enforcing the provisions on their notices. Avon CC had never taken any enforcement action to prevent people from crossing the field. Indeed, action had been taken to facilitate pedestrian use: after discussion of a possible stile at the Cheyne Road entrance, eventually some large tree trunks were laid to deter vehicles but allow easy access for pedestrians.

4. Even if the notices had been linked to an extant local authority, the threat of prosecution for "exercising dogs or horses, using motorcycles, parking vehicles or flying model aircraft" was qualified by the phrase "which causes or permits nuisance or disturbance to the annoyance of persons lawfully using the playing field", which could be interpreted as saying that even those potentially disruptive activities were acceptable provided they were carried out unobtrusively. I never committed - or saw anyone else committing - "nuisance or annoyance" to other users of the playing field by simply walking across the land on the well-established routes that I sincerely hope will now be officially recognised and protected by this Committee with DMMO registration. Thank you.

22 November 2024

Witness Statement in support of 'Public Rights of Way' for Stoke Lodge Parkland

Mrs Polly-Anna Cockerham
7 South Dene, Stoke Bishop, Bristol BS9 2BW
Chartered Tax Adviser

I am writing this statement to show the routes time my family have enjoyed across Stoke Lodge Parkland.

I moved into South Dene in October 1998. My family have enjoyed a nice green walk to Stoke Lodge Adult Education Centre, Shirehampton shops and down to Blaise mainly from the West Dene entrance, although occasionally from the top of Ebenezer Lane.

I use the route from the West Dene entrance down to Cheyne Road as a regular route to the shops on Shirehampton Road and my dentist on Bell Barn Road. This is a very safe route with my two girls.

The route across from the West Dene entrance to Stoke Lodge Adult Education Centre is also used by us when it is time to vote or if there is an exhibition or event on in the building.

On the occasion of having younger children visit the route from West Dene to the play area on Stoke Lodge is the safest and quickest route.

The field is also used by me for daily exercise, taking a circular route around the field from the West Dene entrance.

I believe that the facts stated in this witness statement are true,

Signature:



Date: 22 November 2024

I would like to record that I regularly use public rights of way across Stoke Lodge and would like them to be recorded as such (public right of way).

The one that I use the most is across the parkland from West Dene to Stoke Lodge where I attend an adult education class. I really enjoy the privilege of walking away from the traffic and appreciate the different seasons in the changes in the trees. It definitely improves my well-being, regardless of the weather.

Can you please forward my statement to the Public Rights of Way and Greens Committee before its next meeting.

Yours,
Lucy Swithinbank

Stoke Lodge

I strongly support registering public rights of way through Stoke Lodge playing fields. I use these routes regularly for example when I drop my bike off at Insight Cycles then run home to Coombe Dingle.

It was very disappointing when the fence blocked my route and meant I had to skirt around the edge of the field. I feel very strongly that there should be public access to the whole green space.

Jenny Grenfell-Shaw (Dr)

Public Forum Statement by Ewen MacLeod of South Dene BS9 2BN
to Bristol City Council Public Rights of Way and Greens Committee meeting 27 November
2024

I have lived in South Dene since 2013, and other members of my family have lived in nearby Ebenezer Lane since 1997 - and continue to do so right up to the present day. My experience of making use of the footpaths across Stoke Lodge is thus a smaller part of a much larger history that extends all the way back to 1947. Earlier today while walking on those paths I had a conversation with an older resident (I am 71 myself) who reflected sadly on the number of even older local people who have passed away in recent years, and are no longer able to share their own personal memories of that heritage and usage of Stoke Lodge. So I hope you will accept my comments on their behalf as well.

The shorter footpath from West Dene over to Stoke Lodge house and the Shirehampton Rd is a highly important umbilical shortcut for anyone who wants to get from the Coombe Lane/ West Dene area over to the shops at Trym Parade and the #4 bus route on the Shirehampton Rd. It is also an important asset for parents who need to escort young children each morning to the Stoke Bishop C of E primary school in Cedar Rd. When Cotham School erected their fence in Stoke Lodge in early 2019 they made a point of keeping the security gates padlocked firmly shut throughout the 8 a.m./ 9 a.m. school run period - forcing local parents and children to make a much longer detour around the field; even though Cotham School's own use of Stoke Lodge for PE never began before 9.30 a.m. This obstructive behaviour of keeping the gates locked even when Cotham School were not using the field for days on end included local and national election days, when Stoke Lodge was in use as polling station - which meant that local residents, many of whom were elderly or had complex health and mobility issues, were forced to make long detours in order to exercise their democratic right to vote.

One interesting aspect of the footpath between West Dene and Stoke Lodge house is that it follows the line of the old carriage driveway leading from the West Dene cottages (which used to be the Lodge gatehouse) up to the house. During hot summers, that old driveway reappears like a ghost in the form of well defined yellow parch marks - an example of what is known as 'heatwave archaeology' in which the lines of old foundations below the soil reappear. A vivid reminder of the historical nature of this particular section of the footpath system, and a rebuttal to anyone inclined to dispute its existence.

The longer sections of footpaths running through Stoke Lodge in a N/S direction between the Cheyne Oak, and the Druid Hill roundabout are a key part of the amenity of this area, and also a boon to anyone who simply wants to enjoy this green space, or perhaps take a child round to visit the play-park on the Shirehampton Rd side. Once again local residents had to endure years of spiteful obstruction of this important footpath after Cotham School quite deliberately installed an access gate in the fence at the Cheyne end some fifty yards to the west of the Cheyne Oak which marks endpoint of the footpath. I was present on the field as a volunteer tree guardian and observer in February 2019 when the contractors were installing the Cheyne gate, and witnessed local residents pointing out to the workmen that the gate was being placed many yards away from where it should have been - the contractors just shrugged and said they were following instructions. When Cotham School subsequently installed electronic gate locking systems, the Cheyne gate was left permanently padlocked because there was no convenient source of electricity nearby to power a traction magnet system.

I do hope that the committee will feel able to follow the recommendations of its advisers, and register the paths on Stoke Lodge as public footpaths, which will help lay to rest once and for all any future attempts by entities like Cotham School to obstruct them.

I have been a user of Stoke Lodge for 40 years, living in Reedley Road. It was a regular area for me to play football there with my son, when he was young. I still regularly walk across the beautiful grass, enjoying the trees, and the open air. I was horrified when fences were put up years ago. There seemed to be no reason for this. There were always football pitches marked there, as we used to use the goals to aim at. If there is/was a problem with dog faeces, then deal with the dog owners. not the general public.

I also understand that there is no legal issue with the idea of school children playing sports there on public access land.

Please enshrine paths with permanent right of way, and respect the strong public access sentiment of local people, and sustain our village green status.

Regards, Ken Wilkinson.

Dear Public Rights of Way and Greens Committee,

I am writing to state that, I fully support registering the long standing public footpaths across Stoke Lodge Playing Fields as Public Rights of Way.

I have lived in the area for over 34 years.

Throughout these years I have regularly used the paths to cross from Shirehampton Road to Cheyne Road to visit friends as well as from West Dene to Shirehampton Road and Ebenezer Path to Cheyne Road and Shirehampton Road.

All use over this 34 years plus period, has been to visit the shops on Shirehampton Road, visit friends and family as well as regular leisure use for exercise.

Of course the erection of the fence by Cotham School abruptly prevented the use of the public paths, causing immense inconvenience.

It is has been marvellous to have the public paths once again be accessible.

Please, ensure these Public Paths used over decades, if not a century or more, are protected for the generations to come, by voting in support of their registration as Public Rights of Way.

Thank you.

Yours sincerely,

Susan Elstob

I am writing in support of the Registration of Footpaths on Stoke Lodge.

My family moved to Rayleigh Rd (BS9 2AU) from Surrey in 1984. Our main attraction to this location was the many green spaces available for our children and our dog. Many of these have now been built on ! We also found that the walk from Rayleigh Rd across Stoke Lodge, to the shops in Stoke Bishop, was a delight compared to other options which were far longer and involved far more hazardous road routes. Our Children could pick Blackberries and wild flowers, and they actually enjoyed the shops in Stoke Bishop knowing that their homeward journey would give them more fun on Stoke Lodge playing field. Their own children are still doing similar walks from Reedley Rd.

I am now 83 years old and I can still manage to walk (with Sticks) on Stoke Lodge 2-3 times a week and also visit friends in Queensgate and Cedar Park which is a short hop from Rayleigh Rd but a long route by road.

Please add my support to the Registration of the footpaths as they have been very much an enjoyable part of our lives for over 40 years.

Hugh Snodgrass

Dear Sirs

I understand you are currently considering formally registering Public Rights of Way across Stoke Lodge.

I would like to record my views for your consideration.

I have lived in Dingle Road, Coombe Dingle for 70 years and have regularly used Stoke Lodge for all that time. Firstly watching and playing cricket for Stoke Bishop cricket club from 1953 to 1980, playing football for Coombe Dingle Boys club in the 1960's and 70's, plus many past and recent informal walks and rambles.

I still regularly use the footpaths outlined on the proposed registration map. Firstly from Cheyne Road to the main house to vote at local and national elections and secondly from Cheyne Road to Druid Hill to frequently visit my barber Salvatore in the village.

These are scenic, traffic free routes and would be sorely missed if they were not available.

I therefore record my support that these footpaths are formally adopted.

Yours Faithfully

Dave Watkins

I would like to lodge my support for footpaths on Stoke Lodge playing fields to be registered as Public Rights of way.

I live at the very end of West Dene and myself and my family have made use of the various footpaths for many years.

We particularly use the path from West Dene to Stoke Lodge House as a route for taking our son to school and back everyday. We also use this route to access the shops and amenities on Shirehampton Road.

We often use the path from West Dene to Parrys Lane as a way of getting to the bus stop on the corner of Shirehampton Road and Parrys Lane and to visit friends who live in that direction.

Having access to these pathways is of material benefit to our lives. When we were excluded from using them by Cotham School's fence we had to navigate through the boggy path around the field which made the journey longer and meant that we would inevitably arrive covered in mud. On two occasions my son slipped on the mud, one time getting his school uniform covered in mud on the way to school, the other time cutting his hand open on the fence as he tried to steady himself.

On behalf of all the people who live in the local area of Stoke Bishop I sincerely hope you are able to preserve our access along these pathways.

Yours faithfully,
Matt Fletcher

Dear Sir / Madam.

I would like you to register the paths at the above Parkland as I, and my family, have used them for many years.

We have lived on Coombe Lane for over 20 years; we regularly walk along West Dene and use the paths to go to the shops on Shirehampton Road.

In addition I attend Bridge courses at the Adult Learning Centre on a weekly basis and always walk, which means walking directly along the path, from one side of the Parkland to the other.

In addition, we used the paths when we walked our eldest daughter to school at Stoke Bishop Primary School.

Being able to use the paths ensures we avoid the busy roads.

If the paths are not registered, we would revert back to using our car.

Thank you in advance.

Yours faithfully,
Allister Simpson

Dear Sir / Madam.

I would like you to register the paths at the above Parkland as I, and my family, have used them for many years.

We have lived on Coombe Lane for over 20 years; we regularly walk along West Dene and use the paths to go to the shops on Shirehampton Road.

In addition I attend Bridge courses at the Adult Learning Centre on a weekly basis and always walk, which means walking directly along the path, from one side of the Parkland to the other.

In addition, we used the paths when we walked our eldest daughter to school at Stoke Bishop Primary School.

Being able to use the paths ensures we avoid the busy roads.

If the paths are not registered, we would revert back to using our car.

Thank you in advance.

Yours faithfully,
Allister Simpson

Dear Sir,

As a local Stoke Bishop resident adjacent to Stoke Lodge I would like to make a statement for the consideration of the Public Rights of Way and Greens Committee at its 27th November meeting. It is as follows:

Three generations of my family have been able to use Stoke Lodge for recreational purposes. Cotham School's fence, erected on the pretext of its being a legal requirement (not true), soon put paid to that!

However, the issue here is the Public Rights of Way across the land, not our recreational use of it. My wife and I, living in Sunnyside, BS9, make particular and regular use of the 'Blue' path (Parry's Lane/Druid Hill to Cheyne Road); also, less often but from time to time, of the 'Green' path (Stoke Lodge to Cheyne Road). It is a great convenience to be able to do so, and there is surely no good reason for Cotham School's blocking of the rights of ways with its fence and with its intransigent opposition to community use of the land generally. (In the course of regular walks we often find ourselves crossing the other putative rights of way as well.) I think I can say that as a community we of course support Cotham School's use of the parkland for the sporting recreation of its pupils; but we do not understand why this is being accompanied by attempts to exclude everyone else from having access; and why the abolition of the public paths is being sought.

We urge Bristol City Council to approve the recording of the Public Rights of Way as proposed.

Chris Harries (Mr)

Statement for the Bristol PROWG Committee

Date of Statement 24th November 2024.

My statement is as follows.

As a guide-dog owner living on Coombe lane I have used 2 of the paths regularly (multiple times per week) since 2016. These paths are: From West Dene across the Town and Village Green to Shirehampton rd. I used this for travelling from my home to the shops and back. Also the path from Parrys lane through the Town and Village Green to Cheyne rd. I used this route when I returned from bus journeys to get back to my home on Coombe lane and vice versa from Cheyne rd up to the top of the TVG.

The routes are extremely important to me as they allow me functional routes to and from my destinations, which also incorporated much needed access to nature for myself and my guide dog. When these routes were blocked by the school fence this caused massive, unnecessary problems with my travel; the fencing was put in place with no consultation with local people, no consultation with local disabled people including myself and no impact assessment. As there was no impact assessment of the effects upon local people there was also no mitigation of the detrimental effects of blocking access for disabled people who used these important pathways.

I would like the pathways officially recognised and registered so that my access in the future and the access of other local disabled and non-disabled people is not ever again put at risk.

I would therefore ask that these pathways be registered by the PROWG.

Thankyou

Karen Cole

Local resident.

Dear Team,

I'm writing to express how important it is to our community that the footpaths on Stoke Lodge be registered as public rights of way.

We walked our children across Stoke lodge in order to get to Stoke Bishop CofE Primary school. Our route starts at the bottom of the field, walking along Ebenezer Lane and crossing over to Stoke Lodge house and the main entrance/exit.

This has been a safe, enjoyable route, providing exercise and time in nature. The footpaths also avoid the busy 'A' road, which brings heavy traffic from the portway and motorways into the centre. Using Stoke Lodge is a welcome, unpolluted walk for young families, to access school or the shops. It is important these are registered for present and future generations for the city to work towards meeting its green targets, and to avoid forcing families to drive relatively short routes. These footpaths encourage and embed the importance of daily exercise, rather than reliance on driving, which starting when children are small can mean lifelong benefits.

When the fence was erected, the very limited space around the field made the journey longer and difficult, in the wet weather the narrow path left, quickly resulted in a bog which meant any walk was very muddy and not an option.

Please register the footpaths as public rights of way to ensure future generations have access.

Thanks for reading this short statement.

Della and Simon Hooper

Dear Committee,

please see below our Statement of use of footpaths at Stoke Lodge, Stoke Bishop.

STATEMENT

(References to Routes are as described page10 & Plan 1 page35 of the CommitteesAgenda Report).

We are Mr M.J. & Mrs L.O. Sheehan.

My wife & I have lived opposite Stoke Lodge at 41, Queens Gate since March 1997 to the present.

We & our family made frequent use of the footpaths at Stoke Lodge Parkland throughout this period.

Even prior to this we lived in nearby Stoke Lane, Stoke Bishop since 1978 & during that period we also used the footpaths at Stoke Lodge.

Route 2

From home we would walk from Shirehampton Rd (via route 2) past Stoke Lodge house across the parkland exiting at West Dene to visit friends in South Dene & beyond. Other times we would use the same footpath to catch the bus in Coombe Lane. We also used this route to walk to Canford Cemetery or Canford Park via a footpath passing the University of Bristol Sports Ground.

Route 3

Walking from home then Shirehampton Rd past Stoke Lodge House we would take the footpath (route 3) to Cheyne Rd to visit family living in nearby Poplar Avenue. Other times we would use this same footpath as a short cut to walk to Combe Dingle via Bell barn Rd & Combe Bridge Avenue.

Route 4 & 1

When returning home from further afield after visiting friends & family via Stoke Paddock Rd or via Cheyne Rd we would periodically vary the route home by walking along the footpath route 4 & then route 2 or alternately towards the end of Parry's Lane (route1) to

enjoy the scenery, trees & & birdlife before exiting at 'D' & then returning home via Parry's Lane then Shirehampton Rd.

Prior to moving to Queens Gate while living in Stoke lane we used to periodically walk to the shops in Shirehampton Rd & the nearby river Trym valley walks. We would walk from Stoke Lane via Stoke Grove / Red House lane / West Dene transverse Stoke Lodge taking the footpath (route 2) & exiting at the main exit at Shirehampton Rd. We also used the same route to walk to Stoke Lodge to use the further education / hobby/ cookery facilities over many years.

After enjoying uninterrupted use of the footpaths for many decades it was incredibly annoying for the footpaths to be shut off by the erection of fencing by Cotham School.

We would very much wish for the Committee to approve the permanent Registration of Stoke Lodge footpaths.

Yours sincerely,

M.J. Sheehan & Mrs L.O. Sheehan

Dear PROW Committee

Please accept this email reference

the importance of the continued ability to use the Public Rights of Way through Stoke Lodge in Stoke Bishop.

We are a local family and every day we use the entrance at Cheyne Road and either cycle or walk across Stoke Lodge to exit at the Adult Learning Centre as a safe way to travel to our children's school Stoke Bishop C of E primary school. This allows us to get to school safely without the use of a car.

I also use the whole length of Stoke Lodge to walk between the Cheyne Road and Parrys Lane entrances to walk to and from work.

I walk through Stoke Lodge on a very regular basis as most of my friends live around the Lodge and we walk through to each other's houses to socialise.

It is very very common that I will use the PROW paths all over Stoke Lodge to walk and relax and talk to my TRIM counsellor due to the nature of my work.

As a family we use the PROW paths to walk or cycle to the play park which our children use several times during the week come rain or shine.

We as a family were unable to do any of these things when the Lodge was fenced off. We hope and pray Stoke Lodge is left unfenced and the thousands of people who rely on it day in and day out, can still access the PROW through it, and are able to use the full size of the green space.

Many thanks and kind regards for reading my statement.

Robert Wilton

Good morning,

I'd like to express my support for having the footpaths on Stoke Lodge playing fields officially designated as Public Rights of Way.

My family and I live at the very end of West Dene and have been using these footpaths for many years.

In particular, we frequently use the path that runs from West Dene to Shirehampton Road as part of our daily routine to walk our son to and from school. Additionally, the path from West Dene to Parrys Lane is a vital route for us to reach the bus stop at the Shirehampton Road/Parrys Lane junction and to visit friends in that direction.

These paths provide significant value to our daily lives. When access was restricted by Cotham School's fence, we were forced to use the boggy path around the field, which not only extended our journey but also left us covered in mud.

I hope that access to these pathways can be safeguarded for the benefit of everyone living in the Stoke Bishop area. They are an important resource for the community, and preserving them would make a real difference to our lives.

Kind regards

Emily

Statement in support of registration:

I regularly walk a circular route from my house in Druid Rd to the shops in Shirehampton Rd, returning via Stoke Lodge (entering at the Cheyne Rd end, exiting at the Parrys Lane end). This uplifting walk across an open space was spoilt by the erection of the fence, and I was very pleased to see the fence removed. I would urge the Public Rights of Way and Greens Committee to register the four public rights of way across Stoke Lodge.

Ben Willcocks

Dear Sirs

Extraordinary Meeting, Public Rights of Way and Greens Committee - Wednesday, 27th November, 2024

We have lived in the area for almost 50 years, both in our present address and previously in Stoke Grove. During that time the footpaths over the playing fields have been invaluable to my wife and I, either during exercise or for convenient access to friends who live in the adjacent area on the other side of the playing fields. We also cross the fields on the way to the shops/hairdresser at the bottom of Druid Hill or those on Shirehampton Road.

It goes without saying that whilst the fencing installed by Cotham School was in place around the playing fields preventing public access it was extremely frustrating and, for our part, very inconvenient.

We sincerely hope/trust that the committee will agree to the registration of these paths as formal rights of way for the benefit of local residents in perpetuity.

Yours faithfully

Keith & Gill Edwards

Dear Members of the committee

I would like to comment on the rights of way across the land at Stoke Lodge. I have lived in Cheyne Road for 25+ years and I rely on the rights of way to exercise and go about my regular activities.

I use the right across the land from Cheyne Road entrance to Stoke Bishop village for shopping and access to the Post Office as well as for visiting a friend in Eastmead Lane. On moving to the area it was possible to see the pathway across the land and take the right route.

When going to Stoke Lane for prescriptions as well as the cashpoint which is situated there I use the route from Cheyne Road into Ebenezer lane (at the top end by Cross Elms Lane)

When the restrictions caused by the fence were in place, I needed to skirt the field and make my journey much longer. I sincerely hope that the committee will follow the recommendations and grant that the ancient rights of way be protected.

Mary Alpass

Statement regarding my use of footpaths on Stoke Lodge.

I was a resident of Bell Barn Road from 1968 until I moved to Cheyne Road in 1985. Apart from using Stoke Lodge for enjoyment, I would often use the pathways as a shortcut from home, via the Cheyne Road entrance up to Parrys Lane and onwards to see friends or to walk my daughters back from the Grove playing fields after school. I would also walk across to the adult learning centre and onwards either to see a friend on Druid Hill or, more often, to the post office, grocer's shop, or off-licence at the bottom of Druid Hill. I would return via the same route.

Being a slightly shorter journey from Cheyne Road, once we moved there in 1985 this was quite a regular walk for me although use declined as I got older.

I am so very pleased that, at last, these important pathways are being recommended for registration. I fully support this as it will guarantee the availability for the constant use they still get by people going to and from shops, bus stops, and social meetings for the future.

Stella Creer.

Dear Public Rights of Way and Greens Committee,

I am writing to express my support for the registration of the four public rights of way at Stoke Lodge. Having lived in this area for most of my life, I can't overstate how important these paths are to me and many others in the community.

For decades, I've relied on these routes as part of my everyday life. Whether it's walking my children to school, visiting friends or family, or simply running errands to the local shops, these paths have provided an easy and safe way to get where I need to go. They save considerable time and make journeys much safer by avoiding the need to cross busy main roads.

When the fence was put up, I felt both frustrated and cut off. Losing access to these routes disrupted routines and forced me, like so many others, to find alternative routes that were longer and far less convenient.

These paths are not just shortcuts; they are vital connections that bring people closer to their community. They encourage walking over driving and help create a sense of shared space that benefits everyone. I strongly urge the Committee to approve the registration and protect these rights of way for future generations.

Thank you for taking this matter seriously and for considering my perspective.

Kind regards,

Michelle Mason

Dear Committee Members,

As a child brought up in Coombe Dingle and particularly since living in Cheyne Road since 1999, I have frequently used the footpaths across Stoke Lodge Fields.

From the access at the south end of Cheyne Road, where there was a kissing gate in my childhood, I use the path across to the access by the roundabout where Shirehampton Road meets Cross Elms Lane and Druid Hill to walk to the shops in Stoke Bishop Village.

In my childhood I used to walk across and play on Stoke Lodge Fields with friends, who lived in Cheyne Road, Coombe Bridge Avenue and Briercliffe Road, accessing the Fields from the end of Cheyne Road, from Ebenezer Lane and sometimes from the end of West Dene.

I sincerely hope that the paths across Stoke Lodge Fields can be registered for the enjoyment of the people of Bristol and the residents of the neighbourhood.

Yours faithfully

Thomas Henry Cockcroft Alpass

We have lived in Stoke Bishop for nearly 20y years and regularly use the footpaths before the fence was put up.

We would meet up with my daughter and grandchildren to go to the play area.

Crossing the field to go to the Stoke Lodge adults classes.

Walking through to go to our local shops

Using the footpaths many times over many years.

Jenny White

Hi, I have lived in the Stoke Bishop area for decades and regularly use the Public Rights of Way at Stoke Lodge for:

1. Gaining access to Stock Lodge house for Adult Learning from West Dene.
2. Visiting the local shops on Shirehampton Road and Druid Hill.
3. Visiting my daughter in Parry's Close.

The fencing off of these Public Rights of Way is breaking the law and should never be allowed.

Regards,

P.J.White

As a resident of Woodland Grove of 20 years I have used Stoke Lodge Village Green as a vital form of access to the various amenities on both Shirehampton Road and Stoke Hill. These amenities include grocery shops, restaurants, doctors' surgery and dentists).I live alone and rely on the small shops and services in the immediate area which are made entirely accessible as a result of being able to walk across Stoke Lodge Village Green.

In addition, the health and well-being afforded by being able to walk to these amenities as opposed to having to drive everywhere is essential to me.

In the years when Cotham School erected the perimeter fence my self-sufficiency and my health were jeopardized by the access being restricted.

It is clear that the green is used by multiple residents for the same purposes and that the green is central to the local community's access to amenities and well-being.

Joan Littlewood

Dear Sir/Madam,

I am writing to let you know that as a local resident, it is imperative that the Stoke Lodge public rights of way are registered as public rights of way.

These rights of way are used by me every week. I use the West Dene entrance to Stoke Lodge. From there I use the public footpath to Shirehampton Road (either exit). This enables me to get to the Trymwood Express Tesco & Co-op. I also go to the Hideaway for drinks and a meal. Also, that would be the route to our vet. I would also go to the shops on Druid Hill. I would shop at the local store and Amy's winehouse. As well as use the hairdresser and beautician.

During the time Stoke Lodge was fenced off. It caused me major inconvenience to have to use the perimeter.

In summary, I would like to express my support at registering these well used paths at public rights of way.

Yours faithfully

Emma

Emma Geale

Dear Sir/Madam,

I am writing to express my support as a local resident, that the Stoke Lodge public rights of way are registered as public rights of way.

These rights of way are used by me regularly. I use the West Dene entrance to Stoke Lodge. From there I use the public footpath to Shirehampton Road (either exit). This enables me to get to the Trymwood Express Tesco & Co-op. I also go to the Hideaway for drinks and a meal. Also, that would be the route to our local vet. I would also go to the shops on Druid Hill. I would shop at the local post office and Amy's Winehouse.

During the time Stoke Lodge was fenced off. It caused me major inconvenience to have to use the perimeter only.

In summary, I would like to express my support at registering these well used paths at public rights of way.

Yours faithfully

Barry

Barry Geale

Mike & Jackie Whitworth
30 Glen Drive
BS91SB

24-11-2024.

PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE

Dear Committee

In 1998 we were lucky enough to move to Stoke Bishop, about a mile from where my wife's parents and brother lived, but in different locations.

In those younger, fitter days it was great to be able to visit parents without having to use the car, as we'd had no option to do this when we lived in Southville.

A short walk up to Druid Hill roundabout and across the road to enter Stoke Lodge Playing Fields by the mobile mast, then a 'walk in the countryside', down the field to Cheyne Road before reaching our destination in Coombe Bridge Avenue; later in the day to have the uphill walk home.

Great in good weather and still enjoyable even in inclement weather. Though parents passed away that walk continued as a regular part of exercise until the fence went up initially, and latterly through health issues, though it still feels good on the less frequent walks where thousands of feet have previously walked.

Please register these paths so that future generations can enjoy walking them as we have.

Yours sincerely

Mike Whitworth

Whilst I have used all four rights of way applied for over Stoke Lodge parkland regularly over the last 30 years I have primarily used the path from the entry to Stoke Lodge off Parrys Lane across the full length of the field to the ancient oak at Cheyne Road almost daily to get both to and from the shops at Shirehampton Road and to the river Trym to see the Kingfishers and occasional deer.

The stunning open view towards the ridge during all seasons is best absorbed from this direct path and is impossible to see or enjoy from the sides of Stoke Lodge parkland.

I have walked over this path both day and night particularly to get to the ALC evening classes whilst watching the bats and avoiding traffic fumes.

The wonderful elation of walking this route was quashed, with my health and well-being suffering greatly, after the wretched fence was prematurely erected with trips to the doctor over stress relating specifically to the fence and the loss of access to the paths.

It is vitally important for the health of many besides myself that the councilors vote to restore all of the rights of way across Stoke Lodge parkland.

Thank you for your attention,

Kind regards

Judith Brant

Dear PROWG

I wish to record that as a local resident, council tax payer, and tax payer, I want the Public Rights of Way over the village green at Stoke Lodge playing fields registered to protect them for this generation and future generations. As a local resident, living in nearby South Dene, I have often walked across Stoke Lodge from the access near the pavilion, when open, with my children and grandchildren to the nearby play park, and as a pleasant short cut avoiding the busy Parrys Lane and Shirehampton Road toward the shops and amenities on Shirehampton Road. As I get older, I am 76, I value open spaces within the city boundary more and more. Currently I am able to access several on foot or by bike, car or public transport, but there may come a time when my most local village green is the only one easily accessible. I understand the advice is that the public rights of way should be registered, and I hope that you uphold this please.

I must also say that this is only necessary because of the continued intransigence of Cotham School, which, having Academy status, are subject to no one other than the Secretary of State for Education, and certainly not Bristol City Council. Nevertheless they are publicly funded so it is public money they are spending and/or risking through their continued legal actions, which one can only think are in a vain attempt to outspend those fighting for Stoke Lodge Playing Fields in the courts. As someone who spent their entire working life of forty years in Education, in and around schools, including over 30 years in Local Government as an Education Officer, I should be sympathetic to Cotham School. It speaks absolute volumes about their refusal to have any meaningful dialogue about this sorry saga, that I am not.

Yours sincerely

Ken Pattison

I regularly walk from my house. This uplifting walk across an open space was spoilt by the erection of the fence, and I was very pleased to see the fence removed. I would urge the Public Rights of Way and Greens Committee to register the four public rights of way across Stoke Lodge.

Graeme Hogg

I would like to emphasise how much these Rights of Way mean to those of us who use them to get about the locality and avoid slippery pavements and increasingly busy roads.

I have recollections from others no longer alive just how useful these paths were for getting to Cedar Park School, the shops on Shirehampton Road, or Stoke Lodge Centre. Thank you.

Vivien Gellett

For Public Rights of Way and Greens Committee meeting, 27th November 2024

Statement in support of the application to register.

Our family has lived in close proximity to Stoke Lodge since 1984. We have used the footpaths as walking routes from Coombe Lane across Stoke Lodge to access the Adult Learning Centre in Stoke Lodge House, shops and businesses at Sea Mills, and to visit our son and his family when they lived in Stoke Bishop. For recreation, we have used the footpath across Stoke Lodge to Cheyne Road for onward access across Bell Barn Road to further footpaths alongside the River Trym.

During the period when access was blocked by fencing we were unable to reach any of these destinations without significant diversion. The footpaths are of long standing, in continuous use by ourselves for decades, and we request that they be registered by the Public Rights of Way and Greens Committee.

Andrew and Margaret Hiles

To Bristol City Council's Public Rights of Way and Greens Committee

I would like to support the recognition of the four public rights of way across Stoke Lodge.

As a resident of Bristol for nearly 20 years, I have used Stoke Lodge for 3 reasons mainly:

- as a nice place to exercise (usually running/jogging), criss-crossing in all directions, and making full use of that great space
- playing with the kids and the kids' friends: we go everywhere in Stoke Lodge, and often go across from Parys Lane to Cheyne road (back and forth) as 2 families of their friends live nearby (one at each end)
- to cross to visit some very good friends, using the path between the West Dene entrance and Shirehampton road.

I hope you will recognize the public right (and benefit) of the various footpaths.

Cotham School should be ashamed of their truly disgusting behaviour, trying to privatize public land for their benefit. I was really shocked and angered when the fences went up. Greed seems to have no end...

Let's hope councillors will have some backbone fighting that back.

Living in hope

Yvan Costes

To Whom It May Concern,

I have lived in Cheyne Road since I was nine months old, when my parents purchased no 10 in 1974.

As a pre-school child my access route(with my mother) to kindergarten at West Dene House on Shirehampton Road, was via the top of Cheyne Road to Stoke Lodge House and its entrance on to Shirehampton Road. Our GP surgery was also next door. I went to Stoke Bishop Primary in Cedar Park so the route was the same, until my mother passed her driving text in 1980 and bought a car.

I went to Clifton High School for Girls from 1980-1992. The Grove was at that time the School's sports fields. If the last lessons were sports at The Grove, (usually in the summer), I would walk home through the gap at the top of Stoke Lodge's boundary wall and down to the entrance/exit at the top of Cheyne Road, rather than being bused back to school. This was common practice for those of us who lived locally. I had school friends who lived in Druid Stoke Avenue, and on the other side off Coombe Lane. So we were constantly criss crossing to each other's houses, whether that be from Druid Hill to Cheyne Road, West Dene to Druid Hill, West Dene to Cheyne Road etc.

Many years ago there were allotments to the rear of Stoke Lodge House, behind the ALC car park. Our then neighbours opposite, a Mr and Mrs Clarke, had one such allotment. Their route to their allotment was, logically, from the top of Cheyne Road to Stoke Lodge House. Mr Clarke tutored me for French G.C.S.E, and when aware that I was interested in gardening took me to see the allotments via this route.

In the mid 1990s I worked for Thresher Wine Merchants. I worked at several premises during this time, and for a while worked at their Druid Hill store (where the fish and chip shop now is). In good weather and light I would take the route from Cheyne Road to Druid Hill and back.

In the late 2000s I took several art courses at the Adult Learning Centre, and usually walked from home to Stoke Lodge via the direct route from Cheyne Road.

Since owning a car (1991 onwards), I have used the garage in Stoke Bishop Village almost continuously (as has the rest of my family). After dropping a car off I have always taken the path from Druid Hill to Cheyne Road, and vice versa when returning for said car. I have also used the path from West Dene to Shirehampton Road via the entrance/exit at Stoke Lodge House. It's not as vital to me as those who live either side; so it must have been incredibly vexatious to anyone who relied on this connection when Cotham Academy completely blocked this passage, with the construction of a fence a few years ago. When this fence went up I found it extremely frustrating when needing to take the most expedient route across Stoke Lodge parkland; finding myself having to circumnavigate a fence that, in places, forced me to take an undesirable, sometimes narrow and latterly overgrown, route. Muddy and sometimes slippery in winter with the subsequently increased traffic, as we were all forced to walk around the perimeter. Sometimes in half light or darkness which can be unsettling in its confinement, as opposed to the visibility and freedom of movement afforded to walking the pre fence well trodden paths in the open.

I can say with certainty that the footpaths proposed for registration are well established connections across Stoke Lodge, and are vital to the community. To my memory, until Cotham Academy put their fence up, these access routes had never been questioned; they were just there. I feel it is of utmost importance that they are awarded the recommended registration and thereby protection, for now and for future generations.

Alexandra Sarah Macara

To Whom It May Concern,

My husband and I, with our infant daughter, moved to 10 Cheyne Road in 1974.

At that time the local GP surgery was Dr Eastman's on the corner of Shirehampton Road and Cedar Park. When my daughter, and then my son, were of age they attended West Dene Kindergarten, next door to the surgery. They then both attended Stoke Bishop Primary in Cedar Park. In the early years I had not yet learnt to drive, and as my husband was at work during the day, local journeys were by bus or on foot. Thus, the most direct route for us to school or surgery was from the top of Cheyne Road, and then across the field to the Adult Learning Centre and out onto Shirehampton Road.

I also attended some classes at Stoke Lodge ALC so used this route regularly at that time.

Both my late husband and I, and my children, have used the garage in Stoke Bishop village for many years for our cars. When dropping a car off, or collecting, the most direct route on foot is from the top of the field where Druid Hill, Parry's Lane and Shirehampton Road meet, directly down to the Cheyne Road entrance, and vice versa.

We also attended events at Stoke Bishop Village Hall over the years using this route, including ballet classes for my daughter when she was around 5/6 years old, children's birthday parties, coffee mornings and such like.

I feel that it is imperative that these paths are recognised through registration to protect them for our community. From our early years in Cheyne Road onwards, we crossed back and forth over Stoke Lodge, it was perfectly normal to do so to get from A to B.

Dictated to my daughter(Alexandra Macara), on behalf of:

Sylvia, Lady Macara.

I was very pleased to hear that both the independent consultant who reported on Professor Preece's application, and the officer's report to this Committee, have recommended that all the four footpaths on Stoke Lodge be registered. I strongly agree that registration should take place, for the reasons below.

The footpaths across Stoke Lodge have been a convenience and a fact of life that I've observed throughout the nearly 30 years that I've visited the parkland and playing field. But only when I moved to Stoke Bishop in 2005 did I realise how much Stoke Lodge is a hub of community life. These four paths link neighbourhoods, which would otherwise be separated by distance and busy roads, making them into an overarching and well connected, supportive community. Without them, South and West Dene, and Ebenezer Lane, would be distanced from shops and bus stops in Shirehampton Road and from the school. Bell Barn Road, Coombe Dingle and several entrances to Blaise estate would be far less accessible from Druid Hill and Hollybush Lane areas. The fabric of the community would loosen and the structure would crumble, to the detriment of mutual support systems and community cohesion.

I use all these paths at different times for seeing friends around Stoke Lodge and combining that with visiting shops in Shirehampton Road and catching the bus into town. I walk from my house in Shaplands along Hollybush Lane to Druid Hill roundabout, where I cross over to enter Stoke Lodge, take the path down to Cheyne Road and into Bellbarn Road, instead of going a long way round via Stoke Paddock Road. I can return via the path past the pavilion into Ebenezer Lane and the Denes and Coombe Lane and the bus stop. Or I can go across to the Adult Education Centre. And during this time I am likely to meet people and talk to them, hear local news that affects me or someone I know, and cements the feeling of being part of something bigger than myself.

In 2019 a fence was installed that chopped up and disrupted our familiar routes, it was intensely felt that our habitual ways were not being protected. It was isolating and inhibiting and frustrating. We also saw many badger deaths as they were prevented from using their ancestral routes and had to venture onto unsuitable roads with fast traffic, and we felt helpless. Without good, varied ways to communicate and bump into each other, there is no community. We felt ours start to wither while the fence disrupted our paths.

Please ensure that our paths are registered so our strong community can remain resilient and resourceful and supportive and connected.

Thank you.
Kathy Welham

I am writing to ask the Committee to register the footpaths across Stoke Lodge field.

From my home, I regularly use the path from the end of West Dene to the Stoke Lodge Adult Learning Centre to attend education classes. This is a very quick and convenient route for me. When the fence was in place with no access through the field, I either had to take a longer route around the roads or risk the very muddy, slippery path around the fence perimeter and arrive for my class with muddy boots. Both of these other routes took longer and were less pleasant, especially in bad weather. I also use the other paths for walks/exercise.

Please preserve all the paths as public rights of way for everyone to use and enjoy.

Alison Chlebig

Dear PROWG Councillors

Since 2014, I have used each of the paths across Stoke Lodge regularly to access various facilities in the local area, firstly from our house on Shirehampton Road and latterly when we moved to the other side of Stoke Lodge.

The reason for using each path may have changed over the years, firstly yellow being a safe route to the pub and blue to the Druid Hill shops or to see friends, then each yellow, blue, red and green a route to push a pram to local baby and toddler groups, the doctors, into the village and then green for the daily school run to Stoke Bishop Primary or each of the paths to walk the kids to local play dates and local clubs and activities. My children are now 13 and 16 and use the paths regularly themselves to visit friends, go to the shops or a safe route to and from the bus stop.

The only interruption of my use of the paths was during the period that Cotham School erected a fence and locked the community out of this vital, safe, beautiful hub of our community. Our use of the paths, when open, was never challenged, nor see signs to suggest we should not use these very well-worn paths. We just saw hundreds of people doing the same.

If the paths were not accessible, I believe we would have used the car hundreds if not thousands of times over the last twenty years, if these safe routes across our community were not available my kids would certainly not have been allowed to venture out with freedom to visit friends so often and at a young age.

Today, my family use all of the pathways regularly in different ways for different reasons; but always providing us a vital connection to our community, local shops and local business.

Please follow the Inspector and Officers recommendation and register these vital routes which link our community in so many important ways.

Kind regards

Emma Burgess

Dear Sirs

I moved to Sea Mills in 2014 and since that date have used the paths across Stoke Lodge several times a week. I moved to the other side of Stoke Lodge some eight years ago and still they have provided me with a vital connection to so many places in the community and local area.

My use of the blue path was probably the most regular from 2014; walking to work daily or to visit friends and local shops. Yellow was used to walk to the village in Westbury at least a few times a week and then when the children came along we all used each path regularly for different reasons; the green path being used twice a day by the kids and four times a day by myself and my partner for the school run.

My kids are now teenagers and these paths connect them safely to the friends on each side of Stoke Lodge, without them they would never have been allowed such freedom and to have the opportunity to gain independence at such a young age.

The fence being erected had a massive impact on how we travelled locally. It was the reason we got in the car more – without the ability to walk and enjoy a beautiful open space on route to somewhere we found that we didn't bother and just took the car. It is so wonderful to have these vital routes back now – please register these paths so that they are protected for everyone today and for the next generation.

Kind regards

Stuart Huggett

Dear Committee Members

I understand there is a meeting on Wednesday 27th November to discuss registration of 4 PROWs at Stoke Lodge parkland.

Being a local resident of the parkland, I often use these routes to walk from my house on West Dene to visit the local shops and services on Shirehampton Road and Stoke Hill. This helps me keep fit, is great for my mental health, reduces my car usage and puts money into the local economy.

The use of these routes was severely impacted by the recent installation of a fence. A lot of routes around the edge of the fence were treacherous to walk on and could often be unusable in poor weather conditions.

I would strongly recommend that the Council register the proposed routes as Public Rights of Ways as this will be beneficial for the community and wider Bristol users for generations to come.

Best regards

Rolf Hudson

This email is a statement of Diana and Jonathan Wyatt who wish the Rights of Way identified by Bristol City Council's expert over Stoke Lodge to be maintained.

We have lived in the immediate area of Stoke Lodge for 37 years. We have regularly used the rights of way to cross the Stoke Lodge area on all the routes identified by the Council's expert.

In particular Jonathan Wyatt, who is now registered blind/partially-sighted, has found that using the rights of way is much safer than using pavements and roads in the area. He has regularly got off the No 3 bus and carefully made his way to Stoke Lodge having a much safer trip home than following the pavement route. He was much disconcerted when Cotham School erected a series of large fences across the rights of way without any public consultation with the users of Stoke Lodge. He is very glad that some citizens chose to use their common law powers to restore the rights of way. In addition he joins with many others in using the rights of way for recreation which is a much safer place for those with a visual handicap.

Diana Wyatt regularly uses the rights of way in particular to visit Stoke Bishop Village Hall for her weekly Pilates class. She walks with a near neighbour and they feel safe crossing Stoke Lodge rather than navigating the narrows pavement from Stoke Paddock Road up Shirehampton Road where the cars travel too fast these days.

We wish the Bristol City Council Committee to confirm the Rights of Way long established over Stoke Lodge, a great green space for the whole of the community.

We make this statement as a statement of truth knowing the consequences of statements that are invented and made up.



Providing a life-enhancing education that develops the character, talents and potential of every child

ACHIEVEMENT ~ DIVERSITY ~ RESPECT

Headteacher: Ms Jo Butler

Statement to Bristol City Council Public Rights of Way and Green Committee

Wednesday 27 November 2024

Item 5. Public Rights of Way Across Cotham School Playing Fields

Cotham School would like to remind the Committee that they are yet again facing community pressure to take action which renders the use of Cotham School Playing Fields impossible. We are one of the City's largest schools, nearly 1700 students whose school playing fields are at risk due to local community challenges. We have a duty to provide a mixed and balanced curriculum including physical education and also to keep our students safe at school.

Cotham School has a 125 year lease of the playing fields, leased by Bristol City Council to Cotham for education purposes. The land is vested to the City Council for education purposes.

Cotham School deeply regrets that you have decided to hold an Extraordinary Committee Meeting to consider the application for public rights of way across our fields instead of working through the usual Committee cycle, and considering as originally scheduled at a future planned meeting. We do not understand why an Extraordinary Meeting is necessary.

We also regret that the officers report before you does not bring to your attention the objections that Cotham School has to the possibility of public rights of way being confirmed across our school playing fields. The report also makes no mention of the City Council as landowner and their views. Our objections are set out in a letter from our solicitor and supported in the outline objection by our barrister, these submissions are buried in the papers - see pages 809 to 827.

You will see in the solicitor's letter, Cotham School's request for deferral of the consideration of public rights of way until the parallel challenge to the designation of our school fields as a Town and Village Green is resolved through the High Court, due to be heard in January 2025. We seek deferral for reason as follows;

'Insofar as the Council took a contrary view of the latter point in its Public Rights of Way and Greens Committee meeting on 28 June 2023, that conclusion is under active challenge before the High

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Court in Cotham School v Bristol City Council (PT-2024-BRS000009), which is listed to be heard between 27-31 January 2025 (with closing submissions on 10 February 2025). The judgment in that matter will resolve important questions of relevance to this matter (in particular the meaning and effect of the signs). Accordingly, the Council may think it appropriate to await the outcome of that process before resolving whether to make this Order (for public rights of way, now in front of you). We therefore invite the Council to resolve not to make the Order or to place the matter into abeyance pending the outcome of the village green litigation.'

We fully understand that you are considering different legislation in seeking to confer public rights of way across our land, but there are clear overlaps of issues for consideration in Robin Carr's Report in front of you today and the Town and Village Green(TVG) Case and thus we urge you to defer this application until the TVG matter is resolved.

We would also like to remind you that land is in scarce supply in the City and needed for many purposes. Cotham School operates from a relatively small urban site in the inner city, we do not have alternative long-term arrangements to provide the physical education for our students needs and hence we seek to resolve the matter of our playing fields for the long term. Cotham School has the residue of a 125-year lease of the fields at Stoke Lodge, it is vital we protect these playing fields for future generations of students.

Thank you for reading this statement, and we hope that you will give this the attention it deserves and defer the decision on the public rights of way applications in front of you.

Sandra Fryer
Chair of Governors

Joanne Butler
Headteacher

Meeting of Bristol City Council Public Rights of Way and Greens Committee

27 November 2024 - Re: Rights of Way over Stoke Lodge Playing Field

Public Forum Statement for consideration of the Committee Members

By

**Jonathan M M Johnson
7 West Dene
Bristol BS9 2BQ**

I am the joint Owner/Occupier of 7 West Dene, which I have lived in for the last 10 years.

As a child I was born and brought up in Redland and Clifton, Bristol, educated and trained for my professional career here until the age of 25 when I moved away, and returning here when I retired 10 years ago.

During the period 1965 - 1976 I had many friends who lived in Druid Stoke Avenue, Stoke Paddock Road, Bell Barn Road, Cote Park and Shirehampton Road and I used the pathways the subject of this application crossing Stoke Lodge Playing Fields to get to their homes from local bus stops, for recreation, and to reach the shops on Shirehampton Road.

Upon moving into 7 West Dene I regularly used all the paths across Stoke Lodge to get to Shirehampton Road and Druid Stoke Avenue, to attend adult education courses at Stoke Lodge and to get to Cheyne Road and on down to Combe Dingle.

When Cotham School erected their fence around the Playing Fields these pathways were closed to me, causing considerable inconvenience and irritation.

I am aware how important these routes and paths are to many members of the local community, particularly those less fit and mobile than myself.

I urge the Committee to register all the paths shown in the application papers to protect them for our community. Thank you.

J M M Johnson

25/11/2024

Appendix 9

Sauvain on Highway Law (6th Edition), pgs 12-58

01 MAY 2026

Highway Law, Sixth Edition

Sweet & Maxwell

This PDF Contains

[View in ProView: Section 53\(3\)\(c\): The discovery by the authority of evidence, p.494](#)

[View in PDF: Section 53\(3\)\(c\): The discovery by the authority of evidence](#)

Highway Law, Sixth Edition

12. Footpaths, Bridleways, and Byways

Mapping of Public Paths

Section 53(3)(c): The discovery by the authority of evidence

CHAPTER 12

Footpaths, Bridleways, and Byways

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INTRODUCTION

- 12-01** There are four types of public right of way that exist primarily to serve walkers and equestrians: footpaths, bridleways, restricted byways, and byways open to all traffic (BOATs). Such ways are usually less formally demarcated than ordinary roads. They are generally much narrower than full carriageway highways and are seldom made up. There may not even be a marked track. Although the inhabitants at large were liable at common law to repair footpaths and bridleways in the same way as they were required to maintain carriageway highways,¹ the degree of repair was, in practice, never as great. The duty to repair was always related to the kinds of traffic which a highway might carry, and there was, therefore, not the same need to undertake extensive maintenance work in those paths which carried no heavy traffic. A major problem with such public rights of way has therefore always been one of identification.
- 12-02** Footpaths and bridleways in particular have attained further significance over the last century, by providing access into the countryside for the increasing number of ramblers and leisure horse riders. A number of active pressure groups have become established whose aims include the preservation and improvement of the footpath and bridleway network. It was thus out of legislation aimed at improving the access of the city dweller to the countryside that the first attempt came to provide a comprehensive basis for the identification and mapping of the footpaths across the countryside. The Countryside and Rights of Way Act 2000 (the CROW Act 2000) has now established a more general right of access to some areas of open countryside and the Marine and Coastal Access Act 2009 is extending rights of access to coastal land. Access rights are considered in the following chapter. In relation to those areas where the new statutory “right to roam” exists, the importance of public paths as a means of ensuring access to the countryside may diminish.
- 12-03** The main statutory provisions governing these public rights of way are found in Part III of the Wildlife and Countryside Act 1981, as supplemented by the Countryside Act 1968 and Highways Act 1980. In more recent years, there have been changes to limit the use of the public rights of way by mechanically propelled vehicles, and proposals to reform and simplify the process of

modifying the definitive record of public paths. While vehicular rights have been limited, however, the provisions for more general reform are largely unimplemented. Given the complexity of the existing law and procedure, it is unfortunate that proposals for simplification and streamlining in the CROW Act 2000 and the Deregulation Act 2015 have not yet been brought into force.

MAPPING OF PUBLIC PATHS

National Parks and Access to the Countryside Act 1949

The purpose of the 1949 Act and its successors

- 12-04** The National Parks and Access to the Countryside Act 1949 required the councils of counties² to undertake a survey of the public paths within their area and to prepare a map, to be known as the “definitive map and statement”, of these public paths. There were initially three categories of public path to be recorded on the maps: footpaths, bridleway and “roads used as a public path” (RUPPs). In *R. v Secretary of State for the Environment Ex p. Hood*³ Lord Denning MR explained the purpose of the 1949 Act:

“The object of the statute is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are. Our old highways came into existence before 1835. They were created in the days when people went on foot or on horseback or in carts. They went to the fields to work, or to the village, or to the church. They grew up time out of mind. The law of England was: Once a highway, always a highway. But nowadays, with the bicycle, the motor car and the bus, many of them have fallen into disuse. They have become overgrown and no longer passable. But yet it is important that they should be preserved and known, so that those who love the countryside can enjoy it, and take their walks and rides there. That was the object of the National Parks and Access to the Countryside Act 1949 and the Countryside Act 1968.”

- 12-05** However, it was never the intention of the Act that all public highways in the country should be recorded on the definitive map. In *Suffolk CC v Mason*⁴ Lord Diplock gave his explanation of the purpose of the legislation as follows:

“1. The only classes of users of highways who are intended to be benefited by the recording of public rights of way are those who may conveniently be referred to as ramblers and riders; they go on foot or horseback. Motorists are not among the intended beneficiaries, nor are cattle drovers. 2. Consequently, the only kinds of highways with which the relevant provisions of the Act are concerned are those which are exclusively, or mainly, used either by ramblers alone or by both riders and ramblers. Footpaths are much commoner than bridleways and a much larger part of the electorate are ramblers than are riders. 3. The way in which ramblers and riders are to be benefited is by providing them with an easy and conclusive way of proving their rights to walk or ride on particular routes ...”

The same theme was echoed by Roche LJ in *Masters v Secretary of State for the Environment, Transport and the Region*:⁵

“The intention of Parliament in passing the 1949, 1968 and 1981 Acts is in my judgment clear. That purpose is that county councils should record in definitive

maps and statements ways, including what Lord Diplock (*in Suffolk County Council v Mason* [1979] AC 705, 710A) called ‘full highways or cartways’ for the benefit of ramblers and horse riders so that such ways are not lost and ramblers and horse riders have a simple means of ascertaining the existence and location of such ways so that they may have access to the countryside. Parliament intended that ‘full highways or cartways’ which might not be listed as highways maintainable at the public expense under the Highways Act 1980, should be included in the definitive map and statement so that rights of way over such highways should not be lost.”

- 12-06** It is with these purposes in mind that the courts have approached the problems of interpreting the obscurely worded, often unhelpful and changing classification of public paths and byways recorded on the definitive map carrying, or possibly carrying, rights of way for vehicles: first the roads used as a public path (RUPP) and then byways open to all traffic (BOATs). A combination of the CROW Act 2000 and the Natural Environment and Rural Communities Act 2006 has now strictly limited the extent to which unrecorded public vehicular rights may be recorded in the definitive map. Ways which were formerly shown as RUPPs have been automatically reclassified as “restricted byways”, excluding mechanically propelled traffic. Equally, any rights for mechanically propelled vehicles that might have existed over footpaths and bridleways have been extinguished. Whilst this does not resolve all the problems relating to vehicular usage of those ways which have already been reclassified as BOATs, or even preclude the addition of BOATs to the definitive map where exemptions are met, it will reduce the level of physical damage to the public path network caused by recreational driving.

The preparation of the definitive map and statement

- 12-07** The procedure for preparation of these maps and statements was long and complex. First, the authority was required, in consultation with the councils of county districts and parishes, to prepare a draft map indicating all footpaths, bridleways and RUPPs which, in the authority’s opinion, subsisted or were reasonably alleged to have subsisted at a specified date.⁶ Notice of the preparation of the draft map was to be published. Provision was made for the lodging of objections. There then followed a hearing by a person appointed by the authority to determine those objections, often a somewhat cursory affair conducted by a local authority officer. Where, in response to objections, a modification was made to the draft map by the addition or the deletion of a path, a further publication, objection and hearing process was necessary in relation to each such modification. A person aggrieved by a decision taken after this stage of the process, involving the omission or deletion of an alleged

path from the map, then had a further right of appeal to the Minister.

- 12-08** Once the objection and appeal procedures belonging to this stage were completed, the authority was required to prepare a provisional map and statement, containing the particulars making up the draft map, together with any modifications made to it.⁷ A publication process was again prescribed. A right of appeal to quarter sessions and subsequently to the Crown Court⁸ was available to a landowner who disputed the existence, extent or route of a path crossing his land.⁹ Only after the expiry of the time for an appeal, or the determination of such an appeal, could the authority finally prepare its definitive map and statement. A final right of challenge to the High Court, on the grounds that the map or statement was not within the powers of the Act, or that some procedural irregularity had occurred, was granted by Pt III of Sch.1 to the Act.¹⁰

- 12-09** The 1949 Act also required the authority to keep its definitive map under periodic revision, having regard to events that had occurred at any time between the date on which the definitive map was based and the date of the review.¹¹ The only events that justified such a review, however, were the creation or extinguishment of rights of way in the intervening period, and the discovery of new evidence which would have required the authority, had it then been preparing a draft map, to show a highway of a particular description on the map that was not in fact shown. The Act, therefore, allowed for the alteration of the map by the addition of paths mistakenly omitted or under-recorded, but not for the removal of paths wrongly recorded.¹² A similar process of hearing and determining objections was applicable to revisions in the same way as to the original map.¹³

Countryside Act 1968

- 12-10** The Countryside Act 1968 modified the procedure for the preparation and revision of definitive maps in a number of ways.¹⁴ The procedure for the revision of a map was amended to allow for a definitive map to be revised, on the discovery by an authority of new evidence, or of evidence not previously considered by the authority, that there was *no* public right of way of the sort shown on the definitive map or to change the particulars shown in the map or statement. The process of review was also simplified to avoid the three stages of draft, provisional and definitive map preparation, and the procedure for dealing with objections was itself streamlined.¹⁵ The 1968 Act also required a special review of all RUPPs to be carried out, with a view to reclassifying them as footpaths, bridleways or BOATs.

Local Government Act 1972

- 12-11** Schedule 17 to the Local Government Act 1972 extended the duty to prepare definitive maps to the councils of the new administrative counties. It followed, therefore, that these new councils inherited, within the new county boundaries, areas that might be in different stages of preparation or review of the definitive map. A chaotic situation, therefore, could potentially have

arisen, especially within the new metropolitan counties. The 1972 Act attempted to deal with this situation. Whilst the county councils were permitted to retain the adoptive nature of the 1949 Act in those parts of the county which formerly consisted of a county borough and which had not adopted the provisions of the 1949 Act, the county council was placed under a duty to concentrate on the preparation of the first definitive map or maps before continuing with any reviews that might already have been commenced within the county.¹⁶ Once the council's area was covered by a definitive map or maps, a review of the whole of the county was to be carried out. The county council was also permitted to abandon surveys that were in the earlier stages of preparation and to start again.¹⁷ Schedule 17, therefore, provided a way through the confusion faced by county councils that had inherited maps in varying stages of preparation. However, the process of bringing the whole of a county up to the same level remained cumbersome and time-consuming.¹⁸

Wildlife and Countryside Act 1981

- 12-12** Although the 1968 Act simplified the process by which a revision of the definitive map could be undertaken, the procedure for the preparation of draft, provisional and definitive maps was retained insofar as preparation had been commenced before the 1968 Act came into force. Reviews of the definitive map and, in some cases, the preparation of the map itself, still progressed very slowly in some areas. The response was to incorporate in the Wildlife and Countryside Act 1981 provisions to eliminate the need for formal "across the board" reviews, and to establish a more flexible system, whereby the definitive map was to be kept under continuous review with necessary changes being carried out incrementally. The Wildlife and Countryside Act 1981, therefore, repealed those parts of the National Parks and Access to the Countryside Act 1949 concerned with the preparation of definitive maps and replaced them with a much simpler procedure, involving continuous review of the definitive map.¹⁹ The 1981 Act did, however, retain the duty to reclassify RUPPs albeit on a path-by-path basis.²⁰

Countryside and Rights of Way Act 2000

- 12-13** Following the passing of the 1981 Act the performance of local authorities in keeping their maps under review, particularly in relation to reclassification of RUPPs, was uneven, with some authorities having to cope with very large numbers of applications for modification orders. In March 1999 the government published a document entitled "Framework for Action" which, in addition to announcing plans for the creation of a general right of access to open land, indicated an intention to strengthen and develop the system of public rights of way with a view to enabling a more ready response to the changing requirements of recreational use, the needs of land managers, and the development of more sustainable transport.²¹ The Countryside Commission (now Natural England) also produced a series of recommendations as to how the rights of way network might be improved: "Rights of Way in the 21st Century; Conclusions and recommendations (CCP

550)". This was followed by a government consultation paper, "Improving Rights of Way in England & Wales". From this emerged the Countryside and Rights of Way Act 2000 (the CROW Act 2000).

12-14 The CROW Act 2000 removed the duty on surveying authorities to reclassify RUPPs.²² The description "road used as a public path" is no longer used on definitive maps and such roads are now shown as restricted byways.²³ Immediately following the commencement of these provisions the Natural Environment and Rural Communities Act 2006 ss.66-71 came into force. Subject to certain specified exceptions,²⁴ all existing rights for mechanically propelled vehicles on ways not recorded on the definitive map or recorded as footpaths, bridleways or restricted byways were extinguished. All restricted byways have now become highways maintainable at the public expense²⁵ and any private liabilities to maintain them as highways have been extinguished.²⁶ Existing limitations and private vehicular rights over these ways were unaffected. Moreover, the Act creates a statutory right of access to land for the owners and occupiers of premises adjoining a highway.²⁷

12-15 The CROW Act 2000 also introduced a number of important new powers relating to the prevention of continuing obstructions to public paths and allowing for the stopping up and diversion of paths on a number of new grounds. These are discussed in Chapters 8 and 9. The Act places on local highway authorities a duty to prepare, publish and update rights of way improvement plans.²⁸

The proposed cut-off date

12-16 The CROW Act 2000 includes a cut-off date for the recording on definitive maps of certain unrecorded rights of way and for their extinguishment, if not claimed.²⁹ In effect, this means that historic footpaths and bridleways dating back to 1949 and not recorded under the National Parks and Access to the Countryside Act 1949, the Countryside Act 1968 or the Wildlife and Countryside Act 1981 will cease to exist. Statutory extinguishment will also apply to unrecorded pre-1949 higher rights of way (such a bridleway, droveway or motorised vehicular rights) over lesser rights of way that are recorded in the definitive map (such footpaths, bridleways or restricted byways). This is an acknowledgement of the difficulty in establishing whether or not paths were used by the public as of right in the absence of evidence from persons who can claim to have used the paths during the relevant period. A number of claims to historic paths are made on the basis of map and other historical evidence alone even though there is no evidence of current usage of the path and, in some cases, even when there is no continuing physical evidence of the existence of the path. Claims to these historic paths will have to be made before the cut-off date and any existing right of way that was in existence before 1949 will be extinguished. There are a number of exceptions to these provisions.³⁰

12-17 Limited protection was also proposed in the CROW Act 2000 to prevent applications to downgrade to footpath status bridleways wrongly recorded in the definitive map on footpaths on the basis of historic (pre-1949) evidence. Under, the Deregulation Act 2015, the proposed protection was extended to

include any “protected right of way”—i.e. footpath, bridleway, restricted byway or BOAT—shown in the definitive map.³¹ Even were evidence to emerge that these rights of way were wrongly recorded, if that evidence relates to before 1949, their removal from the map by modification order after the cut-off date will no longer be possible.

12-18 The cut-off date is currently fixed as 1 January 2026, but this is subject to regulations.³² The prospect of it has already triggered an acceleration of modification applications to add historic rights of way to the definitive map by countryside amenity organisations. It is thought that there will be a large volume of further applications in the period immediately before the cut-off date. The Deregulation Act 2015 provides an alternative order-making power for historic evidence cases, founded upon the consent of landowners, which may simplify the processing of applications.³³ It also addresses the potential duplication in workload for surveying authorities by making provision for them to designate public rights of way for one year post-cut off and for such ways to cease to be regarded as extinguished pending a decision by the authority on whether or not to include them in the definitive map.³⁴ The 2015 amendments also provided safeguards from extinguishment for private rights of way where “reasonably necessary to enable a person with an interest in land to obtain access to it”.³⁵

12-19 It remains to be seen exactly when, and in what form, these measures will be brought into force, however while the short-term effect may be an influx in definitive map modification order applications, after the cut-off date (and subject to any transitional provisions) the number of applications should significantly reduce, and the need for historical and archival research in determining applications will be removed.

The definitive map and statement

12-20 The history of definitive map preparation, overlapping as it does with several stages of local government reorganisation in England and Wales, has resulted in the present surveying authorities having inherited several definitive maps and statements within their administrative areas, possibly at different stages of preparation and prepared under different statutory regimes. This is recognised in the definition of “definitive map and statement” which “in relation to any area” means:³⁶

- “(a) the latest revised map and statement prepared in definitive form for that area under s.33 of the 1949 Act; or
- (b) where no such map and statement have been so prepared, the original definitive map and statement prepared for that area under s.32 of that Act; or
- (c) where no such map and statement have been so prepared, the map and statement prepared for that area under s.55(3).”

The definitive map and statement for “any area” could, therefore, fall into one of these three possible categories. Within any current administrative unit

there may be several definitive maps each relating to the different “areas” that have been combined into the present administrative unit during local government reorganisation. Thus, the definitive maps for which any surveying authority is responsible may have been prepared under the onerous provisions of the 1949 Act in its original form, under the modified procedures introduced by the 1968 Act or under the much shorter procedure contained in the 1981 Act. For the time being at least the “definitive map and statement” may in some areas, in practice, consist of a number of maps and statements prepared at different times under different regimes.

12-21 The CROW Act 2000 addressed this problem by allowing authorities to consolidate the information on the various maps and statements that relate to their present administrative area into a single map and statement. Section 57A of the Wildlife and Countryside Act 1981³⁷ provides that where different definitive maps and statements relate to different parts of a surveying authority’s area, the authority may, if it appears to it expedient to do so, prepare a map and statement

comprising copies of so much of each definitive map and statement as relates to the authority’s area. This map and statement will then become the definitive map and statement for its area for the purposes of the 1981 Act, with a new relevant date.³⁸ An authority will only be able to exercise this power where it has definitive maps and statements covering the whole of its area which have been prepared in compliance with the provisions of ss.53(2) and 55 of the 1981 Act. It cannot exercise this power where the definitive map and statement relating to any part of its area is the subject of a review under s.33 of the 1949 Act and which review has neither been abandoned in pursuance of a direction under s.55(1) nor been completed. Following the making of modification orders an authority may also prepare a copy of the map as modified which will then be treated as the definitive map and statement for that area.³⁹

12-22 The definitive map is required to be at a scale of not less than 1:25,000 but it may contain inset maps for particular areas at a larger scale.⁴⁰ The notation to be used for indicating different classes of paths is prescribed by regulations.⁴¹

12-23 The statement that accompanies the map is required to record the “relevant date”, for the purposes of the map, together with particulars as to the position and width of the path and any limitations or conditions affecting the public right of way. The “relevant date” is the base date of the survey from which the map has been prepared or modified, or in some cases, a date shortly before a consolidated map was prepared. This date must have been no earlier than six months before the date on which notice of the preparation of the draft map or review was published in the case of maps prepared under the 1949 Act provisions, not earlier than six months before the preparation of the map in those cases where the map is prepared under the provisions of the 1981 Act⁴² and not earlier than six months before the date of preparation of any consolidated map for the area.⁴³ Where the map is modified by an order under s.53(4), the order itself must prescribe the “relevant date”, which must not be earlier than six months prior to the making of the order.⁴⁴ So far as the other

details are concerned, there remain discrepancies between different authorities as to the amount of detail included in the statement. Little statutory guidance is provided on this matter. There is no requirement that the statement should be in any particular form so long as it contains the prescribed information.⁴⁵

Conflict between the map and the statement

- 12-24** Where there is a conflict between the statement and the map itself the Wildlife and Countryside Act 1981 provides no express guidance as to which is to prevail.

In *L.E. Walwin & Partners Ltd v West Sussex CC*⁴⁶ it was stressed that the map and the statement must be read together. In *Norfolk CC v Secretary of State for the Environment*⁴⁷ Pitchford J was faced with an inspector's decision on a modification order that had attempted to address a conflict between the definitive map, which showed the position of a path along one alignment, and the statement, which gave particulars indicating another alignment. The modification order had opted for the route as described in the statement but the inspector had refused to confirm the order on the grounds that the conflict between the map and the statement could not be resolved.⁴⁸ The first issue to be considered was which of these routes should be taken to be the route conclusively recorded by the definitive map and statement. Pitchford J took the view that:⁴⁹

“the correct approach to interpretation of the definitive map and statement must be a practical one. They should be examined together with a view to resolving the question whether they are truly in conflict or the statement can properly be read as describing the position of the right of way. If they are in conflict, then the map must take precedence since the discretionary particulars depend for their existence upon the conclusiveness of the obligatory map. Unless the statement can properly be interpreted as describing the same footpath as that shown on the map, then the statement cannot be regarded as conclusive evidence of the position of the footpath shown on the map. The question whether the statement does describe the position of a footpath shown on the map is, I accept, a matter of fact and degree. That the statement purports, by reference to the same footpath designation number, to specify the position of a footpath similarly designated on the map is some but, in my view, inconclusive evidence that it in fact does so.”

In considering whether there was an irreconcilable conflict between the map and the statement, however, Pitchford J cautioned:⁵⁰

“the judgment whether the statement was describing the position of the footpath marked on the map need not require the precision of a slide-rule.”

With this in mind it should be remembered that the position of paths on the definitive map is often marked by a thick line on a small-scale map. The

potential for inaccuracy in determining the precise line of the path is, therefore, significant.⁵¹

12-25 In the *Norfolk* case the court went on to hold, however, that when considering an application for a modification order seeking to resolve the conflict between the map and the statement there is no presumption that either should take precedence. All the evidence had to be looked at together:

“What is required at review is, in my judgment, simply a consideration which (or which other) route, on a balance of probability, is correct, if any, in the light of all the relevant evidence, including the terms of the map and statement.”

In *Kotarski v Secretary of State for the Environment, Food and Rural Affairs*⁵² this approach was applied to allow for a modification of the Definitive Map to show a short spur to a footpath described in the statement but omitted from the map itself.

12-26 The *Norfolk* case was concerned with the question whether the description in the statement could be said to refer to the same footpath shown on the map. In *Edgar Ernstbrunner v Manchester CC*⁵³ the issue was how to resolve an apparent conflict between the definitive map and statement in relation to what was agreed to be the same footpath, namely the omission from the definitive statement of any reference to the divergence of the footpath from a private road and over a line of setts on the edge of the landowner’s property when such a route was consistent with the line shown on the definitive map. The statement had also omitted to mention the agreed fact that the path also passed through a farm-yard which the evidence suggested was probably gated. Lloyd Jones J took the view that:⁵⁴

“These matters provide strong support for the view that the draughtsman of the definitive statement was highly selective in the information which he provided ... He has failed to describe or define in any way the position of the footpath as it crosses the farmyard. A definitive statement is conclusive evidence of the matters it positively states. However, it is possible for a definitive statement to omit information and therefore not to be comprehensive in describing the full route.”

No significance, therefore, could be ascribed to the omission of any mention of the line of setts and the presence of a stile and the Crown Court below had been entitled to find that the definitive map showed the path following the line of setts. Whilst this case establishes the obvious point that a definitive statement cannot be conclusive of matters that it omits to mention the fact that the statement omits to mention obstructions such as stiles and gates must nonetheless carry some evidential weight as to whether those obstructions existed at the time the path was surveyed and added to the definitive map. Unfortunately, however, the level of detail on definitive statements does vary greatly.

Copies of definitive map and modification applications

Copies⁵⁵ of the definitive map and statement for any area, together with all

relevant modification orders, must be kept available for inspection free of charge at all reasonable hours at one or more convenient places in each district,⁵⁶ and, so far as is practicable, within each parish, comprised in the area to which the map and statement relate.⁵⁷ Authorities now have a duty to keep a register, in both electronic and paper form, of modification order applications⁵⁸ containing, amongst other prescribed details, the name of the applicant,⁵⁹ the nature and subject of the application and information relating to the disposition of the application.⁶⁰

Duties of the surveying authority

- 12-28** The body with duties in relation to the definitive map and statement is the “surveying authority” for any area,⁶¹ although under the Wildlife and Countryside Act 1981, surveying authorities are not required to carry out any kind of systematic survey. The Act imposed three principal duties on these authorities. First, where there is no definitive map for any part of its area, the surveying authority is under a duty to prepare a definitive map and statement using the modification procedures in the Act that will then serve as the definitive map and statement for that area. Second, where there is a definitive map and statement for its area, the surveying authority is to make any requisite modifications as soon as practicable after the commencement date of the Act, and is thereafter to keep the definitive map and statement under continuous review. Finally, the surveying authority also had the duty to carry out a review “of such of the particulars contained in the map and statement as relate to roads used as public paths” and to make modifications reclassifying these paths—this duty has now been superseded.

To prepare a definitive map

- 12-29** Where, at the date of the commencement of the 1981 Act,⁶² no definitive map had been completed by an authority for any part of its area,⁶³ or where a review of the definitive map was still in preparation, the Secretary of State has power, after consultation with the surveying authority,⁶⁴ to direct the authority to complete the survey or to review or abandon it, either wholly or partially.⁶⁵ Where the authority is directed to abandon a survey or review, it is obliged to prepare a map and statement which is then to become the definitive map and statement for the area, by means of a modification order made under the Act. The authority is required to incorporate into that map and statement such work as had been completed prior to the commencement of the 1981 Act and which had not been objected to within the prescribed period, together with any determinations by the authority or the Secretary of State which had become final.⁶⁶

To keep the definitive map and statement under review

- 12-30** Section 53(2)(a) requires the surveying authority “as soon as practicable”

after the commencement date for the 1981 Act to make such modifications as appear to it to be requisite to the map and statement in consequence of the occurrence “before that date” of any of the events specified in s.53(3). The modifications are made by order and follow the procedures discussed below.⁶⁷ Essentially this provision was designed to allow the authority to bring the map and statement up to date using the new procedures introduced by the Act. It also has the effect, however, of allowing applications for modification orders to be made based upon events that have occurred before the commencement date of the Act.

12-31 The continuing duty imposed on the surveying authority by the 1981 Act, however, is to keep the map and statement under continuous review as from the commencement date of the Act. The authority is to achieve this by the making of modifications to the map as soon as is reasonably practicable after the occurrence of any of the events specified in s.53(3).⁶⁸ This requires the authority to make modifications on its own initiative in appropriate cases,⁶⁹ but in general, modifications will be made in response to applications from members of the public following the procedures set out in Sch.14 to the Act.⁷⁰

12-32 Basically the “events” set out in s.53(3) fall into five categories namely: (i) the stopping up, diversion, widening or extension of any existing path under statutory powers; (ii) the alteration of the status of any highway under statutory powers; (iii) the express creation of a new public path (for example, under a public path creation order or agreement or by simple dedication and acceptance); (iv) the expiration of such a period of public use of a way as would give rise to a presumption that a way has been dedicated as a highway (either under s.31 of the Highways Act 1980 or at common law); and (v) the discovery by the authority of evidence which, when considered with all other evidence available to it, shows that a right of way has been omitted from or included in the map in error or inaccurately. It is important, however, to look at each of the events as they are set out in the statutory provision separately. These various grounds are discussed in more detail below.⁷¹

The former duty to reclassify RUPPS

12-33 The Wildlife and Countryside Act 1981 initially required that surveying authorities carry out a review to reclassify those rights of way which were shown on the definitive map as roads used as a public path (RUPPS). This requirement has now been removed and replaced by the automatic reclassification of RUPPs as restricted byways.⁷² The Natural Environment and Rural Communities Act 2006 has largely extinguished rights of way for mechanically propelled vehicles over footpaths, bridleways and restricted byways.

12-34 It was the Countryside Act 1968 which had first required that this reclassification be carried out. The purpose of reclassification was to have these RUPPs described in the definitive map as footpaths, bridleways or byways open to all traffic.⁷³ The definition of “road used as a public path” in the National Parks and Access to the Countryside Act 1949 defined these ways as being:

“a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used.”

The effect of this definition appeared to indicate that the road in question, being a *highway* other than a public path, must be a cartway (carriageway), since this was the other main classification of highway⁷⁴ (other than footpaths and bridleways) that was known to the law. Section 32(4)(b) of the 1949 Act, however, went on to say that the inclusion within the definitive map of a RUPP was to be conclusive proof:

“that there was at the said date a highway as shown on the map, and that the public had thereover at that date a right of way on foot and a right of way on horseback or leading a horse, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than the rights as aforesaid.”

The other public right of way that could have existed would principally have been the public right of cart or carriageway. It seems, therefore, that whilst a surveying authority would have had to believe that the RUPP was a public carriageway highway in order to put it on the map in the first place, the map was not conclusive as to the existence of any greater rights over it, other than those of foot and bridleway. At the date of any reclassification, however, a road that had previously only carried footpath rights might have been used by horse riders in accordance with the designation on the definitive map for many years. To confuse matters further, some local authorities had included, as RUPPs, in their definitive maps, roads which were not public cartways or carriageways, but which were private roads carrying public rights of way by foot or on horse.

12-35 In *R. v Secretary of State for the Environment Ex p. Hood*⁷⁵ a RUPP was, as the result of a special review, downgraded to a footpath. This was challenged by the British Horse Society, which alleged that it should have been reclassified as a bridleway. The Court of Appeal held that since a RUPP would have been conclusively presumed to have carried rights of bridleway as well as on foot under the National Parks and Access to the Countryside Act 1949, it was necessary, on a special review, for there to be positive new evidence to the effect

that there was *no* public right of bridleway, before the path could be reclassified as footpath. Where the evidence was inconclusive as to the extent of the public right of way, the reclassification had to be as a bridleway. The view was expressed that the 1968 Act could, however, be construed as permitting the downgrading of a RUPP by the extinguishment of vehicular rights (in relation to which the map had never been conclusive) but not as involving the loss of the right of bridleway. This view did not take account of the provision in s.32(4) of the 1949 Act (and now in s.56 of the 1981 Act) that the designation on the definitive map was without prejudice to the existence of greater rights.⁷⁶

12-36 The 1981 Act also required that RUPPs be reclassified but, in the light of the *Hood* decision, it specified more precisely how the road is to be treated on

such a reclassification. Section 54(3) stated that a road used as a public path was to be shown on the definitive map after such a review:

- “(a) if a public right of way for vehicular traffic has been shown to exist, as a byway open to all traffic;
- (b) if paragraph (a) does not apply and public bridleway rights have not been shown not to exist, as a bridleway; and
- (c) if neither paragraph (a) nor paragraph (b) applies, as a footpath.”

The effect of para.(b), therefore, was to incorporate the decision in *Hood*, thereby requiring the authority to be convinced that the way is not a bridleway whilst the burden was otherwise on the person asserting the vehicular right to convince the authority that there are vehicular rights of way.

12-37 In *Masters v Secretary of State for the Environment, Transport and the Regions*⁷⁷ the issue arose as to what had to be established in order for a way to be shown on the map as a byway open to all traffic. The case involved a modification order. It was argued that for a path to fall within the definition:

“a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used”

it must be possible to say of a given path at the time of its classification or reclassification that it is currently used on foot and on horseback and with vehicles and that the current pedestrian and equestrian use combined must be more than the current vehicular use.⁷⁸ The Court of Appeal, however, held that the definition was not so restrictive and had to be seen in the context of the purpose of the legislation as a whole and in the light of the fundamental principle of highway law that “once a highway always a highway”. Per Roche LJ:⁷⁹

“The definition in section 66(1) has to be read in its statutory context and in particular with the provisions of section 54 and section 56 of the Act in mind. The

whole purpose of Part III of the Act is the ascertainment of public rights of way ... If a public right of way for vehicular traffic has been shown to exist over the road used as a public path, then it is to be shown as a byway open to all traffic. Once that is done then under section 56(1)(c) the definitive map and statement shall be conclusive evidence that there was at the relevant date a highway as shown on the map and that the public had thereover at that date a right of way for vehicular and all other kinds of traffic. It is, in my judgment, clear from those provisions that Parliament did not contemplate that ways shown in definitive maps and statements as roads used as public paths should disappear altogether from the definitive maps and statements simply because no current use could be shown or that such current use of the way as could be established by evidence did not meet the literal meaning of the definition in section 66(1). In my opinion it is much more likely that Parliament intended the way to be shown in the definitive map and statement

so that thereafter, if no current use was being made of the way, ramblers and horseriders would come to know the existence of the way and start to use it. This approach is consistent with the report of the Hobhouse Committee in 1947 on which the 1949 Act was based which in paragraph 21 stated ‘in spite of the maxim “once a highway always a highway” it is a fact that a very large number of rights of way are being lost through disuse ... many have already disappeared. Others have become overgrown and are no longer passable; unless steps are taken before many more years elapse, these rights of way will be forgotten and lost for all time. We consider it essential that a complete survey should be put in hand forthwith so that an authoritative record of rights of way in this country may be prepared before it is too late’.”

12-38 It has also been held that in carrying out a reclassification of RUPPs, a surveying authority, and the Secretary of State, should have been purely concerned with the legal status of the way as proven to the required standard by the evidence before them. The physical suitability of the way to accommodate modern vehicular traffic could not affect the decision.⁸⁰

12-39 Now that the CROW Act 2000 has been brought into force the duty on local authorities to reclassify RUPPs has disappeared and all existing RUPPs have automatically been converted into restricted byways.⁸¹ A restricted byway is essentially a bridleway over which rights to drive vehicles which are not mechanically propelled exist. This means that the definitive map will indicate that there is a right for horses and carts over the way but not for motor vehicles or other mechanically propelled vehicles. As a result of the Natural Environment and Rural Communities Act 2006, save where one or other the statutory exceptions exists, it will not now be possible for anyone to seek to establish that vehicular rights for mechanically propelled vehicles exist over these ways.⁸²

The evidential effect of the definitive map

12-40 The importance of the definitive map is not simply that it maps the footpath and bridleway rights which exist throughout the country, but that the inclusion of a path in the map and statement is deemed to be conclusive evidence of the minimum status⁸³ of the public right of way over that path at a particular date, and also of a number of other matters relating to the path.⁸⁴ The particular date is that specified in the statement to be the relevant date for this purpose or, where the way has been placed on the map by an order, the date specified in that order.⁸⁵

12-41 Where a footpath is shown, the map will be conclusive evidence that, at the relevant date, there was such a highway, as shown on the map, over which the public had a right of way on foot.⁸⁶ Where the map shows a bridleway then the map is conclusive evidence that there was, at the relevant date, a highway as shown on the map, and that the public had over it a right of way on foot and a right of way on horseback or leading a horse.⁸⁷ In both cases, the conclusive nature of these rights is expressed to be without prejudice to the question of whether the public had any greater rights of way over the path at that date.⁸⁸

Where the map shows a byway open to all traffic, the map is conclusive evidence that there was at the relevant date a highway, as shown on the map, and that the public had a right of way over it for vehicular and all other kinds of traffic at that date.⁸⁹ Where the map shows a restricted byway, the map is conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had at that date a right of way over it on foot and a right of way on horseback or leading a horse together with a right of way for vehicles other than mechanically propelled vehicles.⁹⁰ This is again expressed as being without prejudice to any question whether the public had at that date any right of way other than those rights, but following the Natural Environment and Rural Communities Act 2006 the only higher right to which this will generally apply is whether or not there is right to drive animals over the way.

12-42 The inclusion of a path on the map does not prevent the calling of evidence⁹¹ to establish that a path:

- (a) carried greater rights of way at the relevant date than are shown on the map;
- (b) now carries greater rights of way that have grown up since the relevant date;
- (c) no longer carries a particular right of way by reason of the legal extinguishment or diversion of the right of way since the relevant date;
- (d) was wrongly recorded on the map and should be deleted.

Where the map is conclusive evidence of any of the matters described above, then it is also conclusive evidence of any particulars contained in the statement as to the position or width of the way at that date, and as to any conditions or limitations on the right of way.⁹² However, this is again expressed to be without prejudice as to whether the right of way was subject to any other conditions or limitations.⁹³ It seems to follow, therefore, that neither the landowner, nor the user of the path, can dispute the particulars contained in the statement to the definitive map as to width and position (except through the modification order process), but that the landowner may claim that there are unrecorded limitations and restrictions that apply to the path.

The modification of the definitive map and statement

12-43 There has always been a tension between the conclusive effect of the definitive map and the need to ensure its accuracy. The legislative history of the process for altering a definitive map demonstrates a movement towards introducing the flexibility to correct the errors of inclusion as well as the errors of omission.⁹⁴ The tension has taxed the courts on several occasions.

12-44 Where the object of a modification is to remove a path from the map or to downgrade a bridleway to a footpath, a number of problems of interpretation have arisen. Section 53(2)(c) allows for “the discovery by the authority of evidence that there *is* no public right of way”. The Countryside Act 1968⁹⁵ had specifically required that the evidence required to justify a removal of a path should be “new evidence, or ... evidence not previously considered by the

authority concerned showing that there was no public right of way". In *Rubinstein v Secretary of State for the Environment*,⁹⁶ the court drew upon the difference in the tense used in the two statutes and held that, in view of the conclusive evidence provisions of s.56 and the apparent need to look at the situation as at the date of the review, the review procedure could not, therefore, be used to remove a path from the map unless the evidence which was discovered affected the status of the way *after* the original inclusion of the path in the map. The effect of this decision was that s.53(3)(c)(iii) would have had very little meaning or effect.⁹⁷

12-45 In *R. v Secretary of State for the Environment Ex p. Simms and Burrows*⁹⁸ the matter was reconsidered by the Court of Appeal and the decision in *Rubinstein* was overruled. The Court of Appeal took the view that the conclusive nature of the definitive map had to be seen in the context of the mechanisms made available in the Act for its modification. The court drew on remarks of Lord Diplock in *Suffolk v Mason*⁹⁹ in dealing with the effect of the 1949 and 1968 Acts:¹⁰⁰

"The entry on the definitive map does not necessarily remain conclusive evidence for ever. Section 33¹⁰¹ makes provision for quinquennial revisions."

Purchas LJ emphasised that the 1981 Act was concerned with the ascertainment of rights of way rather than with their creation. The duty under s.53 was a continuous one to keep the map and statement up to date and where evidence became available which would indicate an error the surveying authority was under a duty to revise the map and statement accordingly. There was no difficulty in reconciling ss.53 and 56 of the Act once the purpose of the Act was properly understood:

"Parliament never removed the duty to revise and keep the record up to date so that not only changes of status caused by supervening events, e.g. the stopping up of a highway under statute or otherwise; or the creation of prescriptive rights, but also changes in the original status of highways or even their existence resulting from recent research or discovery of evidence should all be taken into account in order to produce the most reliable map and statement that could be achieved."

Evidence can, therefore, be introduced in support of a modification order to remove a path currently shown on the definitive map.¹⁰²

12-46 A similar argument to the effect that the inclusion of a public footpath in a definitive map and statement prepared under the National Parks and Access to the Countryside Act 1949 was conclusive for all time of the status of that path so as to prevent a modification under the 1981 Act based on evidence of prior bridleway use was rejected by the Court of Appeal in *Fowler v Secretary of State for the Environment and Devon CC*.¹⁰³ Farquharson LJ summarised the position as follows:

"While the relevant entry subsists on the definitive map it is conclusive

evidence of the nature of the highway there recorded. *Non constat* that where fresh evidence is later discovered which demonstrates that the record is inaccurate the right of way cannot be altered accordingly.”

The “events” requiring modification of the definitive map under the Wildlife and Countryside Act 1981

12-47 Section 53(3) sets out the “events” the occurrence of which requires a modification of the definitive map and statement. In view of the differences in language it is worth setting them out in full. They are:

- “(a) the coming into operation of any enactment or instrument, or any other event, whereby—
- (i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;
 - (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or
 - (iii) a new right of way has been created 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 or a restricted byway;
- (b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway;
- (c) 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, a restricted byway or, subject to s.54A,¹⁰⁴ a byway open to all traffic;
 - (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or
 - (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.”

In each case the “event” in question is concerned with the status of the alleged public right of way. The modification procedure is not appropriate to test the desirability or suitability of a public right of way of a particular class being established or not established over a particular path.¹⁰⁵

12-48 The relationship of these different “events,” or grounds for a modification, was considered by Glidewell LJ in *R. v Secretary of State for the Environment Ex p. Simms and Burrows*:¹⁰⁶

"I agree with the suggestion made to us in argument, that s.53(3)(a) and (b) relate to events which have happened since the definitive map was prepared. These events may have resulted in a right of way coming into existence where none existed before, or the upgrading of an existing right of way to a right of a wider sort, e.g. by express dedication under paragraph (a) (iii) or by prescription under paragraph (b). Paragraph (a)(i) relates to the happening of an event which results in the extinguishment of a previously existing right of way, shown on the definitive map. Since the common law maxim is 'once a highway, always a highway', such a result can only be achieved by statute, and the events to which sub-paragraph (i) refers as authorising the stopping up or diversion of a highway can therefore only take place under statute.

On the other hand, s.53(3)(c) differs from the preceding sub- paragraphs in that the use of the word 'discovery' suggests the finding of some information which was previously unknown, and which may result in a previously mistaken decision being corrected. This information will normally, if not always, relate to a fact or situation that already existed at the time when the definitive map was prepared. In this way, paragraph (c) is to be distinguished from its predecessors.

If I am right in my view that paragraph (c) is concerned with the correction of mistakes as the result of newly discovered information, in order to be comprehensive, the power of correction must cover three different situations: (i) the addition of a right of way not shown on the definitive map: paragraph (c)(i) achieves this; (ii) the upgrading or downgrading of rights of way shown on the map, but so shown in a wrong category: sub-paragraph (c) (ii) covers both these situations; (iii) the deletion of a right of way which the latest information proves should not have appeared on the map at all: sub-paragraph (c)(iii) by its terms achieves this."

Section 53(3)(a): The coming into operation of any enactment or instrument, or any other events stopping up, etc. highways—legal event orders

12-49 This part of s.53(3) addresses events which have occurred since the relevant date.¹⁰⁷ The grounds for a modification of the definitive map which are specified in s.53(3)(a) involve the coming into operation of any enactment or instrument, or any other event, with certain specified effects on a highway already shown in the map and statement. The first group of these effects is where a highway shown in the map and statement has been authorised to be stopped up, diverted, widened or extended.

12-50 As the effect of s.56 is to make the definitive map conclusive evidence of the existence and line of a path as at the "relevant date" it would seem that a modification order is not essential before a stopping up or diversion order made after that date under other statutory powers can have evidential effect.¹⁰⁸ The purpose of a modification order based on this "event" is to bring the definitive map into line with the legal change brought about by a stopping up or diversion order that has occurred since the map was prepared. To avoid

the delays and possible confusion where paths shown on the definitive map are subsequently altered by legal process the stopping up or diversion of a path under certain types of order and the consequent modification of the definitive map can, in England, be achieved in a single combined order.¹⁰⁹

12-51 The references in the section to cases where the path has been authorised to be widened or extended by “any enactment or instrument or any other event” are slightly more obscure. A widening of a public path under the powers of improvement in the Highways Act 1980 would not result in any formal order. However, widening will require the incorporation of other land into the highway and will take effect through agreement with the landowner or by some form of compulsory order: either a compulsory purchase order or a public path creation

order. The widening of a highway could have the indirect effect of making a description in the definitive map statement incorrect and so a modification might be desirable. It is suggested that an “extension” of a public path refers more to the status of a path than to its physical extent, as any physical extension would involve the creation of a new right of way under subs.(3)(a)(iii). The removal of a limitation or condition relating to a path might fall within this category. It is not clear whether an order designating a footpath as a cycle track under the Cycle Tracks Act 1984 s.3 could also be classed as an extension to an existing highway shown on the map.¹¹⁰ The map is not required to show cycle tracks but it might be desirable to indicate such a change in the statement.

12-52 The group of events under s.53(3)(a)(ii) is the coming into operation of any enactment or instrument or other event whereby a highway shown or required to be shown in the map or statement as a highway of a particular description has ceased to be a highway of that description. This would cover the cases where a bridleway, restricted byway or byway open to all traffic was the subject of a stopping up order but where lesser rights were either reserved¹¹¹ or created in its place.¹¹² It might also cover the situation where greater rights had been created over a footpath or bridleway by dedication, order or agreement.

12-53 The final group of events is the coming into operation of any enactment, instrument or other event whereby a new right of way has been created over land in the area to which the map relates “being a right of way such that the land over which the path subsists is a public path or a restricted byway”: s.53(3)(a)(iii). This deals with new ways that may have been created through public path creation orders and agreements or through diversion orders. The word “instrument” would also be capable of encompassing a dedication agreement whereby greater rights were created over the line of definitive path. Under the CROW Act 2000 s.47 every way that is presently shown on the definitive map as a RUPP will be treated instead as if it were a restricted byway.¹¹³ It seems, therefore, that when RUPPs were converted to restricted byways under the provisions in the CROW Act 2000 this could also have been an event for the purposes of s.53(3)(a)(iii) justifying a modification order. These provisions do not cover the creation of new rights of way that are not within the definition of a public path or restricted byway.

- 12-54** Where a definitive map or statement is to be modified under any of the grounds set out in s.53(3)(a) a simplified procedure is provided for these orders which are to come into effect on the date on which they are made without the necessity for any confirmation.¹¹⁴

Section 53(3)(b): The expiration of any period giving rise to a presumption that the way has been dedicated as a public path

- 12-55** This event again addresses a situation which will have occurred since the relevant date for the definitive map. Principally, this part of subs.(3) will be brought into play through 20 years' user of a way as of right thereby invoking the statutory presumption under s.31 of the Highways Act 1980. Section 31(9), however, makes it clear that a way may still be dedicated according to common law principles of implied dedication over a lesser period than 20 years. Presumed dedication of highways is discussed in Ch.2.¹¹⁵ Logically, s.53(3)(b) is the most apt "event" where a right of way has been created by dedication and should be used for that purpose. However, there is a potential overlap with s.53(3)(c)(i) as evidence that a public right of way has been created is also evidence that it subsists. The distinction is important as the test for making an order under the latter provision is lower—it suffices that the right of way "is reasonably alleged to subsist" whereas under subs.(b) there must be a period of enjoyment that raises the presumption "that the way has been dedicated". Perhaps for that reason, in practice it is common for authorities to rely upon s.53(3)(c)(i), it is suggested that the better approach is to limit s.53(3)(c) to evidence of mistakes based upon new evidence,¹¹⁶ which could include evidence that a recorded path was wrongly thought to have been dedicated by public use, but not that a new path has been dedicated by more recent use.

Section 53(3)(c): The discovery by the authority of evidence

- 12-56** This group of events has proved to be the most controversial and difficult to interpret. In *R. v Secretary of State for the Environment Ex p. Simms and Burrows*¹¹⁷ it was confirmed that this part of s.53(3) is concerned with the correction of mistakes in the definitive map and statement and that it covers errors of inclusion of paths as well as errors of omission. A path may be "upgraded" from a path of lower status to one of higher status or "downgraded" from a path of higher status to one of lower status.¹¹⁸ In the case of restricted byways, s.53(4A) and (4B) states that evidence can be adduced to show that immediately before the commencement of s.47 of the CROW Act 2000 a byway open to all traffic existed over the path.¹¹⁹

- 12-57** This event is triggered by the "discovery of evidence". It is not apparent from this wording nor from its legislative history that s.53(3)(c) is intended to provide a belated appeal mechanism from earlier decisions taken when the map was originally prepared (or subsequently modified) and it might have been thought that the word "discovery" implied that evidence not available, or at least not considered, at the time of the preparation or earlier modification of the map

should now have come to light. The approach of the courts has, however, been to take a flexible view of what evidence may trigger the “event” contemplated by this subsection and as to the nature of the decision that has to be taken based upon such evidence.

12-58 In *R. v Secretary of State for the Environment Ex p. Simms and Burrows*¹²⁰ the three members of the Court of Appeal used different expressions to supplement the wording of s.53(3)(c). Glidewell LJ indicated his view that the use of the word “discovery” suggested “the finding of some information which was previously unknown”.¹²¹ Russell LJ referred to the “discovery of information which may or may not have existed at the time of the definitive map”.¹²² Purchas LJ simply used the expression “discovery of new evidence”.¹²³ In none of these judgments, however, was the precise quality of the evidence required to initiate a modification order in issue and the use of these different expressions was clearly obiter. In *R. v Secretary of State Ex p. Riley*¹²⁴ the quality of that evidence was in issue. Macpherson J accepted the argument put to him that the discovery of evidence meant:

“evidence ‘discovered’ or ‘produced and laid before the Council at the appropriate time’ which is different from the original evidence.”

Macpherson J also used the expressions “additional unused or ‘discovered’ evidence”. In *Fowler v Secretary of State for the Environment and Devon CC*¹²⁵ Farquharson LJ introduced the idea that evidence should be “fresh in the sense that it was not available at the date of the existing definitive map”. In all these decisions, therefore, whilst it appears to have been accepted that it was not necessary that the evidence had physically to have come into being since the original date of the map, there was a consistent view that the act of discovery should have occurred since the that date in the sense that something new should be brought to the deciding body’s attention which had not been considered before. This has been further clarified in *Mayhew v Secretary of State for the Environment*,¹²⁶ where the court emphasised that the comparison to be made in determining whether evidence had been “discovered”—thereby triggering the operation of s.53 of the 1981 Act—was between the evidence available at the time of the application for modification and the evidence available at the date of the preparation of the map. The fact that the surveying authority may have considered that evidence at some different point of time in the past does not prevent the use of that evidence in support of an application based on s.53(3)(c).¹²⁷

12-59 In *R. (on the application of Roxlena Ltd) v Cumbria CC*¹²⁸ the Court of Appeal revisited the authorities in response to the argument that evidence included in an earlier application that had not complied with procedural requirements could not be relied upon later as it could not be “discovered” again. Lindblom LJ rejected that argument, emphasising that “discovery” could not be seen in isolation, but requires consideration of the evidence, together with other relevant evidence, “in effect, therefore, a composite event.”¹²⁹ On that basis, he held that:

“evidence discovered by somebody once – in the sense of its being found for

the first time – cannot, in that sense, be discovered by that person on a second or subsequent occasion. But this is not to say that evidence, once discovered, but not so far considered by the surveying authority, cannot be considered on the second occasion when it is submitted. ‘discovered’ or ‘produced and laid before the Council at the appropriate time’ which is different from the original evidence.”¹³⁰

Discovery, therefore, entails consideration in substance. Otherwise procedural errors could have the arbitrary consequence of preventing the definitive map from being kept up-to-date unless further fresh evidence appeared justifying its modification. On the same basis, the courts have held that “discovery does not have to be new evidence – a long-standing discrepancy between the map and the statement may justify a modification order under s.53(3)(c) if it has not previously been addressed by a surveying authority.”¹³¹

12-60 Discovered evidence has to be considered together “with all other relevant evidence” available to the surveying authority. It is not necessary, therefore, that the new evidence alone should be capable of establishing the error on the map independently of evidence which may have already been considered at the time of preparation of the map nor, so long as it was not minimal, that it should be of any particular weight.¹³²

12-61 Under s.53(3)(c), the new evidence that triggers a modification can be evidence that points towards adding a right of way not shown in the map and statement, changing the description of a right of way already shown, removing a right of way shown on the basis that there is no recordable highway of any description or modifying any other particulars contained in the map and statement. The test to be applied by the surveying authority is not the same in each case.

12-62 For an order including a new path on the definitive map under s.53(3)(c)(i), the surveying authority has to be satisfied the path “subsists or is reasonably alleged to subsist”. That was the original test for inclusion of paths in the 1949 Act¹³³. The statutory addition of the words “or ... reasonably alleged to subsist” is a deliberately lesser test to whether, on the balance of probabilities, a way subsists. This lesser test is whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to exist.¹³⁴

12-63 Whilst this statutory wording prescribing two possible tests for the *making* of an order based on new evidence that a path should be added to the definitive map cannot be denied, it is not entirely clear from the statutory provisions whether the same two tests carry through to the confirmation stage. If the status of a path were to be determined through the court process then the appropriate test would be the normal civil test of a balance of probabilities. It is difficult to see why the inclusion of a path on the definitive map, with its conclusive evidential effect, should be subject to any lesser burden. In *R. v Secretary of State for Wales Ex p. Emery*¹³⁵ the Court of Appeal seems to have proceeded on the basis that the lower test was applicable only at the preliminary order-making stage, and therefore so long

as there was credible evidence of 20 years' use it would be appropriate to make the order and allow the matter to be tested at inquiry. In *Todd and Bradley v Secretary of State for the Environment, Food and Rural Affairs*¹³⁶ Evans-Lombe J. held that the test at the confirmation stage should be the ordinary balance of probabilities. First, he looked at the procedures introduced by the National Parks and Access to the Countryside Act 1949 which resulted in paths being included on the definitive map:

"It seems to me that the pattern of the 1949 Act has been carried through by the legislature into the 1968 Act and on into the 1981 Act although the detailed provisions have developed over the years. That pattern is one of requiring the local authority to prepare a preliminary record in cases where there is evidence of the existence of a public right of way. That preliminary record is then published with the object of inviting comments and objections from persons interested either in the subsistence of the right of way or to deny its subsistence. There is then a procedure for resolving issues thrown up by objections to the preliminary record. Finally there is the preparation of the final record reflecting those decisions which is given the status of conclusive evidence. In the case of the 1949 Act there can be no doubt that the procedure under section 31 at quarter sessions would be subject to the civil burden of proof ... In the absence of an express provision it seems to me to be reasonable to assume that the legislature intended to replicate the pattern of the 1949 Act in the 1981 Act so as to subject the issue of proof of the existence and extent of public rights of way to the ordinary civil burden of proof namely the balance of probabilities. The contrary contention that it is sufficient to establish a right having serious consequences for land owners and other users by a mere finding that it was reasonable to allege that such a right subsists seems to me to be counter-intuitive."

He also felt that it would be surprising if rights in property of such importance were capable of being determined in the course of a statutory procedure applying a lower burden of proof than that which would be applicable were the existence

of those same rights to fall to be determined in the course of ordinary litigation in the civil courts. That the confirmation stage involves a different, and more stringent, approach to the evidence has now been confirmed by the Court of Appeal in *R. (on the application of Roxlena Ltd) v Cumbria CC* where Lindblom LJ approved Evans-Lombe J's judgment in *Todd and Bradley*.¹³⁷ As a matter of principle, a more stringent approach to confirmation must be correct. To allow for the creation of public rights of way with their potentially serious effects on property rights based on an evidential standard less than a balance of probabilities would be a draconian measure which had escaped the attention of the courts in the 50 years or more since the legislation was first introduced.

12-64 The Deregulation Act 2015 proposes an amendment to s.53(3)(c)(i) so that modification orders will no longer be able to be made on the basis that a right of way is "is reasonably alleged to subsist". Once brought into force, along with the other proposed changes,¹³⁸ that will mean that the test at the order-

making and confirmation stages will be the same for all types of modification and for unrecorded rights of way orders will only be able to be made on the basis that the way subsists on the balance of probability.

12-65

Where the application for a modification order is seeking to remove or to record a lesser highway right over a public path than is shown on the map under s.53(3)(c)(ii) or (iii), it has been held that cogent evidence is required to establish on the balance or probabilities that the path was wrongly included.¹³⁹ However, the question also arises as to what *weight* should be given to the fact that the path was included on the map originally after following the relevant statutory processes. The decision in *R. v Secretary of State for the Environment Ex p. Simms and Burrows*¹⁴⁰ demonstrates that the fact that the path is included on the map is not determinative for all time. Equally, however, there must be some new evidence which, taken with the evidence that was originally available, triggers the “event” that justifies the modification. In *Trevelyan v Secretary of State for the Environment, Transport and the Regions*¹⁴¹ the Court of Appeal had to address this question. The court had regard to s.32 of the Highways Act 1980 which indicates that map evidence will carry such weight as a tribunal:

“considers justified by the circumstances, including the antiquity of the rendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

As the definitive map was expressly prepared to record rights believed to be in existence at the relevant date and provided procedures for the assertion of those rights to be challenged and tested then it must carry a certain degree of weight. Lord Phillips MR¹⁴² felt that the matter should be addressed in the following way:

“Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.”

In fact, the inspector in the decision under appeal had made a modification order removing the majority of the path from the map and his decision was

upheld notwithstanding the fact that the owners of the land crossed by the path had, during the original map preparation process, shown a willingness to challenge the route and existence of the path over their land but had apparently eventually accepted the status and line of the path as it was finally recorded.

12-66 Applications to modify the particulars in a definitive map and statement may be made to amend or add otherwise unrecorded widths, to add or remove limitations (such as gates) or to clarify the exact line of a way.¹⁴³

12-67 A limitation of the modification procedure in correcting some types of error in the definitive map has been highlighted in *R. v Secretary of State for the Environment Ex p. Kent CC*.¹⁴⁴ A footpath had been shown on the definitive map. The existence of a footpath was not in dispute. However, the route of a part of its length was alleged to have been incorrectly shown on the definitive map. The surveying authority made a modification order proposing the deletion of the whole path. The order was opposed and a public inquiry was held. The inspector concluded that the path had been shown to exist along the line shown on the map up to a certain point but that it had been wrongly recorded over the remainder of its length. Initially, the inspector concluded that the correct line was over another route and he proposed to modify the order to show the path over the supposedly correct line.¹⁴⁵ This modification required another public inquiry and, as a result of the evidence adduced to this inquiry, the same inspector concluded that the evidence did not support the existence of public rights over the proposed new line. He then refused not only to make the modification but also to make the original order, expressing the view that the council should look to other powers to deal with the disputed section of the path. The council sought to challenge this decision and Turner J, in dismissing the application, confirmed the unsuitability of the modification procedure to delete in its entirety the whole of a footpath where only the route of part of the path was in dispute. He also expressed the view that other statutory powers would have to be used to address this problem.

12-68 On its facts the *Kent* decision is undoubtedly correct. It would have been wrong to delete an undisputed path in its entirety simply because part of its route was incorrectly shown. The case does, however, hint at a pragmatic approach in favour of maintaining the integrity of the public path network as shown on the definitive map. The only alternative powers that the inspector and the court could have had in mind for dealing with the disputed section of the path must have been the diversion procedures under ss.116 and 119 of the Highways Act 1980.¹⁴⁶ An alternative approach, however, available to the inspector, would have been to have modified the original order to delete only the disputed section of the path without attempting to determine where the correct continuation route was situated. This approach would have left the footpath temporarily truncated and the continuity of the network disrupted pending either the identification of the correct line or the creation of a replacement route. The approach adopted left the existing line shown on the map intact whilst other procedures for its diversion were pursued.

12-69 The decision in the *Kent* case turned essentially on whether the inspector

had erred on the evidence and argument before him. However, Turner J also suggested:¹⁴⁷

“it seems inherently improbable that what was contemplated by section 53 was the deletion in its entirety of a footpath or other public right of way of a kind mentioned in section 56 of the Act of 1981, the existence, but not the route, of which was never in doubt ... one would expect to look elsewhere for statutory provisions which were concerned with the question whether or not an established right of way, but not its route, should continue to exist.”

One cannot, however, divorce a highway from its route. It either exists over a particular line or it does not. It is submitted that the *Kent* decision should not be considered as authority for the proposition that a dispute over the route of a section of the public path network cannot or should not be addressed by the modification procedure.¹⁴⁸

- 12-70** Where there is an undoubted conflict between the definitive map itself and the statement then it is the map that will prevail but, in considering a modification order that seeks to remedy the conflict the decision maker must look at all the evidence in order to determine which is correct and what form of modification is required.¹⁴⁹

The decision to make a modification order

The application for a modification order: Schedule 14

- 12-71** Whilst surveying authorities are under a free-standing duty to keep their definitive maps and statements under review—which may involve making orders on their own initiative¹⁵⁰—s.53(5) allows any person to apply to the authority for a modification order based on the occurrence of one or more of the events set out in s.53(3)(b) and (c). Schedule 14 sets out the procedure for making such orders. The form of an application is prescribed by regulations.¹⁵¹ The application must be accompanied by a map at a prescribed scale and by any documentary evidence, including the statements of any witnesses, which the applicant wishes to adduce in support of his application.¹⁵²

- 12-72** The extent of compliance required by Sch.14 has been examined by the courts in the context of the extinguishment of unrecorded rights for mechanically propelled vehicles under s.67 of the Natural Environment and Rural Communities Act 2006. One of the exceptions to extinguishment was where:

“... before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c. 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic.”

Section 67(6) made it clear that for the purposes of this exception an application under s.53(5) of the 1981 Act was made when it is made “in accordance with” para.1 of Sch.14 to that Act, i.e. accompanied by a map and

any documentary evidence. This gave rise to two issues: (i) what is necessary for an application to accord with para.1 of Sch.14; and (ii) what are the consequences if an application does not.

12-73 On the first issue, the courts have made clear that there must be strict compliance with the procedural requirements.¹⁵³ Omission in an application of a document upon which an applicant intends to rely will render the application invalid.¹⁵⁴ Only *de minimis* failures may be discounted. In *R. (on the application of Trail Riders Fellowship) v Dorset CC*¹⁵⁵ the question arose as to whether the map submitted with the application was at the prescribed scale. The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993¹⁵⁶ require that the scale of the map accompanying an application to modify should be not less than 1:25,000. The map which accompanied the relevant application had been originally produced at a scale of 1:50,000 but had been altered by digital

techniques (digital raster mapping) so that it presented at 1:25,000 scale. Evidence was produced that different information is shown on maps of different scale and at first instance Supperstone J held that the altered map did not meet the prescribed requirements as it had not been drawn to the required scale and, therefore, would not show all the information that might be expected from a larger scale map. This decision was reversed on appeal and that reversal was upheld in the Supreme Court, determining by a 3:2 majority that the digitally enlarged plan was drawn at a scale of 1:25,000 and so met the procedural requirements. A different majority of the Supreme Court also rejected the idea of “substantial compliance” preferred by Lord Carnwath who considered that the narrow approach of the courts moved from “proper strictness” into “unnecessary bureaucracy”. As Lord Neuberger said at [95]:

“If an application does not comply with that requirement, and the failure is not waived by the council, the application is invalid as it stands. Unless it can be said that the failure is *de minimis* (a suggestion that was rightly rejected by Supperstone J in this case), the court would not be giving effect to the statute if it simply overlooked the defect.”

12-74 On the second issue, there is a critical difference between applications to add public vehicular rights to the definitive map that do not comply with para.1 of Sch.14—and so engage s.67 of the Natural Environment and Rural Communities Act 2006—and other cases of non-compliance. Where s.67 is in play, the accordance or otherwise of an application with the procedural requirement falls to be assessed as at the relevant date under s.67(4), namely 20 January 2005. Any waiver of non-compliance by a surveying authority is irrelevant and the opportunity to correct defects in the application likely to have been lost. In *Trail Riders Fellowship* Lord Neuberger noted:

“While it may seem harsh, it seems to me quite consistent with the purpose of the section to exclude from that class of exemption cases where the application is defective (even though it might otherwise be saveable). I do

not consider the court would be performing its duty of reflecting the intention of Parliament as expressed in legislation if it effectively ignored or discarded a subsection because it did not like the consequences, or it considered that they were rather harsh.”¹⁵⁷

The strict approach accords with Parliament’s intention to extinguish vehicular rights on public rights of way. However, it should not be taken as supporting the outright rejection of general modification order applications that do not comply with procedural requirements (save, perhaps, in cases of serious non-compliance). The Supreme Court noted the ability of surveying authorities to waive procedural requirements; that facility was also emphasised by Dyson LJ in *R. (on the application of Warden and Fellows of Winchester College) v Hampshire CC*:¹⁵⁸

“I wish to emphasise that I am not saying that, in a case which does not turn on the application of section 67(6), it is not open to authorities in any particular case to

decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3; or to treat a non-compliant application as the “trigger” for a decision under section 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in subsection (3).”

Moreover, applicants should be given the opportunity to correct defects. Consistent with his (dissenting) view on non-compliance in the *Trail Riders Fellowship* case, Lord Neuberger considered that “subject to any special reason to the contrary (e.g. the claimants not having availed themselves of ample opportunity to do so after warnings), the claimants would have been entitled to remedy the defect on the applications by submitting maps which were properly compliant ...”.¹⁵⁹ Authorities must deal with applications in a way that is procedurally just.¹⁶⁰

12-75 The applicant for an order must serve notice of the application on the owners and occupiers of any land to which the application relates. In certain cases, the authority may authorise the service of the notice by addressing it to “the owner or occupier” and affixing it to some conspicuous object on the land. The applicant must supply a certificate to the authority to the effect that he has complied with these requirements.¹⁶¹ It does not appear from the wording of the Schedule that an incorrect certificate would deprive the authority of jurisdiction to entertain the application.¹⁶² However, the obligation of the authority to investigate and process the application depends on the receipt of such a certificate.¹⁶³ It is suggested that an authority is entitled to rely upon a certificate that appears on its face to be valid.¹⁶⁴ Consideration of an application without service of the required notices on landowners might, however, amount to a procedural error susceptible to judicial review, subject to the question as to whether the failure has caused prejudice.¹⁶⁵ In the *Winchester*¹⁶⁶ case the court went on to consider the question whether the determination of the local authority on one of the applications was invalid

because of a failure to comply with the requirements as to service; per Dyson LJ.¹⁶⁷

“... the correct approach is to apply ordinary public law principles. In so far as there is shown to have been a failure to comply with the procedural requirements of paragraph 2, it is necessary to ask whether and, if so, to what extent any substantial prejudice has been suffered as a result. On the facts of this case, the council was entitled to waive the failure to comply with the procedural requirements.”

12-76 After receipt of the certificate, the authority must, as soon as is practicable, investigate the matters stated in the application and must, after consulting with every local authority¹⁶⁸ whose area includes land affected by the application, decide whether to make the order.¹⁶⁹

12-77 In investigating applications, s.289(1) of the Highways Act 1980 give authorities the power to enter onto land to exercise any of their functions “in their capacity as a highway authority”. The extent to which this provision may be used by *surveying* authorities is open to question. However, at least in cases where there is a reasonable case that a highway exists on land, it is suggested that an authority ought to be able to rely upon s.289 to access land for the purpose of investigating an application.¹⁷⁰ There is otherwise an unfortunate statutory lacuna. It has been confirmed that a surveying authority is not under a duty to carry out a deep investigation or to follow up every line of inquiry before making an order,¹⁷¹ although a degree of rigour is good practice. Ultimately, an authority can only make a judgment on the basis of the best evidence that is reasonably available.¹⁷²

12-78 The decision that is to be made, although it will be subject to confirmation, is not just an interim or prima facie decision. In making that decision the authority must come to a careful and properly informed decision with a proper appreciation and weighing of the available evidence and of any legal principle that may have to be applied.¹⁷³ However, where the authority is considering an application to add a path to the definitive map it must be mindful of the fact that it should make an order where it is reasonably alleged that the claimed path subsists.¹⁷⁴ In *R. v Secretary of State for Wales Ex p. Emery*¹⁷⁵ the Court of Appeal pointed out that the combination of this lower test with the potential for evidence to be tested at the subsequent inquiry stage should lead authorities to make an order where there was credible evidence supporting the claim—notwithstanding the fact that there might also be credible evidence against it—unless there is documentary evidence that must inevitably defeat the claim either, for example, by establishing incontrovertibly that the landowner had no intention to dedicate, or that the way was of such a character that use of it by the public could not give rise at common law to any presumption of dedication.¹⁷⁶

12-79 Where the authority fails to determine the application within 12 months of receipt of a certificate, the applicant may make representations to the Secretary of State, who may direct the authority to determine it within a specified time. The Secretary of State will consider, among other things, any statement of priorities

for determining applications adopted by the authority and the reasonableness of those priorities.¹⁷⁷ There is no further sanction provided against a dilatory authority, and the Secretary of State is not *required* to make a direction. Where an authority fails to determine an application after a direction from the Secretary of State, the direction ought to be capable of enforcement by him through an application of judicial review seeking an order of mandamus. It is less clear whether a similar remedy would be available to the applicant.

12-80 Before making such an order, the surveying authority must consult with every local authority whose area includes the land to which the order relates. Where, after considering the application, the authority decides not to make an order, the applicant may appeal to the Secretary of State within 28 days of the service on him of notice of the decision. The decision as to whether the modification order should be made then lies with the Secretary of State, who may issue directions to the authority concerned (including a direction as to the time within which an order is to be made).

12-81 The nature of the Secretary of State's decision at this stage, and the standard of proof required, is the same as that relating to the decision of the surveying authority.¹⁷⁸

Procedure following the making of an order: Schedule 15

12-82 Once the authority has decided to make an order, the procedure for modifying the definitive map is contained in the Wildlife and Countryside Act 1981 ss.53-57 and Sch.15. Before it can take effect the order has to be confirmed either by the authority itself (in the absence of objections) or by the Secretary of State. Before making an order the authority must first consult with every other local authority whose area includes the land to which the order relates.

12-83 On making the order, the authority must give notice, in the form prescribed by regulations,¹⁷⁹ to the owners and occupiers of the land affected,¹⁸⁰ to local authorities whose area includes the land, to any person who, on payment of a reasonable charge to the authority, has required the authority to give him notice of such orders, and to a number of organisations which are prescribed in the regulations. The notice must also be advertised in local papers and must be displayed at the ends of so much of any way as is affected by the order,¹⁸¹ in council offices in the locality of the affected land and at such other places as the authority considers appropriate. The notices must indicate the general effect of the order, that it has been made and that it requires confirmation. The notices must name a place where the order may be inspected free of charge, and must specify both the time (being not less than 42 days from the date of the first publication of the notice) and the manner in which representations may be made

with respect to the order. The notices given to landowners and occupiers and to local authorities must include a copy of the order itself, insofar as it relates to their land or area.¹⁸²

12-84 During the 42-day period for the making of representations, any person may require the authority to permit him to inspect and take copies of any documentary evidence that was taken into account by the authority in making the order. Where no representations or objections are "duly made" to the

authority within the prescribed period, or where all such objections or representations have been withdrawn, the authority may then confirm the order itself, without modification.¹⁸³ Otherwise, where the authority wishes to modify the order, or where there are unresolved representations or objections, the order must be submitted to the Secretary of State for confirmation. An objection is duly made when it is made within the relevant time limit and in accordance with the provisions of Sch.15.¹⁸⁴ In fact, there are no procedural requirements for the making of an objection, although the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993¹⁸⁵ indicate, in the prescribed form of notice of the making of an order, that representations and objections must be sent in writing to the appropriate officer of the authority. However, the authority must state in their notice how objections or representations should be made which must include particulars of the grounds on which the objection or representation is made.¹⁸⁶

12-85 Where there are outstanding representations or objections, the Secretary of State must, subject what is said below, either cause a local inquiry to be held or afford the person making the representation or objection the opportunity of being heard before a person appointed by him and who may be authorised to make the decision.¹⁸⁷ However, the Secretary of State is entitled, in deciding whether or not to hold an inquiry or hearing, to take the view that no representation or objection which has been duly made and not withdrawn relates to an issue which would be relevant in determining whether or not to confirm the order, either with or without modifications.¹⁸⁸ In that case, whilst he would still be required to consider the objection, he may confirm the Order without holding an inquiry or hearing.

12-86 The appeal procedure is now governed in England by the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007.¹⁸⁹ There are no similar rules yet in Wales. Thereafter, the Secretary of State, after considering the representations and the report of his inspector, may confirm the order with or without modifications. In any case where the order is confirmed with modifications that involve land not affected by the order or where the modifications add or delete a highway or alter its status, the Secretary of State is first required to give at least 28 days' notice of his proposal to modify the order, permitting representations or objections to the modification.¹⁹⁰ Where relevant representations or objections are made and are not withdrawn, a further local inquiry must be held or a hearing afforded before the order is confirmed.¹⁹¹ In order to prevent all the modifications from being delayed by this lengthy process, the authority is permitted to give notice to the Secretary of State that it is severing the opposed modifications from those that are unopposed, so as to create two separate orders. The unopposed order could then be confirmed by the authority itself. Notice of a final decision on the confirmation of an order must be given by the authority.¹⁹²

Proposed changes: New Schedules 14A and 15A

12-87 The Deregulation Act 2015 posits substantial changes to the process for the making and confirmation of modification orders in England.¹⁹³ The overall

aim is simplification, but the proposals are significant and wide-reaching. They are not yet in force, and depend upon secondary legislation and/or guidance for their full articulation. They are nonetheless both significant and interesting. The main changes are outlined below.

12-88 New Schedule 13A will apply to applications for modification orders. Para.2 will introduce a new form of preliminary assessment—a basic evidential test—of applications under which surveying authorities will have to ask themselves within three months of receipt if there is a “reasonable basis for the applicant’s belief that a definitive map and statement should be modified in consequence of the occurrence of one or more events falling within section 53(3)(b) or (c)”. Guidance will be produced to assist in this task. If the authority fails to complete the preliminary assessment within three months, the applicant can serve a notice on the authority and, after a further three months, seek an order that it comply with its duty from the Magistrates’ Court.¹⁹⁴ There is no statutory appeal against the preliminary rejection of an application, however the authority must inform the applicant of the decision and the reasons for it. Any challenge to a negative preliminary determination itself would have to be by way of judicial review. Presumably, the applicant will have an opportunity to reapply, but there is no express provision for this.

12-89 The duty to investigate and determine applications will begin once a positive preliminary determination has been made.¹⁹⁵ If an authority fails to determine the application within 12 months, an applicant’s only redress will again be to seek an order from the Magistrates’ Court.¹⁹⁶ Where an authority refuses an application, an applicant may give notice that they wish to appeal the decision to the Secretary of State and, save where the grounds of appeal are irrelevant, the authority must then submit the matter to the Secretary of State. Detailed provisions as to the management of such appeals are set out in paras 7-11 of Sch.13A and will be supplemented by guidance. There is no requirement that an inquiry must be held where relevant representations are received—the Secretary of State may decide to hold a hearing or to deal with the matter by written representations.¹⁹⁷ The Secretary of State’s decision (or that of an inspector appointed by them) may be to uphold the authority’s refusal, to direct the authority to make the order or to make the order directly.¹⁹⁸ Orders directed to be made or made by the Secretary of State under para.8 of Sch.13A must be confirmed without any further process.¹⁹⁹ This will remove a major inefficiency with the current system whereby modification proposals can be referred to the Secretary of State twice: first to direct the authority to make the order and second to consider outstanding objections.

12-90 The use of the Magistrates’ Court in the modification process is an innovation and will be one of the more challenging aspects for implementation. The advantage of the Magistrates’ Court is that it is equipped for, and used to, hearing small applications swiftly. The disadvantage is that it lacks expertise in the recording of public rights of way and can be overwhelmed by other business. The Magistrates’ Court will have a discretion rather than a duty to make any order. There is also express provision for an authority to ask for a 12-month extension,²⁰⁰ which may become used as a

default.

12-91 Schedule 14A will govern the confirmation of orders made by surveying authorities. This echoes some of the changes proposed in Sch.13A. Authorities will be able to refuse to submit opposed order to the Secretary of State where they deem objections to be irrelevant.²⁰¹ The Secretary of State may determine contested orders following an inquiry, a hearing or written representations.²⁰² There are also express provisions enabling the severance of orders where representations only relate to some modifications or where only some representations are relevant.²⁰³ The new procedure is otherwise similar to existing Sch.15.

12-92 A more innovative change proposed in the Deregulation Act 2015 is the power on authorities to make a “special order” that accommodates a landowner not wholly opposed to modification. Such orders will be known as “modification consent orders” and, where relied upon, authorities may bypass the process in Schs 13A and 14A. Indeed, an authority may confirm a modification consent order “whether or not any representations or objections are made”.²⁰⁴ The provision seems designed to deal with the influx of cases anticipated by the 2026 cut-off date.²⁰⁵ Under new s.54B, a modification consent order may be made where: (i) it appears to a surveying authority that it might be requisite to make a modification order; (ii) the basis for modification is documentary evidence from before 1949; and (iii) following notice, every relevant landowner would consent to the making of an order if it were either diverted from the proposed route, altered as to its width or subject to a new limitation or condition. A modification consent order is therefore a kind of fusion between modification order and public path order, insofar as it takes into account both historical evidence and the current or prospective position of landowners. Authorities will not be obliged to make special orders of this kind simply because owners would prefer it. For diversion orders, some of the protections from s.119 of the Highways Act 1980 are imported into s.54B.²⁰⁶ As with other provisions, exactly how modification consent orders operate will depend upon guidance. However, on any view, the provision represents an interesting compromise between the recognition of lost ways and the facilitation of modern land uses. The aim is presumably to encourage agreement and compromise and so to save the time and expense of the conventional order-making process (even as proposed to be updated). If owners do not consent to a special order, or the authority decides not to pursue such an order, the authority will have to commence the process of considering the modification order application under Sch.13A. In some cases, therefore, the existence of this special alternative power will cause delay.

12-93 Other changes proposed include:

- (a) a simplified procedure for the situation where “the need for the modification has arisen because of administrative error” and both the error and the requisite modification required are “obvious”;²⁰⁷
- (b) the transfer of responsibility to the surveying authority to notify landowners and occupiers of applications;²⁰⁸ and
- (c) a requirement that public notice be published on a website maintained by

the authority “and on such other websites or through the use of such other digital communications media as the authority may consider appropriate”.²⁰⁹

- 12-94** The Deregulation Act 2015 received royal assent on 26 March 2015. The changes proposed to the definitive map modification procedure contained within it are detailed and capable of implementation with little further guidance. It is nonetheless unclear when, whether and in what form they will be implemented. Cumulatively, the 2015 Act makes some radical alterations and should assist both in clearing the backlog of cases and in implementing the cut-off date for historic applications, which itself remains unimplemented after more than 20 years.

Transfer of applications

- 12-95** There is no express provision in the 1981 Act allowing for the transfer of applications. Nonetheless, in practice, it is not uncommon for applications to be transferred to or adopted by someone other than the original applicant in the course of their consideration, sometimes on the death of the original applicant. An authority’s s.53(2)(b) duty to keep the definitive map under review is not, in any event, dependent upon there being a live application.²¹⁰ Another one of the changes proposed by the Deregulation Act 2015 is to fill this gap by making it plain that an applicant “may at any time before the application is determined give notice in the prescribed form to the authority that another person named in the notice is to carry on the application”²¹¹

Challenging definitive map decisions in the courts

- 12-96** Following the publication of notice of confirmation of the order, there is then a 42-day period within which a challenge on ultra vires grounds may be made to the High Court. Thereafter, the order may not be questioned in any legal proceedings whatsoever.²¹² This is a statutory time limit, which is not capable of being extended. Failure to make an application within the prescribed time limit will, therefore, be fatal.²¹³ This limited right of challenge applies only to orders that have “taken effect”. However, the Court of Appeal has held that it also prevents any challenge being made to the process leading up to the confirmation of an order. In *R. v Cornwall CC Ex p. Huntington; R. v Devon CC Ex p. Isaac*²¹⁴ challenges had been mounted by way of judicial review to modification orders made, but not yet confirmed, by two surveying authorities. The grounds of challenge were that the original decisions to make the order had not been properly made.²¹⁵ The Court of Appeal took the view that the statutory intention was that the remedy in Sch.15 should be regarded as the exclusive means of challenge to the procedures leading up to the confirmation of an order, and quoted with approval from the judgment of Brooke J at first instance in the *Cornwall* case:²¹⁶

“It is quite clear, in my judgment, that Parliament intended to prescribe a comprehensive programme of the events which should happen from the time the

relevant authority sets in motion the consultation process mentioned in para.1 of Sch.15 and that once the order is made the prescribed procedure then follows, without any interruption for legal proceedings in which the validity of the order is questioned, until the stage is reached, if at all, when notice of a decision is given pursuant to the procedure prescribed in para.11. It is then, and then only, that Parliament intends that a person aggrieved by an order which has taken effect shall have the opportunity of questioning its validity in the High Court provided that he takes the opportunity provided for him by para.12(1) of Sch.15.”

12-97 It is not thought, however, that the decision in the *Cornwall* and *Devon* cases alters the law in relation to the situation where the surveying authority or the Secretary of State refuses to make or confirm an order. In such a case the decision may be challengeable on appropriate grounds by way of judicial review.²¹⁷ An application for permission to apply for judicial review must itself be made promptly and, in any event, within three months of the decision under challenge.²¹⁸ The three-month period is not an absolute bar to obtaining leave²¹⁹ but, equally, the fact that an application is made within that period does not mean that it has necessarily been made promptly. Even where permission to apply for judicial review has been obtained any delay in making an application can still be the basis of a refusal of relief. Section 31(6) of the Senior Courts Act 1981 states:

“Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant (a) leave for the making of the application; or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.”

Where an obvious error has occurred in the process leading up to the making of an order the potential applicant for relief will be advised to wait to see whether the order is confirmed. If it is, and he is opposed to the order, then he will have six weeks from the date of publication of the relevant notices to bring his challenge. If, following such an error, the order is not made or confirmed a potential applicant supporting the making of the order could, subject to the question of exhausting the appeal mechanism in para.4 of Sch.14,²²⁰ apply for leave to apply for judicial review. It is thought that time would then run from the date on which the decision not to proceed was made, even if the circumstances giving rise to the challenge arose earlier.²²¹ Whilst para.12(3) of Sch.15 would not in terms seem to prevent a challenge being made before a surveying authority has made an order, the policy approach adopted in the *Cornwall* and *Devon* decisions suggests that any attempt to challenge the order-making process before a final decision of one sort or another will be discouraged.²²²

12-98 The two statutory grounds of challenge to a confirmed order set out in Sch.15 are that the order is not within the powers of the Act “or that any of the requirements of this Schedule have not been complied with”. The first ground

is a familiar invocation of ultra vires principles and includes any challenge in law as to whether or not an appropriate “event” had taken place and whether the authority had the power to make the order.²²³ The second ground relates to the procedural requirements of Sch.15 only and relief will only be available where the applicant can establish that his interests have been “substantially prejudiced by a failure to comply with those requirements”. A procedural breach of one of the provisions of Sch.14 is not specifically addressed. This could mean that Parliament did not intend any of the provisions in Sch.14 to be mandatory and therefore to invalidate a subsequently confirmed order. However, the courts have found that the duty to investigate and determine an application for an order may be susceptible to challenge.²²⁴ Alternatively, it has been suggested that a breach of Sch.14 would necessarily be a breach of s.53(5) of the 1981 Act and could lead to a challenge on the grounds that the exercise of the power to modify was not within the powers of s.53.²²⁵

- 12-99** Although a confirmed order can only be challenged within the prescribed time limits and although the definitive map and statement will be conclusive evidence in any court of the matters set out in s.56 of the 1981 Act, landowners, and other parties with the required legal interest, may still apply to the courts to determine public rights of way issues notwithstanding the existence of ongoing, but incomplete, modification procedures under the 1981 Act. However, the court may well stay proceedings pending the outcome of the modification procedure where the issues involved in the two sets of proceedings are identical.²²⁶

The situation in London

- 12-100** The National Parks and Access to the Countryside Act 1949 did not require the then London County Council to prepare definitive maps, but permitted the Council, by resolution, to adopt the survey provisions for any part of the county. The London Government Act 1963 abolished the London County Council and established the new London boroughs. The outer London boroughs were comprised of areas which had, formerly, been part of other counties within which the general survey provisions of the 1949 Act applied. The Wildlife and Countryside Act 1981 s.58(1) excludes from the provisions relating to definitive maps “any area which, immediately before 1st April 1965, formed part of the administrative county of London”. London borough councils can, however, adopt the provisions of the Act in relation to those parts of their areas which are excluded by s.58(1).²²⁷

CREATION, MAINTENANCE, AND PROTECTION OF PUBLIC PATHS AND RESTRICTED BYWAYS

Creation of footpaths, bridleways and restricted byways

- 12-101** The creation of public rights of way by dedication and acceptance follows the general rules applicable to all highways. The Highways Act 1980 does, however, specifically provide for the creation of footpaths, bridleways and restricted byways by agreement and by order. These are discussed in Ch.2.²²⁸

One other, unique, way in which a footpath or bridleway can be created, occurs when vehicular rights are extinguished in a carriageway highway by virtue of a pedestrian planning order under the Town and Country Planning Act 1990 s.249.²²⁹

Maintenance of footpaths, bridleways and restricted byways

12-102 Section 23 of the Highway Act 1835 did not apply to footpaths and bridleways as such. It followed, therefore, that the duty to maintain these paths continued after 1836, whether or not there had been any formal adoption.²³⁰ Whatever doubt there may have been about this was resolved by s.47 of the National Parks and Access to the Countryside Act 1949, which declared that *all* existing public paths²³¹ were repairable by the inhabitants at large, but which also provided that s.23 was to apply to all paths dedicated after the commencement of the 1949 Act,²³² otherwise than in pursuance of a public path agreement.²³³ The present situation is that the following will be maintainable at the public expense:

- (a) all paths dedicated prior to December 16, 1949;²³⁴
- (b) all paths created since that date by virtue of public path creation orders or agreements;²³⁵
- (c) all paths which have otherwise been adopted by the highway authority by virtue of one of the adoption procedures in the Highways Act 1980 and its predecessors;²³⁶
- (d) paths which are created as replacements for stopped up or diverted paths;²³⁷
- (e) paths that have been subject to one of the reclassification processes relating to roads used as public paths (RUPPs);²³⁸
- (f) all restricted byways created by the automatic reclassification of RUPPs;²³⁹
- (g) all other paths which fall within one of the categories contained in the Highways Act 1980 s.36(1), for example public paths constructed by a highway authority and certain paths constructed as highways by a housing authority.²⁴⁰

However, the fact that such highways are maintainable at the public expense does not impose any obligation on the authority to metal the ways even in the case of byways open to all traffic (BOATs).²⁴¹

12-103 Non-metropolitan district councils may undertake the maintenance of footpaths and bridleways that are maintainable at the public expense. These councils may be reimbursed by the county council for expenses incurred in maintaining such highways.²⁴² Schedule 7 to the Highways Act 1980 sets out a procedure whereby the district council must give notice to the county council of its intention to exercise these powers, specifying the highways concerned. Where the county council is of the view that any highway so specified does not fall within the district council's maintenance powers, it may serve a counter-notice to this effect. Where the dispute cannot be resolved, it

must be referred to the Minister.²⁴³ In exercising these powers, the district

council stands in the shoes of the county council, and may sue and be sued in its own name. Indeed, an indemnity must be given to the county council in respect of any claim made against it, with regard to any failure to maintain a highway at a time when the district council was exercising its powers in respect of that highway, or any claim arising out of any maintenance works carried out by the district council pursuant to these powers.²⁴⁴ Non-metropolitan district councils may also undertake the maintenance of footpaths and bridleways which are maintainable by some other person (without affecting the continuing liability of that person to maintain the way) or which are maintainable by no one.²⁴⁵ The provisions of Sch.7, with respect to notices and indemnities, apply also here.

- 12-104** Parish and community councils may also undertake the maintenance of footpaths and bridleways, whether maintainable by the highway authority,²⁴⁶ or whether maintainable by some other person, or by no one at all.²⁴⁷ These powers of the parish are exercisable, however, without affecting the liability of the highway authority or any other person to maintain the path. The parish council is not entitled to automatic reimbursement of its expenses and is subject to overall statutory limitations on its expenditure. However, the highway authority or district council (where that council is itself exercising maintenance powers under s.42) may undertake to defray all or part of the parish or community council's expenses in maintaining publicly maintainable paths.²⁴⁸

Extent of maintenance

- 12-105** The same basic test applies to the standard of maintenance of public rights of way as it does to any other highway.²⁴⁹ However, public paths will not require a particularly high standard of maintenance and will not usually need to be metalled, although the surface must be kept clear and passable.²⁵⁰ The highway authority will have separate responsibility to effect the removal of vegetation that obstructs the highway, pursuant to its duties to assert and protect the rights of highway users.²⁵¹

Protection of highway rights over footpaths and bridleways

- 12-106** Footpaths and bridleways will generally cross open country, including farmland. They are less well defined on the ground than are carriageway highways and sometimes, perhaps for that reason, appear to be less well established and are less acceptable to landowners. In any event, it is regarding the footpaths and bridleways in country areas that most conflict between the interests of ramblers and landowners has occurred. There are, therefore, a number of provisions that are designed to protect the public right of way from encroachment by the landowner whilst attempting also to recognise and protect his interest in the proper husbandry of his land.

Signposts

12-107 It is an offence for any person to place or maintain, on or near any public path or restricted byway shown on a definitive map any false or misleading statement, likely to deter the public from using the way.²⁵²

12-108 Highway authorities have power, in consultation with the owner or occupier of the land concerned, to erect and maintain signposts along any footpath, bridleway or byway for which they are the highway authority.²⁵³ They are under a duty to erect a signpost at every point at which a public path or byway leaves a metalled road, unless they are satisfied that a sign is not necessary and the parish council or chairman of the parish meeting (who must be consulted) agrees.²⁵⁴ Such a sign should indicate the nature of the path and, so far as the authority considers appropriate or convenient, where the path leads. The highway authority is also under a duty to erect such signposts as it considers to be necessary to assist persons unfamiliar with the locality to follow the course of a footpath, bridleway or byway.²⁵⁵ Persons other than highway authorities may erect and maintain signposts along paths and byways, with the consent of the highway authority.²⁵⁶ It is an offence to pull down or obliterate any signpost erected or placed along a footpath, bridleway or byway, pursuant to these provisions.²⁵⁷

Stiles and gates

12-109 A footpath or bridleway may be dedicated (either expressly or impliedly) subject to obstructions across the way so long as these are not inconsistent with its dedication as a public path. Stiles and gates are not inconsistent with dedication,²⁵⁸ and may, in fact, provide a means for the rambler or rider to circumvent fences, walls and hedges, which are necessary for the proper agricultural use of the land, but which otherwise would provide an obstacle to the exercise of the right of way. However, once dedicated free from such obstacles, the erection of a stile or gate in an otherwise unrestricted part of the path may constitute an obstruction.²⁵⁹ In order to reconcile the potentially conflicting needs of the farmer and of the user of the path, the highway authority is empowered, on representations being made by the owner of agricultural land or of land which is being brought into use for agriculture,²⁶⁰ to authorise the erection on the path of stiles, gates or other works for preventing the ingress or egress of animals.²⁶¹ The authorisation may be conditional as to the maintenance of the gate or stile, and unless the conditions are complied with, the gate or stile will cease to be an authorised structure in the highway and may be subject to removal under the provisions of s.143 of the Highways Act 1980. Where the path is being maintained by a district council under the provisions of ss.42 or 50 of the Highways Act 1980, then the authorisation may be given by that council.

12-110 All gates in carriageway highways and bridleways are required to be of a minimum width. In the case of bridleways, this width is five feet, measured between the posts of the gate. Where, across such a highway, there is a gate of less than the minimum width, the highway authority may, by notice to the owner of the gate, require him to enlarge or remove it. Failure to comply with this notice is an offence.²⁶²

12-111 Stiles across footpaths and bridleways are required to be maintained by

the owner of the land in a safe condition, and to the standard of repair required to prevent unreasonable interference with the rights of the persons using the

footpath or bridleway. This duty of maintenance is subject to a contribution from the highway authority (or from the district council where the path is maintained by the district council).²⁶³ The duty does not apply to any structure which is the subject of an agreement between the landowner and the highway authority or district council, and which agreement imposes the liability of maintenance on that authority. Nor does the duty apply if any conditions for the maintenance of the structure are in force under s.147 of the 1980 Act. The highway authority (or district council) has default powers after giving the landowner not less than 14 days' notice and has power to recover all or part of its expenses reasonably incurred, from the landowner.²⁶⁴ It seems, therefore, that it is in the financial interests of the landowner to maintain his stiles subject to the authority's contribution rather than to run the risk of that authority recovering all of its costs of exercising the default power.

Improvements for the benefit of persons with mobility problems

- 12-112** The CROW Act 2000 made provision for authorities to enter into agreements with the owners and occupiers of land crossed by public paths and in which a stile, gate or other structure is located for the carrying out by the authority of works that will result in a structure that is safer and more convenient for persons with mobility problems.²⁶⁵

Ploughing

- 12-113** Common law recognised that a highway might be dedicated across land subject to the reservation of a right to plough that land. The highways legislation, however, has given farmers a statutory right to interfere with paths in order to plough their land, subject to safeguards relating to the length of the disturbance and to a duty of reinstatement. Amendments to that statutory right introduced by the Rights of Way Act 1990 have considerably tightened up these statutory provisions governing the reinstatement of the path with the objective that they may be more easily enforced.

- 12-114** Under the Highways Act 1980 s.134 (as amended), a statutory right to plough up²⁶⁶ paths in the interests of good husbandry is given to any occupier of any agricultural land (or of land which is being brought into use for agriculture) and the public right of way is subject to this right to plough. The right applies to any footpath or bridleway that passes over a field or enclosure consisting of agricultural land, or land that is being brought into use for agriculture. Field edge paths are excluded. The farmer is expected to be able to manage his farming activities so as not to disturb these paths. The statutory right arises where it is not reasonably convenient to plough or otherwise disturb the surface of farmland without also disturbing the surface of the path or way and rendering it inconvenient for the public to exercise their right of way.

- 12-115** The farmer is obliged, however, to make good the surface of the footpath or bridleway within certain time limits.²⁶⁷ the “relevant period”. Where the disturbance to the surface of the path is the first disturbance for the purposes of the sowing of a particular crop²⁶⁸ he has 14 days from the day on which the path was first disturbed before the path must be made good. In every other case he must make good the surface within 24 hours of the disturbance. Where the farmer faces difficulty in complying with these time limits he must make an application to the highway authority, either before the disturbance occurs or during the relevant period, and the authority may then grant an extension of that period for an additional period not exceeding 28 days.²⁶⁹
- 12-116** The extent of the duty to reinstate the path has also been made much more explicit and capable of practical enforcement. The surface of the path must be restored to not less than a prescribed minimum width and its line on the ground must be indicated to not less than that width so that it is both reasonably convenient for the exercise of the public right of way²⁷⁰ and apparent to members of the public wishing to use it. The prescribed minimum widths are set out in Sch.12A to the Highways Act 1980. In the case of paths affected by this section they are, where the width of the footpath can be proved,²⁷¹ that width; and in all other cases, 1m for footpaths crossing land, 2m for bridleways and 3m for any other kind of highway.
- 12-117** It is an offence to plough up any footpath or bridleway other than in accordance with the provisions of this section.²⁷² Enforcement of these provisions may be brought only by the highway authority, the district council or the parish or community council. However, the highway authority has a duty to enforce the provisions of the section. There is a default power for the enforcing authority²⁷³ to reinstate the path and recover the expenses of so doing from the occupier of the land who has carried out unauthorised ploughing. Powers of entry are given to the enforcing authority.²⁷⁴
- 12-118** The permissive power in s.134 does not act as a diversion of the path and there is no obligation on the farmer to provide any alternative route. The public may still cross the ploughed land during the period when the surface of the path is broken up. In practice, however, they are more likely to walk around the edge of the field. Formerly, a power to divert a path temporarily that could be used during the ploughing of a way was contained in s.135 of the Highways Act 1980. The power contained in that section does not now apply to cases where ploughing has disturbed a way. The present legislation has chosen instead to place stricter time limits on the disruption to a way which can be caused by ploughing activities.
- 12-119** The dedication of footpaths and bridleways subject to the right of the landowner to plough the land was recognised at common law.²⁷⁵ Where such a limited dedication had occurred, it was not the case that the public had the right to deviate from the path around the ploughed area, nor that they lost the right to follow the line of the path over the ploughed area.²⁷⁶ In *Mercer v Woodgate*²⁷⁷ the occupier of a field had been in the habit of ploughing up the whole of it, so destroying the footpath. There was no evidence of the existence of the footpath before living memory. It was held that the inference to be drawn was that the owner had originally dedicated the right of way to the

public, subject to this right of periodically ploughing it up. The provisions of s.134 do not seem to be intended to extinguish any existing common law rights²⁷⁸ although they may in practice provide farmers with a more certain and satisfactory basis on which to proceed. Nonetheless a more extensive right of interference may still exist where a path has been dedicated subject to the right of the landowner to plough across the path and where there is evidence of the extent of the reserved right to support it. Where a landowner relied upon an existing limitation on the dedication rather than on s.134 it would seem that the restoration to minimum width provisions would not apply. It may be noted that the reinstatement provisions only apply where the footpath has been disturbed “under the right” conferred by s.134(1).²⁷⁹

Interference with paths by excavations and engineering operations on agricultural land

12-120 Where the occupier of any agricultural land²⁸⁰ desires to carry out an excavation or engineering operation that is reasonably necessary for the purposes of agriculture, but which will so disturb the surface of a footpath or bridleway that passes over that land as to render it inconvenient for the exercise of the public right of way, he may apply to the highway authority for an order that the public right of way²⁸¹ shall be subject to the condition that he has the right to disturb the surface by that excavation or operation for a period to be defined in the order. The period that may be specified in such an order is one not exceeding three months. The highway authority must make an order where it is satisfied either that it is practicable temporarily to divert the path or way in a manner reasonably convenient to users or that it is practicable to take adequate steps to ensure that the path or way remains sufficiently convenient, having regard to the need for the excavation or operation, for temporary use while it is being carried out. The order must not authorise any interference with the apparatus or works of any statutory undertakers.

12-121 An order made under these provisions may provide for the temporary diversion of the path or way during the authorisation period,²⁸² but if the diversion is to be onto land not occupied by the applicant, the written consent of the occupier and of any other person whose consent is needed to obtain access to it will be required. Where a diversion is required, the order may include such conditions as the authority reasonably thinks fit for the provision, either by the applicant or by the authority at the expense of the applicant, of facilities for its convenient use, including signposts and other notices, stiles, bridges and gates. The authority must cause notices of such a diversion, together with a plan showing the effect of the diversion and the line of the alternative route provided, to be prominently displayed throughout the authorisation period at each end of the diversion.

12-122 An order under s.135 may include other conditions. These may relate to the protection and convenience of users of the path or way during the authorised period of interference; the making good of the surface of the path or way to not more than its minimum width before the expiration of the authorisation period; and the recovery from the applicant of expenses

incurred by the authority in connection with the order. The “minimum width” for paths is prescribed by Sch.12A as:

- “(i) as respects a footpath which is not a field-edge path,²⁸³ 1 metre,
- (ii) as respects a footpath which is a field-edge path, 1.5 metres,
- (iii) as respects a bridleway which is not a field-edge path, 2 metres, or
- (iv) as respects any other highway,²⁸⁴ 3 metres.”

12-123 An interference with the surface of a path that is not authorised by these provisions will be an offence under s.131A of the Highways Act 1980.²⁸⁵ If the applicant fails to comply with a condition imposed on an order under s.135 he will be guilty of an offence.²⁸⁶ Proceedings for an offence under s.135 may be brought only by the highway authority or (with the consent of the highway authority) by the council of the non-metropolitan district, parish or community in which the offence is committed. A default power to reinstate the surface of the path is given in Sch.12A.²⁸⁷ Highway authorities are placed under a specific duty to enforce the provisions of this section.²⁸⁸

Interference by crops

12-124 Section 137A of the Highways Act 1980²⁸⁹ requires occupiers of agricultural land on which a crop other than grass²⁹⁰ has been sown or planted to take steps to ensure that the line of certain highways running over their land is so indicated to not less than its minimum width²⁹¹ as to be apparent to members of the public wishing to use the highway. This provision is considered in Chapter 8.²⁹² The highways covered by this provision are footpaths, bridleways or un-made carriageways. The occupiers of such land are also required to prevent the crop from so encroaching²⁹³ on such highways over their land or which are on adjoining land as to render the highways inconvenient for the exercise of the public right of way.

Bulls

12-125 Restrictions are imposed by the Wildlife and Countryside Act 1981 on the keeping of bulls in fields crossed by footpaths, bridleways and byways open to all traffic.²⁹⁴ It is an offence²⁹⁵ for the occupier of a field or enclosure crossed by a public path to permit a bull “to be at large” in that field or enclosure. There are exceptions to this prohibition. It does not apply to any bull that is less than 10 months in age. Nor does it apply to any bull that is not of a recognised dairy breed²⁹⁶ that is at large in any field or enclosure in which cows or heifers are also at large. This latter exception significantly reduces the scope of the prohibition. Prior to the passing of the 1981 Act the restriction on the keeping of bulls in fields crossed by public paths was generally addressed locally in byelaws. This section replaces and overrides any such byelaws.²⁹⁷ Where the safety of persons using a path is put at risk by the presence of a bull in an adjoining field there may, however, be an offence under s.3 of the Health and Safety at Work Act 1974.

Other obstructions and dangers

- 12-126** The general provisions in the Highways Act 1980 concerning obstructions of the highway apply also to public paths.²⁹⁸ One or two provisions have particular relevance to public paths. By s.164 of the Highways Act 1980, a highway authority or district council may, by notice, require the removal of barbed wire, in any fence adjoining a highway, that constitutes a nuisance. Where the occupier of the land has failed to comply with the notice, the authority may apply to the magistrates' court for an order that the nuisance be abated and, where that order is not complied with within a reasonable period of time, the authority may take whatever steps are necessary to secure compliance, and may recover the expenses from the occupier of the land. Where the presence of the wire is likely to be injurious to persons or animals lawfully using the way, it will be deemed to be a nuisance.²⁹⁹ Where the land in question is occupied by the highway authority or district council, any ratepayer may stand in the shoes of the authority for the purpose of these provisions.

Powers to rectify damage to paths

- 12-127** Highway authorities and non-metropolitan district councils exercising powers under ss.42 or 50 of the Highways Act 1980 have powers to rectify damage caused to the surface of footpaths, bridleways and un-made carriageway highways together with powers of entry and power to recover costs.³⁰⁰

Prevention of obstructions

- 12-128** A new procedure has been introduced into the Highways Act 1980 to secure the removal of obstructions in public paths. This is discussed in Ch.7.³⁰¹

IMPROVING THE NETWORK

- 12-129** Every local highway authority other than an inner London authority³⁰² must prepare and publish a rights of way improvement plan. This requirement is contained in the CROW Act 2000 s.60. A rights of way improvement plan must contain the authority's assessment of the extent to which local rights of way³⁰³ meet the present and likely future needs of the public, the opportunities provided by local rights of way for exercise and other forms of open-air recreation and the enjoyment of the authority's area,³⁰⁴ and the accessibility of local rights of way to blind or partially sighted persons and others with mobility problems. The plan must also have regard to such other matters relating to local rights of way as the Secretary of State (as respects England) or the National Assembly for Wales (as respects Wales) may direct. The plans must contain a statement of the action the authority proposes to take for the management of local rights of way, and for securing an improved network of local rights of way, with particular regard to the matters dealt with in the assessment. The assessment must be repeated and the plan reviewed at least every 10 years.³⁰⁵

12-130 Before preparing or reviewing a rights of way improvement plan, and making any assessment, the authority is required to consult each local highway authority whose area adjoins its area, each district council, and each parish or community council, whose area is within its area, the National Park Authority for any National Park³⁰⁶ within its area, any local access forum established for any part of its area³⁰⁷ and Natural England or Natural Resources Wales (as appropriate).³⁰⁸ There is no intention to make regulations to add further statutory consultees under s.61(1)(g), but the statutory guidance suggests that authorities consider consulting the organisations in their area that would normally be consulted on public path orders. The local highway authority must then publish, in two or more local newspapers circulating in its area, notice of how a copy of the draft can be inspected or obtained and how representations on it can be made to it, and consider any representations made in accordance with the notice. In performing its plan-making or review function the local highway authority may act jointly with a district council or National Park Authority within its area and must have regard³⁰⁹ to statutory guidance.³¹⁰ Other statutory requirements such as the Equality Act 2010 will be relevant to the content of plans. In Wales, there is likely to be a particular overlap with the Active Travel (Wales) Act 2013.

PROVISION OF AMENITIES IN PEDESTRIAN WAYS

12-131 Part VIIA of the Highways Act 1980³¹¹ empowers councils³¹² to provide special facilities in certain kinds of pedestrian ways. The highways in which these powers may be exercised are:

- (a) footpaths, bridleways and restricted byways;
- (b) highways that have been the subject of an order under the Town and Country Planning Act 1990 s.249(2);³¹³
- (c) footways;
- (d) subways and footbridges constructed under Highways Act 1980 ss.69 and 70;
- (e) walkways (including those walkways and pedestrian ways that owe their existence to local Act powers);
- (f) highways that are the subject of orders under the Road Traffic Regulation Act 1984 ss.1, 6, and 9, prohibiting vehicular traffic either wholly, or for certain periods of the day or year.

12-132 The powers contained in Pt VIIA fall into two categories. The council is empowered to provide services and amenities in these highways, which may involve the carrying out of works in, on or over the highway, or the placing of structures in the highway. Secondly, the council is empowered to grant permissions to other persons to provide facilities and place objects in the highways.

Provision of services and amenities by councils

12-133 A council may carry out works and place objects or structures on, in or over highways, for the purposes of giving effect to a pedestrian planning order,³¹⁴

of enhancing the amenity of the highway and its immediate surroundings and of providing a service for the benefit of the public or a section of the public. The council may maintain the works, objects or structures that have been carried out or installed. The Highways Act 1980 gives as examples of ways in which the amenity of the highway may be enhanced, the provision of lawns, trees, shrubs or flowers.³¹⁵ Councils are also empowered to provide, maintain and operate facilities for recreation or refreshment on these kinds of highways.³¹⁶

- 12-134** It may well be the case that the exercise of these powers under Pt VIIA of the Highways Act 1980 will obstruct the highway. Section 115D makes it clear that this is permissible, subject to some overall restrictions. The council may not exercise its powers in such a way as to prevent traffic, other than vehicular traffic, from entering the highway, at any place where traffic could have entered it before the making of any pedestrian planning order or traffic order, nor from passing along the highway nor from having normal access to any premises adjoining the highway. Furthermore, the exercise of these powers cannot be used to restrict any use of vehicles which is allowed under the terms of a pedestrian planning order, or which is not prohibited by the road traffic regulation order, nor to prevent statutory undertakers, sewerage authorities or telecommunications operators from having access to their apparatus under, in, on or over the highway.³¹⁷

Grant of permissions by councils for the execution of works and use of objects or structures

- 12-135** A council may grant to a person permission to do anything that the council may itself do under this Part of the Act, in relation to the placing of objects and structures in, on, or under highways, or in providing facilities for recreation or refreshment.³¹⁸ It may also permit the use, by other persons, of objects or structures in the highway, for a purpose that will result in the production of income, or for the purpose of providing a centre for advice and information or for the purpose of advertising.³¹⁹ It follows that the council's permission can be granted to a third party to place objects or structures in the highway only for the same purposes as the council may itself place those objects or structures. However, if an object or structure has been lawfully placed in the highway by the council, either under the powers contained in this Part of the Act, or by virtue of any other powers, then that object or structure may be used for a further purpose of advertising. It seems unlikely that the powers in this Part of the Act may be used simply to permit a shopkeeper to place an advertising board in the highway outside his shop, unless it could be argued that the board could have been placed there by the council itself to provide a service for the benefit of the public or of a section of the public. The cases in which permission can be justified in this way are likely to be extremely limited.

- 12-136** Permissions may be granted conditionally, including a requirement to pay to the council its reasonable charges.³²⁰ The council may require an indemnity to be given against any claim in respect of any injury, damage or

loss arising out of the grant of permission, except in respect of the council's own negligence.³²¹ Where any person granted a permission is in breach of the terms of that permission, the council may serve a notice on him requiring him to take steps to remedy the breach. The council may itself take steps to remedy the breach in default of compliance with the notice, and may recover its expenses from the person on whom the notice was served.³²²

Procedure

- 12-137** Except where the council is exercising its powers under ss.115B or 115C,³²³ in relation to highways which are the subject of pedestrian planning orders or traffic orders, notices must be displayed at or near the position to which the proposal relates, and a copy must be served on the owner and occupier of any premises which appear to the council to be materially affected.³²⁴
- 12-138** A number of consents have to be obtained before the council may exercise its powers under this Part of the Act. "Walkway consent" must be obtained where the council itself carries out works or places any object or structure in, on or over any walkway, or provides facilities for recreation or refreshment therein.³²⁵ A "walkway consent" involves the consent of occupiers of the building in which the walkway subsists and who, in the opinion of the council, are likely to be affected by the exercise of the powers, and also the consent of the persons whose agreement would be needed to the creation of the walkway in the first place.³²⁶ In the case of local Act walkways, the consent of any person who is the owner or occupier of premises adjoining the walkway and who is, in the opinion of the council, likely to be affected by the exercise of the power, and the consent of the owner of the land on, under or over which the walkway subsists, must be obtained.
- 12-139** Where the council is using the power to place an object or structure in a footpath or bridleway or in a footway relating to which no pedestrian planning order is in force, and does so either for a purpose that will result in the production of income,³²⁷ or for the purpose of providing a centre for advice or information, it is necessary to obtain the consent of interested frontagers to the placing of the object in the highway for the purpose for which it is placed there. Where the council grants permission to a person to use an object or structure placed in any of the types of highway to which this Part of the Act applies, the consent of these frontagers must be obtained, not only to the placing of the object or structure and its purpose, but also to the grant of the permission.³²⁸ Frontagers are regarded as having an interest if their land adjoins that part of the highway and the object or structure is to be placed between their land and the centre of the highway.³²⁹
- 12-140** Where the highway in question is maintained by the British Railways Board³³⁰ or Transport for London (or any subsidiary of Transport for London), then the consent of these bodies must also be obtained. All consents should be obtained in writing.
- 12-141** Consents may not be withheld unreasonably, but it is not unreasonable for a consent to be given for a specified period of time or subject to the payment of a reasonable sum. Where a council has served a notice requesting consent,

and no reply is given within 28 days, then the consent will be deemed to have been refused unreasonably. Any question as to whether the consent has been reasonably refused is otherwise referable to arbitration and the arbitrator has power to direct that the consent, though unreasonably withheld, should only be given subject to conditions. The council is also required to consult the highway authority and the local planning authority (where it is not itself those authorities).

PRIVATE VEHICULAR USE OF PUBLIC FOOTPATHS, BRIDLEWAYS AND RESTRICTED BYWAYS

12-142 It is, subject to certain exceptions,³³¹ a criminal offence to drive a mechanically propelled vehicle on a footpath, bridleway or restricted byway without lawful authority. The offence is presently contained in s.34 of the Road Traffic Act 1988 (as amended). It has, however, been a criminal offence to drive a motor vehicle on a footpath or bridleway since the passing of the Road Traffic Act 1930 s.14. For the purposes of the presently worded section in the 1988 Act it is provided that a way shown in a definitive map and statement as a footpath, bridleway or restricted byway is, without prejudice to s.56(1) of the Wildlife and Countryside Act 1981, to be taken to be a way of the kind shown, unless the contrary is proved. The burden of proof would, therefore, fall on a person prosecuted under the section to prove that the way in question carried higher rights consistent with the usage for which he or she had been prosecuted. Bearing in mind the fact that most highway rights for mechanically propelled vehicles have now been extinguished by the Natural Environment and Rural Communities Act 2006³³² the opportunity to run this defence would appear to be somewhat limited.

12-143 The offence is not committed, however, in a number of defined situations or where the usage is not without lawful authority. First, it is not an offence under this section for a person with an interest in land, or a visitor to any land, to drive a mechanically propelled vehicle on a road if, immediately before the commencement of the CROW Act 2000 s.47(2), the road was shown in a definitive map and statement as a road used as a public path (RUPP), and in use for obtaining access to the land by the driving of mechanically propelled vehicles by a person with an interest in the land or by visitors to the land. The CROW Act 2000 s.50 also provides a private vehicular right of way for owners or lessees of premises adjoining or adjacent to restricted byways that were formerly RUPPs and were in the same ownership as the premises insofar as it is necessary for the reasonable enjoyment of and occupation of land. The Natural Environment and Rural Communities Act 2006 contains a number of provisions which are designed to protect those who depend upon the use of ways shown as footpaths, bridleways or restricted byways for access to their premises. Where immediately before commencement of the Act, use of the way for mechanically propelled vehicles was reasonably necessary to enable a person to obtain access to land, or would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only, then:

- (a) If the person has made an application to have the way shown on the definitive map as a byway open to all traffic then any public rights of way for mechanically propelled vehicles will not be extinguished.³³³
- (b) If no such application has been made then any public right exercisable becomes a private right of way for mechanically propelled vehicles for the benefit of the land or (as the case may be) the part of the land.³³⁴

It is not clear where this leaves private roads which carry footpath rights but which were not marked on the definitive map as RUPPs, although usage of these roads by a landowner, at least, would probably still be with lawful authority.³³⁵

12-144 Secondly, it is not an offence to drive a mechanically propelled vehicle on any land within 15 yards of a road, being a road on which a mechanically propelled vehicle may lawfully be driven, for the purpose only of parking the vehicle on that land. Whilst s.34 also makes it a criminal offence to drive off-road—to which this exception makes obvious sense—it is not clear whether this exception could also apply to driving a mechanically propelled vehicle onto the first 15 yards of a footpath or bridleway with a view to parking. It is suggested that it does not apply because of the distinction drawn in the section between “land” and “road”. The footpath or bridleway is treated within the section as being a road—albeit a road over which restrictive rights exist—rather than land within 15 yards of a road. However, the contrary view may well be arguable. A person does not commit an offence if he proves to the satisfaction of the court that the vehicle was driven for the purpose of saving life or extinguishing fire or meeting any other like emergency.³³⁶

12-145 The existence of this criminal offence and the question of what could amount to lawful authority to drive a mechanically propelled vehicle on a footpath or bridleway raises a number of interesting questions about the effect of dedication of land as a footpath or bridleway on the rights of a landowner. A public path may become established through the principles of implied dedication over a private road used by the landowner as a vehicular access to his property. Where a path has been dedicated through the middle of land owned by a landowner it could, if there was no retained right of the landowner to drive over the path, create severance and a barrier that has serious effects on the effective use of land. Such a result would undoubtedly not have been contemplated by any landowner when he has acquiesced in, or positively encouraged, public usage of paths or roads across his land. Nor can there be any sensible public policy that such a result should be achieved by a regime that allows public rights to be gained through usage. However, the statutory offence in its present and historic form does not expressly address this situation. The absence of case law on the topic is probably more a tribute to the basic common sense of the users of paths and of prosecuting authorities than the result of detailed analysis.

12-146 The words “or excuse” that often accompany “without lawful authority” in many statutory prohibitions are absent from s.34. The meaning of the words “lawful authority or excuse” have been discussed in Chapter 8.³³⁷ Where land has been dedicated as a public highway it may have been dedicated subject to

limitations or conditions. Where public rights have been acquired through usage or forms of prescription they would usually be taken to have been acquired subject to the existing usage of the land. Dedication of land as a highway does not remove from the landowner the ability to continue the reasonable use of his land. In *St. Mary, Newington, Vestry v Jacobs*,³³⁸ Mellor J addressed the social consequences of the similar problem that would result from landowners being unable to drive vehicles over footways dedicated out of their land ownership which separated their properties from the highway.

“The owner, who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership, not inconsistent therewith; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public.

If this were not so, the owner of a large estate, having dedicated a portion of his land to the use of the public as a roadway, and they, or the persons representing them, having raised a footpath on one side of such roadway for their own more convenient use thereof, would, after a lapse of time, be so bound by this convenient arrangement of such roadway as to be unable to open a new gateway or entrance to his land from such roadway, without being liable to be convicted under the provisions of the Highway Act. If this were really the law, the result would be most serious to owners who have dedicated, or may dedicate, roadways to the public; and in towns would, to a great extent, prevent the owners of houses and buildings from changing their character and use to any purpose of business which could not be accomplished without the use of a horse, or cart, or carriage.”

The same concerns would appear to be equally applicable in the rural situation where a public footpath or bridleway has been established over a landowner's

property. Mellor J, giving the judgment of a court that included Lord Cockburn CJ, did not feel that there was any authority that prevented a common-sense approach from being adopted:

“That such is not the law, appears to us to be the result both of principle and authority; and we think that the provisions of the Highway Acts and the Metropolis Local Management Act, so far as they apply to roads or streets, are subordinate to the paramount rights reserved by the owner. We do not deny that the owner cannot derogate from the grant of roadway made by him to the public, and cannot do anything which would really and substantially interfere with the right of passage by the public. So far as we are aware, no case is to be found in the books which conflicts with the view of the law above expressed, notwithstanding the numerous instances which must have occurred, in which an owner, rebuilding or changing the character of his houses or other buildings, has made crossings of the

footpath, in order to carry into effect some object of convenience or business.”

A landowner who uses vehicles on his own land for purposes that are within the reasonable use and enjoyment of that land would, therefore, appear to have lawful authority for driving over a footpath or bridleway on his land. If so, then it would appear that the same principle should apply to those who the landowner may authorise to drive over his land. If a footpath is recorded over the only access road leading to a farm it must be the case that the invitees and licensees of that landowner are within the same lawful authority. Again, so long as it is within the reasonable use of his land and does not cause a public nuisance to the users of the highway it would seem that a landowner ought to be able to grant vehicular rights of way or even dedicate public vehicular rights of way over this land. More difficulty arises, however, where such rights are claimed through prescription or implied dedication.

12-147 The issue became of some importance through the related legal issue relating to driving on common land. In *Hanning v Top Deck Travel*³³⁹ it was held that, because it had been made an offence by s.193(4) of the Law of Property Act 1925 to drive without lawful authority on a common, a right of way could not have been acquired by 20 or more years of uninterrupted use. An easement could not be acquired by conduct which, at the time the conduct took place, was prohibited by statute. The same principle was then applied to the acquisition of vehicular rights over footpaths and bridleways through the principle of implied dedication.³⁴⁰

12-148 The effect of these decisions, at least in relation to common land, was that the rights of owners and occupiers of properties to access their properties in vehicles were thrown into question in circumstances where they neither owned nor had the benefit of an express right of way over the common which their access route crossed. The same problem was potentially applicable to roads carrying public paths. In order to provide some alleviation of these problems s.68 of the CROW

Act 2000 and regulations made under that section provided a procedure for the occupiers of property to acquire an easement of access to their property.³⁴¹

12-149 In *Bakewell Management Ltd v Brandwood*³⁴² the House of Lords decided that *Hanning* was wrongly decided and that a statutory prohibition that does not apply where usage is with lawful authority does not prevent the acquisition of vehicular rights based on the principle of lost modern grant. The speech of Lord Scott expressly recognises that the same approach may apply to the acquisition of public rights of way for vehicles over public paths, subject to the issue whether such usage might, in any event, be unlawful (and therefore without lawful authority) by reason of public nuisance.³⁴³ Whilst the restriction now created on the acquisition of new public vehicular rights for mechanically propelled vehicles over footpaths, bridleways and restricted byways probably mean that the particular point addressed by Lord Scott will no longer have much relevance, the application of the same principles would also suggest that private rights of way for motor vehicles could be granted by

a landowner or acquired by usage over a public path so long as this usage did not cause a public nuisance to other highway users.

FOOTNOTES

¹ See Wellbeloved, "A Treatise on the Law relating to Highways" (1828), p.4.

² At s.27(1). The councils of county boroughs were given power to adopt these provisions; National Parks and Access to the Countryside Act 1949 s.36.

³ [1975] Q.B. 891.

⁴ [1979] A.C. 705 at 715.

⁵ [2001] Q.B. 151.

⁶ National Parks and Access to the Countryside Act 1949 ss.27 and 28; see also the National Parks and Access to the Countryside Regulations 1950 (SI 1950/1066), all now repealed.

⁷ National Parks and Access to the Countryside Act 1949 s.30.

⁸ National Parks and Access to the Countryside Act 1949 s.31 and the Public Rights of Way (Applications to Quarter Sessions) Regulations 1952 (SI 1952/559) (all now repealed).

⁹ See *Armstrong v Whitfield* [1974] Q.B. 16; *LE Walwin and Partners Ltd v West Sussex CC* [1975] 3 All E.R. 604; in both cases it was held that decisions on appeal were binding *in rem*.

¹⁰ Challenge to the validity of the map after the six-week period was thereafter precluded: National Parks and Access to the Countryside Act 1949 Sch.1 Pt III para.10. See also *Chivers & Sons Ltd v Cambridge CC* [1957] 2 Q.B. 68.

¹¹ National Parks and Access to the Countryside Act 1949 s.33.

¹² The statutory process for stopping up paths was the only to effect their removal from the definitive map; see *Morgan v Hertfordshire CC* (1966) 63 L.G.R. 456.

¹³ National Parks and Access to the Countryside Act 1949 ss.33-34.

¹⁴ Countryside Act 1968 s.31 and Sch.3.

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- ¹⁶ Local Government Act 1972 Sch.17 Pt II paras 27 and 29.
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- ¹⁷ Local Government Act 1972 Sch.17 Pt II paras 24-26.
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- ¹⁸ The duty to prepare maps was still not universal, in that the areas of some of the former county boroughs could still be excluded.
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- ¹⁹ A consideration of the historical development of the definitive map can be found in the judgments of the Court of Appeal in *R. v Secretary of State for the Environment Ex p. Simms and Burrows* [1991] 2 Q.B. 354 at 363-381.
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- ²⁰ Wildlife and Countryside Act 1981 s.54, now repealed.
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- ²¹ *Access to the Countryside: The Government's Framework for Action* (London: DETR, March 1999).
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- ²² CROW Act 2000 s.47, which came into force, subject to transitional provisions, in England on 2 May 2006 and in Wales on 11 May 2006; see SIs 2006/1172 and 2006/1279 (W.124).
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- ²³ As to the meaning of restricted byway, see paras 1-49 and 12-39.
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- ²⁴ See para.9-163.
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- ²⁵ CROW Act 2000 s.49(1); although there is no duty to provide any metalled surface; s.49(4).
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- ²⁶ CROW Act 2000 s.49(2).
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- ²⁷ Where they own an interest in the highway; CROW Act 2000 s.50(2).
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- ²⁸ CROW Act 2000 ss.60-62; see para.12-12 et seq.
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- ²⁹ CROW Act 2000 s.53, not yet in force.
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- ³⁰ See CROW Act 2000 ss.54 and 56.
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- ³¹ CROW Act 2000 s.55A, inserted by Deregulation Act 2015 s.20.
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- ³² CROW Act 2000 s.56(1). As the date gets closer, it becomes less and less likely that it will be the eventual cut-off. In a short debate on the topic in the House of Lords on 2 April 2019 the Minister (Baroness Vere of Norbiton) described delaying the cut-off date until 2031 at the

latest as a possibility (Hansard Vol.797, col.45GC). On 16 February 2022 Defra indicated to a stakeholder working group that the cut-off date would be delayed in England; it is likely to be repealed in Wales.

³³ Deregulation Act 2015 Sch.7 para.5 inserting ss.54B-C into the Wildlife and Countryside Act 1981. See para.12-89.

³⁴ Deregulation Act 2015 s.21 inserting s.56A into the CROW Act 2000.

³⁵ Deregulation Act 2015 s.21 inserting s.56B into the CROW Act 2000.

³⁶ Wildlife and Countryside Act 1981 s.53(1).

³⁷ In force in England by virtue of SI 2004/292, and in Wales by virtue of SI 2005/1314.

³⁸ See para.12-23.

³⁹ Wildlife and Countryside Act 1981 s.57(3).

⁴⁰ In *R. (on the application of Trail Riders Fellowship) v Dorset CC* [2015] 1 W.L.R. 1406 Lord Clarke of Stone-cum-Ebony said that given the availability of the Ordnance Survey map, it would be irrational for an authority not to use it (see para.28). Cf. Lord Toulson at [38].

⁴¹ Wildlife and Countryside Act 1981 s.57(2); Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12).

⁴² National Parks and Access to the Countryside Act 1949 ss.27(3) and 34.

⁴³ Wildlife and Countryside Act 1981 s.57A(4) inserted by the CROW Act 2000 Sch.5 para.8.

⁴⁴ Wildlife and Countryside Act 1981 s.56(3).

⁴⁵ See *R. v Secretary of State for the Environment Ex p. O'Keefe* (1998) 76 P. & C.R. 31 (CA), approving the decision at first instance by Pill J [1996] J.P.L. 42.

⁴⁶ [1975] 3 All E.R. 604.

⁴⁷ [2006] 1 W.L.R. 1103.

⁴⁸ Had this been the correct approach then the absurd result would have been that it would be impossible to achieve consistency between the map and the statement by means of a modification order. See *R. v Secretary of State for the Environment Ex p. Kent CC* (1995) 93 L.G.R. 322, discussed at para.12-62, for another abortive attempt to resolve errors in the

alignment of a path shown on a map.

⁴⁹ [2006] W.L.R. 1103 at [38].

⁵⁰ At [41].

⁵¹ But see *Perkins v Secretary of State for the Environment and Rural Affairs* [2009] EWHC 658 (Admin) on the need for accuracy.

⁵² [2010] EWHC 1036 (Admin).

⁵³ [2009] EWHC 3293 (Admin).

⁵⁴ At [58]-[59].

⁵⁵ See, however, s.57(6).

⁵⁶ In Wales the reference to “in each district” is omitted; subs.(5A) inserted by the Local Government (Wales) Act 1994 c. 19 Sch.16 para.65(7).

⁵⁷ Wildlife and Countryside Act 1981 s.57(5). This duty will be satisfied so long as that part of the map is available as relates to the particular district or parish. Local authorities are also urged to make copies available to the public; ROW Circular 1/09 para.2.3.

⁵⁸ Wildlife and Countryside Act 1981 s.53B inserted by the CROW Act 2000 Sch.5 para.2.

⁵⁹ Although this information can be omitted where its inclusion would be likely to cause substantial damage or substantial distress to the applicant or to another person.

⁶⁰ As to the full information required to be kept in these registers, see the Public Rights of Way (Register of Applications under s.53(5) of the Wildlife and Countryside Act 1981) (England) Regulations 2005 (SI 2005/2461) and the Public Rights of Way (Registers) (Wales) Regulations 2006 (SI 2006/42) (W.8). See also the Public Rights of Way (Combined Orders) (England) Regulations 2008 (SI 2008/442) as amended.

⁶¹ i.e. the “county council, Welsh council, metropolitan district council or London borough council”; see Wildlife and Countryside Act 1981 s.66(1) as amended by the Local Government Act 1985 s.7 and Sch.3 and the Local Government (Wales) Act 1994 Sch.16. Unitary authorities will also be included.

⁶² 28 February 1983 (SI 1983/20).

⁶³ e.g. in the area of a former English county borough.

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- ⁶⁴ As to which, see fn.61.
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- ⁶⁵ Wildlife and Countryside Act 1981 s.55.
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- ⁶⁶ i.e. under s.29(3), (4), and (6) of the 1949 Act, and para.4(4) of Pt II of Sch.3 to the 1968 Act.
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- ⁶⁷ See para.12-71, et seq.
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- ⁶⁸ Wildlife and Countryside Act 1981 s.53(2) and (3).
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- ⁶⁹ e.g. in response to the “events” specified in s.53(3)(a) or where the authority itself becomes aware of evidence falling under s.53(3)(c).
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- ⁷⁰ See para.12-71, et seq.
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- ⁷¹ At para.12-44, et seq.
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- ⁷² CROW Act 2000 ss.47-48.
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- ⁷³ Countryside Act 1968 Sch.3 paras 7 and 8; Wildlife and Countryside Act 1981 s.54(2).
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- ⁷⁴ A right to drive animals along a road; a “driftway” is also a kind of highway; see para.1-30.
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- ⁷⁵ [1975] 1 Q.B. 891.
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- ⁷⁶ See *R. (on the application of Kind) v Secretary of State for the Environment, Food and Rural Affairs* [2006] Q.B. 113; *R. v Secretary of State for the Environment, Ex p. Riley* (1990) 59 P. & C.R. 1.
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- ⁷⁷ [2001] Q.B. 151.
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- ⁷⁸ See *R. v Wiltshire CC Ex p. Nettlecombe Ltd* [1998] J.P.L. 707; *Buckland v Secretary of State for the Environment Transport and the Regions* [2000] 1 W.L.R. 1949.
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- ⁷⁹ [2001] Q.B. 151 at 162.
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- ⁸⁰ *Lasham Parish Meeting v Hampshire CC* (1993) 65 P. & C.R. 331; *Mayhew v Secretary of State for the Environment* (1993) 65 P. & C.R. 344. Cf. the position under the Countryside Act 1968 Sch.3 Pt III para.10.
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- ⁸¹ CROW Act 2000 s.47.
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⁸³ See, however, para.12-38 in relation to the position with restricted byways.

⁸⁴ As to the position where there is a conflict between the map and the statement, see para.12-21, et seq.

⁸⁵ Wildlife and Countryside Act 1981 s.56(2). See also s.56(2A) and 3A.

⁸⁶ Wildlife and Countryside Act 1981 s.56(1)(a).

⁸⁷ Wildlife and Countryside Act 1981 s.56(1)(b).

⁸⁸ Although cyclists also are permitted to use bridleways, by virtue of the Countryside Act 1968 s.30(1), the definitive map is not conclusive as to any rights that may exist for cyclists over such ways; Wildlife and Countryside Act 1981 s.66(3).

⁸⁹ Wildlife and Countryside Act 1981 s.56(1)(c).

⁹⁰ Wildlife and Countryside Act 1981 s.56(1)(d).

⁹¹ See *R. (on the application of Kind) v Secretary of State for the Environment and Rural Affairs* [2005] EWHC 1324 (Admin) This is now subject to the provisions of the Natural Environment and Rural Communities Act 2006 s.66 which restrict the creation of new rights of way for mechanically propelled vehicles.

⁹² Wildlife and Countryside Act 1981 s.56(1)(e). As to the position where there is a conflict between the map and the statement, see para.12-24 et seq.

⁹³ Wildlife and Countryside Act 1981 s.56(1)(e); and see *Edgar Ernstbrunner v Manchester CC* [2009] EWHC 3293 (Admin) discussed at para.12-26.

⁹⁴ See para.12-10 et seq.

⁹⁵ Sch.3 Pt I; see also para.12-10.

⁹⁶ [1988] J.P.L. 485.

⁹⁷ See also under the former law, *R. v Secretary of State for the Environment Ex p. Stewart* (1978) 77 L.G.R. 431.

⁹⁸ [1991] 2 Q.B. 354.

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¹⁰⁰ At 714.

¹⁰¹ National Parks and Access to the Countryside Act 1949.

¹⁰² As to the evidential burden to be overcome when seeking to establish that a path was included in error, see *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 W.L.R. 1264; discussed at para.12-61.

¹⁰³ (1992) 64 P. & C.R. 16.

¹⁰⁴ Section 54A is not at the time of writing in force.

¹⁰⁵ *Lasham Parish Meeting v Hampshire CC* (1993) 65 P. & C.R. 331; *Mayhew v Secretary of State for the Environment* (1993) 65 P. & C.R. 344.

¹⁰⁶ [1991] 2 Q.B. 354.

¹⁰⁷ Although they may have occurred before the commencement date of the 1981 Act; see s.53(2) (a) and see hereon, *R. v Secretary of State for the Environment Ex p. Andrews* [1995] J.P.L. 52.

¹⁰⁸ There is, in any event, a simplified procedure for modifying the definitive map and statement to take account of these orders; see s.53(6).

¹⁰⁹ See Wildlife and Countryside Act 1981 s.53A; and the Public Rights of Way (Combined Orders) (England) Regulations 2008 (SI 2008/442). The orders covered are those under the Highways Act 1980 ss.26, 118, 118A, 118B(4), 119, 119A, 119B(4); the Acquisition of Land Act 1981 s.32; the Housing Act 1985 s.294, and the Town and Country Planning Act 1990 ss.247(2A), 257 and 258(1).

¹¹⁰ As there is no requirement to show a cycle way on the map and no appropriate notation a cycle way would remain shown as a footpath on the map and so, it is suggested, would not fall within s.53(3)(a)(ii).

¹¹¹ e.g. under the Highways Act 1980 s.116; see Ch.9.

¹¹² e.g. by a public path creation order or an agreement.

¹¹³ As to the meaning of “restricted byway”, see paras 1-39 and 12-36.

¹¹⁴ Any challenge to such an order on the grounds that it contained errors would be by way of judicial review, as the procedures in Sch.15 do not apply to such an order; see s.53(6).

¹¹⁵ At para.2-48, et seq.

¹¹⁶ See e.g. *R. v Secretary of State for Wales Ex p. Emery* [1998] 4 All E.R. 367 and *R. (on the application of Roxlena Ltd) v Cumbria CC* [2019] EWCA Civ 1639.

¹¹⁷ [1991] 2 Q.B. 354.

¹¹⁸ See *Fowler v Secretary of State for the Environment and Devon CC* (1992) 64 P. & C.R. 16.

¹¹⁹ Wildlife and Countryside Act 1981 s.53(4A) and (4B). Unrecorded rights for mechanically propelled vehicles however were extinguished by s.67 of the Natural Environment and Rural Communities Act 2006, which came into force immediately after these provisions.

¹²⁰ [1991] 3 W.L.R. 1070.

¹²¹ At 1097.

¹²² At 1102.

¹²³ At 1090.

¹²⁴ (1990) 59 P. & C.R. 1.

¹²⁵ (1992) 64 P. & C.R. 16 at 22.

¹²⁶ (1993) 65 P. & C.R. 344.

¹²⁷ It would appear, therefore, that there is nothing to prevent repetitive, but unsuccessful, applications for modification based upon the same evidence “discovered” since the date of original map preparation.

¹²⁸ [2019] EWCA Civ 1639.

¹²⁹ At [62].

¹³⁰ At [63].

¹³¹ *Kotarski v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWHC 1036 (Admin) per Simon J at [24]; see also *Norfolk CC v Secretary of State for the Environment* [2006] 1 W.L.R. 1103 and para.12-24 et seq.

R. v Secretary of State for the Environment Ex p. Hiley (1990) 59 P. & C.R. 1. See, however, the position where a modification order is seeking to remove a path from the map: *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 W.L.R. 1264 discussed at para.12-65.

¹³³ See National Parks and Access to the Countryside Act 1949 s.27.

¹³⁴ See *R. v Secretary of State Ex p. Bagshaw and Norton* (1994) 68 P. & C.R. 402.

¹³⁵ [1998] 4 All E.R. 367; *R. v Secretary of State for the Environment Ex p. Norton and Bagshaw* [1994] 68 P. & C.R. 402.

¹³⁶ [2004] EWHC 1450 (Admin); 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; 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.

¹³⁷ [2019] EWCA Civ 1639 per Lindblom LJ at [37]; see also *R. (on the application of Norfolk CC) v The Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 119 (Admin) at [45] where Pitchford J described the reasoning in *Todd and Bradley* as “compelling”. The *extempore* judgment of Collins J in *R (on the application of Leicestershire CC) v Secretary of State for the Environment Food and Rural Affairs* [2003] EWHC 171 is wrongly decided to the extent that it is inconsistent with this.

¹³⁸ See para.12-87 et seq.

¹³⁹ *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 W.L.R. 1264; *R. (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 171; *Thould v Secretary of State for Environment, Food and Rural Affairs* [2006] EWHC 1685 (Admin).

¹⁴⁰ [1991] 2 Q.B. 354; see para.12-45.

¹⁴¹ [2001] 1 W.L.R. 1264; see also *R. (on the application of Macintosh) v Secretary of State for the Environment, Food and Rural Affairs* [2006] EWHC 2703 (Admin).

¹⁴² At [30]; and see *R. (on the application of Leicestershire CC) v Secretary of State for the Environment Food and Rural Affairs* [2003] EWHC 171 (Admin).

¹⁴³ See *R. (on the application of Durbin) v Welsh Ministers* [2014] EWHC 4458 (Admin).

¹⁴⁴ (1995) 93 L.G.R. 322.

¹⁴⁵

i.e. by deleting the disputed section and showing the route of the path over a new line.

¹⁴⁶ See Ch.9.

¹⁴⁷ At 331.

¹⁴⁸ Such an approach would also ignore the statutory wording in s.53(4)(a) which expressly allows an order to be made in relation to the “position” of any public path.

¹⁴⁹ *R. (on the application of Norfolk CC) v The Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 119 (Admin); and see the discussion at para.12–24 et seq.

¹⁵⁰ Orders under s. 53(3)(a) *should* be made by the authority without the necessity for an application; see s.53(6).

¹⁵¹ See the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1983 (SI 1983/21).

¹⁵² Wildlife and Countryside Act 1981 Sch.14 para.1.

¹⁵³ See *R. (on the application of Warden and Fellows of Winchester College) v Hampshire CC* [2009] 1 W.L.R. 138. See also *Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWCA Civ 280.

¹⁵⁴ *Trail Riders Fellowship v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 2083.

¹⁵⁵ [2015] 1 W.L.R. 1406; also a s.67 case.

¹⁵⁶ SI 1993/12.

¹⁵⁷ At [102].

¹⁵⁸ [2009] 1 W.L.R. 138 at [55]. See also per Macpherson J in *R. v Isle of White CC Ex p. O’Keefe* (1990) 59 P. & C.R. 283 at 285.

¹⁵⁹ At [93].

¹⁶⁰ At [96], citing *Inverclyde DC v Lord Advocate* (1982) 43 P. & C.R. 375 and *Oxfordshire CC v Oxford CC* [2006] Ch 43.

¹⁶¹ The form of the notice and of the certificate is prescribed in the regulations.

¹⁶²

the analogy with the requirements of s.65 of the Town and Country Planning Act 1990 with respect to certificates accompanying planning applications is not exact; see thereon *Main v Swansea CC* (1985) 49 P. & C.R. 26.

¹⁶³ Sch.14 para.3(1). It may not, however, amount to strict compliance for the purposes of the Natural Environment and Rural Communities Act 2006 s.67.

¹⁶⁴ The obligation to investigate in para.3 of the Schedule relates to “the matter stated in the application”. The certificate is separate from the application.

¹⁶⁵ See para.12-98.

¹⁶⁶ [2009] 1 W.L.R. 138; see para.12-74.

¹⁶⁷ At [67].

¹⁶⁸ i.e. any non-metropolitan district council, parish or community council, or the parish meeting where there is no parish council.

¹⁶⁹ Wildlife and Countryside Act 1981 Sch.14 para.3(1).

¹⁷⁰ The judgment of the Court of Appeal in *R v Lancashire CC Exp Guyer* [1980] 1 W.L.R. 102 may be of some relevance; see para.7-06 et seq.

¹⁷¹ *R. (on the application of Roxlena Ltd) v Cumbria CC* [2019] EWCA Civ 1639 at [52]-[54].

¹⁷² See *Perkins v Secretary of State for Environment, Food and Rural Affairs* [2009] EWHC 658 (Admin) and *Roxlena Ltd* at [35], [44]-[46].

¹⁷³ *R. v Isle of White CC Ex p. O’Keefe* (1990) 59 P. & C.R. 283. As to whether, and how, any failure to give a proper consideration to these issues may now be challenged in the courts, see para.12-96.

¹⁷⁴ See para.12-63.

¹⁷⁵ [1998] 4 All E.R. 367.

¹⁷⁶ At 376 per Roche LJ; see also *R. v Secretary of State for the Environment Ex p. Norton and Bagshaw* [1994] 68 P. & C.R. 402 and the cases cited at para.12-63.

¹⁷⁷ See Circular 1/09 para.4.9.

¹⁷⁸ See *R. v Secretary of State Ex p. Bagshaw and Norton* (1994) 68 P. & C.R. 402 and para.12-63.

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- ¹⁷⁹ See the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12).
-
- ¹⁸⁰ Where these are not known or cannot be found, the Secretary of State may direct that the notice be addressed to “The owners and any occupiers” of the land and the notice affixed to some conspicuous object on the land; Sch.15 para.3(3).
-
- ¹⁸¹ Together with a plan; Wildlife and Countryside Act 1981 Sch.15 para.3(7).
-
- ¹⁸² Wildlife and Countryside Act 1981 Sch.15, para.3.
-
- ¹⁸³ Provision is made for treating certain representations made to a draft map, where the survey has been abandoned by virtue of a direction under s.55, as having been made to the order; see the Wildlife and Countryside Act 1981 Sch.15, para.4.
-
- ¹⁸⁴ *Lasham Parish Meeting v Hampshire CC* (1993) 65 P. & C.R. 331; the interest of the applicant, however, had not been substantially prejudiced by the failure to submit the order to the Secretary of State, so relief was refused.
-
- ¹⁸⁵ SI 1993/12.
-
- ¹⁸⁶ Sch.15 para.3(1)(c).
-
- ¹⁸⁷ Wildlife and Countryside Act 1981 Sch.15, para.10. As to the recovery of costs of resisting an application for a modification order, see *R. v Secretary of State for the Environment Ex p. Smith and Deller* [1995] J.P.L. 42 and Circular ROW 1/09.
-
- ¹⁸⁸ Wildlife and Countryside Act 1981 Sch.15 para.7(2A) introduced by the Countryside and Rights of Way Act 2000 Sch.5(I) para.11 and the Countryside and Rights of Way Act 2000 (Commencement No.4) Order 2004 (SI 2004/292) subject to transitional provisions.
-
- ¹⁸⁹ SI 2007/2008.
-
- ¹⁹⁰ See the Wildlife and Countryside Act 1981 Sch.15, para.8(2)(a).
-
- ¹⁹¹ See the Wildlife and Countryside Act 1981 Sch.15, para.8(2)(b) and para.8(3).
-
- ¹⁹² In accordance with Sch.15 para.11.
-
- ¹⁹³ Deregulation Act 2015 s.26 and Sch.7.
-
- ¹⁹⁴ Sch.13A para.3. An appeal may be brought in the Crown Court against Magistrates’ Court

decisions.

¹⁹⁵ Sch.13A para.4. Subject to whether or not a modification by consent is sought, see para.12-92.

¹⁹⁶ Sch.13A paras 5-6. There is again provision for appeal to the Crown Court.

¹⁹⁷ Sch.13A para.8(1).

¹⁹⁸ Sch.13A para.8(3).

¹⁹⁹ Sch.14A para.1.

²⁰⁰ Sch.13A para.5(5).Sch.13A para.5(5).

²⁰¹ Sch.14A para.6(1); see also Sch.13A para.7(3). Guidance will be produced to assist, but whether or not a point is “relevant” is more a matter of law than discretion. There is no statutory appeal against such determinations.

²⁰² Sch.14A para.13(1).

²⁰³ Sch.14A paras 7-8.

²⁰⁴ Sch.14A para.9.

²⁰⁵ See para.12-16 et seq. and fn.32.

²⁰⁶ Deregulation Act 2015 s.54B(6)(a) and s.54C.

²⁰⁷ Deregulation Act 2015 Sch.7 para.3.

²⁰⁸ Sch.13A para.2(4)(b).

²⁰⁹ Sch.13A para.7(7) and Sch.14A para.5(2)(a).

²¹⁰ See *R. (on the application of Roxlena Ltd) v Cumbria CC* [2017] EWHC 2651 (Admin) at [89] approved in the Court of Appeal [2019] EWCA Civ 1639.

²¹¹ Wildlife and Countryside Act 1981 Sch.13A para.12, proposed to be inserted by the Deregulation Act 2015 Sch.7 para.6.

²¹² Wildlife and Countryside Act 1981 Sch.15 para.12.

²¹³

see *R. v Secretary of State Ex p. Osuel* [1977] Q.B. 122; *R. v Secretary of State for the Environment Ex p. Kent* [1990] J.P.L. 124. However, a court may not be precluded from granting a declaratory remedy by way of judicial review which does not question the validity of the order; see *R. (on the application of Derwent Holdings Ltd) v Liverpool CC* [2008] EWHC 3023 (Admin).

²¹⁴ [1994] 1 All E.R. 694; see also *Enterprise Inns Plc v Secretary of State for the Environment, Transport and the Regions* (2001) 81 P. & C.R. 18; *R. v Planning Inspectorate Cardiff Ex p. Howell* [2000] N.P.C. 68.

²¹⁵ Such a challenge had been entertained in *R. v Isle of White CC Ex p. O'Keefe* (1990) 59 P. & C.R. 283.

²¹⁶ [1992] 3 All E.R. 566 at 576.

²¹⁷ See *Islington LBC v Secretary of State for the Environment; Stockport MBC v Secretary of State for the Environment* [1980] J.P.L. 739; *Lenlyn v Secretary of State for the Environment* (1985) 50 P. & C.R. 129.

²¹⁸ CPR r.54.5(1); Senior Courts Act 1981 s.31. Also see generally *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 A.C. 738.

²¹⁹ An extension of time may be obtained where the application is not made promptly or is outside the three-month period.

²²⁰ i.e. the appeal from the authority's refusal to make an order to the Secretary of State.

²²¹ As no challenge could have been brought whilst the modification procedures were still continuing.

²²² This did not prevent the claim in *R. (on the application of Roxlena Ltd) v Cumbria CC* [2017] EWHC 2651 (Admin) which was brought against an authority's *resolution* to make a modification order. The claim was in any event dismissed in part on the basis that the Secretary of State would be able to address the contentions made by the claimant when considering whether or not to confirm the order.

²²³ See e.g. *Elveden Farms Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2012] EWHC 644 (Admin) per Charles J at [3].

²²⁴ e.g. *R. v Isle of White CC Ex p. O'Keefe* (1990) 59 P. & C.R. 283.

²²⁵ See per Simon Brown LJ in *R. v Cornwall CR Ex p. Huntington; R. v Devon CR Ex p. Isaac* [1994] 1 All E.R. 694 at 701.

²²⁶

²²⁷ Wildlife and Countryside Act 1981 s.58(2).

²²⁸ See para.2-15 et seq.

²²⁹ See para.9-138.

²³⁰ Except where a public right of way on foot or by horse had grown up over a “road or occupation way” set out after 1835.

²³¹ Including those which had become established over private roads and occupation ways.

²³² i.e. 16 December 1949.

²³³ Public path creation orders were introduced later.

²³⁴ National Parks and Access to the Countryside Act 1949 s.47; Highways Act 1980 s.36(1).

²³⁵ Highways Act 1980 s.36(2)(d).

²³⁶ e.g. the Highways Act 1980 ss.37, 38, and 228; see also Ch.4.

²³⁷ See the Highways Act 1980 s.36(2)(d), and (e) and Ch.9.

²³⁸ See the Countryside Act 1968 Sch.3 para.9(2); Wildlife and Countryside Act 1981 s.54(4).

²³⁹ CROW Act 2000 s.49(1).

²⁴⁰ Highways Act 1980 s.36(2)(a) and (b); and see Ch.4.

²⁴¹ See the Countryside Act 1968 Sch.3 para.9(5); Wildlife and Countryside Act 1981 s.54(7); CROW Act 2000 s.49(4).

²⁴² Highways Act 1980 s.42. See also Sch.12A.

²⁴³ Where it is decided against the district council, then no further notice may be served by that council in relation to that highway, unless there is a change in the character or status of the way; Highways Act 1980 Sch.7 para.3.

²⁴⁴ Highways Act 1980 Sch.7 para.7.

²⁴⁵

Highways Act 1980 s.50. See also Sch.12A.

²⁴⁶ Under s.43.

²⁴⁷ Highways Act 1980 s.50.

²⁴⁸ Highways Act 1980 s.43(2). Such expenses will not then form part of the expenditure of the parish or community council.

²⁴⁹ See Ch.4.

²⁵⁰ See, generally, *Worcestershire CR v Newman* [1975] 1 W.L.R. 901; *Whiting v Hillingdon LBC* (1970) 68 L.G.R. 437.

²⁵¹ See the Highways Act 1980 ss.130 and 130A-130D, and para.7-03 and para.7-52, et seq.

²⁵² National Parks and Access to the Countryside Act 1949 s.57.

²⁵³ Countryside Act 1968 s.27(1).

²⁵⁴ Countryside Act 1968 s.27(2)-(3).

²⁵⁵ Countryside Act 1968 s.27(4).

²⁵⁶ Countryside Act 1968 s.27(5).

²⁵⁷ Highways Act 1980 s.131(2); Countryside Act 1968 s.27(6).

²⁵⁸ *Davies v Stephens* (1836) 7 C. & P. 570; *Att. Gen. v Meyrick & Jones* (1915) 79 J.P. 515.

²⁵⁹ See *James v Hayward* (1630) Cro. Car. 184; *Bateman v Burge* (1834) 6 C. & P. 301; *Durham CC v Scott* [1991] J.P.L. 362; cf. *Herefordshire CC v Pick* (1996) 71 P. & C.R. 231. See also para.8-69.

²⁶⁰ "Agriculture" includes forestry for this purpose.

²⁶¹ Highways Act 1980 s.147. Authorities must have regard to the needs of persons with mobility problems and to guidance issued by the Secretary of State; s.147(2A) and (2B).

²⁶² Highways Act 1980 s.145.

²⁶³ Highways Act 1980 s.146(1) and (4).

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- ²⁶⁴ Highways Act 1980 s.146(2) and (3).
-
- ²⁶⁵ CROW Act 2000 s.69, inserting s.147ZA into the Highways Act 1980.
-
- ²⁶⁶ “or otherwise disturb the surface”, i.e. harrowing or other activity which is not technically ploughing but excluding excavations or engineering operations; s.134(2).
-
- ²⁶⁷ Formerly the period was within two weeks or, in exceptional weather conditions, as soon as is practicable.
-
- ²⁶⁸ If two crops are taken from a field in a year, then this right will arise twice a year.
-
- ²⁶⁹ S.134(8).
-
- ²⁷⁰ See, hereon, *Woodcock v Solari* (1966) 203 E.G. 133.
-
- ²⁷¹ For example, where the width of the path is indicated in the definitive map statement.
-
- ²⁷² Punishable with a fine not exceeding level 3 on the standard scale; Highways Act 1980 s.134(4).
-
- ²⁷³ i.e. a highway authority or a district council acting under the Highways Act 1980 ss.42 or 50; Sch.12A paras 2, 3, and 9.
-
- ²⁷⁴ Highways Act 1980 Sch.12A para.8.
-
- ²⁷⁵ *Mercer v Woodgate* (1869) L.R. 5 Q.B. 26; *Arnold v Blaker* (1871) L.R. 6 Q.B. 433; *Denis v Good* (1918) 88 L.J.K.B. 388.
-
- ²⁷⁶ *Arnold v Holbrook* (1873) L.R. 8 Q.B. 96.
-
- ²⁷⁷ (1869) L.R. 5 Q.B. 26.
-
- ²⁷⁸ See the Highways Act 1980 s.333(2).
-
- ²⁷⁹ Highways Act 1980 s.134(3).
-
- ²⁸⁰ Or land which is being brought into use for agriculture.
-
- ²⁸¹ The order may not affect the line of a footpath or bridleway on land not occupied by the applicant; Highways Act 1980 s.135(3)(c). A diversion may, however, be onto other land; subs.

(3)(a).

²⁸² Highways Act 1980 s.135(3).

²⁸³ i.e. a footpath or bridleway that follows the sides or headlands of a field or enclosure: Highways Act 1980 s.329(1).

²⁸⁴ e.g., in relation to this section, a bridleway which is a field edge path.

²⁸⁵ See para.8-19.

²⁸⁶ Liable to a fine not exceeding level 3 on the standard scale; Highways Act 1980 s.135(6).

²⁸⁷ Highways Act 1980 Sch.12A para.3.

²⁸⁸ Highways Act 1980 s.135(8).

²⁸⁹ Inserted by the Rights of Way Act 1990.

²⁹⁰ As to when a crop will be treated as being grass, see subs.(3).

²⁹¹ "Minimum width" is to be defined by reference to Sch.12A of the Highways Act 1980. See para.12-122.

²⁹² Para.8-51.

²⁹³ "Encroaching" for this purpose will occur where any part of the crop grows on or otherwise extends onto or over the highway so as to reduce its apparent width to less than its minimum width.

²⁹⁴ Wildlife and Countryside Act 1981 ss.59 and 66(1).

²⁹⁵ The offence is punishable by a fine not exceeding level 3 on the standard scale.

²⁹⁶ Defined at s.59(4) and (5).

²⁹⁷ Wildlife and Countryside Act 1981 s.59(3).

²⁹⁸ See Ch.8.

²⁹⁹ Highways Act 1980 s.164. See *Stewart v Wright* (1893) 9 T.L.R. 480.

³⁰⁰

³⁰¹ At para.7-12 et seq.

³⁰² These councils may adopt the provisions if they so choose.

³⁰³ Including cycle tracks; CROW Act 2000 s.60(5).

³⁰⁴ Particularly for pedestrians and cyclists.

³⁰⁵ Where an authority decides not to amend the plan it must re-publish the existing plan and give reasons why it has not changed.

³⁰⁶ Or the Broads Authority.

³⁰⁷ See Ch.13.

³⁰⁸ CROW Act 2000 s.61(1).

³⁰⁹ CROW Act 2000 s.61(4).

³¹⁰ Statutory Guidance to Local Highway Authorities in England (Defra, November 2002) and Guidance for Local Authorities on Rights of Way Improvement Plans (Welsh Government, July 2016).

³¹¹ Inserted by the Local Government (Miscellaneous Provisions) Act 1982. See also the limited duration power to issue pavement licences under the Business and Planning Act 2020 s.1.

³¹² i.e. county councils, metropolitan district councils, non-metropolitan district councils, London borough councils and the Common Council of the City of London.

³¹³ See para.9-138 et seq. These are, in any event, footpaths or bridleways.

³¹⁴ i.e. an order under the Town and Country Planning Act 1990 s.249.

³¹⁵ Highways Act 1980 s.115B(3).

³¹⁶ Highways Act 1980 s.115C.

³¹⁷ Highways Act 1980 s.115D.

³¹⁸ Highways Act 1980 s.115E.

-
- ³¹⁹ Highways Act 1980 s.115E(1)(b).
-
- ³²⁰ This will be a standard charge except where the council owns the subsoil; Highways Act 1980 s.115F(3).
-
- ³²¹ Highways Act 1980 s.115F(4).
-
- ³²² Highways Act 1980 s.115K.
-
- ³²³ i.e. where the council is not granting any permissions to third parties.
-
- ³²⁴ Highways Act 1980 s.115G(1) and (2).
-
- ³²⁵ i.e. the Highways Act 1980 ss.115B and 115C.
-
- ³²⁶ See para.2-17.
-
- ³²⁷ Trading from a permanent structure authorised under Part VIIA of the Highways Act 1980 is not street trading for the purposes of the Local Government (Miscellaneous Provisions) Act 1982. See Sch.4 para.1(2)(g) of that Act and *Tower Hamlets LBC v Sherwood* [2002] EWCA Civ 229.
-
- ³²⁸ Highways Act 1980 s.115B(7).
-
- ³²⁹ Highways Act 1980 s.115A(7).
-
- ³³⁰ The section still refers to B.R.B. but such highways will probably now be maintainable by Network Rail.
-
- ³³¹ See Highways Act 1980 s.300; certain local authority vehicles cleaning or removing obstructions from paths.
-
- ³³² See para.9-160 et seq.
-
- ³³³ Natural Environment and Rural Communities Act 2006 s.67(3)(c).
-
- ³³⁴ Natural Environment and Rural Communities Act 2006 s.67(5).
-
- ³³⁵ See para.8-03 et seq.
-
- ³³⁶ Road Traffic Act 1988 s.34(4).
-
- ³³⁷

At para.8-04, et seq. Also see also Highways Act 1980 s.300 and the Vehicles (Conditions of Use on Footpaths) Regulations 1963 (SI 1963/2126 as amended by SI 1966/864).

³³⁸ (1871) L.R. 7 Q.B. 47; cf. *R. v Longton Gas Co* (1860) 2 E. & E. 651.

³³⁹ (1994) 68 P. & C.R. 14.

³⁴⁰ *Robinson v Adair*, *The Times*, 2 March 1995 DC; *Hereford and Worcester CC v Pick* (1996) 71 P. & C.R. 231; *Hayling v Harper* [2003] 39 E.G. 117.

³⁴¹ Vehicular Access Across Common and Other Land (England) Regulations 2002 (SI 2002/1711) and the Vehicular Access Across Common and Other Land (Wales) Regulations 2004 (2004/248) (W.25) now both repealed.

³⁴² [2004] UKHL 14.

³⁴³ This is discussed at paras 2-51 and 2-101.

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Appendix 10

Court Judgments

Appendix 10.1

***Fowler v SSE* (1992) 64 P & CR 16**

Fowler v Secretary of State for the Environment and another [1991] Lexis Citation 1946

[1992] JPL 742

COURT OF APPEAL (CIVIL DIVISION)

FARQUHARSON, SCOTT LJ, SIR JOHN MEGAW

20 NOVEMBER 1991

20 November 1991

The Appellant appeared in person; N Fleming for the Respondents; D Ouseley appeared as Amicus Curiae

Treasury Solicitor

FARQUHARSON LJ

This appeal concerns the nature of the right of way over a path near Uplyme in Devonshire. It runs from Cannington Lane past some cottages called Happy Valley but which were formerly described as Horseman's Hill Cottages. One of these is owned and occupied by the appellant and his wife. The path continues along a private access driveway which has been surfaced with tarmac until it reaches an adopted road called Cuckoo Lane. The path continues over fields until it reaches Gore Lane just south of Uplyme. In the Devonshire County Council's Definitive Map and Statement the path is identified as Footpath No 6 and shown as no more than a footpath.

In 1987 the County Council made a Map Modification Order pursuant to section 53(2)(a) of the Wildlife and Countryside Act 1981 which purported to show 750 metres of the path, namely that part from Cannington Lane to Cuckoo Lane as a bridleway. The order was submitted to the Secretary of State for confirmation but in the light of objections received, he directed that a public inquiry should be held. An Inspector was appointed and a public local inquiry into the order took place at Uplyme Village Hall on 24th October 1988. The order was objected to by the Parish Council and by a number of other persons including the appellant, who would clearly be prejudiced if the order was put into effect. At the outset a solicitor appearing on behalf of one of the objectors took the point that contrary to Schedule 14 paragraph 3(1)(a) of the 1981 Act no member of the relevant committee of the County Council had made the necessary investigation prior to the making of the order, and the committee had left the task to the solicitor to the Council and his staff. This point, as will be demonstrated later in this judgment, was unsound. It was rejected by the Inspector, with the unfortunate and unnecessary consequence that not only did the solicitor withdraw but nearly all the objectors as well. The Inspector was thus deprived of the assistance he might have received from that quarter.

Evidence was put before the Inspector that the path was used regularly by horse riders since at least 1917, but after

September 1957 when the Definitive Map was issued the path had been effectively closed for passage by horses. There was also documentary evidence in the form of the Estate Book of a former owner of the land on which the path ran, dated 1st May 1934, which described that part of the path which is the subject of the order as a bridleway.

In the result the Inspector decided to confirm the order. By his decision letter of 22nd December 1988 he held that the fresh evidence pointed inexorably to the legal existence of a public right of way on horseback along this path of very long standing.

Paragraph 12 of the 15th Schedule of the 1981 Act makes provision for a person aggrieved by such an order to challenge its validity. It provides:

"12. -- (1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.

(2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.

(3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever."

Pursuant to those provisions the appellant issued proceedings in the High Court. There were a number of grounds set out to challenge the order, but only one was proceeded with by the experienced counsel who represented the appellant. By that ground counsel contended that the path in question was designated by the County Council Definitive Map as a footpath in accordance with the provisions of the National Parks and Access to the Countryside Act 1949. Counsel contended that the status of the path as a public footpath was thereby conclusively established, and could not be challenged.

Kennedy J rejected that argument and dismissed the application. The appellant now appeals to this court against the judge's decision. While he continues to adopt counsel's argument that the path is now irrevocably designated as a public footpath only, he contends that status can be established by the provisions of the 1981 Act.

In my judgment the appellant is plainly wrong in that contention. While the application for the Modification Order by the County Council is clearly governed by the 1981 Act, the status of the path depends on its appearance in the Definitive Map of 1957 which was published under the provisions of the 1949 Act. It is therefore necessary to consider the purpose and the relevant sections of the earlier Act.

The long title of the Act states its purpose, viz:

". . . to make further provision for the recording, creation, maintenance and improvement of public paths and for securing access to open country, and to amend the law relating to rights of way . . ."

The relevant sections are contained in Part IV of the Act which is headed:

"Ascertainment of footpaths, bridleways and certain other highways".

Mr Fleming for the Secretary of State submits that the overall purpose of this part of the Act is to record as accurately as possible the existence of public rights of way over land so that they may be preserved. He points to the observations of Lord Denning MR in *R v Secretary of State for the Environment ex parte Hood* [1975] QB 891 at 896:

"The object of the statute is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are . . . it is important that they should be preserved and known, so that those who love the countryside can enjoy it, and take their walks and rides there."

Returning to the 1949 Act, section 27 makes provision for County Councils to prepare draft maps showing the footpaths and bridleways in their area wherever in their opinion such a right subsisted. These ways were defined in subsection (6):

"[footpath] means a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road;

[bridleway] means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse . . ."

Section 29 provided for objections to be made to the draft map and its supporting statements, to the process by which they were considered, and for the map to be modified, where the objections are made out. Thereafter provisional maps and statements were to be prepared, and finally the definitive maps and statements (section 32(1)).

The effect of these provisions is set out in section 32(4):

"A definitive map and statement prepared under subsection (1) of this section shall be conclusive as to the particulars contained therein in accordance with the foregoing provisions of this section to the following extent, that is to say --

(a) where a map shows a footpath, the map shall be conclusive evidence that there was at the relevant date specified in the statement a footpath as shown on the map;

(b) where the map shows a bridleway, or a road used as a public path, the map shall be conclusive evidence that there was at the said date a highway as shown on the map, and that the public had thereover at that date a right of way on foot and a right of way on horseback or leading a horse, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than the rights aforesaid; and

(c) where by virtue of the foregoing paragraphs of this subsection the map is conclusive evidence, as at any date, as to a public path, or road used as a public path, shown thereon, any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at the relevant date, and any particulars so contained as to limitations or conditions affecting the public right of way shall be conclusive evidence that at the said date the said right was subject to those limitations or conditions, but without prejudice to any question whether the right was subject to any other limitations or conditions at that date."

Finally section 33 provides for periodical reviews of the map.

"33. -- (1) The authority by whom a definitive map and statement have been prepared under the last foregoing section shall from time to time review the particulars contained therein having regard to events which have occurred at any time between the relevant date specified in the definitive statement and such date as may be determined by the authority for the purposes of the review (in this and the next following section referred to as [the date of review]):

Provided that in the case of a map and statement which have previously been reviewed under this subsection, the foregoing provisions of this subsection shall have effect with the substitution, for the reference to the relevant date specified in the statement, of a reference to the last preceding date of review.

(2) The events so occurring as aforesaid to which an authority shall have regard in carrying out a review under the last foregoing subsection shall include the following events, that is to say --

(a) . . .

(b) . . .

(c) . . .

(d) . . .

(e) the discovery by the authority of new evidence such that, if the authority were then preparing a draft map under the foregoing provisions of this Part of this Act, they would be required by those provisions to show on the map, as a highway of a particular description, a way not so shown on the definitive map, or on the revised map last prepared in accordance with the following provisions of this section, as the case may be.

(3) A review under subsection (1) of this section shall be carried out at such time as the authority carrying out the review may consider appropriate, so however that the date of review shall not in any case be a date later than the expiration of five years after the relevant date, or the last preceding date of review, whichever is the later:

Provided that nothing in this subsection shall affect the validity of any review carried out under the said subsection (1) or of any document prepared or thing done in consequence of such a review."

It was in the light of these statutory provisions that counsel for the appellant contended that the application of the County Council in the present case was ill-founded. He argued that where a highway was recorded in the definitive map as a footpath only by virtue of section 32(4)(a) its status was preserved for all time. Where a document was directed to be conclusive evidence of some fact by the terms of a statute then that fact could not thereafter be challenged.

For my part I cannot see how such a construction can stand in the light of the provision for five-yearly reviews, or indeed any subsequent review. Section 33(2)(e) does not constrict the new evidence referred to in that subparagraph to the period since the preparation of the first definitive maps but comprehends new evidence relating to the existence of earlier rights of way not recorded in the first definitive map.

The matter was put beyond doubt by the decision of the House of Lords in *Suffolk County Council v Mason* [1979] AC 705. The majority held that the showing of a right of way as a footpath on the definitive map was conclusive that at the relevant date there was a right of way on foot and that there was not any more extensive right. Lord Diplock went on to explain that the map was not conclusive in any permanent sense when he said at page 714 C-E:

"The entry on the definitive map does not necessarily remain conclusive evidence for ever. Section 33 makes provision for quinquennial revisions -- though these do not appear in practice to have been carried out punctually. On a revision, entries on the definitive map which require modification as a result of events that have occurred since the date of the last revision may be modified accordingly. Among the subsequent events which call for a modification of an entry is the discovery by the county council of new evidence which, if it had been known to them at the time of the last revision, would have resulted in their being required to enter it on the definitive map as a highway of a different description. So an entry made by mistake because of lack of historical knowledge would, if the Act were administered in accordance with its terms, endure for a maximum of five years after the error was discovered. These provisions for revision have since been amended by the Countryside Act 1968; but this cannot affect the construction of the Act of 1949 as it was originally enacted."

For my part I cannot see how the appellant's argument before Kennedy J can survive that decision, and indeed the

judge so held. He accepted the respondent's submission that the key word in section 32(4)(a) is "evidence". While the relevant entry subsists on the definitive map it is conclusive evidence of the nature of the highway there recorded. Non constat that where fresh evidence is later discovered which demonstrates that the record is inaccurate the right of way cannot be altered accordingly.

This approach by the learned judge is supported by other authorities, notably *R v Secretary of State for the Environment ex parte Hood* [1975] QB 891 (see the remarks of Lord Denning MR at page 898) and *R v Secretary of State for the Environment ex parte Stewart* [1978] P & CR 279.

In 1968 Parliament passed the Countryside Act. One of its provisions was to include a special review procedure as County Councils had fallen behind in their task of preparing definitive maps and supporting statements. Another provision (section 9) was to reclassify roads used as public paths as either:

- (a) a byway open to all traffic or
- (b) a bridleway or
- (c) a footpath.

The 1968 Act, it is agreed, does not influence the issues in the present case.

This brings us to the 1981 Act which, as already observed, is the statute under which the present proceedings are brought. The relevant sections are in Part III and a duty was imposed on the surveying authority to keep the definitive map and statement under continuous review. The following sections are relevant:

"53. -- (2) As regards every definitive map and statement, the surveying authority shall --

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

(3) The events referred to in subsection (2) are as follows --

(a) . . .

(b) . . .

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows --

(i) . . .

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description . . .

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to --

- (a) the position and width of any public path or byway open to all traffic which is or is to be shown on the map; and
- (b) any limitations or conditions affecting the public right of way thereover.

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

Section 55 provides that there shall be no further reviews under the 1949 Act. Section 56(1):

"A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely --

(a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than that right."

It will be seen that although these sections replace the corresponding provisions of the 1949 Act they are not in identical terms. In particular section 56(1)(a) just cited brings the position of footpaths into line with those relating to other rights of way by saying that the conclusive evidence of the existence of a footpath by being included in the map is without prejudice to the existence of any other public right. Accordingly the 1981 Act, so far from preserving the existence of a footpath in the sense that it could not be enlarged into a greater right, or alternatively deleted, specifically contemplates the possibility of it being altered in the light of fresh evidence obtained. Such evidence must be fresh in the sense that it was not available at the date of the existing definitive map, and such fresh evidence should be identified by an inspector whenever he decides that it exists. There are no other provisions of the 1981 Act which relate to this issue. The general thrust of the 1981 Act is to ensure that the definitive maps are accurate and that the need for continuity does not prevent it. In that respect it reverses the decision in *Suffolk County Council v Mason* (supra). A reconciliation of the provisions of the 1981 Act was explained in the recent decision of *R v Secretary of State for the Environment ex parte Burrows and Simms* [1990] 3 WLR 1070. Purchas LJ said at page 1095:

"There is no difficulty in reconciling sections 53 and 56 of the Act of 1981 once the comparatively restricted purpose of the legislation as a whole is understood, namely the preparation and maintenance of an authoritative record in the form of a definitive map and statement showing those highways over which the public have rights of way whether as 'ramblers' only or as 'ramblers and riders'. As Lord Diplock commented, the drivers of vehicles or drovers of cattle or other users play only a minor part when after 1968 Parliament decided to rationalise the classification of RUPPs. Once prepared, however, and until subsequently revised, the map and statement is to be conclusive evidence in rights of way disputes between landowners and the various categories of persons exercising rights of way. Parliament never removed the duty to revise and keep the record up to date so that not only changes of status caused by supervening events, eg the stopping up of a highway under statute or otherwise; or the creation of prescriptive rights, but also changes in the original status of highways or even their existence resulting from recent research or discovery of evidence should all be taken into account in order to produce the most reliable map and statement that could be achieved."

At page 1097G Glidewell LJ observed:

"On the other hand, section 53(3)(c) differs from the preceding sub-paragraphs in that use of the word 'discovery' suggests the finding of some information which was previously unknown, and which may result in a previously mistaken decision being corrected. This information will normally, if not always, relate to a fact or situation which

already existed at the time when the definitive map was prepared. In this way, paragraph (c) is to be distinguished from its predecessors.

If I am right in my view that paragraph (c) is concerned with the correction of mistakes as the result of newly discovered information, in order to be comprehensive, the power of correction must cover three different situations: (i) the addition of a right of way not shown on the definitive map: paragraph (c)(i) achieves this; (ii) the upgrading or downgrading of rights of way shown on the map, but so shown in a wrong category: sub-paragraph (c)(ii) covers both these situations; (iii) the deletion of a right of way which the latest information proves should not have appeared on the map at all: sub-paragraph (c)(iii) by its terms achieves this."

Finally at page 1102 Russell LJ:

"Having regard to the very comprehensive and closely reasoned judgments of Purchas and Glidewell LJJ, which I have read and with which I respectfully agree, there is very little that I can usefully add. I would, however, wish to emphasise that subsections (2) and (3) of section 53 of the Wildlife and Countryside Act 1981 do provide scope for the modification of the map and statement to keep pace with the reality of changing circumstances. In particular I am satisfied that section 53(3)(c), with its use of the word 'discovery', embraces the situation where a mistaken decision has been made and its correction becomes possible because of the discovery of information which may or may not have existed at the date of the definitive map."

It is clear from this examination of the interplay between section 53 and section 56 that on the sole point argued before Kennedy J the appellant's case fails as it does in its amended form before this court.

The appellant has advanced a number of other grounds in his notice of appeal to attack the decision of the Secretary of State. Counsel for the latter has not objected to these grounds being argued. The main ground developed before us was of a geographical nature. The appellant contends that when the footpath (No 6) reached Cuckoo Lane Cottages it continued over the stile (formerly footpath No 9) which was of course impassable to horses. Riders would therefore be obliged to turn to their right into Cuckoo Lane by passing in front of the cottages and the garage. The appellant contends that between the track of the footpath and Cuckoo Lane (an adopted highway) there is an area of land over which there is no public right of passage. Accordingly any riders who took their horses over that area were trespassers. The appellant supports this argument by a large number of documents relating to the maintenance of Cuckoo Lane in the past. This material he suggests supports his claim that there was an area in front of the cottages and garage which was not maintained by the County Council. The appellant refers specifically to extracts from the Books of the Axminster District Council relating to the matter as well as other records.

This point, for the reasons explained, was never taken before Kennedy J. Furthermore none of the material was placed before the Inspector. The appellant tells us that the material was not available at the time of the Inquiry. This may well be so but the issue was never drawn to the attention of the Inspector. It was well in the minds of the objectors. The appellant says he himself has obtained an easement of passage over the "private" area from the owner of the cottages. Also it seems that at some stage a gate was erected to prevent anyone riding through. The reason for the Inspector not being apprised of it was of course that the objectors foolishly walked out of the Inquiry, but that does not justify the point first being raised in this court. The correct course for the appellant to follow if he wishes to take this point is that set out in section 53(3)(c)(iii). Furthermore the definitive map shows or (in deference to the appellant) purports to show four footpaths converging at a point to the west of Cuckoo Lane Cottages and one of these, No 7, appears to cross over the disputed ground. The appellant does not accept this, but it is the definitive map which he relies on to claim that Footpath No 6 is no more than a footpath. I would reject this ground of appeal.

The next point taken by the appellant is that the County Council failed to comply with Schedule 14 of the 1981 Act.

Paragraph 3(1) of that schedule requires the authority as soon as possible after receiving the relevant certificate

from an applicant to investigate the matters stated in the application. The appellant complains that the Councillors themselves did not carry out the task of investigation but delegated it to the County Council solicitor and his staff. A report was prepared by the solicitor and submitted to the Council for its consideration and if accepted, his approval. It is quite plain that there was no delegation of his power or function by the Council. The decision was reserved to the members of the Council. The duties required of the solicitor were to obtain and collate the relevant material. In those circumstances there is no room for the application of the maxim "Delegatus non potest delegare" as the appellant suggests. In any case the authority could rely on the provision of section 101(1)(a) of the Local Government Act 1972.

Another complaint is that the Inspector was not legally qualified, and received any legal instruction from lawyers within the department of the Secretary of State. The short answer is that paragraph 10(1) of the 15th Schedule of the 1981 Act does not require the Inspector to be legally qualified. In the present context he would perhaps be more usefully qualified as a surveyor.

The appellant further contends that section 72(11) of the 1981 Act -- an amending section -- excludes reliance on the 20-year presumption of dedication contained in section 31 of the Highways Act 1980. The amended subsection is (10), which states:

"Nothing in this section or section 32 below affects section 56(1) of the Wildlife and Countryside Act 1981 (which provides that a definitive map and statement are conclusive evidence as to the existence of the highways shown on the map and as to certain particulars contained in the statement) . . ."

Section 56(1) of the 1981 Act has already been set out in this judgment. The effect of the amendment is not to exclude reliance upon the 20-year presumption of dedication. The entry of a footpath on the definitive map is specifically stated to be "without prejudice to any question whether the public had any right of way other than that right". The subsection does not prevent the proving of additional rights of way other than the rights recorded in the plan, such as for example presumed dedication of a right of way following public user for twenty years.

The last ground to be dealt with concerns an allegation that there was no evidence before the Inspector that the provisions of schedule 15 had been complied with in regard to objections and notice. In this appeal it remained no more than an allegation. Unless there is specific evidence to the contrary the presumption of regularity applies.

No point has been taken that those several grounds of appeal are not within the terms of Schedule 15 paragraph 12 of the 1981 Act, which sets out the matters which may be challenged by a person aggrieved.

I would dismiss the appeal.

SCOTT LJ

I agree with the judgment of Farquharson LJ. Before this court the appellant raised a point not mentioned in his notice of appeal to this court.

The point is, as Farquharson LJ has described it, of a geographical nature. The appellant contends that footpath No 6 is separated from Cuckoo Lane by a rectangular area of ground over which there are no public rights of way. So, he contends, the upgrading of footpath No 6 to the status of bridleway cannot give any right to those on horseback to go from the bridleway to Cuckoo Lane.

The answer to this point is to be found, in my judgment, in the contents of the Definitive Statement relating to footpath No 6.

The original Statement is headed "Concise Description of Path to include Width, Nature of Surface, Means of Access, Obstructions, etc".

The contents of the Footpath No 6 Statement are as follows:

"From: Cannington Lane

To: Gore Lane

Description: The path is a Footpath. It starts at Unclassified County Road, Cannington Lane, by Loomhouse and proceeds first south-eastwards then north-eastwards past the western side of Horseman's Hill Cottages following Horseman's Hill to Cuckoo Lane and Footpath No 8, thence across the railway and fields and a short length of Private Accommodation Road (not repairable by the inhabitants at large) to join the County Road C 183, Gore Lane by Hook Farm."

This description of Footpath No 6 includes what was originally Footpath No 9. The important point for present purposes is that the footpath is described as leading "to Cuckoo Lane and Footpath No 8."

It is clear from this description that access could be obtained from Footpath No 6 either to Footpath No 8 or to Cuckoo Lane. The appellant's proposition that access could not be obtained from Footpath No 6 to Cuckoo Lane is inconsistent with the contents of the Statement.

The Statement relating to Footpath No 6 that I have just read was made pursuant to Section 32(4) of the 1949 Act. Section 32(4) provides, inter alia, that

"A definitive map and statement . . shall be conclusive as to the particulars contained therein . . . to the following extent, that is to say --

(a) . . .

(b) . . .

(c) . . . any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at the relevant date . . ."

Section 33 of the 1949 Act provided for periodical reviews.

If a statement showed incorrectly the position of a footpath or bridleway, the error could be corrected on a review. These provisions have been repeated in the 1981 Act (see section 56(1)(a) and (e)).

The Definitive Map Modification Order 1987, which is being challenged by the appellant in these proceedings, was made by the Devon County Council on 18th November 1987. It substituted the following Definitive Statement for the original Statement:

"Path No 6: This path is a bridleway for part of its length and a footpath for the remainder. It begins as a bridleway at the Unclassified County Road known as Cannington Lane at GA SY 31689231 and enters a field OS No 7624 by the property shown as Loomhouse on the plan annexed to the Order. It travels southeastwards for a short distance before turning northeastwards across a field, then past the western side of Horseman's Hill Cottages, following Horseman's Hill along a metalled road until it reaches the western end of the Unclassified County Road known as Cuckoo Lane by the property shown as Cuckoo Hill Cottages on the plan annexed to this Order. This is at point GR SY 32139276. The path then continues as a footpath . . ." etc.

So this Statement, too, describes the route taken by Path No 6 as leading to Cuckoo Lane.

The Modification Order was confirmed by the Inspector in his Decision letter dated 22nd December 1988. In para 8 of the letter the Inspector describes the route of the path by saying this:

"On reaching a bend to the right in front of Cuckoo Hill Cottage the driveway becomes an adopted lane called Cuckoo Lane . . ."

The appellant appealed to the High Court under para 12 of Schedule 15 to the 1981 Act. In his grounds of appeal the appellant stated that:

"The Definitive Map and Statement show that Footpath No 6 Uplyme runs well clear of the end of the adopted highway Cuckoo Lane. The Inspector notes this in point 8 of his 22nd December 1988 Public Inquiry Report".

The Definitive Statement is to the reverse effect, as is paragraph 8 of the 22nd December 1988 Decision letter.

In my judgment, the appellant's geographical point is one that it was not open to him to take in the High Court and that he cannot take before us.

Once the original Definitive Statement had stated that the route of the footpath No 6 went "to Cuckoo Lane", the route was thereby fixed until such time as it became varied by an appropriate Modification Order. The 1987 Modification Order confirmed that route. It did not purport to vary it. It also upgraded the path from footway to bridleway. If the appellant had succeeded either before the Inspector or in the High Court, in having the Modification Order set aside, that success would not have altered the route. The route would have remained as stated in the original Definitive Statement. Foot users would have been entitled to go from path No 6 to Cuckoo Lane.

If the route as stated in 1957 and confirmed in 1987 is, as the appellant contends, incorrect, the appellant must endeavour to persuade the County Council to make a Modification Order correcting the error. This point is not a relevant objection to the 1987 Modification Order whereby the status of the path was upgraded to bridleway but the position of the path was not altered.

I would dismiss this appeal for the reasons given by Farquharson LJ.

SIR JOHN MEGAW

I agree that the appeal should be dismissed for the reasons given in judgments of Farquharson and Scott LJJ.

Appeal dismissed with costs; application for leave to appeal to the House of Lords refused.

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Appendix 10.2

***Mayhew v SSEnv* (1993) 65 P & CR 344**

MARGARET MAYHEW v. SECRETARY OF STATE FOR THE ENVIRONMENT

QUEEN'S BENCH DIVISION (Potts J.): July 10, 1992

Highways—Wildlife and Countryside Act 1981—Reclassification of footpaths to by-ways open to all traffic—Evidence now relied upon was available at time of previous classification—Whether evidence within section 53(3)(c)—Whether Secretary of State for the Environment had power to call in decision to confirm order after inspector appointed to hold inquiry and determine appeal

The Wildlife and Countryside Act 1981 imposed a duty on the Hampshire County Council as a surveying authority to reclassify roads used as public paths. Three such roads were shown on the 1964 edition of the definitive map as footpaths. After a review of the documentary evidence, the Hampshire County Council concluded that the three paths were ancient highways. No action was taken until 1985 when the council considered a submission from the Horndean Parish Council that the footpaths should be upgraded to bridleways. The council disagreed, but took the view that they should be reclassified as by-ways open to all traffic and that the earlier classification of 1952 when they had been classified as footpaths was wrong. The council therefore made the Hampshire (East Hampshire District No. 2) (Parish of Horndean) Public Path Modification Order 1986 dated October 21, 1988. It was opposed. Accordingly, the Secretary of State for the Environment directed an inspector to hold a public inquiry and subsequently directed that the appeal be determined by him instead of by the inspector. An inquiry was held. The applicant was one of several objectors. It was accepted by all parties at the inquiry that the evidence relied on to support the order had existed for some time and no fresh evidence had been found recently. The failure to pick up the facts at the earlier reviews was inexplicable. The inspector was satisfied that vehicular rights existed over the footpaths and recommended that the order be confirmed. The Secretary of State accepted the recommendation and confirmed the order. The applicant applied to the court questioning the validity of the order.

Held, the word "evidence" in section 53(3)(c) of the Wildlife and Countryside Act 1981 must be given its full and natural meaning and should not be restricted to "new evidence" or to "evidence not previously considered." The "event" in the subsection is concerned with the finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared. In the 1981 Act, the power of the surveying authority under section 53(2) is not to make such modifications as may appear to it to be desirable. It is to make such modifications to the map and statement as appear to be requisite in consequence of the occurrence of any of the events specified in subsection (3). Section 53 limits the modifications which ought to be made in consequence of the occurrence of a relevant event to those which would give effect to the rights of way which are found to exist rather than those which might be thought to be suitable or desirable. The Act recognises three categories of way only. If vehicular rights over a way are "ascertained" by the "discovery of evidence," the surveying authority must modify the map so as to show that way as a by-way open to all traffic. Regrading is not the conversion of a cartway into a motorway but rather the recording of vehicular rights of passage. Vehicular use changes over the years. The particular mode of propulsion of the vehicle is not relevant. The criticisms of the confirmation of the order were misconceived and it was therefore within the powers of the Act. The application failed.

Legislation construed:

Wildlife and Countryside Act 1981, section 53 and Schedule 15. These provisions are set out at page 347, *post*.

Cases cited:

- (1) *Fowler v. Secretary of State*, unreported, November 20, 1991.
- (2) *Kain v. Norfolk* [1949] 1 Ch. 163.
- (3) *Ladd v. Marshall* [1954] 1 W.L.R. 1489.
- (4) *R. v. Secretary of State, ex p. Riley* (1989) J.P.L. 921.
- (5) *R. v. Secretary of State, ex p. Burrows*, *R. v. Secretary of State, ex p. Simms* [1991] 2 Q.B. 354.

Application by Margaret Mayhew under paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 to question the validity of the Hampshire (East Hampshire District No. 2) (Parish of Horndean) Public Path Modification Order 1988 dated December 30, 1986, and its confirmation. The ground of challenge was that the confirmation of the order was misdirected by law. In particular, that:

- (1) the Secretary of State had no jurisdiction to confirm the order himself;
- (2) the county council failed to comply with certain statutory formalities; and
- (3) the evidence relied on when making the order did not fall within section 53(3)(c) as it was not fresh evidence.

The applicant in person.

N. Fleming, Q.C. for the respondent.

J. Howell appeared as *amicus curiae*.

POTTS J. In 1969 Horndean Parish Council wrote to the Hampshire County Council querying the status of various footpaths shown on the 1964 edition of the definitive map of Hampshire. The parish council expressed the view that the correct status of footpath 13 (Ham Lane), footpath 47 (Coldhill Lane) and footpath 48 (Tagdell Lane) appeared to be that of: "roads used as public paths (R.U.P.P.s)."

After a review of documentary evidence, the county council concluded that the three paths were ancient highways. In 1982 an individual claim, supported by claim forms, was submitted to the county council requesting the upgrading of footpath 13. No action was taken until 1985 when the county council considered a further submission by the parish council that footpaths 37, 47 and 48 should be upgraded from footpaths to bridleways. The county council did not accede to this submission. It took the view that the available historical evidence, namely, the consistent portrayal of the lanes in reputable topographic mapping, from 1810 onwards, the enclosure map of 1816, the Tithe map of 1838 and the Award of 1843, on a balance of probabilities, justified the classification of the paths as by-ways open to all traffic and that the earlier classification of 1952 when they had been classified as footpaths was wrong:

A by-way open to all traffic means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used. (Section 66(1) of the Wildlife and Countryside Act 1981.)

Thus, on December 30, 1986, the county council made:

The Hampshire (East Hampshire District No. 2) (Parish of Horndean) Public Path Modification Order 1986,

the effect of which, if confirmed without modification, would be to modify the definitive map and statement by regrading Horndean footpaths 13, 47 and 18 (the Horndean footpaths) as by-ways open to all traffic because it appeared:

to the Hampshire County Council (hereinafter called the Surveying Authority) that the Hampshire National Parks and Access to the Countryside Act 1949—section 33 Second Review of the Definitive Map and Statement (dated 1st January 1964) requires modification in consequence of the occurrence of an event specified in section 53(3) of the Act namely:

That the Highways shown on the Definitive Map and Statement as Horndean Footpaths Nos. 13, 47 and 48 ought to be there shown as By-ways open to all Traffic.

The order was opposed. Accordingly, the Secretary of State directed Major General Sexton to hold a public local inquiry pursuant to paragraph 10(1) of Schedule 15 to the Wildlife and Countryside Act 1981 to hear representations relating to the order. By a letter dated February 20, 1989, in the purported exercise of his powers under paragraph 10(2) of Schedule 15 to the Act he directed that the appeal: "shall be determined by the Secretary of State instead of by an inspector" in view of the complex legal issues raised by the case.

The inquiry was held on February 21 and 22, 1989. There were seven objectors, including the present applicant, Mrs. Mayhew, and one supporter. The county council was represented and submitted that the evidence relied on to support the order had:

existed for some time and no fresh evidence had been found recently. The failure to pick up the facts at the reviews was inexplicable. The county council, however, had to deal with about 6,500 rights of way (although there was some duplication in this total because of different numbering at parish boundaries) and some 3,100 route miles of path. In consequence heavy reliance was placed on the work of parish councils.

This submission appears to have been accepted on all sides at the inquiry. The present application has proceeded on the basis that the documentary evidence relied on by the county council to make the modification was at all relevant times within the council's archives. The inspector heard evidence from Mr. Lamb, Deputy Council Archivist, and it was common ground at the inquiry and in this court, that consideration was not given to this documentary material until after 1969.

Having heard evidence and submissions, the inspector was satisfied that vehicular rights existed over the footpaths and recommended that the Modification Order be confirmed. The Secretary of State (letter dated December 20, 1989) accepted this recommendation:

Accordingly, the Secretary of State having carefully considered the Inspector's findings and recommendation finds that he agrees with the Inspector that, despite the lack of user evidence, the weight of docu-

mentary evidence strongly indicates that the right of vehicular passage exists on each of the rights of way included in the order. Consequently, the Secretary of State accepts the recommendation of the inspector and he hereby confirms . . . the Order.

Mrs. Mayhew was and is a person aggrieved by the order. She has applied to the court questioning the validity of the order under the provisions of paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981. The court may only quash an order if it is:

satisfied that the order is not within (the powers of sections 53 and 54 of the Act) or that the interests of the applicant have been substantially prejudiced by a failure to comply with (the requirements of Schedule 15).

Sections 53 and 54 are to be found in Part III of the Wildlife and Countryside Act 1981 (the 1981 Act). Part III is concerned with "Public Rights of Way" and sections 53 to 58 relate to "Ascertainment of public rights of way." Section 53 is material to the present application. It imposes a duty on the surveying authority (here the Hampshire County Council) to: "keep (the) definitive map and statement under continuous review."

Section 53 provides:

- (1) In this Part "definitive map and statement," in relation to any area, means, subject to section 57(3),—
 - (a) the latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; . . .
- (2) As regards every definitive map and statement, the surveying authority shall—
 - (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and
 - (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.
- (3) The events referred to in subsection (2) are as follows—
 - (a) the coming into operation of any enactment or instrument, or any other event, whereby—
 - (i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;
 - (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or
 - (iii) a new right of way has been created 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;
 - (b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

(c) 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 to which this Part applies;

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to—

(a) the position and width of any public path or by-way open to all traffic which is or is to be shown on the map; and

(b) any limitations or conditions affecting the public right of way thereover.

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appears to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other order under subsection (2).

Paragraph 10 of Schedule 15 to the Act is also relevant:

10(1) A decision of the Secretary of State under paragraph 6, 7 or 8 shall, except in such classes of case as may for the time being be prescribed or as may be specified in directions given by the Secretary of State, be made by a person appointed by the Secretary of State for the purpose instead of by the Secretary of State; and a decision made by a person so appointed shall be treated as a decision of the Secretary of State.

(2) The Secretary of State may, if he thinks fit, direct that a decision which, by virtue of subparagraph (1) and apart from this subparagraph, falls to be made by a person appointed by the Secretary of State shall instead be made by the Secretary of State; and a direction under this subparagraph shall state the reasons for which it is given and shall be served on the person, if any, so appointed, the authority and any person by whom a representation or objection has been duly made and not withdrawn.

The nature of the applicant's case is to be found in paragraphs 2 and 3 of her grounds. It is right that I should set out those grounds in full:

There are three "green lanes" at Horndean. They have been recorded

by the Hampshire County Council on the definitive map for many years as "Footpaths" with no right of way for vehicles. They have never been used by vehicles within living memory. The County Council are now engaged in a reclassification of country lanes. Their officers have looked into old maps and have made a Modification Order by which they have upgraded these lanes so as to become "By-ways open to all traffic." This Modification Order has been confirmed by the Secretary of State. It opens the lanes up to use by motor-cyclists and four-wheel drives. The Horndean Parish Council challenge this Order and its confirmation. They say that, on the re-classification, the lanes should be recorded only as "bridleways" for walkers and riders but not for vehicles.

In making the Modification Order the Hampshire county council misdirected themselves in law and were supported afterwards by an inspector in his report and by the Secretary of State.

In a statement read to this court the applicant said:

My main concerns at the present interpretation of the law are that:

(a) Peaceful walks in the countryside are under threat on these public rights of way.

(b) Such lanes are usually very ancient and should be protected and respected environmentally. Many have been severely damaged already, *e.g.* The Ridgeway, as well as local paths.

(c) B.O.A.T.s fall between highway and rights of way law to their detriment. Road Traffic Orders have been offered as a solution. They are not. In the case of Ham, Tagdell, Coldhill and Crouch Lane, the Rights of Way Committee has dismissed the need for Road Traffic Orders. There is concern at the cost and difficulties of implementation. They have been used in only six or so of the 540 lanes in Hampshire. The Rights of Way Department has a budget of £50,000 for the County and has recently been given responsibility for repair. One lane alone is costing £26,000. It cost £4000 to implement a Road Traffic Order and another £1500 if gates and signs are needed. Landowners are not always happy to have signs erected. The County officers have to liaise with the police to provide supervision and it is difficult for them to supply manpower.

(d) There is no clear legislation to protect or repair surfaces (though I understand that in the last month the Rights of Way Department, with their limited budget, has been given responsibility, in Hampshire at least).

(e) No distinction is made at present between the types of vehicular traffic which may use such lanes. This means that any vehicle of any weight may use them.

(f) There is a real danger to walkers and horseriders for traffic on such narrow, unsurfaced lanes.

(g) Rallies involving up to 12 vehicles at any time of day or night are legal providing they do not involve racing. (This has happened locally at 2 a.m.)

The present interpretation of the law seeks to give rights to modern-day traffic on what are essentially rights of way to be used mainly as footpaths and bridleways. In seeking to do so an imbalance has been created and too little consideration given to the concerns I have men-

tioned, and to the "main" users. I hope that this present case will result in a redress of the balance.

The applicant makes certain specific complaints. The first relates to paragraph 10 of Schedule 15 to the Act. It is said that it was for the inspector himself to confirm or refuse to confirm the Modification Order, that by his letter of December 20, 1989, the Secretary of State himself purported to confirm the Order and that he had no jurisdiction to do this. In my view, paragraph 10(2) is clear in its terms and gave the Secretary of State power to call the decision in. He did so by the letter dated February 20, 1989, because: "of the complex legal issues raised by the case." He was fully entitled to take this course and determine the Order himself. The complaint is without substance.

Next, it is suggested that the county council failed to comply with the statutory formalities. Paragraph 11 of the inspector's report is cited. It is in these terms:

Formalities

Hampshire County Council confirmed that all the statutory formalities had been complied with.

No points were raised.

The applicant states:

But we presume that the Inspector is there referring to the statutory requirements in section 53 that have to be satisfied before the County Council can make a modification order. These are not "formalities" at all, but conditions precedent to the making of an Order.

This complaint is misconceived and results from a confusion between the formal requirements of Schedule 15 and the substantive requirements of section 53. Paragraph 11 is concerned with "formalities." This word is used by the inspector. The formalities referred to are those set out in Schedule 15 to the Act, particularly paragraph 3. Paragraph 11 does not refer to and is not concerned with the requirements of section 53. It is said that:

In paragraph 53 of his report, the inspector said "I have assumed that the Order is not ultra vires." We know nothing about ultra vires and did not raise it. We suggest that the Order would be ultra vires if the county council had not complied with the "statutory formalities." The inspector was misled into thinking they had been complied with.

Paragraph 53 of the report is perfectly clear:

I have considered the legal submissions of counsel for the principal objectors. They are matters for the Secretary of State and for the purpose of this report on the evidence for and against the existence of vehicular rights over the paths, I have assumed that the Order is not ultra vires.

At paragraphs 4, 5 and 6 of the decision letter the Secretary of State considered the legal submissions and requirements of section 53. As indicated above, he was entitled to do this. I therefore reject this complaint.

Paragraph 5 of the decision letter is in these terms:

(a) that it was for the surveying authority under section 53(2)(a), under which the order was made, to make such modifications to the

map and statement as appeared to them to be “requisite” in consequence . . . of any of the events specified in section 53(3);
(b) section 53(3)(c) provides for an authority to discover evidence not previously considered.

It is submitted that the evidence relied on by the county council when the order came to be made did not come within section 53(3)(c). The evidence relied on, it is said, was not fresh evidence; it had existed for “an inexplicable period of time” (inspector’s report, paragraph 36), and at the time of the earlier review. Consideration of it by the surveying authority in 1985/1986 did not constitute the discovery of evidence so as to require the authority to take steps to modify the map and statement in accordance with the provisions of section 53(2)(a). Mr. Howell submits that:

The purpose of section 53(3)(c) was not merely . . . a review based on a reconsideration of evidence already considered.

(1) section 53(3)(c) contemplates two categories of evidence “available” to the authority: the evidence it discovers and other relevant evidence available to it. The difference between the two is that the former is not available until its discovery: that is the event which triggers the review.

(2) Parliament intended that a review should only be triggered by “the occurrence of an event,” that is to say by something the occurrence of which was objectively identifiable. It is consistent with such an intention that the event should not be defined subjectively in terms of evidence which may have been considered by the authority (particularly given the nature of such a body) but rather in terms of evidence which the authority had. (Thus, if an authority acted on the statement of the County Archivist that he had searched his records but could find nothing of assistance, it might be impossible later to determine whether (a) he had failed to consider a particular document or (b) he had considered it but failed to appreciate its significance.)

I am unable to accept this argument. There is no authority directly on the point. In *R. v. Secretary of State for the Environment, ex p. Burrows*, *R. v. Secretary of State for the Environment, ex p. Simms* the Court of Appeal had to consider whether a definitive map was conclusive evidence that a particular right of way existed. This involved the consideration of section 53. In his judgment Glidewell L.J. said¹:

I agree with the suggestion made to us in argument, that section 53(3)(a) and (b) relate to events which have happened since the definitive map was prepared. These events may have resulted in a right of way coming into existence where none existed before, or the upgrading of an existing right of way to a right of a wider sort, *e.g.* by express dedication under paragraph (a)(iii) or by prescription under paragraph (b). Paragraph (a)(i) relates to the happening of an event which results in the extinguishment of a previously existing right of way shown on the definitive map. Since the common law maxim is “once a highway, always a highway,” such a result can only be achieved by statute, and the events to which subparagraph (i) refers as authorising

¹ [1991] 2 Q.B. 354 at pp. 387H–388E.

the stopping up or diversion of a highway can therefore only take place under statute.

On the other hand, section 53(3)(c) differs from the preceding subparagraphs in that the use of the word "discovery" suggests the finding of some information which was previously unknown, and which may result in a previously mistaken decision being corrected. This information will normally, if not always, relate to a fact or situation which already existed at the time when the definitive map was prepared. In this way, paragraph (c) is to be distinguished from its predecessors.

If I am right in my view that paragraph (c) is concerned with the correction of mistakes as a result of newly discovered information, in order to be comprehensive, the power of correction must cover three different situations: (i) the addition of a right of way not shown on the definitive map: paragraph (c)(i) achieves this; (ii) the upgrading or downgrading of rights of way shown on the map, but so shown in a wrong category: subparagraph (c)(ii) covers both these situations; (iii) the deletion of a right of way which the latest information proves should not have appeared on the map at all: subparagraph (c)(iii) by its terms achieves this.

Russell L.J. said²:

In particular I am satisfied that section 53(3)(c), with its use of the word "discovery," embraces the situation where a mistaken decision has been made and its correction becomes possible because of the discovery of information which may or may not have existed at the time of the definitive map.

These passages are relevant to the questions raised in the present case and I respectfully adopt them. In *Fowler v. Secretary of State for the Environment*, the Court of Appeal had to consider section 53. Farquharson L.J. referred to *Burrows and Simms* and cited the passages in the judgments of Glidewell L.J. and Russell L.J. quoted above. He said:

Accordingly the 1981 Act, so far from preserving the existence of a footpath in the sense that it could not be enlarged into a greater right, or alternatively deleted, specifically contemplates the possibility of it being altered in the light of fresh evidence obtained. Such evidence must be fresh in the sense that it was not available at the date of the existing definitive map, and such fresh evidence should be identified by an inspector whenever he decides it exists.

In my view, this passage must be read subject to those cited above (with which Farquharson L.J. was clearly in agreement). Given the facts of *Fowler*, the use of the expression "fresh evidence" is not inconsistent with the approach adopted in *Burrows and Simms* and the applicant can derive no advantage from the use of this expression by Farquharson L.J.

Mr. Fleming submits that the word "evidence" in section 53(3)(c) must be given its full and natural meaning and should not be restricted to "new evidence" or to "evidence not previously considered." He relied on the passages in *Burrows and Simms* cited above and on *R. v. Secretary of State for the Environment, ex p. Riley* where Macpherson J. accepted the argument that "the discovery by the authority of evidence" means exactly what

² *Ibid.* at p. 392H.

it says: the relevant words simply envisaged the "discovery of evidence triggering the right to apply for modification." Thus, Mr. Fleming submits that the brief statement of the law at paragraph 5(a) and (b) of the decision letter is correct. I agree with him and accept his submissions and reject those of the applicant and Mr. Howell. "To discover," means to find out or become aware. "Discovery," means finding out or making known (*Concise Oxford Dictionary*). It connotes a mental process in the sense of the discoverer applying his mind to something previously unknown to him. In my judgment, the "event" in section 53(3)(c) is concerned with the finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared. Were it otherwise, the surveying authority or a member of the public would be unable to take steps to correct a previously mistaken decision. Such a state of affairs would be at variance with the purpose and scheme of the legislation as well as good sense.

For completeness, I should say that I have considered *Ladd v. Marshall*, an authority relied upon by Mrs. Mayhew. In my view, that case, and the principles expressed in it, has no bearing on the questions raised by the present case which turns on the construction of section 53.

I return to the decision letter. The Secretary of State concluded (paragraph 5(c)):

the Secretary of State does not consider that the word "requisite" in section 53(2)(a) implies that the authority should take into account other matters such as the practical effect of reclassification before acting on the evidence before them: he is satisfied that it is for the surveying authority to modify the definitive map and statement to reflect the occurrence of any events before that date as specified in section 53(3).

The applicant complains that the inspector and the Secretary of State wrongly ignored evidence of present-day unsuitability for vehicular traffic:

4. The county council, on the advice of their officers, held that they were bound by law to consider *only* whether the public had vehicular rights of way along the three lanes: so that they could *not* take into account the practical effect of reclassification, and the fact that the three lanes were utterly unsuitable for vehicular traffic.

In order to assess this complaint, it is necessary to refer shortly to the legislative history. Section 27(6) of the National Parks and Access to the Countryside Act 1949 made provision for and defined footpaths, bridleways and roads used as public paths. The definition and concepts of roads used as public paths proved to be unsatisfactory. Thus, by the Countryside Act 1968 (Schedule 3, Part III, paragraph 9) Parliament provided that every R.U.P.P. must be shown in the definitive map as either a bridleway open to all traffic, a bridleway or a footpath, and that the expression R.U.P.P. must not be employed in any way. This classification was re-enacted by section 54(2) of the 1981 Act. The 1968 Act laid down a test for the reclassification of R.U.P.P.s in Schedule 3, Part III, paragraph 10:

The considerations to be taken into account in deciding in which class a road used as a public path is to be put shall be—

- (a) whether any vehicular right of way has been shown to exist,
- (b) whether the way is suitable for vehicular traffic having regard to the position and width of the existing right of way, the condition and the state of repair of the way, and the nature of the soil,

(c) where the way has been used by vehicular traffic, whether the extinguishment of vehicular rights of way would cause undue hardship.

It is to be noted that, this paragraph sets out criteria limited to the reclassification of R.U.P.P.s. It is exceptional in the sense that this provision apart, the relevant legislation has been concerned only with status, that is the ascertainment of public rights of way, and not with whether the exercise of such rights is desirable in particular circumstances. This provision was repealed by the 1981 Act and not re-enacted. The considerations of suitability are not to be found in the 1981 Act.

In the 1981 Act, the power of the surveying authority under section 53(2) is not to make such modifications as may appear to it to be desirable. It is to make such modifications to the map and statement as appear to be *requisite* in consequence of the occurrence of any of the *events* specified in subsection (3). The applicant relies on the words "requisite" in section 53(2)(a) and (b) and "ought" in section 53(3)(c)(ii). But neither of these words, read in context, could permit the surveying authority to take into account other matters before acting on one of the "events" and I accept Mr. Fleming's submission in this regard. As to "requisite," the effect of the section is that the surveying authority shall make such modifications as appear to the authority to be required in consequence of the event. "Ought" was not intended to confer a general discretion but merely leads to the result that follows from the discovery and consideration of evidence.

Thus, I conclude that the inspector and the Secretary of State correctly treated section 53 as limiting the modifications which ought to be made in consequence of the occurrence of a relevant event to those which would give effect to the rights of way which were found to exist rather than those which might be thought to be suitable or desirable. Considerations of suitability were within the ambit of the surveying authority's duties in the reclassification of R.U.P.P.s under the 1968 legislation. The fact that they were left out of the 1981 Act and the terms of section 53 of that Act leave me in no doubt that Parliament did not intend surveying authorities to have such considerations in mind when (as in the instant case) they had to consider regrading footpaths as by-ways open to all traffic. The surveying authority's duty under section 53 is to ascertain public rights of way and to modify the map so that it correctly defines those rights; no more and no less. This ground of complaint unhappily confuses that duty with the repealed provisions of the 1968 Act and must fail.

By ground 10 of the Notice of Motion, the applicant complains that the inspector misdirected himself in paragraph 56 of the report:

He there relied on old maps and in particular on an enclosure map of 1816 and concluded "that vehicular rights existed at that time." He did not regard "the wide variation in widths today,—some 170 years later—as a matter of particular significance." He treated the maxim "once a highway, always a highway" as if it meant that a cartway in 1816 "ought" in law to be reclassified as a motorway in 1986. And that it "ought" to be reclassified, not as a highway repairable by the inhabitants at large, but by a B.O.A.T. repairable by no one."

This complaint overlooks the limited purpose of Part III of the 1981 Act which is of ascertainment of rights. The Act recognises three categories of way only. A way is either a footpath, a bridleway or a by-road open to all

traffic. If vehicular rights over a way shown as a footpath are “ascertained” by the “discovery of evidence,” the surveying authority must modify the map so as to show that way as a by-way open to all traffic. This is the effect of Part III of the Act; in particular, sections 53 and 66(1). I accept Mr. Fleming’s submission that this regrading is not the conversion of a cartway into a motorway but rather, as he put it, the recording of vehicular rights of passage. Vehicular use changes over the years. The particular mode of propulsion of the vehicle is not, for present purposes, material (see *Kain v. Norfolk*).³ This complaint must therefore be rejected.

It follows from the whole of the above that the applicant has failed to satisfy me that the order is not within the powers conferred on the Secretary of State by section 53 of the Act. I am satisfied that it is. I am furthermore satisfied that the requirements of Schedule 15 have been complied with by the surveying authority and the Secretary of State. Thus, Mrs. Mayhew’s application must fail.

The inspector found that walkers and horse riders were the main users of the paths and that they would be “adversely affected by reclassification” of the paths as by-ways open to all traffic. Thus, it may be thought that this judgment will have unsatisfactory consequences. But Mr. Fleming on behalf of the Secretary of State submitted that where there is public concern as to the over use of a by-way open to all traffic by inappropriate vehicles, the solution is not to be found in an artificial reading of section 53 of the Act denying the existence of a B.O.A.T., and the recording of it in the definitive map and statement, but the making, where appropriate, of traffic regulations. Section 54(7) of the 1981 Act is in these terms:

Nothing in this section or section 53 shall limit the operation of traffic orders under the Road Traffic Regulations Act 1984 or oblige a highway authority to provide, on a way shown in a definitive map and statement as a by-way open to all traffic, a metalled carriage-way or a carriage-way which is by any other means provided with a surface suitable for the passage of vehicles.

Mrs. Mayhew is pessimistic as to the efficacy of traffic orders. But section 54(7) is clearly consistent with the scheme of the legislation as a whole, and this court’s task is not to make legislation but to construe it. Once a B.O.A.T. is “ascertained” and “shown” on the definitive map and statement, Parliament empowers the highway authority to consider questions of abuse and unsuitable user, and, for example, to make an order preventing the use of the road by vehicular traffic of a kind which is unsuitable having regard to the existing character of the road or adjoining property (section 1(1) of the Road Traffic Regulations Act 1984). It is to be hoped that those responsible will recognise the existence of these powers and not hesitate to use them where necessary.

Application dismissed. No order as to costs.

Solicitors—the Treasury Solicitor.

³ [1949] 1 Ch. 163 at p. 169.

Appendix 10.3

***R (on the application of Roxlena Ltd) v
Cumbria CC [2019] EWCA Civ 1639***

 **R (on the application of Roxlena Ltd) v Cumbria County Council [2019]
EWCA Civ 1639**

Court of Appeal, Civil Division

Simon, Lindblom and Irwin LJ

9 October 2019

Judgment

Mr George Laurence Q.C. and Ms Claire Staddon (instructed by **Underwood Vinecombe LLP**) for the **Appellant**

Mr Alan Evans (instructed by **Cumbria County Council**) for the **Respondent**

The Interested Party did not appear and was not represented.

Hearing dates: 14 and 15 May 2019

Judgment Approved by the court **for handing down** **(subject to editorial corrections)**

Lord Justice Lindblom:

Introduction

1. How should a surveying authority approach the evidence said to justify its making an order to add a footpath to its definitive map and statement of public rights of way under section 53 of the Wildlife and Countryside Act 1981? That question arises in this appeal.

2. The appellant, Roxlena Ltd., appeals against the order of Kerr J., dated 30 November 2017, dismissing its claim for judicial review of a decision of the respondent, Cumbria County Council, on 4 January 2017, authorizing the making of an order under section 53(3)(c)(i) and (iii) of the 1981 Act to add 34 footpaths to its definitive map and statement, and to extend a bridleway, over land owned by Roxlena and the interested party, Mr Peter Lamb, in woodland known as Hayton Woods, in Cumbria, which is used for shooting game-birds. The decision was made by the county council as surveying authority.

3. After the county council had made its decision it agreed to a request made by Roxlena's solicitors not to act on the decision for six weeks, or, if proceedings were brought, "unless and until the proceedings are

finally disposed of in [its] favour". Having dismissed the claim, Kerr J. granted permission to appeal on a single ground – ground 3. I granted permission to appeal on the other three grounds on 4 December 2018.

The issues in the appeal

4. There are four main issues in the appeal. First, was the judge wrong to conclude that there was sufficient evidence to justify making the order (ground of appeal 1a); wrong not to conclude that, if the supporting evidence was insufficient to demonstrate, on the balance of probabilities, that the footpaths subsisted on the alignments shown on the draft order map and thus to justify the confirmation of the order, it could not have been reasonable to allege their subsistence to justify making it; and wrong to conclude that the question of whether the evidence would support confirmation could properly be postponed to an inquiry (ground 1b)? Secondly, was he wrong to conclude that the county council had not failed properly to investigate the evidence of the 40 people who had said they used the footpaths during the outbreak of foot and mouth disease in 2001 (ground 2)? Thirdly, was he wrong to conclude that the county council had made a relevant and effective "discovery" of evidence within section 53(3)(c) (ground 3)? And fourthly, was he wrong to conclude that there was sufficient evidence to justify making an order extending the bridleway (ground 4a); and wrong not to conclude that if the supporting evidence was insufficient to demonstrate, on the balance of probabilities, that the claimed bridleway subsisted on the alignment shown on the draft order map and thus to justify confirmation of the order, it could not have been reasonable to assert its subsistence to justify making it (ground 4b)?

The statutory framework

5. Section 31 of the Highways Act 1980, "Dedication of way as highway presumed after public use for 20 years", provides that "(1) [where] a way over any land, other than a way of such a 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".

6. In Part III of the 1981 Act, section 53, "Duty to keep definitive map and statement under continuous review", states:

"53. –

(1) In this Part "definitive map and statement", in relation to any area, means ...

(a) the latest revised map and statement prepared in definitive form for that area under section 33 of [the National Parks and Access to the Countryside Act 1949] ...

...

(2) As regards every definitive map and statement, the surveying authority shall –

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

(3) The events referred to in subsection (2) are as follows –

(a) the coming into operation of any enactment or instrument, or any other event, whereby –

(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;

(ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or

(iii) a new right of way has been created 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 or a restricted byway;

(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway;

(c) 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, a restricted byway or, subject to section 54A, a byway open to all traffic;

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to –

(a) the position and width of any public path, restricted byway or byway open to all traffic which is or is to be shown on the map; ...

...

...

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more

events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

...

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2)."

7. Paragraph 1 of Schedule 14 to the 1981 Act requires an application to be "made in the prescribed form" and to be "accompanied by ... (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and ... (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application". Paragraph 3(1) requires the authority "[as] soon as reasonably practicable after receiving a certificate under paragraph 2(3) ... (a) [to] investigate the matters stated in the application; and ... (b) after consulting with every local authority whose area includes the land to which the application relates, [to] decide whether to make or not to make the order to which the application relates".

8. Paragraph 2 of Schedule 15 provides that "[an] order shall not take effect until confirmed either by the authority or the Secretary of State under paragraph 6 or by the Secretary of State under paragraph 7". Paragraph 7(1) provides that "[if] any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him". Under paragraph 7(2) "[where] an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall, subject to sub-paragraph (2A), either ... (a) cause a local inquiry to be held; or ... (b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose". Paragraph 7(3) provides that "[on] considering any representations or objections duly made and the report of any person appointed to hold an inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications".

The origin of these proceedings

9. The dispute now before us in this appeal has a long and tortuous history, which was fully recounted by the judge (in paragraphs 22 to 57 of his judgment). I gratefully adopt his narrative, and will refer only to the salient parts of it.

10. Hayton Woods has not been surveyed by the county council, because successive owners have exercised their right not to permit entry for that purpose. Nor are there aerial photographs showing any paths beneath the trees. Evidence of those routes and their use, much of it contentious, is in various maps, records, witness statements and responses to questionnaires.

11. On 6 January 2011 an application was made by Mr Roger Horne under section 53(2) of the 1981 Act for an order modifying the definitive map and statement by adding a network of footpaths identified on 70 user evidence forms and shown superimposed on an Ordnance Survey map of 1901. In correspondence with the county council in October 2011, the solicitors acting for the then owners of the land, Mr and Mrs Day, drew attention to the fact that in February 2001, under the Foot-and-Mouth Disease (Amendment) (England) Order 2001, the county council had prohibited in Cumbria "the movement of any person on moorland or on a public footpath or bridleway which adjoins or gives access to agricultural land, except on a public highway open to vehicular traffic". If this prohibition applied to the disputed rights of way, it would

have fallen within the 20-year period of asserted uninterrupted enjoyment under section 31(1) of the 1980 Act, which began in 1990.

12. As the judge said (in paragraph 30 of his judgment), “[the] solicitors then did what they could to thwart Mr Horne’s application, in a series of lengthy letters, taking various points”. Their efforts culminated in a letter dated 7 February 2013, contending that Mrs Day had not been properly served with Mr Horne’s application, and that the application had lapsed because Mr Horne had died. The application was to have been considered at a meeting of the county council’s Development Control and Regulation Committee on 27 March 2013. An officer’s report had been prepared, which took account of Mr and Mrs Day’s objection but recommended that an order should be made under section 53(3)(c) – subject to confirmation – because there was sufficient evidence that the rights of way could reasonably be alleged to subsist. In the end, however, the committee did not consider the application. On 26 March 2013 the officer wrote to those who were now promoting Mr Horne’s application, saying the county council had decided “not to proceed because it appears that the notification requirements ... have not been complied with”.

13. On 2 April 2013 another application was made, by Mrs Rebecca Tiffen. It was in the same terms as Mr Horne’s. It relied on the same user evidence forms, and other material, including documents and maps of various provenance between 1814 and the 1950s. It was vigorously opposed by Mr and Mrs Day in solicitors’ letters to the county council in May and June 2013. The land was sold to Roxlena – later in 2013 or in 2014. On 26 March 2015 Mrs Tiffen wrote to the county council withdrawing her application, saying she had “received a letter from the solicitors representing Roxlena [dated 24 March 2015] threatening legal action against [her] personally”, which had “led [her] to this decision”, and she was “in no position to counter this”. Mr George Laurence Q.C., who appeared for Roxlena, rightly acknowledged it was “highly regrettable” that such a letter should have been written.

14. The county council did not, however, cease dealing with the application. A report on it was prepared in draft by its Senior Countryside Access Officer and published in July 2015, recommending that the order should be made. An objector, Mr Boyd Holmes, commenting on the draft report, challenged the assertion that there had been 20 years’ uninterrupted enjoyment of the routes. On 10 August 2015 Roxlena’s solicitors threatened proceedings if the officer’s recommendation were followed. In September 2015 several objectors submitted statements asserting that, contrary to the evidence in some of the user evidence forms, there had not been 20 years’ uninterrupted enjoyment of the routes. Various contentions were made about the use of the routes while the restrictions under the 2001 Order were in force. Alleged legal errors in the process were – as the judge put it (in paragraph 39) – “debated at length in depressingly long letters”.

The March 2016 report

15. The officer’s report was published in final form on 21 March 2016. It was due to be put before the committee at its meeting on 30 March 2016. The recommendation in the report was that the order be made but that the county council’s position should be neutral if there was “significant evidence” against its being confirmed.

16. Considering the objections to the application – in section 5.0 of the report, “Detail” – the officer said the county council “has been denied access to the land by the owner for the purpose of surveying the claimed paths and has therefore relied on the application plan to plot the routes as shown on [the draft order map]”. In his view, however, it was “possible [for the county council] to fulfil its duty to prepare a map, with sufficient accuracy, of the claimed alignments without a site survey and ... that has been so in this case” (paragraph 5.1(e)). He rejected the contention that the “control measures” introduced under the 2001 Order, which had caused a “temporary interruption” of use of the claimed footpaths, had brought “a sufficient interruption to the claimed user period for the purpose of section 31(1) of [the 1980 Act]”. This

was, he said, “a matter of judgment for the decision maker which needs to be reasonably exercised”. The advice in the Planning Inspectorate Advice Note 15, that “... it does not seem that the temporary cessation of use of ways solely because of the implementation of measures under the Foot and Mouth Disease Order 1983 could be classified as an “interruption” under section 31(1)” – was, he said, “not an authoritative statement of law as only the courts can provide that” (paragraph 5.1(f)).

17. At the end of the report – in section 9.0, “Conclusion” – the officer acknowledged that “this is a complex case with conflicting evidence”, but expressed “the opinion that sufficient evidence has been brought forward at this stage to show a reasonable allegation that there has been uninterrupted use on foot for more than 20 years by the public of the routes shown on the plan at Appendix A” (paragraph 9.1), and also that “sufficient evidence has been brought forward at this stage to show a reasonable allegation that public bridleway 117004 should be extended to point G as shown on the plan at Appendix A” (paragraph 9.2). There was “some force” in the legal arguments put forward by Roxlena’s solicitors, but the officers’ view was that “the alleged errors of law can be answered as set out in the report”. There would, however, be a risk in resolving to make the order, because Roxlena had said it would challenge such a decision, and the court might find in its favour. This was, said the officer, “one of those finely balanced matters where the Committee might come to a different conclusion to its officers and accept the legal arguments put forward on behalf of the landowner” (paragraph 9.3).

18. After the report was published but before the committee met, Roxlena’s solicitors, in a lengthy letter to the county council dated 22 March 2016, repeated and elaborated their legal arguments, appending documents running to more than 150 pages. The application was then withdrawn from the committee agenda, and deferred to a future meeting.

The committee meeting on 4 January 2017

19. The application eventually came before the committee at its meeting on 4 January 2017. By then, in mid-November 2016, Roxlena’s solicitors had again warned the county council that Roxlena would challenge by a claim for judicial review any resolution to make the order. In December 2016 the officer produced another report, to which the March 2016 report and voluminous other material were appended. The officer’s recommendation was now different. It was that for the footpaths “no order be made on the evidence submitted”, but that for the bridleway the committee should authorize the making of an order to extend it to point 23, and – if there were no objections – its confirmation.

20. In section 5.0 of the report, “Detail”, the officer considered three main points of objection to the making of the order. He dealt first with “Point (i) Cessation of use due to Foot and Mouth Outbreak”. After discussing the evidence and arguments put forward, including the lack of evidence that the land had been “taped off” (paragraph 5.1.10), he said (in paragraph 5.1.16):

“5.1.16 Having revisited the evidence as a whole, officers consider they may have fallen into error in too readily accepting there was a temporary interruption of use as that is not necessarily borne out by all the evidence before the County Council. There are clearly conflicts in the evidence that need to be resolved but at the order making stage the 57 users, who make no reference to any interruption of use, represent a body of apparently credible evidence of lack of interruption of the claimed routes during the Foot & Mouth outbreak. The conflicts in the evidence cannot be resolved one way or the other on the documentary evidence but it is considered that the evidence of the 57 users who make no reference to any interruption of use would allow an order to be lawfully made on the “reasonably alleged to subsist” basis in accordance with the approach set out in the case of [*R. v Secretary of State for Wales, ex p. Emery* [1998] 4 All E.R. 367].”

21. The officer went on to say that if the committee was satisfied that the 20-year period for the purposes of section 31 of the 1980 Act had been interrupted during the outbreak of foot-and-mouth disease and that the interruption was not “de minimis”, it must “consider resolving not to make an Order ... or risk a challenge by way of Judicial Review” (paragraph 5.1.17). But he added that in the officers' view it “would be reasonable to make the order in light of [the Planning Inspectorate's Advice Note 15] and the guidance supplied by the recent decision for Marble Quarry” (paragraph 5.1.18).

22. In his conclusions on “Point (ii) Exact alignment of claimed routes not known by [the county council]”, the officer said (in paragraph 5.2.1):

“5.2.1 ... The application map is based on a 1901 Ordnance Survey 1:10,000 plan. These maps were produced from precision surveying at the time that gave plans of high quality and accuracy. Nevertheless not all of the detail of this area shown on a modern Ordnance Survey 2015 matches the information on the 1901 Ordnance Survey 1:10,000 plan of the same area. It is difficult to determine which detail has moved in the intervening 114 years and which detail may have been located incorrectly on either plan. The 2015 Mastermap does not show the networks of tracks shown on the 1901 plan because many updates of Ordnance Survey plans are done by observing overhead photographs. Although the ancient tracks shown on the 1901 plan may physically exist on the ground today, they would not be visible in wooded areas on aerial photographs. The regulations require a submission plan to be 'not less than 1:25,000' so the application map is substantially larger than the basic requirements although the detail on it was plotted no later than 1901.”

23. He added, however, that “a considerable level of effort has been shown by the persons submitting user evidence forms to show what routes they have used by marking alignments on the plan and in many cases adding further detail on a supplementary form or in an attached letter”. Users had “not indicated that they walked wherever they wished and [had] said that they followed specific trods that appeared well used and unobstructed”, and some had “indicated that many of the paths were benched and specifically constructed as tracks and therefore very obvious to follow. ...” (ibid.).

24. He accepted that “a site survey would have helped in identifying the routes on the ground”. The alignments of the routes shown on the application plan had been “interpreted and then transferred to the draft order plan”, which, he said, “cannot be as accurate as it would have been had it been possible to carry out a site survey” (paragraph 5.2.2). On the “antiquity, and alleged out of date nature, of the application map”, he acknowledged that “[a] serious weakness of the 2015 Mastermap is that it does not show the network of tracks shown on the 1901 plan which appear to be the majority of the routes claimed on the user evidence plans” (paragraph 5.2.3). Given “[the] thickness of the lines marked on the claim forms”, he said that “the clarity of marking and accuracy of the maps used ... are not adequate to show the precise location of the claimed routes and ... this must be accepted as a serious weakness in the evidence submitted with the claim” (paragraph 5.2.4).

25. On “Point (iii) No discovery of evidence”, the officer said the “gist of this point appears to be that no new evidence was discovered with Ms Tiffen's application as it contained the same evidence as the earlier application submitted by Mr Horne”. He rejected this argument. There had been “no discovery of evidence in [Mr Horne's application] because the evidence submitted by [him] was not considered as part of any formal determination”. The application “was not determined on the evidence”. It had been “turned down because it did not conform to the statutory requirements”. Thus “[the] evidence 'discovered' has yet to be considered as part of a substantive determination and so it has not been 'discovered' twice” (paragraph 5.3.1).

26. The officer went on to consider the evidence for the extension of the bridleway to point 23. He referred to the Hayton Parish 1814 Inclosure Award, which, he said, “[officers] believe ... provides evidence that the

track to the quarry (D to 23) is a right of way for the specific group of people detailed in the award ...” (paragraph 5.4.2). He concluded (in paragraph 5.4.8):

“5.4.8 In the 1950 Parish Schedule ... the claim for the extent of bridleway 117004 ... is “... [to the Quarry]” not to stop 120m short. The associated claim plan (Appendix G) shows a claim route numbered '3' running from point D not easterly to the quarry but in a northerly direction to point 22 Later First Review plans from 1967 show the claimed route numbered '4' as starting at C and stopping at point D. The [public] rights of way were supposed to be claimed from one highway to another or to a public place. They should not be claimed to a dead end or place without any public significance. There appears to be a case that the Parish Council of the time incorrectly claimed the route or that a small drafting error was made in excluding that part of the route now claimed and that was not picked up through the consultation process.”

27. In the officer's view those considerations were “probably the most significant evidence that the bridleway be extended to point 23”. Combined with the “historic evidence”, they supported the making of the order, “notwithstanding that the Inclosure Award may only [show] private rights” (paragraph 5.4.9).

28. In section 7.0, “Legal Position”, he said that although Mrs Tiffen had “requested the withdrawal of her application”, the county council was “still obliged to assess the evidence that has come to its attention and decide whether to make a modification order” (paragraph 7.3). On the approach to be taken at this stage, he said (in paragraphs 7.5 and 7.6):

“7.5 [The county council] has a duty to consider all relevant evidence available to it, and then to reach a conclusion. All the evidence must be weighed in the balance and any relevant legal principles applied to it. The burden of proof imposed on [the county council] at the stage of deciding whether to make a modification order is to consider whether or not sufficient evidence is available for an Order to be made based on whether or not the evidence as produced discloses either that a right of way subsists or that it is reasonable to allege that a right of way subsists. In order to answer the first of those possibilities in the affirmative, it is necessary to show that, on a balance of probabilities, the right of way exists. For the second possibility to be established, it is necessary to show that a reasonable person, having considered all the relevant available evidence, could reasonably allege that a right of way subsists. This is a lesser burden of proof than is required should the application proceed beyond this stage. If the Order were to be made, it would need to be confirmed before it takes effect. Should objections be raised, a public inquiry may be held before a final decision is made by the Planning Inspectorate. At that stage the burden of proof is whether the footpaths can be said to exist on the higher “balance of probabilities” test.

7.6 The reason for the difference is to allow for the resolution of conflicts of fact. This can only be done if people give their evidence and are cross-examined on it. The County Council does not know at the Order making stage whose version of events will be preferred.”

29. In section 9.0, “Conclusion”, the officer said this was “a complex case with conflicting evidence” (paragraph 9.1), and “a finely balanced matter” (paragraph 9.2). As for the alleged “legal errors”, he did not accept that there had been “no discovery of evidence” (paragraph 9.2.1) or that the order should not be made because there was a cessation of use of the claimed routes during the outbreak of foot-and-mouth disease amounting to an interruption under section 31 of the 1980 Act (paragraph 9.2.2). There was, however, “some merit” in the argument that the county council could not make the order because it did not know “the exact alignment” of the claimed routes. The recommendation now was that an order should not be made for the claimed footpaths (paragraph 9.2.3). But “sufficient evidence” had been “discovered” to show a “reasonable allegation” that the bridleway should be extended to point 23 (paragraph 9.3). The committee “[did] not need to follow the recommendation in this report”; it “could make an Order in respect of the claimed footpaths in addition to the extension of [the bridleway]” (paragraph 9.4). If the committee accepted that the footpaths “cannot be identified with sufficient precision without a site survey it should

accept the recommendation in the report and resolve not to make an order in respect of the claimed footpaths” (paragraph 9.5).

30. At the committee meeting on 4 January 2017 supporters of the application addressed the members. Mr Laurence spoke on behalf of Roxlena in opposition to the making of the order, as did Mr Boyd Holmes. Councillor McGuckin urged the committee to follow the recommendation in the March 2016 report. A transcript records his contribution to the discussion, which included these remarks: “if you deny access then you defeat the claim”, and “[that] is not how we should be doing it” (lines 392 to 394); and “one of our crucial issues is to fulfil our duties and accept where there is evidence and where we can take a reasonable decision that these paths exist, that we support them” (lines 403 to 405). The committee resolved, by a majority of 11 to four, to make the order.

Was there sufficient evidence to justify making the order for the footpaths?

31. Before the judge, and again before us, Mr Laurence argued that there was insufficient evidence to justify adding the claimed footpaths to the definitive map and statement. The clear, and correct, advice in the officer's report in December 2016 was that the county council should not make an order for the footpaths because the officers were not satisfied they could mark the routes on the draft order map precisely enough. In reaching this conclusion the officers had departed from the view they had expressed in the March 2016 report. They had done so in the light of the argument presented by Roxlena's solicitors' letter dated 22 March 2016. Their revised view was rejected by the committee for no obvious or good reason. Their advice that the committee did not need to follow their recommendation was tantamount to saying, wrongly, that even though the footpaths could not be accurately drawn on the draft order map without a site survey, it would still be reasonable to allege they subsisted – as the officers had advised in the March 2016 report.

32. Mr Laurence submitted that the “reasonably alleged to subsist” test in section 53(3)(c) of the 1981 Act could not be satisfied, for the purposes of making an order, if the evidence would be insufficient to demonstrate, on the balance of probabilities, that the asserted right does in fact subsist. In this case the evidence was insufficient to demonstrate that. At its January 2017 meeting the committee should have been advised that the uncertain evidence about the position and alignment of the claimed footpaths was insufficient to justify confirmation. That advice was not given, nor did the committee consider the question. This was fatal to the county council's decision to make the order. It was a “plain error of law” (see the judgment of Dyson J., as he then was, in *R. v Wiltshire County Council, ex p. Nettlecombe Ltd.* [1998] 96 L.G.R. 386, at p.394).

33. Kerr J. did not accept those submissions. In his view the “exacting standard of precision” demanded by Mr Laurence was higher than the law requires and would often be impossible to meet – for example where, as in this case, a “determined and hostile landowner” exercises his right not to co-operate in the process by permitting access to the land (paragraph 61 of the judgment). Agreeing with observations made by Sir George Newman in *Perkins v Secretary of State for Environment, Food and Rural Affairs* [2009] EWHC 658 (Admin), the judge said the surveying authority must make a judgment on the best evidence it has. Here the county council's committee was entitled to take the view that the evidence of the alignment and width of the footpaths was sufficient (paragraph 62). It would be a rare case where the court was prepared to “second-guess” the outcome of an inquiry to determine the force of the objectors' case, when the objection was an attack on the exercise of the surveying authority's judgment. This would normally only be done where “the high *Wednesbury* threshold” was reached (paragraph 63). At its meeting on 4 January 2017 the committee had accepted Councillor McGuckin's contention that it was able to “take a reasonable decision that these paths exist” (paragraph 65). The “strength or weakness” of an order, said the judge, is “what the inspector is there to determine” (paragraph 66). The committee had not acted unlawfully by preferring the officers' view in the March 2016 report to that in the December 2016 report. Roxlena's attack

on the adequacy of the map and other evidence could be made to an inspector in an objection to the order's confirmation (paragraph 69).

34. Mr Laurence submitted that the judge's approach was wrong. The judgment in *Perkins* did not support the proposition he drew from it. The fact that a landowner exercises his right to deny access to his land is wholly irrelevant to the standard of evidence required to support the making of an order under section 53. The judge was also wrong, said Mr Laurence, not to conclude that if the evidence was insufficient to demonstrate on the balance of probabilities that the claimed footpaths did subsist on the alignments shown on the draft order map, and thus to justify the confirmation of the order, it could not have been reasonable to allege their subsistence, to justify making the order. It was not right to conclude, as he did, that the question of whether the evidence would support confirmation could be put off to an inquiry. Every authority faced with an application under section 53(5) must ask itself whether, if the order were unopposed, the evidence taken at its highest in favour of the public would support confirmation.

35. I cannot accept this argument. I think the judge's approach and reasoning were correct. The court's role here is to consider whether the county council could lawfully make the order it did. In a more refined form, that question is essentially whether, at its meeting on 4 January 2017, the committee could lawfully decide to take a different course from that recommended to it in the December 2016 report. As the judge recognized, the test by which this question is to be answered is a public law standard of review. Did the committee misdirect itself on the relevant statutory provisions? And if it did not, was its decision unreasonable in the "Wednesbury" sense, or otherwise unlawful? The answer to both questions, in my opinion, is "No".

36. I see no basis for concluding that the committee misunderstood the relevant statutory provisions. There is nothing in the minutes of its meeting on 4 January 2017, or in either of the officer's reports, to suggest it did.

37. Under the 1981 Act the order-making part of the process is separate from confirmation, and involves a different approach to the evidence. This has been consistently recognized by the courts. The procedure under Schedule 14 to the 1981 Act was described by Roch L.J. in *ex p. Emery* (at p.377b) as "preliminary". He said (at p.377e-h) that "[where] there is no credible evidence of 20 years' user or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, ... then the decision should be not merely that the allegation that a right of way subsists is not reasonable, but that no right of way as claimed subsists". However, where there is "conflicting evidence on one or other or both issues", an authority "must bear in mind that an order under [section] 53(2) made following a [Schedule] 14 procedure still leaves [objectors] with the ability to object to the order under [Schedule] 15 when conflicting evidence can be heard and those issues determined following a public inquiry". He went on (at p.379c) to approve observations made by Owen J. in *R. v Secretary of State for the Environment, ex p. Bagshaw* (1994) 68 P. & C.R. 402 (at pp.407 to 409) – that the words of section 53(3)(c)(i) indicate "that the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right of way does subsist", and that "bearing in mind the structure of [the 1981 Act], this seems to be clear". He also endorsed Owen J.'s formulation of the relevant question as being "Does the evidence produced by the claimant together with all the other evidence available show that it is reasonable to allege a right of way?". Consistent with this is another observation made at first instance, by Evans-Lombe J. in *Todd v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin) (at paragraph 51(iii)) – that the provisions of paragraph 6 of Schedule 15, which confer on an authority a discretion to confirm unopposed modification orders, "... imply a revisiting by the authority ... of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage".

38. As Mr Alan Evans submitted for the county council, the statutory regime does not provide, or imply, that the surveying authority may only make an order under section 53 of the 1981 Act if it has first concluded not merely that a right of way actually “subsists” or is “reasonably alleged to subsist”, but also that, on the balance of probabilities, the order will actually be confirmed after all the relevant evidence, whatever it may be, has been considered by an inspector at an inquiry. This would be a much more onerous requirement than Parliament saw fit to impose on a surveying authority at the order-making stage.

39. The submissions made by Mr Laurence seem to conflate the two stages of the statutory process: the making of the order and its confirmation. As the judge held, this is inappropriate. It is not the surveying authority's task, when considering whether an order should be made, to anticipate the outcome of an inspector's consideration of the evidence presented to him and tested before him at an inquiry, effectively forestalling that stage of the process. This would be the consequence of substituting the balance of probabilities standard of proof for the reasonable allegation test at the order-making stage. The crucial question for the surveying authority at that stage is whether it is at least reasonable to allege that the right of way subsists. Sometimes it will be clear that this is not a reasonable thing to allege – for example, where there is a conflict of evidence and it becomes obvious that the allegation of a right of way subsisting will be impossible to maintain. But if in the view of the authority the allegation is reasonable, it may make the order.

40. There are two alternatives under section 53(3)(c)(i): either that the right of way subsists or that it is reasonably alleged to subsist. If the surveying authority were obliged to apply the balance of probabilities test to the allegation of a right of way subsisting, that distinction would be eroded or removed. This cannot have been what Parliament intended by including the second alternative. The statutory purpose is not hard to discern: that orders may be made where the relevant allegation is reasonable, but not unless it is.

41. Mr Laurence's argument does not draw strength from *ex p. Emery*, or any other case law to which he referred – including *O'Keefe v Secretary of State for the Environment* [1996] J.P.L. 42. In *ex p. Emery* Roch L.J. accepted (at p.379d-f) that in some circumstances a claim could be rejected “as an unreasonable allegation, because a reasonable person would say that the allegation that a right of way subsists was not reasonable because it would be bound to fail”. By contrast, however, “where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under [section] 31 [of the 1980 Act], then the allegation that the right of way subsists is reasonable ... , unless there is documentary evidence which must inevitably defeat the claim either for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that the use of it by the public could not give rise at common law to any presumption of dedication” (ibid.). This reasoning, with which I agree, lends no support to the concept that in such a case the surveying authority must, at the order-making stage, suspend or disapply the test of reasonable allegation and scrutinize the case for confirmation by applying the balance of probabilities.

42. At its meeting on 4 January 2017 the committee was correctly advised on the task it had to perform, and the approach required under the statutory scheme. The advice in paragraphs 7.5 and 7.6 of the December 2016 report shows no legal error. It properly reflects the separate stages of order-making and order confirmation, and the different evidential requirements in each. The committee only had to resolve, on the material then before it, whether the proposed order should be made. The decision was, of course, for the members to make, not the officers. The committee was guided by the December 2016 report, to which the March 2016 report was appended. The advice given in the December 2016 report was presented to the members both with a justification for deciding to make the order and with a justification for deciding not to do so. It set out, and discussed, the various contentions put forward on behalf of Roxlena in opposition to the making of the order, including the legal arguments. The officer acknowledged that the case was “complex ... with conflicting evidence” (paragraph 9.1), and “finely balanced” (paragraph 9.2). In view of his misgivings about the evidence on “the exact alignment” of the claimed routes, he recommended

that the order should not be made, but he expressly advised the committee that it did “not need to follow” his recommendation (paragraph 9.4): in effect, that it was reasonably open to them to take a different view on the evidence before them – which they clearly did.

43. The committee's decision, though contrary to the officer's recommendation, was not irrational. The members were entitled to take the view they did of the material before them, to conclude that the shortcomings of the evidence on the exact alignment of the claimed routes did not prevent the order being made, and to accept the opinion expressed by the officer in the March 2016 report that the evidence was sufficient to show a “reasonable allegation” that the rights of way subsisted. This was a matter for their own judgment. Unless the exercise of that judgment was flawed by some significant error of fact, it could only be impugned on “Wednesbury” grounds.

44. As Sir George Newman said in *Perkins*, having referred to observations made by Purchas L.J. in *R. v Secretary of State for the Environment, ex p. Burrows and Simms* [1991] Q.B. 394 ¹, “... if it is possible, it will generally be desirable to show an order route to a high level of precision, but that will be the position if there is evidence to support such precise delineation actually relating to the right of way in question”; and “[where], as is often the case, the existence of the right of way is shown by historical maps of varying quality, vintage and produced for varying purposes ... there is certainly no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence” (paragraph 14). In that case the inspector appointed to decide whether or not to confirm two footpath orders, had dealt with various issues relating to the precision with which the claimed footpath should be shown on the definitive map and described in the statement. In Sir George Newman's view, “[her] conclusions on those various points were a matter of judgment for her on the evidence available and, to a degree, were for her discretion as to how things should be shown within the Order” (paragraph 16). The inspector had concluded, on the material before her, that the description in the statement, taken with the map, would enable a reasonable person to understand where the footpath was. Sir George Newman saw this as “a matter for the planning judgment of the Inspector” and saw no grounds for interfering with her conclusion (paragraph 17).

45. A similar conclusion applies no less in this case – where we are concerned only with the evidence being considered at the order-making stage, not the evidence as it might eventually be before an inspector at an inquiry. The committee did not make any error of fact, nor did it overlook any relevant material available to it, and in my view its impression of the evidence falls within the range of reasonable judgment. The judge's conclusion to this effect is unimpeachable. There is nothing to suggest that the committee decided as it did because it thought it was unnecessary, or unimportant, in the course of the statutory process, to establish the location and alignment of the claimed paths with as much accuracy as was possible. This was not the tenor of comments made by members, including Councillor McGuckin, in the discussion at the meeting on 4 January 2017. It was not being said that all the committee required was evidence, however slight, of the public using some, though indeterminate, route across the land. The real thrust was that the evidence of the location and alignment of the claimed routes, though by no means perfect, and not as good as it might have been had the land been surveyed, was still sufficiently clear.

46. The judge recognized this. He did not misunderstand the reasoning in *Perkins*. He did not gauge the reasonableness of the committee's exercise of judgment by the false criterion that even if the evidence of location and alignment was likely to prove inadequate for the depiction of the route on the definitive map and its description in the statement, the evidence as it was would have to suffice. That is not what was said in *Perkins*. And it is not what Kerr J. said in his judgment here. He simply concluded (in paragraphs 61 and 62) that the committee was reasonably entitled to find the evidence of location and alignment good enough to justify making the order. This was not to reduce the accuracy envisaged in *Perkins*. It was entirely consistent with the reasoning there, and in my view correct.

47. I do not accept the suggestion that the members' rejection of the recommendation made to them in the December 2016 report must be regarded as unreasonable because in the officers' view (in paragraph 5.2.3) it was a "serious weakness" of the 2015 Mastermap that it did not show the network of tracks marked by users on the 1901 Ordnance Survey map. It was not unreasonable for the committee, in the absence of a survey of the land, to assume that the position and alignment of the routes had not altered in any material way in the intervening 114 years. The officer pointed out to the members (in paragraph 5.2.1) what the limitations of the 2015 Mastermap were. As he explained, it did not show features on the ground, because it had been compiled from an analysis of aerial photographs, which would not show footpaths within Hayton Woods that were obscured in views from the air. This was not to say, however, that the footpaths did not exist, merely that the 2015 Mastermap was not evidence that they did. The officer referred to the care taken by users in marking alignments on the plan, and the further detail some had provided. There was evidence of "well used" tracks. As Mr Evans submitted, where the paths marked by users on the plan coincided with tracks shown on the 1901 Ordnance Survey map and there was a lack of evidence that those tracks no longer subsisted on the same alignments, it was not irrational to assume this was so (see the judgment of Lord Clarke of Stone-cum-Ebony in *R. (on the application of Trail Riders Fellowship) v Dorset County Council* [2015] 1 W.L.R. 1406, at paragraph 28, Lord Toulson's at paragraph 39, Lord Carnwath's at paragraphs 59 and 71, Lord Neuberger of Abbotsbury's at paragraph 94, and Lord Sumption's at paragraph 107).

48. In the circumstances I think the committee was reasonably entitled to prefer the view expressed in the March 2016 report (in paragraph 5.1(e)) that it was possible to "prepare a map, with sufficient accuracy, of the claimed alignments without a site survey", to the doubts expressed in the December 2016 report. This was a classic matter of judgment for the members. It was not unreasonable for them to conclude that, in its totality, the evidence they had received of the location and alignment of the claimed footpaths, whether or not it would ultimately be enough to satisfy an inspector, was nevertheless sufficient to justify the making of the order.

Did the county council fail to discharge its duty to investigate?

49. Mr Laurence argued that the county council had failed, under paragraph 3(1)(a) of Schedule 14 to the 1981 Act, properly to investigate the assertions that the claimed footpaths had been used during the outbreak of foot-and-mouth disease in 2001. In the March 2016 report the officers had accepted there had been a "temporary interruption" of use of the footpaths by members of the public in that period, though – in the light of Planning Inspectorate Advice Note 15 – not a sufficient interruption to defeat the making of the order. In the December 2016 report, having reconsidered the available evidence, they acknowledged that that conclusion might have been wrong. A number of those who had completed user evidence forms – 40 in fact, not 57 – had claimed to have used the footpaths in that period. But there were circumstances to suggest they had done so inadvertently – including the way in which the relevant question (question 3c) was framed in the user evidence form, the findings of the county council's 2002 report on the outbreak of foot-and mouth disease, the evidence of 12 people that there had been no use of the paths in that period, and the evidence of 13 members of the public who mentioned the outbreak of foot-and-mouth disease but did not claim to have used the paths in that period. At the committee meeting on 4 January 2017 Mr Boyd Holmes told the members that the public were "shut out" of Hayton Woods "for months ...". It was incumbent on the county council to satisfy itself that, in spite of all this, the assertions made in the user evidence forms were true.

50. Kerr J. did not accept the view stated in the Planning Inspectorate Advice Note that an interruption of use caused by measures put in place to restrict the use of footpaths during an outbreak of foot-and-mouth disease was incapable in law of amounting to an interruption in use (paragraph 73). In this case the exercise the county council had to perform was not to make a finding of fact on the question of whether the 40 people had used the paths during the outbreak in 2001. It was "sufficient to identify evidence making it reasonable to allege that the rights of way subsist". The county council had done this by looking at the

content of the user evidence forms (paragraph 74). The “simple point” was that “40 persons gave evidence of uninterrupted use of the routes over the requisite 20 year period”. The county council’s duty to investigate the matters stated in the application had been “performed by officers tabulating and analysing the [user evidence forms], considering them and commenting on them in the March and December 2016 reports, and by the committee then considering them before deciding that it was reasonable to allege that the rights of way subsist” (paragraph 75). Questions bearing on the interruption of use were “points for the inspector at an inquiry, if one is held” (paragraph 77). The county council did not have “to ask specific questions about foot and mouth disease at the present preliminary stage”. There was no duty to ask the 40 people a further question on “the specific subject of foot and mouth” (paragraph 78).

51. Mr Laurence submitted that the judge misunderstood Roxlena’s argument here. In the light of Roch L.J.’s judgment in *ex p. Emery*, if there was a conflict of fact where resolution in favour of the public would justify confirmation, it would be reasonable to allege the subsistence of a right of way, and this would justify the order being made. This was not in dispute. So if the 40 members of the public who apparently claimed to have used the paths during the outbreak of foot-and-mouth disease had truly intended to make that claim, and if their evidence were accepted, this would be a proper basis for confirming an order and thus a proper basis for making it in the first place. Roxlena did not contend that making the order could only be justified if the county council found the 40 members of the public had used the paths in that period. Rather, the submission was that the county council’s duty to investigate required it to establish whether those 40 people had intended to claim what they had. To say it was “sufficient to identify evidence making it reasonable to allege ... the rights of way subsist” was wrong. The county council had failed to investigate whether that evidence reflected what the 40 people had really meant to say.

52. I cannot accept those submissions. The analysis on the previous issue is also relevant here. At the order-making stage of the statutory process, the consideration of evidence is necessarily less intense than at the stage of confirmation. The context here is the need to consider whether a right of way may reasonably be alleged to subsist. In that context, a surveying authority’s duty to “investigate” under paragraph 3(1)(a) of Schedule 14 to the 1981 Act does not constrain it to investigate a particular matter in greater depth and detail than it reasonably judges to be necessary in the circumstances.

53. In this case, by the time the county council’s committee came to consider the making of the order in January 2017 it had the benefit of the officer’s advice in the two reports, which described and analysed the evidence relating to the interruption of the use of the claimed routes during the outbreak of foot-and-mouth disease in 2001. If the committee had considered the evidence on interruption of use to be insufficient for its purposes at the order-making stage, or to require more assessment than the officer had provided in the two reports, it could have sought further evidence or asked for further work to be done. But it was not compelled to do so if it was to discharge its duty to “investigate” in paragraph 3(1)(a) of Schedule 14. It was not obliged by the duty to “investigate” to tackle every actual or potential conflict of evidence that an inspector would have to resolve in due course. As Mr Evans submitted, the “margin of appreciation” here was generous (see, for example, the judgment of Green J., as he then was, in *AA & Sons Ltd. v Slough Borough Council* [2014] EWHC 1127 (Admin)).

54. I agree with the judge that the evidence of interruption of use within the relevant 20-year period, contentious as it was, did not have to be more deeply investigated than it was before the county council decided to make the order. The county council did not have to go behind the user evidence forms and send letters to the 40 users who had said they did use the paths during the outbreak of foot-and-mouth disease, or a sample of those users, to ask whether they had inadvertently claimed to have done so. As the judge said, those 40 people had given some evidence of the uninterrupted use of the routes over the relevant 20-year period. That evidence could reasonably be taken at face value at the order-making stage. The county council did not have to assume it was unreliable because the 2001 Order had been in force at a relevant time. It might or might not withstand questioning at the confirmation stage. But it did not have to be investigated more fully before the order could lawfully be made.

Was there a “discovery” of evidence within section 53(3)(c)?

55. In his conclusions on this issue, Kerr J. referred to Mr Laurence's submissions based on the first instance decisions in *Mayhew v Secretary of State for the Environment* (1993) 65 P. & C.R. 344 and *R. v Secretary of State for the Environment, ex p. Riley* (1990) 59 P. & C.R. 1, but found neither of those cases relevant. The argument that the evidence that Mr Horne had carefully assembled must be ignored would be, he said, “disturbing if correct”, for it would mean that a surveying authority “must shut its eyes to relevant evidence, which would be contrary to the interests of justice” (paragraph 82). He was in no doubt that the county council had acted lawfully in relying on the user evidence forms in deciding to make the order (paragraph 88). The “event” that had triggered the county council's duty to consider them was their “discovery” in January 2011 when Mr Horne made his application, which was an “event” within section 53(3)(c). Though that application then “fell away”, the county council's duty under section 53(2)(b) remained (paragraph 89). The statutory language did not support the proposition that the “continuous review” duty was displaced by the successive applications under section 53(5) (paragraph 90). When Mrs Tiffen made her application in April 2013 the discovery of the user evidence forms had not yet been acted upon – because of the “dissuasive efforts” of Mr and Mrs Day's solicitors (paragraph 92). But there was nothing to preclude the county council performing “belatedly in January 2017” its duty under section 53(2)(b), or to prevent an applicant such as Mrs Tiffen from relying, in an application under section 53(5), on “evidence discovered years earlier but not yet acted upon by the authority concerned” (paragraph 93). This understanding of the statutory provisions did not make the procedural requirements in Schedule 14 pointless, and the court would grant relief where unfairness resulted from those requirements being breached or ignored (see the judgment of Dyson L.J., as he then was, in *R. (on the application of the Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 W.L.R. 138, at paragraph 55) (paragraphs 95 and 96).

56. Mr Laurence criticized that reasoning. He submitted there had been no effective discovery of evidence under section 53(3)(c). There was therefore no requirement for the county council to make an order under section 53(2), either under its free-standing duty to keep the definitive map and statement under continuous review, or because it was obliged to decide whether to make an order in response to Mrs Tiffen's application. The judge was wrong to hold otherwise.

57. Relying on the judgment of Macpherson J. in *ex p. Riley*, Mr Laurence submitted that relevant evidence already discovered once cannot be the subject of a subsequent discovery within section 53(3)(c)(i). Macpherson J. said (at p.5) that the discovery of evidence meant exactly that. And he accepted that “evidence” was not restricted to new or fresh evidence. Mr Laurence stressed that the evidence brought forward by Mrs Tiffen in support of her application for the claimed footpaths was identical to that adduced by Mr Horne in support of his. She had produced no new evidence of her own. Evidence adduced in support of an application under section 53(5) that is not proceeded with cannot be treated as having been discovered under section 53(3)(c) to engage the surveying authority's free-standing duty under section 53(2).

58. The burden of Mr Laurence's argument here is that an order under section 53(2)(b), based on user evidence of the kind adduced by Mr Horne, should only be made on an application taken to its conclusion under section 53(5). The circumstances in which section 53(5) and Schedule 14 require evidence produced by an applicant to be treated as having been “discovered” for the purposes of section 53(3)(c) no longer apply when the surveying authority decides the application cannot be proceeded with because of a failure to comply with the procedural requirements of Schedule 14.

59. Contrary to the judge's conclusion, Mr Laurence submitted, a relevant “event” calling for the surveying authority to exercise its free-standing duty to keep the definitive map and statement under continuous

review does not occur when the application, with the accompanying evidence, is received by the surveying authority. The only event that occurs then is the trigger for the authority to exercise its duty under paragraph 3 of Schedule 14, and subject to the procedural requirements in paragraphs 1 and 2, to investigate the application and “decide whether to make or not to make the order to which the application relates”. A subsequent application of the kind made by Mrs Tiffen, accompanied only by evidence that had already been discovered, cannot alter the position. The same evidence cannot be discovered twice. The effect of section 53(5) and Schedule 14 is to require an applicant who makes another, later, application to bring forward at least some new and probative evidence – as was done in *ex p. Riley* – before the surveying authority has jurisdiction to consider the previously discovered evidence as well. But in any event in this case the county council had already acted on the discovery of the evidence adduced by Mr Horne, by deciding it was not going to proceed with his application because of his failure to comply with the procedural requirements. This, submitted Mr Laurence, is by no means unjust. The evidence itself is not lost – because on a subsequent application supported by fresh evidence, the surveying authority must have regard to the previously discovered evidence under section 53(3)(c)(i). That provision refers to the discovery of evidence being “considered with all other relevant evidence ...”, which would include previously discovered evidence.

60. This case, Mr Laurence argued, was distinguishable on its facts from *Mayhew*. In his judgment in that case Potts J. referred (at p.353) to the meaning of the verb “to discover” as “a mental process in the sense of the discoverer applying his mind to something previously unknown to him”. There, said Mr Laurence, the evidence in question had already been discovered soon after 1969 and could not be discovered again. It was a discovery that took place in the past, for which section 53(2)(a) provided. The critical difference between the documents in *Mayhew* and the user evidence forms in this case was that in *Mayhew* the surveying authority had genuinely discovered the material after 1969 in circumstances calling for an order under section 53(2)(a), which is not what happened here.

61. Mr Laurence also submitted that no reliance should be placed on observations made, obiter, by Dyson L.J., as he then was, in *Winchester College* (at paragraph 55), to the effect that where a surveying authority decides not to waive any default in compliance with the procedural requirements of Schedule 14, it is open to it “... to treat a non-compliant application as the “trigger” for a decision under section 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in subsection (3)”. Mr Laurence said this was incorrect. But in any event the point had not been not fully argued in that case, and the court did not consider the separate question, which arises on the facts here: does a decision not to waive a procedural defect permit, or require, the surveying authority to treat the non-compliant application as triggering a decision under section 53(2)?

62. In my view those submissions are not cogent. One must start with the statutory language. Section 53(2) refers to the occurrence of any of the “events” specified in subsection (3). The potentially relevant event in this case is the event described in subsection (3)(c), which is “the discovery ... of evidence which (when considered with all other relevant evidence available to them) shows ...” any of the matters referred to in subsection (c)(i), (ii) and (iii). In each case the occurrence of the specified “event” is not simply the “discovery” of the evidence in the sense of its being physically found. It also requires a consideration of that evidence, together with any other relevant evidence available to the surveying authority, which actually “shows” the circumstance in subsection (c)(i), (ii) or (iii) – in effect, therefore, a composite event. That consideration of the evidence must surely be a consideration of its substance, by the surveying authority, rather than its merely being received from the applicant with the application. It involves the surveying authority undertaking that “mental process” on the evidence discovered. If the evidence has not been “considered”, a relevant event for the purposes of section 53(3)(c)(i), (ii) or (iii) will not have occurred. The event cannot occur until one of those three circumstances has actually been shown.

63. I accept, as did the judge, that evidence discovered by somebody once – in the sense of its being found for the first time – cannot, in that sense, be discovered by that person on a second or subsequent

occasion. But this is not to say that evidence, once discovered, but not so far considered by the surveying authority, cannot be considered on the second occasion when it is submitted. That is this case. By the time Mrs Tiffen made her application under section 53(5), in April 2013, the evidence in the user evidence forms submitted by Mr Horne with his application in January 2011 had still not been considered, in its substance, by the county council. It had not been considered because the county council had been dissuaded from determining Mr Horne's application by the efforts of Mr and Mrs Day's solicitors. In these circumstances I do not see in the provisions of section 53 any restriction preventing Mrs Tiffen from relying in her application on the same material as had Mr Horne in his, without that material ever having previously been considered under section 53(3)(c). This was, I think, the essential point in the judge's analysis, though he did not express it in quite the same way.

64. I reject the argument that the effect of the provisions in section 53(5) and Schedule 14, read with section 53(3)(c), is to compel an applicant to bring forward some new and previously undiscovered evidence before the surveying authority may consider, for the first time, evidence previously discovered but never considered in substance. That is not what the provisions state, nor a sensible inference from them. If the interpretation contended for by Mr Laurence were right, previously discovered but unconsidered evidence, which had not been considered because of some procedural mistake by a previous applicant, could only be considered if there also happened to be some new evidence never discovered before. This would have arbitrary consequences, and cannot have been Parliament's intention. It would, in effect, elevate a procedural error – in this case the lack of service on Mrs Day – to a substantive outcome, until some further evidence happened to be discovered. In many cases it would prevent a consideration of significant or compelling evidence, merely through some minor default.

65. As Mr Evans submitted, the judge's conclusions on this issue do not offend the principle of legal certainty. They do not mean that a substantive decision under section 53, taken on particular evidence, should be re-opened in the absence of some evidence justifying that course. That is not what happened here. In this case there was no substantive decision on the material produced by Mr Horne, because that evidence was not considered. There was no previous determination to engage the principle.

66. The judge was also right to conclude that neither of the first instance decisions in *ex p. Riley* and *Mayhew* assist the court on the issue here. In *ex p. Riley* a relevant substantive decision had previously been taken by the surveying authority. *Mayhew* is also materially different on its facts, but it supports the principle that evidence may be capable of lawful consideration some time after the point of discovery – in that case a review that had never resulted in a formal decision.

67. Like the judge, I also think there is no obstacle in the statutory provisions to the surveying authority taking into account previously discovered but unconsidered material in discharging its free-standing duty under section 53(2)(b). Similar reasoning applies. Where the surveying authority, because of a failure by an applicant to comply with the procedural requirements of Schedule 14, has decided that an application should not be proceeded with, that decision does not disapply the free-standing duty. Again, to reach the opposite conclusion, one would have to read into the statutory provisions a qualification Parliament did not insert. The free-standing duty in section 53(2)(b) is not suspended or displaced by the making of an application under section 53(5). It is a continuous duty. In discharging it, the surveying authority is not debarred from considering evidence not previously considered, though submitted with an application never determined. Nor does it have to await a further application adducing that evidence again, together with evidence not submitted before.

68. I would add, finally, that none of these conclusions denies a proper role to the procedural requirements in Schedule 14. Those requirements are to be complied with. But an applicant's failure to comply does not automatically have the result of circumscribing the scope of the surveying authority's jurisdiction under

section 53, and does not impinge on the free-standing duty in section 53(2)(b). This conclusion seems consistent with Dyson L.J.'s observations in *Winchester College* (at paragraph 55), with which I agree.

Was there sufficient evidence to justify making the order for the bridleway?

69. Mr Laurence submitted there was insufficient evidence to justify extending the bridleway on the definitive map and statement. When the officers recommended in the December 2016 report that such an order be made, they regarded as the “most significant evidence” the 1950 Parish Schedule at Appendix F to the report, and the “associated claim plan” at Appendix G. But the plan in Appendix G was not the “associated claim plan”. It was therefore impossible to establish either the alignment or the end of the bridleway – which was described in the schedule to the draft order as ending “at the Quarry in Gelt Woods”. So, submitted Mr Laurence, the “most significant” evidence supporting the extension of the bridleway did no such thing. And the county council could not reasonably conclude, as the officers advised in the December 2016 report, that “sufficient evidence [had] been 'discovered' ... to show a reasonable allegation that [the bridleway] should be extended to point 23 as shown on the plan at Appendix A”. Mr Laurence also submitted that the county council should have considered whether the documentary material discussed in paragraph 5.4 of the December 2016 report was sufficient to support the confirmation of an order extending the bridleway. It did not do so.

70. The judge acknowledged that the “associated claim plan (Appendix G)” referred to in paragraph 5.4.8 of the December 2016 report was the wrong plan, which did not show the bridleway (paragraph 104). He rejected the criticism levelled at the officer's analysis – in particular, the contention that it made no sense for the route to turn to the south from point D to point 24 and from there north-east to point 23, and that this was not borne out by contemporary maps. He also rejected the argument that the county council should have applied a “balance of probabilities” test rather than the lower test of “reasonable allegation” (paragraph 108). The court should not substitute its own judgment for the decision-maker's. The “threshold of intervention”, said the judge, is “the high one of irrationality” (paragraph 109). Roxlena's case was, in effect, an invitation to the court to embark on its own assessment of the historical documents and maps, and to disagree with the county council's, “without properly alleging irrationality, still less establishing it”. The “balance of probabilities” test could not be substituted for that of “reasonable allegation”, merely because this would be the applicable standard at the stage of confirmation if the order were unopposed (paragraph 110). It should be for the inspector at a public inquiry to weigh and evaluate the weaknesses of the evidence supporting the extension of the bridleway. There was no justification for the court to interfere with that exercise (paragraph 111).

71. Mr Laurence submitted that those conclusions of the judge were mistaken. As with the claimed footpaths, if the evidence before the county council was not enough to demonstrate on the balance of probabilities that the claimed bridleway subsisted on the alignment shown on the draft order map, and so to justify confirmation, it could not have been reasonable to make the order.

72. I disagree. I do not accept the submission that because the map at Appendix G showed a route that was not the claimed bridleway, the evidential basis for adding the stretch of bridleway to which the application related fell apart, and that the allegation of the subsistence of the bridleway on that alignment and to that extent could not be reasonable. As Mr Evans submitted, one must not ignore what the officer said in paragraph 5.4.8 of the December 2016 report. The officer referred there to the 1950 Parish Schedule, and the assertion made by the parish council that the bridleway extended to a point ending at the “Quarry in Gelt Woods”, rather than some indeterminate point short of the quarry. He also suggested, sensibly, that it would have been surprising if the bridleway had ended where it was shown on the definitive map – at Point D on the map at Appendix A – because that was a dead end, and not a destination of any kind. These observations did not depend on a map showing the route of the bridleway all the way to the

quarry. The officer recognized that the application plan did not show that. The identity of the plan itself made no difference.

73. And in any event the officer also referred, in the same paragraph, to other plans from 1967, which, he said, “show the claimed route ... starting at C [Grey Stone] and stopping at point D”. This was taken to be the existing bridleway, though it did not appear to go as far as the quarry. But other passages in the December 2016 report provide a more complete picture, indicating that the route shown in the 1950 Parish Schedule as a bridleway ending at the quarry was the same route to the quarry as had been shown in the 1814 Inclosure Award, which the officer described in paragraph 5.4.2 of the report as the “track to the quarry (shown as D to 23 on draft order plan)”. Taken as a whole, the relevant material could properly be taken as amounting to a reasonable allegation of the claimed route. That conclusion was not unlawful.

74. The reasons I have given for rejecting the parallel argument relating to the footpaths are also relevant here. The crucial question is whether the allegation is a “reasonable” one. This is not a high test, and deliberately so. The fact that the allegation is based on primary documents rather than user evidence as such does not bear on the principle. A reasonable allegation can properly be based on documentary material alone – as Roch L.J. effectively accepted in *ex p. Emery* (at p.379c) when endorsing Owen J.’s observation in *ex p. Bagshaw* (at p.409) that “if ... the evidence were to be wholly documentary it might be possible, satisfactorily or reliably, to evaluate that evidence without any necessity for a hearing, and in these circumstances answer the question whether a reasonable person could reasonably allege a right of way to subsist”.

Conclusion

75. For the reasons I have given I would dismiss the appeal.

Lord Justice Irwin

76. I agree.

Lord Justice Simon

77. I also agree.

Appendix 10.4

***R. v Secretary of State Ex p. Bagshaw and
Norton (1994) 68 P. & C.R. 402***

**R. v. SECRETARY OF STATE FOR THE
ENVIRONMENT, ex p. BAGSHAW AND NORTON**

QUEEN'S BENCH DIVISION (Owen J.): April 28, 1994

Footpaths—Definitive map and statement—Secretary of State refused to direct modifications to add public footpath and by-way—Judicial review—Whether Secretary of State erred in law—Wildlife and Countryside Act 1981, s. 53(3)(c)(i)—Whether right of way subsists or is reasonably alleged to subsist—Different evidential tests to be applied—Whether public right of way could end in a cul-de-sac in the countryside

Bagshaw and Norton had applied separately to their respective county councils for orders to modify the definitive maps and statements of the by-ways, public paths and rights of way in their areas. Bagshaw had sought to add a public footpath to the map, whilst Norton had sought to add a by-way, relying upon witness evidence of at least 20 years of uninterrupted use. Both Norton and Bagshaw appealed to the Secretary of State against the county councils' decisions not to make the orders for which they had applied. The Secretary of State considered that he should not direct the councils to make the order. In the case of Bagshaw, the Secretary of State agreed with the county council that Bagshaw had not provided "sufficient evidence" to support his claim and that the evidence was "irreconcilable" and as such no public right of way could reasonably be alleged to subsist. In the case of Norton, the Secretary of State considered that the evidence Norton submitted did not convince him that a presumption of dedication has arisen, that there was a need for "conclusive" proof, and that Norton had provided "insufficient evidence" to show that there was a public by-way along the claimed route.

Both Bagshaw and Norton applied to quash the decisions by way of judicial review on the basis that the Secretary of State had applied the wrong test in considering the evidence. Norton's case contained an added allegation that the Secretary of State had erred in law by not accepting the proposition that a public right of way, which ended in a cul-de-sac, could not exist in law in the countryside.

Held, allowing both applications and quashing the Secretary of State's decisions, that (1) under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, the tests which the county council and then the Secretary of State needed to apply were whether the evidence produced by the claimant, together with all the other evidence available, showed that either (a) a right of way subsisted or (b) that it was reasonable to allege that a right of way subsisted. On test (a), it would be necessary to show that the right did subsist on the balance of probabilities. On test (b), it would be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. Neither the claimant nor the court were to be the judge of that, and the decision of the Secretary of State was final if he had asked himself the right question, subject to an allegation of *Wednesbury* unreasonableness. The evidence necessary to establish that a right of way is reasonably alleged to subsist is less than that needed to show that a right of way does subsist. The Secretary of State had erred in law in both cases as he could not show that test (b) had been satisfied.

(2) In a case where the evidence from witnesses as to user is conflicting, if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.

(3) There was no rule of law that you cannot have a right of way to a cul-de-sac in the countryside. The Secretary of State had made no error of law in this regard.

Cases referred to:

- (1) *Attorney-General v. Antrobus* [1905] 2 Ch. 188; 69 J.P. 141.
- (2) *Eyre v. New Forest Highway Board* (1892) 56 J.P. 517.
- (3) *Moser v. Ambleside Urban District Council* [1925] 89 J.P. 118.
- (4) *Poole v. Huskinson* [1843] 11 Meeson & Welsby 827.
- (5) *R. v. Cornwall County Council, ex p. Huntingdon and Another* [1992] 3 All E.R. 566; [1992] C.O.D. 223; (1992) 142 New L.J. 348; and [1994] 1 All E.R. 694.
- (6) *R. v. Isle of Wight County Council, ex p. O'Keefe* (1990) 59 P. & C.R. 283; [1989] J.P.L. 934.
- (7) *R. v. Secretary of State for the Environment, ex p. Simms and Burrows* [1991] 2 Q.B. 354; [1990] 3 All E.R. 490; [1990] J.P.L. 746; (1991) L.G. Rev. 464, C.A., reversing [1990] C.O.D. 37, D.C.
- (8) *R. v. Secretary of State for the Environment ex p. Smith & Deller*, May 5, 1993, CO/1128/9, Q.B.D.
- (9) *Rubinstein v. Secretary of State for the Environment* (1989) 57 P. & C.R. 111.

Legislation construed:

Wildlife and Countryside Act 1981 (c. 69), s. 53(3)(c)(i) and Schedule 14, para. 4. Section 53(3)(c)(i) is set out in the judgment below at p. 407. Paragraph 4 of Schedule 14 states:

- (1) Where the authority decided not to make an order, the applicant may, at any time within 28 days after service on him of the notice of the decision, serve notice of appeal against that decision on the Secretary of State and the authority.
- (2) If on considering the appeal the Secretary of State considers that an order should be made, he shall give to the authority such directions as appear to him necessary for the purpose.

Applications for judicial review of two decisions of the Secretary of State for the Environment. On February 11, 1992 the Secretary of State refused to direct Devon County Council to modify the definitive map for its area to include a public footpath which Bagshaw alleged should be added on basis of evidence of user. On January 6, 1992, the Secretary of State refused to direct Suffolk County Council to modify the definitive map to include a by-way open to all traffic in the Parish of Polstead. Mrs Norton had alleged that it was a by-way, relying on evidence of user and documentary evidence. Both county councils had refused the applications, and the claimants had appealed to the Secretary of State of the Environment under Schedule 14 to the Wildlife and Countryside Act 1981.

George Laurence, Q.C. for the applicants.
John Hobson and Reuben Taylor for the respondent.

OWEN J. Mr Bagshaw seeks judicial review of a decision of the Secretary of State for the Environment, dated February 11, 1992, and refusing to direct Devon County Council to make an order modifying its definitive map by adding as a public footpath the highway, shown coloured red on the plan attached to his application, in the parish of Dartmoor Forest within that county.

Mr Bagshaw's case was that user evidence of a former mine track indicated that it was used by the public as of right and without interruption until 1982 and this gave rise to a presumption of dedication. For the purposes of this application it is not necessary to examine that evidence in any detail nor to examine the evidence submitted to the county council against Mr Bagshaw's contention. At the time of giving their decision the county council clearly had in mind the decision of McPherson J. in *R. v. The Isle of Wight*

County Council, ex p. O'Keefe.¹ Mr Laurence, for Mr Bagshaw, has sought to place some gloss upon this decision and in particular has pointed out that *Rubinstein v. Secretary of State of the Environment*² has since been overruled; see *R. v. Secretary of State for the Environment, ex p. Simms and Burrows*.³ He also points out that *O'Keefe* itself has been held probably to have been wrongly decided albeit for quite other reasons: *R. v. Cornwall County Council, ex p. Huntingdon*.⁴ I was also referred to a decision of my own given last year *R. v. Secretary of State for Environment, ex p. Smith and Deller*.⁵ This was said to bear on the proper interpretation of "subsist or is reasonably alleged to subsist" in section 53(3)(c)(i) of the 1981 Act. However, that decision, which was concerned with other matters, does not, I consider, assist me one way or the other with what I have to decide here. However, I see no reason not to accept the judgment of McPherson J. that an order should not be made lightly. This statement, however, does not assist the respondent. More to the point, it is to be noted that in the county council's decision it was stated that:

The evidence of use from 1955 is thus completely irreconcilable and makes it difficult to be satisfied that a public right of way is reasonably alleged to exist.

It is on this irreconcilability and the respondent's attitude to it that Mr Laurence rests the main part of his case.

The Secretary of State, Mr Laurence says, started his conclusions (at paragraph 6) by stating the correct consideration, namely:

Whether the evidence shows that a right of way exists or is reasonably alleged to exist.

The Secretary of State then proceeded to deal with an argument based upon section 31 of The Highways Act 1980. He summarised this by saying that:

There is a statutory presumption that a right of way has been dedicated to the public where it has been used for at least 20 years without interruption unless there is sufficient evidence that there was no intention during that period to so dedicate.

He then set out certain conflicting evidence and continued (in paragraph 8):

In the Secretary of State's opinion, on a balance of probabilities, the most likely date for the locking of the access gate and the painting of "private" on it is 1982, as he finds the detailed evidence of Captain Cross the most convincing.

It is necessary to appreciate that this assessment of Captain Cross's evidence was by reading statements and not by any examination or assessment of him as a witness. Paragraph 8 continues:

If 1982 is taken as the date when the right of the public to use the path was first questioned, then the evidence of use between 1962-82 (and

¹ (1990) 59 P. & C.R. 283

² Referred to in *R. v. Isle of Wight C.C., ex p. O'Keefe* *ibid.* at 288.

³ [1991] 2 Q.B. 354.

⁴ [1992] 3 All E.R. 556.

⁵ Not yet reported, judgment on May 26, 1993.

indeed since 1955) is contradictory. The Secretary of State agrees with the County Council that the evidence of use from those who claim unimpeded use as of right is balanced by the amount of evidence supporting the claims of the tenants of the Slade Newtake (the Coakers) and the Hexworthy Newtake (the Mudges) that walkers were challenged and there never was a right of way over the track. In these circumstances, the Secretary of State agrees with the County Council that the evidence is *irreconcilable and as such no right of way can reasonably be alleged to subsist, on the basis that unimpeded public use of the route ceased in 1982.*

It is not necessary to read the whole of paragraph 9 of the Secretary of State's letter. Reliance is placed, however, on the use of the words "counter-balanced by" when referring to the evidence, and criticism is also made of the last words of that paragraph:

... the Secretary of State considers that the evidence of unimpeded public use of the track as of right is insufficient to indicate that a presumed dedication as a public right of way had occurred.

Mr Laurence also takes exception to paragraph 11 which states:

Accordingly, after taking into account all representations received, and for the reasons given above, the Secretary of State considers that there is not sufficient evidence to support your claim that a public footpath exists ...

On behalf of Mr Bagshaw, Mr Laurence now argues that the respondent applied the wrong test.

Mrs Norton seeks judicial review of a decision of the Secretary of State for the Environment dated January 6, 1992 and refusing to direct Suffolk County Council to make an order modifying the definitive map by adding a by-way open to all traffic to the county's definitive map for the parish of Polstead in that county.

Again, the applicant relies on user evidence. In addition she relies upon documentary evidence, the *Layham Tithe Map* (1841), *Greenwood's Map* (1824/5), *Bryant's Map* (1826) and the *Ordnance Survey 6" Maps* of 1884, 1904 and 1927. She also relies on a copy of a Sale Plan for Pope's Green Farm dated 1877. Connected to the submission on the documentary evidence is a contention that it is illogical for the public part of Pope's Green Lane effectively to form a cul-de-sac. Mr Laurence argues that a public right of way cannot end in a cul-de-sac except in very limited circumstances which do not exist in this case and accordingly the Secretary of State was not entitled to conclude, or at least could not reasonably conclude, that it was not reasonable to allege the existence of a right of way. Again, it is not necessary to make any analysis of this evidence nor of the body of evidence on paper much greater, submitted against the applicant by the landowner.

From paragraph 6 of the Secretary of State's decision letter it may be seen that the county council in rejecting the application first did not accept:

... that it is illogical that cul-de-sac routes may exist in the country ... taking the

... view that the continuation of such routes cannot be assumed and that the evidential tests required under the 1981 Act must be met to show that, *on a balance of probabilities, public rights do exist.*

The Secretary of State's conclusions are set out in paragraphs 7, 8, 9 and 10. It is Mrs Norton's contention that he applied an incorrect test to the evidence before him.

Paragraph 7 starts by saying:

The Secretary of State has carefully considered all the representations and documentary evidence submitted by yourself and by the County Council. He takes the view that, whilst surveying authorities are required to take into consideration all other relevant evidence available to them concerning the status of a right of way the subject of a request for a modification order, the onus is upon the applicant to provide evidence to support the claim.

It is accepted that this is a clear and accurate statement of the law. The letter continues:

He notes that the user evidence submitted in support of a presumption of dedication is limited to four persons claiming 20 years of vehicular use as of right; he must weigh this against the statements from the landowner, supported by 115 signed forms and the Layham and Polstead Parish Councils, indicating the use of the route has been on permissive basis and that active steps to prevent a presumption of dedication arising have been taken. The Secretary of State concludes that the user evidence you have submitted does not, in itself, convince him that a presumption of dedication has arisen for the use of a route as a by-way.

Whilst accepting that decision letters are not to be construed as if they were statutes, Mr Laurence argues that the tenor of the last sentence and especially "convince him that a presumption of dedication has arisen" indicate that a wrong test has been applied. He also takes exception to the last sentence in this paragraph which reads:

Essentially, therefore, he considers that the case must turn on whether sufficient documentary evidence has been adduced to support the claim that a by-way exists along the claimed route.

Mr Laurence says that this clearly indicates that a wrong test has been applied.

It is not necessary to read out the whole of paragraph 8. Of this Mr Laurence says, again conceding that the letter must not be construed strictly as if a statute, it nevertheless indicates by its use of "conclusive proof" on two occasions, "conclusive" on one occasion and "inconclusive" on one occasion, that the wrong test was in the mind of the Secretary of State.

Paragraph 9 is criticised by Mr Laurence on the basis that it rejects his argument, as I understood him to be saying at one time, that it is a "legal principle" with strictly limited exceptions of which there is no evidence in this case that cul-de-sac routes cannot exist in the countryside. The letter states:

Whilst accepting that cul-de-sac routes may be unusual in the countryside, they are by no means unprecedented and he sees no reason why routes cannot continue over private land on a permissive basis, as appears to be the case here.

Mr Laurence criticises paragraph 10 as showing that the incorrect test was applied. Paragraph 10 reads:

After careful consideration of all the representations before him, the Secretary of State considers that you have provided insufficient evidence to show that, on balance of probability, *there is a by-way* along the claimed route.

On this short account of the two cases, it can be seen that each application raises the question of what is the right test to be applied. Whilst Mrs Norton's case contains an added allegation that the respondent erred in law by not accepting the proposition that a right of way ending in a cul-de-sac cannot, save with exceptions which do not exist here, exist in law, each application turns on a decision as to the proper approach of the Secretary of State when he is considering paragraph 4 of Schedule 14 to the Wildlife and Countryside Act 1981.

It will be as well not to turn to section 53 of the Wildlife and Countryside Act 1981. In general terms, by this section the council is required to maintain a definitive map of its area. The definitive map will show the various "byways open to all traffic", "public paths" and "rights of way". By subsection (2) the council is required to make modifications of that map as soon as reasonably practicable after "an occurrence". Subsection (3) lists that types of activating occurrence. At (c) of that subsection it is provided that:

(c) 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 is the area to which the map relates, being a right of way to which this Part applies.

shall be such an occurrence. By subsection (5) of that section:

Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3).

Each applicant here claims to be acting under subsection (5). There is no dispute as to this.

It is also common ground that by subsection (5) of Schedule 14 "shall have effect as to the making and determination of applications under this subsection". By paragraph 3 of that Schedule, the authority is required to investigate the matter stated in the application, consult (if necessary) other local authorities and then decide whether or not to make the order sought. The councils did this.

By paragraph 4 of the Schedule, on refusal the applicant may serve notice of appeal on the Secretary of State and the authority. If he considers that an order should be made the Secretary of State "shall give to the authority such directions as appear to be necessary for that purpose." It has been pointed out, rightly, that Schedule 15 had no relevance here since no order has been made. The common question which is raised by these two applications is the construction of section 53(3)(c)(i).

It is necessary to give some meaning to all the words used. Accordingly, there must be a difference between showing "that a right of way which is not shown in the map and statement subsists" and showing that a right of way which is not shown in the map and statement "is reasonably alleged to subsist". Accordingly the questions for the council and subsequently for the

Secretary of State were: does the evidence produced by the claimant together with all the other evidence available show that either—

- (a) a right of way subsists? (I shall call this test “A”), or
- (b) it is reasonable to allege that a right of way subsists? (I shall call this test “B”).

To answer either question must involve some evaluation of the evidence and a judgment upon that evidence. For the first of those possibilities to be answered in the affirmative, it will be necessary to show that on a balance of probabilities the right does exist. For the second possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

The first of those possibilities does not apply here. Accordingly the question which was for decision by the councils and also by the Secretary of State is whether a reasonable person could reasonably allege a right of way, having considered all the relevant evidence available to the council. The question is not: was it reasonable for the claimant so to allege?—since the claimant is not to be the judge of that. At this stage the authority is to be the judge. At a later stage it is to be the Secretary of State. Even less is it for me to be the judge of that. Subject to an allegation of *Wednesbury* unreasonableness, which may have been in part alleged here (although I think that in the end it was not), the decision of the Secretary of State must be final if he asked himself the right question.

The wording of the section indicates, as I consider, that the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right does subsist. Indeed, bearing in mind the structure of the Act, this seems to be clear. That structure is, in this respect, that an application under section 53(3)(c)(i), if upheld, will be followed by an order, consequent upon which, after an objection, there may be some form of inquiry with either confirmation or a refusal to confirm.

If the evidence were merely that a claimant had on a limited number of occasions not been stopped when using the way, such an allegation that a right of way subsists might well not be reasonable. In this connection the words of Parke B. in *Poole v. Huskinson* (1843) 11 *Meeson & Welsby* 827, approved in *Moser v. Ambleside Urban District Council* 89 J.P. 59 are relevant. There Parke B. said at p.61:

... that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment.

If, however, as probably was so in each of these cases, there were to be conflicting evidence which could only be tested or evaluated by cross-examination, an order would seem likely to be appropriate. Again in *Moser v. Ambleside Urban District Council* a case which was cited to me with enthusiasm by Mr Laurence, Pollock M.R. said of the evidence in that case: “It is also to be remembered that he (the trial judge) had the great advantage of seeing the witnesses”.

Atkin L.J. also dealt with the apparent necessity to weigh and judge the evidence when he said:

In a right of way case such as this, no doubt a very great deal of importance must be attached to the fact that the learned judge heard a vast amount of oral testimony, and was able to judge the value of that

evidence by observing the persons who gave it, and in a case where the oldest inhabitants are the persons who are the most valuable and the most able witnesses it obviously is a great advantage to see exactly how the old gentlemen and the old ladies do deport themselves in the witness box, because the judge is able to tell in that way whether he can rely upon their testimony or whether he cannot.

Mr Hobson argues that "if the decision maker accepts the evidence of the objectors, which he may do without rejecting the evidence of the claimants as untruthful, he is entitled to conclude that the right of way cannot reasonably be alleged to exist". However, this cannot be an answer in Mr Bagshaw's case since the conflict is said to be irreconcilable, at least on paper, and there would then seem to be only one way to resolve that conflict.

If, on the other hand, the evidence were to be wholly documentary it might be possible, satisfactorily and reliably, to evaluate that evidence without any necessity for a hearing, and in these circumstances answer the question whether a reasonable person could reasonably allege a right of way to subsist. In argument Mr Laurence did not wish to accept this proposition and argued that inquiries frequently lead to the discovery of yet more unknown evidence which may affect the answer to the question. This may be true. However, as the question which has to be answered is: "Does the evidence produced by the claimant together with all the other evidence available show that it is reasonable to allege a right of way?", it would be difficult to take into account unknown evidence.

Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to user is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to me to be reasonable to allege such a right. I say this because it may be reasonable to reject the evidence on the one side when it is only on paper, and the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.

I must now return to the reasons given by the Secretary of State. In respects of Mr Bagshaw, it is argued on his behalf that the respondent applied the wrong test. Purporting to find that the evidence was balanced (as in paragraph 8, p. 13), or counterbalanced (p. 9) by evidence adduced on behalf of the objectors indicates that the wrong test was used. Such a balance might indicate that test (A) was not satisfied; it could not show that test (B) was not satisfied. Indeed it is argued that it is in such situations that it is reasonable to make the allegation.

Further, finding that the evidence was irreconcilable, and "*as such*" (paragraph 8, p. 13) no right of way can reasonably be alleged to exist indicates that a wrong test was applied.

My judgment is that those words, even construed favourably for the respondent, do indicate that the wrong test was applied.

In these circumstances, without indicating any further than I have already thought necessary what the answer should be, I must find that the respondent erred in law in such a manner as to make it necessary to quash the respondent's decision and require him to ask the right question in proper exercise of his powers.

Mrs Norton: Here it is argued:

- (a) that the respondent applied the wrong test; and
- (b) that in any event the respondent's decision was one which no reasonable person properly directing himself as to the law could have reached.

As to the first argument, the use of "conclusive proof" in paragraph 8 (p. 14), even when construed strongly in favour of the respondent, so indicates. The statement in paragraph 10 that Mrs Norton had provided insufficient evidence to show that, on the balance of probability, there *is* a by-way along the claimed route, seems to emphasise this since the question to be asked is, as I find, whether the evidence shows that on a balance of probability it is *reasonable to allege* a by-way along the claimed route. Accordingly, it seems to me that again the respondent erred in law and should be required to consider the matter afresh asking the right question.

In the course of opening his case, and in his skeleton argument, Mr Laurence sought to argue that the respondent and the council were also in error in law in their rejection of what has been called the "cul-de-sac point". The argument arises in this way. There is a track which leads from Layham to the U8512. The U8512 is undoubtedly a highway. The road from Layham to a point marked "E" on the map is also a highway—the U8504. The track continues but no right of way for vehicular traffic is shown on that track. The argument placed before the authority and before the Secretary of State was that if the map is right, the right of way ended as a cul-de-sac at "E", and that as a right of way leading to a cul-de-sac in this place could not have come into existence the right of way must have continued along the track to join the two undoubted highways.

It was suggested that the reason for the whole track not being shown as a by-way on the map is probably an administrative error caused by the fact that two authorities were involved with their boundaries meeting at the point marked "E". Relying upon *Eyre v. New Forest Highway Board*⁶ and *Attorney-General v. Antrobus*,⁷ Mr Laurence sought to argue that as a legal principle here "you must find a right of way as the track leads from one public place to another public place, and you cannot have a right of way to what is a cul-de-sac unless it be in a town." However, it is abundantly clear from the judgments in *Moser v. The Ambleside Urban District Council*⁸ that there is no such rule of law. Pollock M.R. declares⁹:

I find it difficult to accept as true *in all cases* that you must find a right of way from one public place to another public place, and that you cannot have a right of way to what is a cul-de-sac unless it be in a town. I do not think that is what was intended, and I do not think if that is what as intended that that is correct. It seems to me that there may be a number of cases in which the public need to go to a particular point, and there may well have been a dedication to them for their use for the purpose of reaching that point, although the return journey might be precisely the same route from the terminus ad quem to which the right of access is granted.

⁶ (1892) 56 J.P. 517.

⁷ [1905] 2 Ch. 188.

⁸ [1925] 89 J.P. 118.

⁹ *ibid.* at 119.

Atkin L.J. in the same cases cited:

It has been suggested that you cannot have a highway except insofar as it connects two other highways. That seems to me to be too large a proposition.

Sargant L.J. expressed similar doubts. Of course, that which Mr Laurence urges upon me may be factual evidence, possibly in some circumstances strong evidence upon which it may be reasonable to make an allegation. Further than that, I am not required to go and I will not. Suffice it to say that I do not regard the respondent as having been in error of law over this matter.

Applications allowed, with costs.

Solicitors—Messrs Godlove Pearlman, Leeds; Treasury Solicitor.

Reporter—William Upton.

Appendix 10.5

R. v Secretary of State for Wales Ex p. Emery

[1998] 4 All E.R. 367

R. v Secretary of State for Wales Ex p. Emery



Positive/Neutral Judicial Consideration

Court

Court of Appeal (Civil Division)

Judgment Date

9 July 1997

Where Reported

[1998] 4 All E.R. 367

[1997] 7 WLUK 206

[1997] E.G. 114 (C.S.)

(1997) 94(29) L.S.G. 29

(1997) 141 S.J.L.B. 170

[1997] N.P.C. 110

Times, July 22, 1997

[1997] C.L.Y. 2348

Subject

Environment

Keywords

Administrative decision-making; Documentary evidence; Rights of way

Judge

[Nourse LJ](#);

[Roch LJ](#);

[Phillips LJ](#)

Counsel

For the Secretary of State: John Hobson.

For E: George Laurence Q.C. and Edwin Simpson.

Solicitor

For the Secretary of State: Treasury Solicitor.

For E: Brooke North & Goodwin (Leeds).

Case Digest

Abstract

E applied for judicial review of a decision of the Secretary of State upholding the local authority's refusal to exercise its powers under the [Wildlife and Countryside Act 1981 s.53\(2\)](#) to amend a definitive survey map to show an alleged public footpath. E submitted statements to prove that

the footpath had been enjoyed as a public right of way for more than 20 years, as required by the [Highways Act 1980 s.31](#) , but there was conflicting evidence from the landowners, who claimed that general access had always been refused. E's application was granted and the Secretary of State appealed.

Held, dismissing the appeal, that under s.53(3)(c)(i), the local authority was required to make amendments to a map where evidence supporting the existence of a right of way was reasonably alleged to subsist. Difficulties arose where there was conflicting evidence as to whether a public right of way in fact existed under s.31 of the 1980 Act. However, in dealing with such cases, the authorities should bear in mind that parties had a right to appeal under Sch.15 of the 1981 Act when those issues could be determined by public inquiry. Where an applicant produced credible evidence of enjoyment as a public right of way for 20 years, but there was conflicting evidence about one of the matters arising under s.31 of the 1981 Act, then the application should be granted unless there was incontrovertible documentary evidence to defeat the claim, [R. v Secretary of State for the Environment Ex p. Bagshaw \(1994\) 68 P. & C.R. 402, \[1994\] 4 WLUK 264](#) approved. In the instant case, it was unreasonable for the Secretary of State to conclude that E's evidence was inadequate to indicate that a right of way was reasonably alleged to subsist.

Appendix 10.6

***Todd and Bradley v Secretary of State for the
Environment, Food and Rural Affairs [2004]***

EWHC 1450 (Admin)

a Todd and another v Secretary of State for the Environment, Food and Rural Affairs
[2004] EWHC 1450 (Admin)

b QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

EVANS-LOMBE J

19–21, 24 MAY, 22 JUNE 2004

Highway – Definitive map – Modification order – Modification order made on discovery by authority of evidence showing that a right of way not shown in the map subsisted or was reasonably alleged to subsist – Secretary of State confirming modification order on basis of evidence from which existence of right of way could reasonably be alleged to subsist – Whether Secretary of State applying correct standard of proof – Wildlife and Countryside Act 1981, s 53(3)(c)(i), Sch 15.

d The relevant surveying authority made an order modifying its definitive map of public rights of way under s 53^a of the Wildlife and Countryside Act 1981, which provided for such modification, inter alia, under sub-s (3)(c)(i), on the discovery by the authority of evidence which showed that a right of way which was not shown in the definitive map and statement subsisted or was reasonably alleged to subsist.

e The modification made was the inclusion of a byway open to all traffic (a BOAT). Orders made, inter alia, under s 53(3)(c) took effect subject to the provisions of Sch 15 to the 1981 Act. Under para 2^b of Sch 15, an order was not to take effect until confirmed either by the authority or the Secretary of State under para 6^c, or by the Secretary of State under para 7^d. Paragraph 6 related to unopposed orders, which the authority could confirm without modification, or submit to the Secretary of State for confirmation if they required any modification. Paragraph 7 required the authority to submit opposed orders to the Secretary of State, who could then either hold a local inquiry or afford objectors an opportunity of being heard. The claimants would not have objected to the inclusion of the way in question as a footpath or bridleway, but they did oppose to its inclusion as a BOAT, as that meant it would be open to motorised vehicles. Accordingly, the authority submitted the order to the Secretary of State; she appointed an inspector and public inquiries were held. The inspector found that the way could 'be reasonably alleged to subsist as a vehicular highway' and confirmed the order. The claimants sought to have the order quashed. They submitted, inter alia, that the inspector had applied too low a standard of proof, namely that the authority could establish facts from which the existence of a BOAT could reasonably be alleged to subsist, as opposed to the normal civil burden of proof that such a way subsisted on the balance of probabilities. The claimants referred to the history of the legislation and to decided cases relating to appeals at the preliminary stage against a refusal by a relevant authority to make a modification order which held that in considering whether or not to make an

a Section 53 is set out at [9], below

b Paragraph 2 is set out at [15], below

c Paragraph 6 is set out at [15], below

d Paragraph 7 is set out at [15], below

order the authority had to be able to demonstrate that a way subsisted or was reasonably alleged to subsist. a

Held – Having regard to the legislative history of s 53(3)(c)(i) of the 1981 Act, the burden of proof to be applied by the Secretary of State when confirming orders modifying the definitive map and statement was the civil burden of proof. Although Sch 15 to the 1981 Act gave no express guidance as to the burden of proof applicable on the confirmation of a s 53(3)(c)(i) order, it was reasonable to assume that the legislature intended to replicate the pattern of the predecessor Acts so as to subject the issue of proof of the existence and extent of public rights of way to the ordinary civil burden of proof, namely the balance of probabilities. It would be surprising if rights in property of such importance were capable of being determined in the course of a statutory procedure applying a lower burden of proof than that which would be applicable were the existence of those same rights to be determined in the course of ordinary litigation in the civil courts. Moreover, there was a clear implication from the principle that a lower standard of proof applied at the preliminary stage and that that was acceptable because where the evidence of the subsistence of a right of way was conflicting, those issues would be determined following a public inquiry, that such determination would take place applying a higher standard of proof than one of a merely justifiable allegation. The provisions in Sch 15, which conferred on the authority a discretion to confirm unopposed modification orders or, if the authority considered that changes to the order should be made required it to submit the revised order to the Secretary of State, who was given a further discretion whether or not to confirm it or to confirm it after a further alteration, implied a revisiting by the authority or the Secretary of State of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage. Accordingly, the order would be quashed (see [51], [73], below). b
c
d
e

R v Secretary of State for the Environment, ex p Bagshaw (1994) 68 P & CR 402 and *R v Secretary of State for Wales, ex p Emery* [1998] 4 All ER 367 considered. f

R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 (Admin) not followed.

Notes g

For the modification of maps and statements, and for opposed modification orders, see 21 *Halsbury's Laws* (4th edn) (2004 reissue) paras 597, 609.

For the Wildlife and Countryside Act 1981, s 53, Sch 15, see 20 *Halsbury's Statutes* (4th edn) (2003 reissue) 552, 574. h

Cases referred to in judgment

Eyre v New Forest Highway Board (1892) 56 JP 517, Assizes and CA.

Fairmount Investments Ltd v Secretary of State for the Environment [1976] 2 All ER 865, [1976] 1 WLR 1255, HL.

R v Secretary of State for the Environment, ex p Bagshaw (1994) 68 P & CR 402. j

R v Secretary of State for the Environment, ex p Hood [1975] 3 All ER 243, [1975] QB 891, [1975] 3 WLR 172, CA.

R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 (Admin).

R v Secretary of State for Wales, ex p Emery [1998] 4 All ER 367, CA.

- a* *Shears Court (West Mersea) Management Co Ltd v Essex CC* (1986) 85 LGR 479.
Suffolk CC v Mason [1979] 2 All ER 369, [1979] AC 705, [1979] 2 WLR 571, HL.

Application

- b* The claimants, Philip Napier Todd and Douglas Bradley, applied under para 12 of Sch 15 to the Wildlife and Countryside Act 1981 for the quashing of an order made by Hampshire County Council on 26 May 2000, and confirmed by the Secretary of State on 15 September 2003, modifying the Council's definitive map of public rights of way pursuant to s 53 of the 1981 Act. The facts are set out in the judgment.

- c* *George Laurence QC* and *Ross Crail* (instructed by *William Sturges & Co*) for the claimants.

Timothy Morshead (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

- d* 22 June 2004. The following judgment was delivered.

EVANS-LOMBE J.

- e* [1] This is an application for the quashing of the order made by the Hampshire County Council (the council) on 26 May 2000 and confirmed on 15 September 2003 by the defendant's inspector (the inspector), modifying the council's definitive map of public rights of way pursuant to s 53 of the Wildlife and Countryside Act 1981. The modification in question was to include on the council's definitive map as a byway open to all traffic (BOAT) a way over land which in the past had formed part of the Bramshill Estate in the parishes of Bramshill and Eversley. The way is described in the order as running from the junction of the roads C164 and C24 over a distance of 1,690 m to the road U241.
- f* The claimants are two persons having an interest in the extent of the rights over the way. The defendant is the Secretary of State for the Environment, Food and Rural Affairs. The actual issue between the claimants and the defendant is not as to the way's status as a highway but as to the extent of the public's rights over it. Whereas the claimants would not object to the way's inclusion on the definitive map as a footpath or bridleway, they object to its being included as a BOAT and thus subjected to motorised vehicular traffic.

- g* [2] The way in question is called Sandy Lane. Counsel for the claimants have helpfully included in their written submissions as an appendix a history of Sandy Lane from the middle of the nineteenth century in the form of a chronology with, as a further appendix, a description of the persons referred to in that chronology. I do not understand that any of the events and descriptions set out in those two documents are in issue between the parties. I therefore append them to this judgment as a clear and succinct summary of the background events to this application concluding with the issue of these proceedings on the 12 November 2003.
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- j* [3] It will be seen that the inspector gave an interim decision by a decision letter dated 18 July 2002 (the interim letter) to which references are made in the chronology as OD 2002. The inspector gave his final decision confirming the council's order by a letter (the final letter) dated 15 September 2003 to which references are made in the chronology as OD 2003. The interim letter indicated the inspector's intention to modify the council's order of 26 May 2000

so as to confirm an entry on the definitive map of Sandy Lane as a way but with user limited to a footpath or bridleway. As a result that modification necessitated re-advertisement of the order and following further objections, a further inquiry. As a result the inspector received further written submissions from the parties which caused him to change his mind so that the final order confirmed Sandy Lane as a BOAT in accordance with the council's initial order.

[4] The claimants seek to have the council's order of confirmation of the 15 September 2003 (the confirming order) quashed under four heads as follows:

'1. That in confirming the council's order the Inspector applied too low a standard of proof for the existence of a BOAT on Sandy Lane namely that the council could establish facts from which the existence of such a way could "reasonably be alleged to subsist" as opposed to the normal civil burden of proof that such a way subsisted on the balance of probabilities.

2. That the Inspector's change of mind was caused by a re-evaluation of documents and plans associated with procedures for the purpose of the [Finance (1909–10) Act 1910] which he found to have constituted a dedication of Sandy Lane by its then owner Sir Anthony Cope which dedication was subsequently accepted by user by the public.

3. That the Inspector's conclusion was reached by procedural unfairness in that the objectors were not given a [sic] opportunity to comment upon new material which they submit passages in the final letter show were the product of independent research by the Inspector which plainly affected his decision.

4. That the Inspector's changed conclusion was unsupported by any findings of fact or any findings capable of supporting that conclusion were unsupported by evidence.'

[5] I turn to deal with the first and main issue.

THE BURDEN OF PROOF REQUIRED UNDER SCH 15 TO THE 1981 ACT FOR CONFIRMING AN ORDER

[6] At para 38 of the final letter, having analysed the effect of the material before him resulting from the Finance Act 1910 procedures, the inspector concluded that 'this leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway'. He then went on to consider evidence tending against 'this allegation' and concluded at para 54:

'Having deduced that the Order route may be reasonably alleged to subsist as a vehicular highway and noting that it is now "used by the public mainly for the purposes for which footpaths and bridleways are so used", I conclude that the Order should be confirmed.'

[7] Although there are other passages in the final letter, notably at para 46, where the inspector appears to have been applying the normal civil standard of proof it is not in issue that the standard he ultimately applied in confirming the order was that he was satisfied that a BOAT could 'be reasonably alleged to subsist'. It is the claimants' case that in doing so the inspector made an error of law.

[8] Part IV of the National Parks and Access to the Countryside Act 1949, under the short title 'Ascertainment of footpaths, bridleways and certain other highways' contained provision for the preparation of maps and statements to

- a record all footpaths, bridleways and roads carrying vehicular traffic but which were being used primarily as footpaths and bridleways (referred to as 'RUPPs'). The 1949 Act's means of doing so was through the preparation of 'definitive maps' and supporting statements, covering the whole country, on which such public rights of way were recorded, and once so recorded, were deemed unchallengeably to exist until lawfully terminated. The 1949 Act placed a duty
b on each county council as 'the surveying authority' to prepare, and by periodic reviews, to keep up-to-date such definitive maps and statements. It will be necessary later in this judgment to examine in some detail the provisions of Pt IV. Sections of the 1949 Act were repealed and replaced by the Countryside Act 1968. Again it will be necessary to examine the relevant parts of this Act. That process was continued by the 1981 Act. The issues arising from the first
c ground upon which the claimants seek to quash the council's order result from the application to the facts of this case of the provisions of s 53 of and Sch 15 to the 1981 Act.

- d [9] Part III of the 1981 Act, which by s 66 applies to footpaths, bridleways or BOATs, under the heading 'Ascertainment of public rights of way' provides by s 53 as follows:

- e *'53. Duty to keep definitive map and statement under continuous review.—*(1) In this Part "definitive map and statement", in relation to any area, means, subject to section 57(3)—(a) the latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; or (b) where no such map and statement have been so prepared, the original definitive map and statement prepared for that area under section 32 of that Act; or (c) where no such map and statement have been so prepared, the map and statement prepared for that area under section 55(3).

- f (2) As regards every definitive map and statement, the surveying authority shall—(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and (b) as from that date, keep the map and statement under
g continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

- h (3) The events referred to in subsection (2) are as follows—(a) the coming into operation of any enactment or instrument, or any other event, whereby—(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended; (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or (iii) a new right of way has been created
j 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; (b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path; (c) 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 to which this Part applies; (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to—(a) the position and width of any public path or byway open to all traffic which is or is to be shown on the map; and (b) any limitations or conditions affecting the public right of way thereover.

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2).'

[10] Section 53 replaces s 33 of the 1949 Act. Section 53(3) is the subsection with which this part of my judgment is primarily concerned and which replaced s 33(2) of the 1949 Act but also contained a power to remove a right of way shown on the definitive map which was not contained in the 1949 Act and first appeared in the 1968 Act.

[11] It will be seen that s 53 places a duty on the 'surveying authority' (the authority) here the council, to modify the definitive map by an order under sub-s (2) in consequence of the occurrence of any of the events specified in sub-s (3). The present case concerns an event specified in sub-s (3)(c)(i) namely 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 on the map and statement subsists or is reasonably alleged to subsist ...'

It will be observed that there are two tests to be met by the authority before making an order. The authority must be satisfied either, that the right of way 'subsists' or, alternatively, 'is reasonably alleged to subsist'. It is accepted that the former test would require the authority to be satisfied of the subsistence of the right of way to the normal civil burden of proof ie on the balance of probabilities, whereas the latter test imposes on the authority a lesser burden, namely one which obliges them only to be satisfied of the existence of facts which raise a prima facie case for the subsistence of the way.

[12] It is pursuant to sub-s (3)(c)(i) that the council made the order of 26 May 2000.

- a* [13] The 'events' specified in sub-s (3)(a) primarily concern alterations to the definitive map consequent on prior 'legal events' such as orders diverting or stopping up existing rights or creating new ones. That subsection has no application to the facts of this case. Subsection (5) permits members of the public to apply to an authority to make an order under sub-s (2) on being satisfied of events falling within sub-s (3)(b) or (c). The 'making and determination' of such applications are governed by Sch 14 to the 1981 Act.
- b* Paragraph 2(1) of Sch 14 requires any applicant to 'serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates' and the applicant is required by para 2(3) to certify to the authority that he has done so. Paragraph 3 of the schedule is headed 'Determination by authority' and provides:

- c* '3.—(1) As soon as reasonably practicable after receiving a certificate under paragraph 2(3), the authority shall—(a) investigate the matters stated in the application; and (b) after consulting with every local authority whose area includes the land to which the application relates, decide whether to make or not to make the order to which the application relates ...
- d* (3) As soon as practicable after determining the application, the authority shall give notice of their decision by serving a copy of it on the applicant and any person on whom notice of the application was required to be served under paragraph 2(1).'

- e* [14] Paragraph 4 gives the applicant a right of appeal against a refusal by the authority to make an order under s 53(2).

- f* [15] Section 53(6) provides that orders consequent on events specified in sub-s (3)(a) shall take immediate effect but those consequent on events specified in paras (b) and (c) of sub-s (3) shall take effect subject to the provisions of Sch 15. So far as material to this judgment that schedule provides as follows:

- '2. *Coming into operation.* An order shall not take effect until confirmed either by the authority or the Secretary of State under paragraph 6 or by the Secretary of State under paragraph 7.

- g* 3. *Publicity for orders.*—(1) On making an order, the authority shall give notice in the prescribed form ...

- (2) Subject to sub-paragraph (4) [immaterial], the notice to be given under sub-paragraph (1) shall be given—(a) by publication in at least one local newspaper ... (b) by serving a like notice on—(i) every owner and occupier of any of that land ... (iv) such other persons as may be prescribed in relation to the area in which that land is situated or as the authority may consider appropriate ...
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6. *Unopposed orders.*—(1) If no representations or objections are duly made, or if any so made are withdrawn, the authority may—(a) confirm the order without modification; or (b) if they require any modification to be made, submit the order to the Secretary of State for confirmation by him.
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(2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State may confirm the order with or without modifications.

7. *Opposed orders.*—(1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him. a

(2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall either—(a) cause a local inquiry to be held; or (b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose. b

(3) On considering any representations or objections duly made and the report of the person appointed to hold the inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications.’ c

[16] Paragraph 8 imposes certain restrictions on the Secretary of State’s power to confirm orders with modifications and the remaining paragraphs in the schedule provide for local inquiries (para 9), the appointment of inspectors (para 10), the notice to be given of final decisions (para 11), and the power to make regulations ‘as to the procedure on the making, submission and confirmation of orders as appears to him to be expedient’ (para 13(1)). Paragraph 12 of the schedule provides for any person to challenge an order which has taken effect as not being within the powers conferred by ss 53 and 54, or for non-compliance with Sch 15, by application to the High Court. It is pursuant to para 12 that these proceedings have been brought. d

[17] It will be seen, therefore, that modifications to the definitive map by an authority consequent on any of the events specified in s 53(3)(b) or (c), to become effective, must proceed through two stages, the order stage and the confirmation stage. The order stage is governed by s 53(5) and Sch 14 and the confirmation stage is governed by s 53(6) and Sch 15. It is accepted that when the authority after consultation decides ‘whether to make or not to make the order’ within para 3(1)(b) of Sch 14 it is empowered to make the order even if it is not, on the material before it, able to conclude that the relevant right of way subsists, provided it is satisfied, on the material before it, that it can be ‘reasonably alleged to subsist’. The question on this part of the case is whether when such an order comes to be confirmed under s 53(6) and Sch 15 the Secretary of State, in the exercise of the discretion conferred on him by para 7(3) of Sch 15, can confirm that order even if satisfied, only, that the allegation of the subsistence of the way is reasonable, or, alternatively whether he must be satisfied on the balance of probabilities that the way subsists. e

[18] I have been shown three internally circulated documents intended to guide the ministry’s inspectorate. The first dated 21 October 1997 appears at para 10 to advise inspectors that, at the confirmation stage, they need only be satisfied up to the lesser burden of proof. That guidance appears to be withdrawn by a circular of February 2001 but restored by one of April 2003. f

[19] It is submitted by the defendant that the Secretary of State’s current view as to the standard of proof required for the confirmation of modification orders under Sch 15 is supported by the recent decision of Collins J in *R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 171 (Admin). The case concerned a public footpath running between two cottages before debouching onto a main road. To get to the main road it had to pass through either the garden of Manor Cottage or the contiguous garden of Glebe Cottage. The existing footpath, as being used at g

- a the time of the application, passed through that of Glebe Cottage but in order to do so it had to do a sharp left turn when reaching the garden fences in order to pass through an existing gate at the top end of Glebe Cottage garden thereafter straightening up to run in a straight line to the road along the boundary between the two gardens, but on the Glebe Cottage side. If the footpath had passed through Manor Cottage garden it would have run in a straight line to the road. The application under the 1981 Act was brought by b the owner of Glebe Cottage under s 53(3)(c)(i) for an order modifying the definitive map to make the path run through Manor Cottage garden and under sub-para (iii) of para (c) to remove the existing entry on the map showing the path as running through Glebe Cottage garden. The matter came before Collins J on a renewed application for permission, it having been refused on c paper. It is not entirely clear from the report but it seems that the relevant surveying authority, the Leicestershire County Council, had made an order on the application of the owner of Glebe Cottage and the question was whether that order should be confirmed. The authority had referred the order to the Secretary of State who had appointed an inspector to hold an inquiry. It seems d that the inspector, regarding himself as at liberty to apply either the test of subsistence on the balance of probabilities or the test of reasonable allegation of subsistence, found that the owner of Glebe Cottage had satisfied the latter test for the purpose of establishing that the footpath should run through his neighbour's garden (s 53(3)(c)(i)) but had failed to establish, to what he regarded as a higher burden of proof, a case justifying the removal from the map of the right of way running through his own garden (s 53(3)(c)(iii)). The e inspector regarded the latter finding as taking precedence and accordingly declined to confirm the order under s 53(3)(c)(i) and also that under para (c)(iii). It is to be observed that the dual test only applies to cases brought under para (c)(i). There is no ambiguity, as to the test applicable to cases under f para (c)(iii) (or para c(ii)), which is the normal civil burden of proof.

[20] I quote from the judgment of Collins J starting at [20]:

- g [20] The inspector then directed himself as to the correct approach that he should adopt. He relied on a decision which had been put before him, *R v the Secretary of State for the Environment, ex p Bagshaw* (1994) 68 P & CR 402, a decision of Owen J. In that case Owen J was considering, among other things, the correct approach to s 53(3)(c)(i), and what he said about it (at 407) was this: "It is necessary to give some meaning to all the words used. Accordingly, there must be a difference between showing 'that a right of way which is not shown in the map and statement subsists' and showing that a right of way which is not shown in the map and statement 'is reasonably alleged to subsist'. Accordingly the questions for the council and subsequently for the Secretary of State were: does the evidence h produced by the claimant together with all the other evidence available show that either—(a) a right of way subsists? (I shall call this test 'A'), or j (b) it is reasonable to allege that a right of way subsists? (I shall call this test 'B'). To answer either question must involve some evaluation of the evidence and a judgment upon that evidence. For the first of those possibilities to be answered in the affirmative, it will be necessary to show that on a balance of probabilities the right does exist. For the second possibility to be shown it will be necessary to show that a reasonable

person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.” a

[21] The inspector then sets out test A and test B in the terms of the section. When considering test A, he says to establish whether a right of way exists on the balance of probabilities would require clear evidence in favour of the applicant and no credible evidence to the contrary. Mr Richards has submitted that that is an incorrect approach to a finding on the balance of probabilities. There may be credible evidence to the contrary, but that would not necessarily prevent a finding that on the balance of probabilities the existence of the right of way was made out. I suppose it must be obvious that, if there is credible evidence to the contrary, it would need clearer evidence to establish on the balance of probabilities that the right of way existed. But, as it seems to me, it is perhaps unsafe and unnecessary for inspectors, as it was for this inspector, to analyse or to use other words to indicate what is the test on the balance of probabilities. All it requires is that the inspector or the council is persuaded that it is more probable than not on the evidence—and on all the evidence—that the right of way exists. If so, it will be established in conformity with the Act. b
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[22] The inspector then sets out test B, which he explains thus: “If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot reasonably be alleged to subsist, then the answer must be that it is reasonable to allege that one does exist.” That has not been criticised as a proper approach. Indeed, as Owen J made clear, the question is whether a reasonable person could reasonably allege a right of way, having considered all the relevant evidence, and the council and the Secretary of State in turn must be judges of that. It is perfectly obvious that the evidence necessary to establish test B will be less than that necessary to establish test A. e
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[23] Mr Morshead has submitted—and, as I understand it, Mr Richards does not dissent from this, although he does not positively put it forward—that the reason for the lesser test in s 53(3)(c)(i) is a recognition by Parliament that, if it can be shown that it is reasonable to allege that a right of way subsists, then it ought to be put down in the public interest on the map, and then it will be for the relevant landowner or whoever to bring forward a case to show that that was wrong and that the map therefore shows a right of way which it should not show. The burden upon the individual to establish that is that set out in s 53(3)(c)(iii). g

[24] The circular which is published by the department under the Act makes it clear that the evidence to establish that a public right of way should be removed from an authoritative record will need to be cogent, and indeed that is consistent with what is set out in s 56 as to the effect of a right of way shown on the definitive map. h

[25] The inspector then considers the tests under s 53(3)(c)(i). On test A in para 47 he says this: “The evidence in support of the Manor Cottage route, however, looks at the situation only from the point of view of people walking southwards from the open countryside into Main Street. When considered the other way round, I believe the Glebe Cottage route would have been the more inviting choice. To that should also be added what I consider can reasonably be assumed to have been in the mind of the j

- a* author of the 1951 Parish Survey Plan and Statement, namely that he knew where the Main Street end of the footpath was, and showed it on his plan accordingly; it therefore did not need also to be recorded verbally. Taken together, these factors lead me to the conclusion that although there is indeed evidence in favour of the applicant, that evidence is not clear-cut because there is likewise credible evidence to the contrary. The order therefore fails test A.” Whether or not the language used was wholly
- b* satisfactory, it seems to me to be absolutely clear from what the inspector has there said that he took the view that the weight of the evidence was such that he was not persuaded that the right of way over Manor Cottage existed. Indeed, he would not have referred to the Parish Survey Plan and Statement of 1951 and the point about Glebe Cottage being more inviting
- c* from Main Street unless he had formed the view that that was the more probable route. But he then went on to consider test B. He made the point that there was evidence in support of Manor Cottage, in particular a substantial body of user evidence, and in those circumstances he was persuaded that test B was satisfied because the footpath was reasonably
- d* alleged to subsist over Manor Cottage.

- [26] Mr Richards submits that, in the light of those findings, he was in effect obliged to find in favour of the county council because the test under (i) had been fulfilled and therefore the only proper course to adopt would be to allow the application because it was shown that the map ought to have the footpath through the curtilage of Manor Cottage. However,
- e* the inspector went on, properly in my view, to consider (iii) and made the point there that cogent evidence was needed to remove a footpath and that there was not sufficient evidence to persuade him that it ought to be removed. Mr Richards submits that that is a perverse finding and that he could not properly have found in favour of the applicant on (i) and against
- f* the applicant on (iii).

- [27] As I have indicated, it is perhaps unusual for s 53 to come into play where there is no dispute that a right of way exists but there is a dispute as to precisely the route of that right of way. In those circumstances it is not possible to look at (i) and (iii) in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed, and the evidence to support the
- g* placing on the map of, in effect, a new right of way.

- [28] As I have already indicated, s 53(3)(c)(i) is usually in play when there is a question as to whether a right of way exists at all, ie when there is no question of any alternative route, merely a battle as to whether the right exists. Likewise, s 53(3)(c)(iii) is normally in issue when there is a battle as to whether the right of way shown on a map should be there at all and it is apparently unusual for the battle to be about alternative routes. If it is, however, it seems to me quite clear that the alternative test B under s 53(3)(c)(i) is the less important. Indeed, it may well be that it is of no
- h* importance because what the inspector is having to do is to decide which is the correct route. If he is in doubt and if he is not persuaded that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive and if the map has been so treated for some time, then it is obvious that it is
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desirable that it should stay in place. Hence the circular indicating that cogent evidence is needed to remove a right of way shown on the map. It would be difficult to imagine that a finding that is less than that the alternative exists on the balance of probabilities would be sufficiently cogent evidence to change what is on the map. It would be strange indeed if merely to find that it was reasonable to allege that the alternative existed was in a given case sufficient to remove what is shown on the map. I am not saying it is impossible—it is dangerous to rule out any possibility—but I would be surprised, I am bound to say, if in any given case that amounted to sufficiently cogent evidence to remove the route shown on the map.

[29] As I say, where you have a situation such as you have here, it seems to me that the issue really is that in reality s 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong—which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right—that a change should take place. The presumption is against change, rather than the other way around.

[30] It seems that the inspector's approach, albeit perhaps expressed in a way which was somewhat over-complicated, was correct and that there is no reason in the circumstances of this case why what was shown on the map should be changed.'

[21] It seems to me that this decision is not direct authority for the proposition that the lesser standard of proof is available to the Secretary of State in confirming modification orders under s 53(3)(c)(i). The case turned on the application to remove under para (c)(iii) under which the judge concluded that the inspector was correct to apply a higher standard of proof to justify a removal than the reasonable allegation standard although there is no direct reference to the civil standard of proof, 'on the balance of probabilities'. However Collins J did not disapprove of the inspector's initial conclusion that it would have been sufficient for him, on the material before him, to confirm the existence of the footpath over Manor Cottage if satisfied that the reasonable allegation test had been met but for the failure to satisfy the higher test he applied to the application to remove it from Glebe Cottage. Thus, it seems to me, that Collins J's judgment is consistent with the lower test being available on applications for confirmation in respect of cases under para (c)(i) but it was not necessary for him to decide the point, which was not argued before him, and he did not do so.

THE 1949 ACT

[22] Before the enactment of the 1949 Act there were no official records of public rights of way. If a dispute arose about the subsistence of a right of way over land such dispute was determined by litigation in the ordinary courts usually between the landowner and the person or persons asserting the right of way. In *R v Secretary of State for the Environment, ex p Hood* [1975] 3 All ER 243 at 245, [1975] QB 891 at 896 Lord Denning MR described the object of the 1949 Act in these words:

'The object of the Act is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are. Our old highways came into existence before 1835.

- a* They were created in the days when people went on foot or on horseback or in carts. They went to the fields to work, or to the village, or to the church. They grew up time out of mind. The law of England was: once a highway, always a highway. But nowadays, with the bicycle, the motor car and the bus, many of them have fallen into disuse. They have become overgrown and no longer passable. But yet it is important that they should
- b* be preserved and known, so that those who love the countryside can enjoy it, and take their walks and rides there. That was the object of the National Parks and Access to the Countryside Act 1949 and the Countryside Act 1968.'

- c* [23] The relevant provisions were contained in Pt IV (ss 27–38) of the 1949 Act under the heading 'Ascertainment of footpaths, bridleways and certain other highways'. Section 27 provided:

- d* 'Surveys of public paths etc., and preparation of draft maps and statements.—(1) Subject to the provisions of this part of this Act, the council of every county in England or Wales shall, as soon as may be after the date of the commencement of this Act, carry out a survey of all lands in their area over which a right of way to which this Part of this Act applies is alleged to subsist, and shall, not later than the expiration of three years after that date or of such extended period as the Minister may in any particular case allow, prepare a draft map of their area, showing thereon a
- e* footpath or bridleway, as may appear to the council to be appropriate, wherever in their opinion such a right of way subsisted, or is reasonably alleged to have subsisted, at the relevant date.

- f* (2) A map prepared in accordance with the last foregoing subsection shall also show thereon any way which in the opinion of the authority carrying out the survey (herein after referred to as "the surveying authority"), was at the relevant date, or was at that date reasonably alleged to be, a road used as a public path.'

- g* [24] Subsection (3) defined 'the relevant date'. Subsections (4) and (5) set out the recording duties of the surveying authority. Subsection (6) described the various forms of right of way to which the 1949 Act applied. Subsection (7) dealt with highways associated with waterways and rights of navigation. Section 29 required notice of preparation of the draft map and statement to be advertised and provided for objections as to anything contained in (or omitted from) them and determination by the authority of such objections with a right of appeal to the minister.

- h* [25] Section 29(3) provided:

- j* 'If any representation or objection is duly made to the surveying authority as to anything contained in or omitted from the draft map and statement, the authority, after considering the representation or objection and affording to the person by whom it was made an opportunity of being heard by a person appointed by the authority for the purpose, shall determine what (if any) modification of the particulars contained in the draft map and statement appears to the authority to be requisite in consequence thereof, and shall serve notice of their determination on the person by whom the representation or objection was made.'

[26] Subsection (4) provided for advertisement by the authority of any proposed modifications to the draft map and gave persons affected an opportunity to object and make representations whereupon sub-s (4)(b) required the authority to 'decide whether to maintain or revoke the determination and serve notice of their decision on the person by whom the representation or objection' was made and 'on the original objector'. Subsection (5) conferred a right on 'any person aggrieved' by such determination to appeal to the minister, who, on hearing the appellants and the authority and also the original objector was to dispose of the appeal in various manners including further modification of the draft map.

[27] The next stage was the preparation of a provisional map and statement under s 30, being the draft map and statement modified to reflect the outcome of the objection procedures (if any) which had taken place pursuant to s 29.

[28] Section 31 provided as follows:

'Determination by quarter sessions of disputes as to provisional maps and statements.—(1) At any time within twenty-eight days after the publication of a notice under subsection (1) of the last foregoing section, the owner, lessee or occupier of any land shown on the map to which the notice relates, being land on which the map shows a public path, or a road used as a public path, may apply to quarter sessions for a declaration—(a) that at the relevant date mentioned in the provisional statement there was no public right of way over the land; (b) that the rights conferred on the public at that date by the public right of way over the land were such rights as may be specified in the application, and not such rights as are indicated in the provisional map and statement; (c) that the position or width of that part of the land on which the public right of way subsisted at the said date was as specified in the application, and not as indicated in the provisional map and statement; or (d) that the public right of way over the land at the said date was not unconditional but was subject to limitations or conditions specified in the application, or, if the said right is indicated in the provisional statement as being subject to limitations or conditions, that the said right was subject to other limitations or conditions specified in the application either in addition to or in substitution for those indicated in the provisional statement ...

(3) If on the hearing of an application under subsection (1) of this section, being an application for a declaration under paragraph (a), (b) or (c) of that subsection, it is not proved to the satisfaction of the court or committee—(a) in the case of an application under the said paragraph (a), that there was at the relevant date a public right of way over the land, (b) in the case of an application under the said paragraph (b), that the rights conferred on the public by the public right of way over the land at the said date were rights other than those specified in the application, or (c) in the case of an application under the said paragraph (c), that the position or width of the part of the land therein mentioned was other than that specified in the application, the court or committee shall make the declaration sought by the applicant.

(4) Where the court or committee make a declaration in the case of an application under the said paragraph (a) and it is proved to their satisfaction—(a) that there was at the relevant date a right of way to which this Part of this Act applies over land other than that to which the

- a* application relates, and (b) that the said right is the right of way which the surveying authority had in view when they showed on the map the disputed public path or road used as a public path, the court or committee may, if satisfied that every owner, lessee and occupier of any of the land mentioned in paragraph (a) of this subsection has had an opportunity of appearing before them, make a further declaration that a public right of way as specified in the declaration subsisted over that land at that date.

- b* (5) Where, in the case of an application under paragraph (b) or paragraph (c) of subsection (1) of this section, the court or committee do not make the declaration sought by the applicant, but the true nature of the rights conferred on the public by the public right of way in question or, as the case may be, the true position or width of the part of the land over which the public right of way subsisted at the relevant date (being different both from that specified in the application and from that indicated in the provisional map and statement) is proved to the satisfaction of the court or committee, the court or committee may make a declaration accordingly: Provided that the court or committee shall not make a declaration under this subsection unless they are satisfied that every owner, lessee and occupier of any land which would be affected by the declaration has had an opportunity of appearing before them.
- c*
- d*

- e* (6) A declaration under paragraph (d) of subsection (1) of this section shall not be made unless the matters to be stated in the declaration have been proved to the satisfaction of the court or committee hearing the application ...

(8) Subject to the last foregoing subsection and to the next following section, a declaration made under this section shall be conclusive evidence of the matters stated in the declaration.'

- f* [29] It will be seen from s 31 that it gave to the owner, lessee or occupier of the land, over which the right of way was being claimed, a right, within 28 days of publication of notice of the provisional map, to apply to quarter sessions for declarations dealing with matters in sub-s (1)(a), (b), (c) and (d)—issues as to the existence and/or extent of rights of way.

- g* [30] The third and final stage was the preparation under s 32 of the definitive map and statement being the provisional map and statement adjusted as necessary to reflect any declarations made under s 31.

- h* [31] Paragraph 9 of Sch 1 to the 1949 Act allowed a six-week period from the publication of notice of its preparation for the validity of the definitive map and statement to be challenged in the High Court on the ground that they were not within the powers of the Act or that any requirements of the legislation had not been complied with at any stage of the above process. Subject thereto the map and statement were not to be questioned in any legal proceedings whatsoever (para 10). In addition s 32(4) provided that a definitive map and statement were to be conclusive as to the particulars contained therein to the extent specified in that subsection. Section 56 of the 1981 Act contains similar but more extensive provisions making the definitive map and statement conclusive evidence of the public rights of way recorded in it, covering the provisions of s 32(4) of the 1949 Act, and extending them.
- j*

[32] Section 33 of the 1949 Act required each surveying authority to review and revise its definitive map and statement at periodic intervals, having regard to any events of the kind specified in sub-s (2) which had occurred since the

relevant date (or the latest review date). These events included in sub-para (e) the discovery by the authority of new evidence such that if the authority were then preparing a draft map under s 27, it would be required to show as a highway of a particular description a way not shown at the time of the review (ie evidence that a right of way not shown on the map subsisted or was reasonably alleged to subsist). The revised map and statement were to be prepared in three stages corresponding to the stages of preparation of the original definitive map and statement, ie in draft, provisional and definitive forms, and the provisions of ss 28–32 inclusive were to apply mutatis mutandis: see s 34. a
b

[33] Four relevant comments should be made as to the provisions of the 1949 Act. They are, first, that there was no provision in the 1949 Act for the removal of a right of way from the definitive map and statement which could be shown not in fact to subsist. This omission was provided for, but to a very circumscribed extent, in the 1968 Act. c

[34] Secondly s 31(3) places the burden of proof in the proceedings at quarter sessions introduced by that section in respect of declarations under paras (a), (b) and (c) (but not (d)) of sub-s (1), as to the existence, user and extent of the rights of way the subject of challenge, on the surveying authority. d

[35] Thirdly there does not seem to me to be any reason to suppose that in arriving at any conclusion in such quarter session proceedings the court would have done other than apply the normal civil standard of proof.

[36] Fourthly, whereas in s 27 the familiar tests of ‘subsisted, or is reasonably alleged to have subsisted’ appear in sub-ss (1) and (2) of s 27, where they define the standard of proof which the surveying authority must apply in deciding what rights of way to insert on the *draft maps and statements*, there is equally no reason to suppose that the surveying authority or the minister should have applied other than the normal civil burden of proof in determining the matters referred to them by s 29 when objections to the draft map were being resolved. At the s 27 stage the surveying authority was preparing a draft map and statement for publication in order to invite comment and, in an appropriate case, objection from persons interested in the subsistence or otherwise and the extent of rights of way over land. It seems to me to be entirely appropriate that, at the stage up to publication of the draft map and statement, the preparer of those documents should have been concerned to ensure that all reasonable claims to the existence of rights of way should be reflected in them. Thus it was appropriate that s 27 should provide for the inclusion on the draft map and statement of rights of way only reasonably alleged to subsist. At the ss 29 and 31 quarter session stages, by contrast, the rights of parties arising from the existence or otherwise of public rights of way, which would previously have been determined in hostile litigation between individuals in the civil courts, were being determined finally after an extensive procedure of objection inquiry and appeal laid down by the 1949 Act. e
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[37] It is Mr Morshead’s submission for the defendant that the reasonable allegation burden of proof was that which should properly have been applied to the provisions of Pt IV of the 1949 Act, and in particular, to the determinations to be made by the surveying authority and the minister under s 29 up to, but not including, decisions to be made on applications to quarter sessions under s 31. He submits that this reflects a policy of Parliament in enacting Pt IV of the 1949 Act, not only to preserve existing public rights of way by a new system for their ascertainment and recording, but also, in certain j

- a circumstances, to create new rights of way where none existed before. That Parliamentary intention is indicated by the absence of any statutory right in a landowner or other person opposing the existence of a right of way, to remove such a right once it has appeared on the definitive map. In those circumstances, he submits, a new right of way could be created where a landowner took no action once the procedure for entry on the map and statement was commenced
- b by a surveying authority. In particular that occurs where the landowner does not apply to quarter sessions within the 28-day period prescribed by s 31. This is consistent, he submits, with the inclusion of the word 'creation' in the long title to the 1949 Act and with the speech of Lord Diplock in *Suffolk CC v Mason* [1979] 2 All ER 369, [1979] AC 705 in particular the passage where, in dealing with a question which has no bearing on the present problem, he embarked
- c upon a survey of Pt IV of the 1949 Act (see [1979] 2 All ER 369 at 373, [1979] AC 705 at 712). Lord Diplock is recorded as saying:

- d 'The sections which follow s 27 deal with the further steps which have to be taken before the definitive map is completed and published. They provide an elaborate procedure for enabling representations or objections to be made to the surveying authority (with a right of appeal to the Minister), as to anything contained in or omitted from the draft map. Such representations and objections can be made not only by persons interested in the land, but also by members of the public, so that a person who alleges that a right of way as shown on the draft map ought to be upgraded from
- e "footpath" to "bridleway", or from "bridleway" to a "road used as a public path" has an opportunity at this stage of adducing evidence to make good his claim. The next step in the procedure is the preparation by the surveying authority of a provisional map incorporating any modifications to the draft which, as a result of representations, have been accepted by the surveying authority or upheld by the Minister on appeal. The procedure
- f for verifying the accuracy of what is eventually to be shown on the definitive map does not stop here; though the remaining step is not likely to bring to light the existence of more extensive rights of way than are shown on the provisional map. Its presence may, however, supply an explanation of why a reasonable allegation that a right of way of a particular kind exists is treated as sufficient justification for entering it on the draft map. The owner, lessee, or occupier of the soil over which any right of way shown on the provisional map passes has the right under s 31 to apply to quarter sessions (now the Crown Court) for declarations, inter alia, that a right of way shown on the provisional map either does not exist or is there shown as being more extensive than it really is; and, if he does
- g so, the onus of proving the existence of the disputed right lies on the county council. But failing any proceedings in the Crown Court under this section, an entry of a right of way that originally appeared on the draft map on no firmer basis than that the surveying authority was of opinion that an allegation that it existed was a reasonable one, is carried through to the definitive map unaltered.'
- h
- j

[38] I am unable to accept these submissions of Mr Morshead. To start with I do not accept that the process described by Lord Diplock was intended by him to indicate that, where there had actually been no public right of way before the institution of proceedings by the surveying authority, a failure by the

landowner to challenge the mistaken allegation that such a right of way existed created a right of way where none had existed before, with the effect that it could not thereafter be challenged on the basis 'once a highway, always a highway' (see [1979] 2 All ER 369 at 375, [1979] AC 705 at 714 per Lord Diplock). What would result would be a temporarily unchallengeable right of passage by the public over the land in question which would not be capable of challenge pending review by the authority or the exercise of the powers of deletion from the map conferred by the 1968 and 1981 Acts (see [41] below for the limited power of deletion introduced by the 1968 Act and s 53(3)(c)(iii) of the 1981 Act).

[39] I do not accept that the creation of new rights of way was part of the statutory policy of Pt IV of the 1949 Act save to the limited extent dealt with in ss 39–41 which have no application to the issues before me. Such a policy runs contrary to the short title to the section of Pt IV dealing with public rights of way namely 'Ascertainment of footpaths, bridleways and certain other highways'. It is also contrary to what Lord Diplock says in *Mason's* case where he says (at [1979] 2 All ER 369 at 372, [1979] AC 705 at 710):

'The purposes for which the Act was passed are set out in the long title. Those that are relevant to the instant appeal are: "... to make further provision for the recording, creation, maintenance and improvement of public paths and for securing access to open country, and to amend the law relating to rights of way ..." The provisions which give effect to these purposes are contained in Parts IV and V of the Act; those relating to the recording of public paths by showing them on a definitive map being found in Part IV, ss 27 to 41.'

[40] As I have already pointed out the 1949 Act provides a statutory framework for the unchallengeable ascertainment and recording of existing public rights of way replacing, in so far as rights of way were contested, litigation in the civil courts to which the ordinary civil burden of proof would plainly have applied. It includes a right under s 31 for landowners, lessees or occupiers of affected land to seek relief by way of declarations at quarter sessions where any rights would be determined on the normal civil standard of proof. It is not without significance that Lord Diplock in *Mason's* case, in the passage quoted above, found that the s 31 procedure might—

'supply an explanation of why a reasonable allegation that a right of way of a particular kind exists is treated as sufficient justification for entering it on the draft map.' (See [1979] 2 All ER 369 at 373, [1979] AC 705 at 712.)

THE 1968 ACT

[41] Section 31 of and Sch 3 to the 1968 Act introduced, for the first time, a circumscribed power to revise the definitive map at the instance of a person prejudiced by the entry of a right of way upon it where no right of way existed. The relevant part of Pt I of Sch 3 to the 1968 Act provides:

'Section 33 (*Revision of maps and statements*)

In carrying out a review under section 33(1) the authority shall have regard to the discovery by the authority, in the period mentioned in that subsection, of any new evidence, or of evidence not previously considered by the authority concerned, showing that there was no public right of way

- a* over land shown on the map as a public path, or as a road used as a public path, or that any other particulars in the map or statement were not within the powers of Part IV of the Act of 1949, and their powers of preparing a revised map and statement under subsection (4) or as the case may be proviso (d) to subsection (5), of the said section 33 may be exercised accordingly: Provided that the authority shall not take account of the evidence if satisfied that the person prejudiced by the public right of way, or his predecessor in title, could have produced the evidence before the relevant date mentioned in the said section 33(1) and had no reasonable excuse for failing to do so ...'
- b*

- [42] Otherwise Pt II of Sch 3 simplified the procedure applicable to reviews begun under s 33 of the 1949 Act after the commencement of the 1968 Act. Instead of three stages there were to be only two. The revised map and statement were to be prepared in draft form and objections to the revision were to be invited by advertisement. Following a local inquiry the minister was to 'take a decision on' any duly made objections and representations (see para 4(4) of Sch 3) and give the authority such directions to modify the draft map as appeared to him necessary to give effect to his decision. Recourse to quarter sessions cease to be part of this procedure. A similar process was prescribed by Pt III of Sch 3 pursuant to which the minister was to direct modifications resulting from objections in relation to the re-classification of routes used as footpaths and bridleways but which carried vehicular traffic (RUPPs), into BOATs as required by the 1968 Act. I can see no reason why this decision-making process, as to the subsistence of rights of way or their extent, should be arrived at by the application of a burden of proof different from the normal civil burden of proof as I have found applied to similar decisions under s 29 of the 1949 Act.
- c*
- d*
- e*

f THE 1981 ACT

- [43] Part IV of the 1949 Act and Sch 3 to the 1968 Act were repealed by the 1981 Act and replaced with the provisions of ss 53–58 of and Schs 14 and 15 to that Act. The system of periodic reviews of the definitive map and statement was abolished and a rolling review system was introduced in its place. I have described s 53 and Schs 14 and 15. Section 54 requires the surveying authority as soon as reasonably practicable after the commencement date, to review RUPPs remaining on their definitive maps and make modification orders re-classifying them. The provisions of Sch 15 apply to orders made under both s 53 (except s 53(3)(a)) and s 54. Section 56(1) of the 1981 Act provides that a definitive map and statement shall be conclusive evidence as to the particulars contained therein to the extent specified in that subsection.
- g*
- h*

- [44] The 1981 Act, therefore, abolished the review system and substituted the procedure under s 53 and Schs 14 and 15. And so, for instance, the provisions of s 31(1)(a) of the 1949 Act permitted any owner, lessee or occupier of any land shown on the map, in proceedings at quarter sessions, to apply for a declaration 'that at the relevant date mentioned in the provisional statement there was no public right of way over the land', such a person and others may now under s 53(3)(c)(iii) apply under sub-s (5) for an order under sub-s (2) modifying the map so as to show 'that there is no public right of way over land shown in the map and statement ...'. It will be seen that the power to remove a right of way from the definitive map provided for in that sub-para (iii) is much
- j*

less restrictive than that inserted by the 1968 Act. However the *Leicestershire CC* case shows that inspectors are requiring ‘cogent’ evidence to justify the exercise of the power to remove. a

THE INSPECTOR’S CONCLUSIONS

[45] The principal conclusions of the inspector contained in the interim letter and the final letter are helpfully summarised in the claimants’ written submissions. This summary is not, as I understand it, challenged and I will incorporate it in this judgment. The conclusions of the interim letter are summarised as follows: b

- Although Sir William Cope (the then landowner) made a new road along the route of Sandy Lane between 1866 and 1885, and asked the local highway authority to adopt it as a ‘public highroad’, it was not made up to the satisfaction of the surveyor of highways or adopted. Sir William’s intention to dedicate the route as an all-purpose highway was conditional upon its being adopted and that condition not having been fulfilled, it remained at his death in 1892 a private estate road. c

- Sir William’s description of the road as ‘a public convenience’ in his 1885 letter to the highway authority requesting adoption suggested current use of the road by the public, but there was no other evidence to support that, and while the 1888 letter from the surveyor of highways referred to ‘wheel traffic’ having been over it, there was no direct evidence of that being *public* wheeled traffic and it was more likely to be estate traffic. d

- Sandy Lane was not included in any taxable hereditament in the valuation carried out by the Inland Revenue for the purposes of the Finance (1909–10) Act 1910; the land on either side was comprised in hereditament no 34 (owner Sir Anthony Cope, Sir William’s son and heir), but Sandy Lane (separate OS parcel no 52) was omitted from that hereditament; however, this did not support the county council’s contention that Sandy Lane had been dedicated as a public carriageway by 1910. e

- In 1922 the Forestry Commission took a 99-year lease of the land adjoining Sandy Lane on both sides. Sandy Lane was not included in the demise but the lease included a grant of a right of way over it for all purposes. The inspector concluded it was ‘very unlikely that a mistake was made in 1921/2 about the private status of Sandy Lane’. He also took the view that Sandy Lane was not mentioned as a highway of any kind in the acquisition report prepared for the Forestry Commission in 1921. g

- Further confirmation that Sandy Lane was not public was to be found in its omission from the 1929 highway handover records of publicly maintainable highways and the 1949 declaration of the then owner Lord Brocket, as chairman of Bramshill parish meeting, as to what rights of way existed in the parish. h

- Lord Brocket showed that he had no intention to dedicate Sandy Lane by that declaration and by telling the Forestry Commission that it was a private road. j

- Such pre-1949 user evidence as there was did not give rise to an inference of dedication of Sandy Lane as a public highway.

- But (and this was common ground between the county council and the objectors) there was enough evidence of user by walkers and horseriders after

a 1970 to support a deemed dedication as a bridleway under s 31 of the Highways Act 1980.

[46] The conclusions of the final letter can be summarised as follows.

- The inspector adhered to his view that the new road was not dedicated by Sir William and remained a private estate road at the date of his death in 1892.

b • He reiterated his view that the public were enjoying the ‘convenience’ of the road by 1885, but said that no documentary evidence had been presented to show that this public user was by vehicle, although vehicles were used along Sandy Lane.

- Contrary to his initial opinion, the Finance Act evidence did support the case for public carriageway status. The exclusion of Sandy Lane from valuation, variously:

c

- was consistent with Sandy Lane being considered a public carriageway;
- showed that on the balance of probabilities, Sandy Lane was considered to be a public carriageway in 1910;

d

- led to the reasonable allegation that ‘in completing the procedures required by the Finance Act’, Sir Anthony dedicated Sandy Lane as a public carriageway.

- There was some, ‘not strong’ evidence of public vehicular user (by four persons) from 1918–1936, and ‘stronger’ user evidence after that. This user from 1918 was ‘evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway’.

e

- Sandy Lane being treated as a private road by subsequent owners of the estate could not undo that: ‘once a highway, always a highway’.

THE AUTHORITIES

f [47] Save for the *Leicestershire CC* case, counsel have been unable to find any authority which deals with the burden of proof applicable by the Secretary of State in confirming orders modifying the definitive map and statement. In *R v the Secretary of State for the Environment, ex p Bagshaw* (1994) 68 P & CR 402 Owen J was considering two cases where county councils had refused to make orders under s 53(3)(c)(i) of the 1981 Act at the preliminary ie Sch 14 stage. In that case, therefore, the judge was properly applying the dual test contained in that subsection and quashed both decisions, which had been made on the basis

g that insufficient evidence had been shown by the applicant to establish, prima facie, the existence of the two public rights of way in question. Owen J is recorded as saying (at 408):

h ‘The wording of [section 53(3)(c)(i)] indicates, as I consider, that the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right does subsist. Indeed, bearing in mind the structure of the Act, this seems to be clear. That structure is, in this respect, that an application under section 53(3)(c)(i), if upheld, will be followed by an order, consequent upon which, after an objection, there may be some form of

j inquiry with either confirmation or a refusal to confirm.’

[48] Later Owen J continues (at 409):

‘Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to user

is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to me to be reasonable to allege such a right. I say this because it may be reasonable to reject the evidence on the one side when it is only on paper, and the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.'

[49] Owen J's judgment in *Ex p Bagshaw* was considered by the Court of Appeal in *R v Secretary of State for Wales, ex p Emery* [1998] 4 All ER 367. That again was a case where a local authority had declined to make an order under s 53(3)(c)(i) at the Sch 14 preliminary stage on the basis that the applicant had failed to establish a reasonable allegation of subsistence of the right of way in question in a case where there was conflicting evidence of user of the way by the public between the landowner and the applicant. The Court of Appeal approved the approach of Owen J in *Ex p Bagshaw* and in particular the second passage which I have quoted from his judgment above. The leading judgment was given by Roch LJ. He is recorded as saying this under the heading 'The test that the Secretary of State should apply at the Sch 14 stage' (see 377):

'Section 53(3)(c)(i) relates to discovery by the authority of evidence of two separate things. First, evidence that a right of way which is not shown on the maps subsists and, second, evidence that a right of way which is not shown on the map is reasonably alleged to subsist. Difficulty is caused by these two limbs of this subsection. There can only be discovery by the authority of evidence that a right of way which is not shown on the map subsists if there is clear evidence of 20 years' user uncontroverted by any credible evidence to the contrary and no credible evidence that there was on the part of the landowner no intention during the period to dedicate the way to the public. Where there is no credible evidence of 20 years' user or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, for example by the landowner complying with s 31(6) of the 1980 Act ... then the decision should be not merely that the allegation that a right of way subsists is not reasonable, but that no right of way as claimed subsists. The problem arises where there is conflicting evidence on one or other or both issues. In approaching such cases, the authority and the Secretary of State must bear in mind that an order under s 53(2) made following a Sch 14 procedure still leaves both the applicant objectors with the ability to object to the order under Sch 15 when conflicting evidence can be heard and those issues determined following a public inquiry.'

[50] It seems to me that both these passages from the judgments of Owen J and Roch LJ are similar in effect to the passage from Lord Diplock's speech in *Mason's* case. Both clearly accept the principle that a lower standard of proof applies at the preliminary stage and that that is acceptable because where the evidence of the subsistence of a right of way is conflicting 'those issues' will be 'determined following a public inquiry'. There would seem to me to be a clear implication that the judges in those cases anticipated that such 'determination' would take place applying a higher standard of proof than one of a merely justifiable allegation.

CONCLUSION UNDER HEAD 1

- a* [51] In my judgment this issue is to be determined in favour of the applicants. It follows that to the extent that the decision of Collins J in the *Leicestershire CC* case is authority for a contrary conclusion I must respectfully decline to follow it. I have arrived at this conclusion for the following reasons.
- (i) I have already concluded that the purpose of Pt IV of the 1949 Act was to
- b* assist in the preservation of existing public rights of way by their ascertainment and by recording them and by providing such record to be conclusive evidence of their subsistence. It seems to me that the pattern of the 1949 Act has been
- c* carried through by the legislature into the 1968 Act and on into the 1981 Act although the detailed provisions have developed over the years. That pattern is one of requiring the local authority to prepare a preliminary record in cases
- d* where there is evidence of the existence of a public right of way. That preliminary record is then published with the object of inviting comments and objections from persons interested either in the subsistence of the right of way or to deny its subsistence. There is then a procedure for resolving issues thrown up by objections to the preliminary record. Finally there is the
- e* preparation of the final record reflecting those decisions which is given the status of conclusive evidence. In the case of the 1949 Act there can be no doubt that the procedure under s 31 at quarter sessions would be subject to the civil burden of proof. I have formed the view that the determinations by the surveying authority and the minister under s 29 would be subject to the same burden. That is because those determinations were quasi-judicial and, in the
- f* absence of a further challenge under s 31 would be determinative of the existence or extent of the rights of way in question. The same is true under the abbreviated review system introduced by Pt II of Sch 3 to the 1968 Act (see para 4(4)). Schedule 15 of the 1981 Act gives no express guidance as to the burden of proof applicable on confirmation of a para (c)(i) order. In the absence
- g* of an express provision it seems to me to be reasonable to assume that the legislature intended to replicate the pattern of the 1949 Act in the 1981 Act so as to subject the issue of proof of the existence and extent of public rights of way to the ordinary civil burden of proof namely the balance of probabilities. The contrary contention that it is sufficient to establish a right having serious consequences for landowners and other users by a mere finding that it was
- h* reasonable to allege that such a right subsists seems to me to be counter-intuitive.
- (ii) It would be surprising if rights in property of such importance were capable of being determined in the course of a statutory procedure applying a lower burden of proof than that which would be applicable were the existence
- i* of those same rights to fall to be determined in the course of ordinary litigation in the civil courts. This is illustrated by the decision of Mr Prosser QC sitting as deputy judge of the Chancery Division in *Shears Court (West Mersea) Management Co Ltd v Essex CC* (1986) 85 LGR 479. In that case the deputy judge was dealing with a claim by residents to use a way over the plaintiff's land as
- j* access to a beach. The county council after representation by the residents instituted proceedings under the 1981 Act having concluded that there was a public right of way. Meanwhile the plaintiff landowner issued a writ seeking a declaration that no public footpath existed over its land. The county council sought to have the writ struck out. The deputy judge having considered such authority as there was concluded (at 486):

‘There is nothing in these cases which supports the contention that once the procedure of the Act of 1981 is under way but not yet completed there is no right to bring a question concerning the alleged right of way before the court. That such an action may be stayed is one thing, but to say that it should be struck out is entirely without foundation.’ a

He therefore declined to strike it out but ordered the proceedings under it to be stayed pending resolution of the local authority’s inquiries and determinations under the 1981 Act. No question of differing burdens of proof appears to have been raised. b

(iii) Paragraph 6 of Sch 15 to the 1981 Act confers on the authority a discretion to confirm unopposed modification orders or, if the authority considers that changes should be made to the order requires the authority to submit the revised order to the Secretary of State who is given a further discretion whether or not to confirm it or to confirm it after a further alteration. The provisions of para 6 seem to me to imply a revisiting by the authority or the Secretary of State of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage. c

(iv) There would seem to be little point in having a full public local inquiry with oral evidence and submissions if the inspector is not required finally to resolve material conflicts of fact and adjudicate on disputed issues of law. A distinction between the approach of the authority and the Secretary of State on a Sch 14 appeal to the making of an order, and the Sch 15 inquiry stage for the purposes of confirmation of that order seems to be implicit in the decisions of the courts in *Ex p Bagshaw* and *Ex p Emery* and in the speech of Lord Diplock in *Mason’s* case. d

(v) It is anomalous if it is sufficient for the purposes of adding a way to the definitive map under s 53(3)(c)(i) that a test of reasonable allegation is sufficient when the civil burden of proof is required to obtain an order varying the permitted user of a way under para (c)(ii) and in removing a way under para (c)(iii). e

(vi) In his judgment in the *Leicestershire CC* case [2003] EWHC 171 (Admin) at [23] Collins J said: f

‘... the reason for the lesser test in s 53(3)(c)(i) is a recognition by Parliament that, if it can be shown that it is reasonable to allege that a right of way subsists, then it ought to be put down in the public interest on the map, and then it will be for the relevant landowner or whoever to bring forward a case to show that that was wrong and that the map therefore shows a right of way which it should not show. The burden upon the individual to establish that is that set out in s 53(3)(c)(iii).’ g

With great respect I do not agree for the following reasons. h

(a) The s 53(3)(c)(iii) procedure would not inevitably be available to an applicant to remove a way from the record because of the necessity prescribed in para (c) for there to have been a subsequent ‘discovery’ of evidence to trigger the power and the duty to make an order under sub-s (2). If the applicant simply wanted to argue his case on the basis of the evidence already known at the Sch 15 inquiry which had resulted in the way being put on the map by the application of the lower test, he might have no forum in which to do so. An application to the High Court under para 12 of Sch 15 to have the order set aside would fail because, on the basis of reasonable allegation only, it would j

a have been quite properly made. An application for a declaration that the right of way did not exist would be struck out because of the conclusive evidence provisions of s 56.

b (b) An applicant under s 53(3)(c)(iii), as has been found by Collins J in the *Leicestershire CC* case, must produce 'cogent' evidence to justify an order. This seems to mean that he must satisfy, at least, the civil burden of proof. If he is alerted in time, raises objections, and takes part in an inquiry under Sch 15 it is theoretically possible that, at the inquiry, he could raise a case that there was no right of way satisfying the civil burden of proof and still lose if it could also be said that the preliminary order by the authority had met and continued to meet the criterion of reasonable allegation.

c (c) The proposed solution to the problem produces a duplication of proceedings and costs which would not occur if at the hearing of any inquiry by an inspector or otherwise those supporting and opposing the existence or extent of a public right of way were treated as at any other inquiry to determine rights, namely that in order to win a party must establish his case to the civil burden of proof.

d (d) If all that is necessary for a proponent to do to obtain confirmation of an order modifying the map so as to include a new right of way is to satisfy a test of reasonable allegation that places upon his opponent the burden of proof of establishing that no right of way exists to at least the standard of the balance of probabilities and, as I have said, even then he may not succeed. It is also contrary to the pattern of ss 29 and 31 of the 1949 Act.

e [52] It is Mr Morshead's submission that a higher burden of proof, on the balance of probabilities, is not required at the confirmation stage because if, at that stage, the landowner or other objector satisfies the Secretary of State or his inspector by evidence on the balance of probabilities that no right of way exists it is unlikely that the order will be confirmed because it will no longer be reasonable to allege that it subsists. As I have pointed out this places the burden of proof on the objector at the inquiry stage which seems to be unjust. Alternatively if what is being said is that the stronger the case which the objector can present the more unlikely it will be that the Secretary of State will confirm the order on the basis of reasonable allegation, then the result is that it is being accepted that to confirm the order the Secretary of State must be satisfied of a case for the subsistence of the right of way in question on the balance of probabilities.

THE REMAINING HEADS

[53] I turn to consider the claimants' ground 2.

h [54] Until the enactment of s 31 of the 1980 Act the only way in which a public highway could be created was, at common law, by express dedication by the landowner over whose land it was to be created or by implied dedication by him, to be implied from the public's user of the way over an appreciable period of time and to be treated as accepted by the public as a result of that use.

j See the judgment of Wills J in *Eyre v New Forest Highway Board* (1892) 56 JP 517 at 517:

'All highways, all rights of passage over the property of individuals, have their actual or presumed origin, although it is not often the origin in point of fact, in a dedication by the owner of the soil, that is to say he either says in so many words, or he so conducts himself as to lead the public to infer

that he meant to say: "I am willing that the public should have this right of passage." If a man has actually conceded that right of passage to the public it is irrevocable, and that is expressed by the maxim with which we are all familiar, I suppose, "once a highway always a highway." Up till the year 1835, when the Highway Act, which is the foundation of our present system, was passed, if there was a dedication of a road to the public by the owner either expressed by deed, as occasionally happens, or inferred from public user for such a time as to any tribunal who judges the case will appear sufficient to found that inference, if the proper inference was that he had said or so conducted himself as to imply that he had granted that right of passage to the public; and the public had on their part accepted it and used the road, from that moment there was not only a right of passage on the part of the public, but there was the liability to repair on the part of the parish ...'

[55] Thus the creation of a right of way at common law involved a two-stage process: the first-stage dedication by the landowner express or to be implied from his acquiescence in public use of the way over an appreciable period of time, and second, acceptance by the public by use of the way after dedication.

[56] Section 31 of the 1980 Act provides for an alternative route to the creation of a public highway so that a way could be established where such a way 'has been actually enjoyed by the public as of right and without interruption for a full period of 20 years'.

[57] It is not in issue that the fundamental cause of the inspector's change of mind between the publication of the interim letter and the final letter was a re-evaluation by him of documentary evidence of proceedings in relation to Sandy Lane caused by the provisions of the 1910 Act which imposed a tax on the values of land holdings. A landowner could not be taxed in respect of land which comprised a public highway or could obtain relief from tax in respect of land that was his property but which was subject to public highway rights. In the present case there was documentary evidence which established that Sandy Lane had a separate OS number and was excluded from the valuation of Sir Anthony Cope's land tax although it had plainly formed part of the estate of which he was owner being the route which his father, Sir William Cope, in the late nineteenth century had tried but failed to make into a public road.

[58] It is common ground that the inspector's re-evaluation was not as a result of any fresh evidence being put before him, but as a result of fresh submissions as to how the existing evidence before him should be treated.

[59] In the final letter the inspector reviewed the Finance Act 1910 evidence between paras 29 and 36. He says this at para 30:

'30 **Uncoloured.** I have researched the use of large scale maps in relation to Finance Act documentation. Two sets of plans (i.e. base maps with annotations) were produced for each area—Field Plans (working copies) and Official Plans. The base map strips submitted in this case were almost certainly Field Plans. I have discovered that on these, the boundaries of hereditaments were often carelessly delineated and only outlined with coloured crayon. The Official Plans, thought to be held in the Public Records Office at Kew, have each hereditament carefully filled in with colour wash. They could have helped to clarify this case. It is unusual that on the Field Plan submitted, Hereditament 34 was not given

- a* at least an outline colour. However, taking the evidence of the Plan and the associated Field Book together, I think it reasonable to conclude that Hereditament 34 consisted of those OS plots enumerated in the Field Book extract and probably did not include the area of Sandy Lane ...'

[60] He continues at para 33:

- b* '33 **Bridleway or Footpath rights over Sandy Lane.** I have researched the objectors' contention that Sandy Lane might have been excluded from valuation because commoners had rights of footway along it and it was therefore considered to be a public footpath. If Sandy Lane had been a private carriageway with a public right of way on foot, normal practice would have been inclusion of the Lane in valuation and a deduction made for "Public Rights of Way or User". Such appears to have been the case with the Footpath shown as "F.P." on the Field Plan to the west of Sandy Lane, and with any other paths crossing Hereditaments 34, 84, 98 and 694 ...'
- c*

- d* [61] The inspector's conclusions on this part of the final letter are at paras 37 and 38 as follows:

- e* '37 **Dedication by Sir Anthony Cope.** From paras 29–36 two facts emerge and I now have more confidence in their implications than I did last year. First, Sandy Lane has a unique parcel number on the 1909 base map (no. 52, as on the 1894 OS 1:2500 map). Secondly, this plot was not included in the list of those valued in the Field Book extract. Such exclusion normally indicates public rights, sometimes bridleway but usually vehicular. It could not be reasonably alleged that the exclusion of Sandy Lane from valuation was a "powerful" indication of public carriageway rights along it if the circumstances before and around 1910 suggested otherwise. But they do not. The "Road" was intended to be part of a through route between Hazeley etc and Wokingham (para 19). It was described as a Road in the Book of Reference for the 1871 OS 1:2500 map and shown as a way without obstructions across it on that map, and the 1894 and 1909 OS 1: 2500 maps (para 20). In 1885 it was "a public convenience, being a direct communication between Odiham and Wokingham ..." (para 21). Vehicles were used along it (para 22). There is evidence of its reputation as an uninterrupted highway and of vehicular user along it (paras 24, 26). The evidence of its reputation as a "Road" is supported by small scale map evidence (paras 27, 28). I therefore conclude that exclusion of Sandy Lane from valuation does show that, on the balance of probabilities it was considered to be a public carriageway in 1910. I consider it unlikely, in the context of this case and in the light of para 33 above, that it was bridleway or footpath rights that existed along the Order route, as contended by the objectors.
- f*
- g*
- h*

- j* 38 There is no evidence to suggest that the procedures laid down for the completion of assessment under the Finance Act were not applied in the case of the Bramshill Estate. These included checks by the landowner of the Field Book entries and of the provisional valuation. Accordingly, the omission of Sandy Lane from valuation and the public carriageway implications of this were open to Sir Anthony Cope's scrutiny. This leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public

carriageway. There then follows a considerable amount of evidence against this allegation and I address it carefully before determining the Order.’ a

[62] The inspector summarised that documentary evidence at para 46 as follows:

‘The documentary evidence supporting the claim can be summarised briefly. Between 1866 and 1871 Sir William Cope built a road over a part of his Estate, intended to be a section of a through route between Odiham, Hazeley etc and Wokingham. The public were using it by 1885 but Sir William did not expressly dedicate it as a highway because the Highway Authority did not accept his condition for such dedication: that it should be adopted as publicly maintainable. Finance 1909/10 Act evidence was consistent with Sandy Lane being considered a public carriageway and the circumstances of this evidence indicated that on the balance of probabilities, the Lane was dedicated as such by Sir Anthony Cope ...’ b
c

[63] The inspector’s conclusion is at para 53 of the final letter as follows: d

‘The Order route as a Vehicular Highway

Paras 26 and 49–52 summarise the evidence of continuous public vehicular user along Sandy Lane from 1918. This was neither challenged nor obstructed until 1958. There is no evidence to show that the gates placed across the Lane in that year and from time to time thereafter were erected with the owners’ permission or on their instructions: the public vehicular user continued despite the gates. This record of user is evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway. The maxim “once a highway, always a highway” has to be applied to the claims of Captain Cope and Lord Brocket that, between 1921 and 1961, the Lane was private.’ e
f

[64] The claimants’ initial submission is that the passages from the final letter which I have set out above, and, in particular the last but one sentence of para 38, show that the inspector was proceeding under a fundamental mistake of law, namely that Sir Anthony Cope’s acquiescence in the preparation and submission of documents and plans required by the 1910 Act, which excluded Sandy Lane, constituted dedication by him of Sandy Lane as a public highway. Mr Morshead’s answer for the defendant is the suggestion that, when the inspector used the word ‘dedication’ in these passages from the final letter, he was not using that word in its technical legal sense to describe a landowner making an oral or written express dedication of the land as a public highway but rather as describing acceptance of a situation which had already come into existence as a result of public user of the way before 1910 from which dedication by Sir Anthony or his father could be implied and which his acquiescence in the exclusion of Sandy Lane from the 1910 Act returns confirmed as having taken place. g
h

[65] I am unable to accept Mr Morshead’s submission. It is absolutely inconsistent with the words in para 38, [t]his leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway’ when read with the words in para 53: j

- a* 'Paras 26 and 49–52 summarise the evidence of continuous public vehicular user along Sandy Lane from 1918 ... This record of user is evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway.'

It is true that there are passages in the final letter which support Mr Morshead's submission such as the penultimate sentence in para 46 which I have set out above. However it seems to me to be incontrovertible from para 53 that the inspector was coming to his changed conclusion to confirm the council's order adding Sandy Lane as a BOAT on the basis of a finding 'that in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway'.

- c* [66] Mr Morshead does not suggest that the evidence of what took place to complete the Finance Act 1910 procedures could possibly support a conclusion that Sir Anthony Cope's part in those procedures amounted to an express dedication of Sandy Lane as public highway.

[67] It follows that the inspector's change of mind was based on a finding which is shown to be erroneous in law.

- d* [68] I turn to consider the claimants' head 3.

- e* [69] In *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865, [1976] 1 WLR 1255 the House of Lords were considering a case where a local authority had made a compulsory purchase order in respect of certain buildings. That order was challenged and an inquiry held by an inspector appointed by the Secretary of State. The inspector, after the conclusion of the hearing, conducted his own inspection of the premises as a result of which he formed the view that the foundations were defective. His decision letter revealed the fact that this was a ground upon which he came to the conclusion that the compulsory purchase order should stand. Viscount Dilhorne says ([1976] 2 All ER 865 at 869, [1976] 1 WLR 1255 at 1260):

- f* 'It was on account of his belief as to the inadequacy of the foundations that the inspector, taking that into account with the other defects, ruled out rehabilitation. So it appears that the inspector attached great weight to a factor which formed no part of the council's case, of which the respondents had not been given notice and with which they had been given no opportunity of dealing. In my opinion there is great substance in the respondents' complaints. Just as it would have been contrary to natural justice if the Secretary of State in making his decision had taken into account evidence received by him after an inquiry without an objector having an opportunity to deal with it, so here in my view it was contrary to natural justice for his decision to confirm the order to be based to a very considerable extent on an opinion, which investigation might have shown to be erroneous, that the foundations were not taken down deep enough, and an opinion, which also might have been shown to be erroneous, that the inadequacy of the foundations showed that rehabilitation was impractical.'
- g*
- h*
- j*

[70] The claimants complain that the inspector's conclusions are vitiated by procedural unfairness on two grounds: the first that the suggestion that Sandy Lane became a public right of way as a result of express dedication by Sir Anthony Cope in 1910 was a point which was not raised at the first inquiry and they had no notice as being raised in the course of the second inquiry by

the written submissions passed to the inspector for that purpose. Their second complaint is that the text of the final letter reveals, in the passages which I have quoted above, that the inspector conducted his own investigations into the Finance Act 1910 procedures and documents, and into how that material should be treated for the purpose of his inquiry, without notifying the parties and without giving them an opportunity to comment upon the material which he turned up.

[71] Mr Morshead for the defendant does not seriously suggest that once it is established that the inspector based his conclusions in the final letter on a finding of express dedication as a result of the Finance Act 1910 material then the conclusion should not follow that it was a breach of natural justice by him, and so procedural error, not to give the claimants notice of this and of any fresh material resulting from his investigations so that they could deal with it.

[72] As to the claimants' fourth ground, in the light of the conclusions which I have already reached it is unnecessary for me to deal with this issue which would involve a substantial investigation of the evidence and needlessly prolong this judgment.

[73] For these reasons it appears to me clear that the order confirmed by the defendant's decision through her inspector of 15 September 2003 must be quashed.

Application allowed.

Dilys Tausz Barrister.

APPENDIX I

CHRONOLOGY

Date	Event
1850s	Sir William Cope took up residence on his Bramshill Estate (which included the route of Sandy Lane)
15.12.1866	Letter written by Sir William Cope and Mr Mark Wyeth proposing to make a road along the route of Sandy Lane if sufficient subscriptions could be obtained

- a* 7.1885 Letter from Sir William Cope to the Hartley Wintney rural sanitary authority (as highway authority) stating that a road (Sandy Lane) had been made (principally at his expense) and indicating an intention to dedicate it to public use conditional upon its being formally adopted by the authority
- b* Report by the surveyor of highways that the road was too narrow and ended 30 yards short of New Mill Lane
- c* 1.9.1885 Eversley vestry meeting (attended by the surveyor and Sir William Cope): following Sir William's promise to gravel the sides of the road and extend it to New Mill Lane, resolution to apply to the justices to declare Sandy Lane a public highway passed [no evidence that such application was made]
- d* 8.1888 Surveyor reported to the authority that Sir William had not done the promised gravelling
- e* 1892 Death of Sir William Cope
Ownership of the Bramshill Estate passed to his son Sir Anthony Cope
- f* 1910 Enactment of the Finance (1909–10) Act requiring a survey and valuation of all land in England and Wales to be carried out by the Inland Revenue for the purposes of a tax on land values to be levied on each occasion of a transfer of ownership
- g*
- h* 1910 The year in which the inspector found it reasonable to allege that 'in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway'
- j* 1918 The first year in which the inspector found there to be evidence of public vehicular use of Sandy Lane having occurred

Date unknown	Transfer of ownership of the Bramshill Estate to Sir Anthony Cope's son Captain Denzil Cope	<i>a</i>
18.6.1921	Acquisition report prepared for the Forestry Commission by one of its officers for the purposes of its proposal to take a lease of parts of the Bramshill Estate: Sandy Lane not mentioned as a public highway	<i>b</i>
5.4.1922	Lease by Captain Denzil Cope to the Forestry Commission of parts of the Bramshill Estate, including the land on both sides of Sandy Lane, together with the grant of a right of way for all purposes over Sandy Lane	<i>c</i>
1929	Transfer of responsibility for maintenance of highways maintainable at the public expense from rural district council to county council: handover map prepared for that purpose does not include Sandy Lane as a highway	<i>d</i>
1932	Death of Sir Anthony Cope	<i>e</i>
1936	Sale of Bramshill Estate to Lord Brocket	<i>f</i>
5.1949	Lord Brocket (in his capacity as chairman of Bramshill parish meeting) signed map (for sending to the county council) stating that the rights of way shown on it (not including Sandy Lane) were the only ones in Bramshill parish	<i>g</i>
1952	Bramshill Estate broken up and sold off in lots; some parts retained (it was common ground at the inquiry that these probably included the route of Sandy Lane)	<i>h</i>
1958	Forestry Commission first locked gates across Sandy Lane	<i>j</i>

- a* 9.9.1958 Letter from clerk to county council to Eversley parish council confirming acceptance of Lord Brocket's 1949 declaration for the purposes of the 1949 Act survey
- b* 1967 Bramshill parish meeting made representations to the county council claiming Sandy Lane as a public right of way: county council responded that it was not satisfied that Sandy Lane was a highway
- c* 1984 Application to county council by Bramshill parish council for addition of Sandy Lane to the definitive map as a byway open to all traffic
- d* 1985 Locked gate installed at northern end of Sandy Lane
- e* 1999 County council resolved to make an order in accordance with the application
- f* Bramshill parish council produced additional evidence and asked the county council to make an order adding Sandy Lane as a bridleway instead
- g* 26.5.2000 Making by the county council of the Hampshire (Hart District No 9) (Parishes of Bramshill and Eversley) Definitive Map Modification Order 2000 (the order), adding Sandy Lane as a byway open to all traffic
- h* Objections to the order made by the claimants and others (including the Bramshill and Eversley parish councils). Order submitted for confirmation to the defendant's predecessor, the Secretary of State for the Environment, Transport and the Regions
- j* 26-28.3.2002 Public local inquiry into the order held by the inspector
5, 23.4.2002

		<i>a</i>
18.7.2002	Issue of inspector's interim decision letter proposing to confirm order subject to modification showing Sandy Lane as a bridleway (instead of a byway open to all traffic) (OD 2002) Objections to proposed modification	<i>b</i>
12.2002) 1. 2003)	Inquiry into proposed modification conducted by way of written representations	<i>c</i>
15.9.2003	Issue of inspector's final decision letter confirming order as originally made (OD 2003)	<i>d</i>
3.10.2003	Publication of notice of confirmation of order under para 11 of Sch 15 to the 1981 Act	<i>e</i>
12.11.2003	Issue of these proceedings	<i>f</i>

APPENDIX II

LIST OF PERSONS REFERRED TO

		<i>g</i>
The Secretary of State for Environment, Food and Rural Affairs	The defendant, in her capacity as the Secretary of State responsible for definitive map modifications under the Wildlife and Countryside Act 1981 (the 1981 Act)	<i>h</i>
Hampshire County Council	The surveying authority for its area for the purposes of the 1981 Act; made the definitive map modification order under challenge (the order) adding Sandy Lane in the Parishes of Bramshill and Eversley as a byway open to all traffic	<i>j</i>

a

D Brook CB CBE

The inspector appointed by the defendant to conduct the public local inquiry into the order, whose decision to confirm it is under challenge

b

Philip Napier Todd

The first claimant: resident of Eversley, chairman of Eversley parish council, chairman of Forest of Eversley Trust and Secretary to the Hart & Rushmoor district group of the Campaign to Protect Rural England: objector to the order

*c**d*

Douglas Bradley

The second claimant: owner and occupier of Broom Cottage, New Mill Lane, Eversley, a property which adjoins Sandy Lane: objector to the order

*e*Philip Graham Plumbe
FRICS FCI Arb

Chartered surveyor and chartered arbitrator: acted as representative for the objectors to the order: maker of two witness statements in support of this claim

*f*The Reverend Sir William
Cope

12th Baronet of Bramshill: owner of the Bramshill Estate (including the route of Sandy Lane) from the 1850s to 1892

g

Sir Anthony Cope

Sir William Cope's son and heir: owner of the Bramshill Estate from 1892 until a date unknown prior to 18.6.1921

h

Captain Denzil Cope

Son of Sir Anthony Cope: acquired the freehold to the Bramshill Estate from his father prior to 18.6.1921 and owned it until 1936

j

Lord Brocket

Purchaser of the Bramshill Estate from Captain Denzil Cope in 1936; sold it off in 1952, in a number of lots none of which included Sandy Lane.

a

Chairman of Bramshill parish meeting 1949

b

Forestry Commission

Lessee of the land adjoining Sandy Lane on both sides under a lease for 198 years of that and other land on the Bramshill Estate dated 5.4.1922; grantee of an all-purpose right of way over Sandy Lane for the duration of the lease

c

Appendix 10.7

***R (on the application of Norfolk CC) v
Secretary of State for the Environment, Food
and Rural Affairs [2006] 1 W.L.R. 1103***

[2006] 1 WLR

R (Norfolk County Council) v Environment Secretary (QBD)

A

Queen's Bench Division

***Regina (Norfolk County Council) v Secretary of State for the
Environment, Food and Rural Affairs**

[2005] EWHC 119 (Admin)

B

2004 Dec 13, 14;
2005 Feb 10

Pitchford J

C

Highway — Right of way — Definitive map — Discrepancy between starting point of footpath as shown on map and as described by accompanying statement — Council ordering modification of map to conform with statement — Inspector requiring cogent evidence that position shown on map incorrect — Inspector refusing to confirm order — Whether position shown on map to prevail over position described by statement — Whether evidential presumption in favour of position shown on map — Wildlife and Countryside Act 1981 (c 69), ss 53(2)(3), 56

D

The council's definitive map and statement of public rights of way included a public footpath. The footpath's starting point as described by the statement was some 30 metres to the east of its starting point as shown on the map. The council made an order under section 53(2) and (3)(c) of the Wildlife and Countryside Act 1981¹ modifying the map so that it showed the footpath starting at the point described by the statement. Following objections to the order the Secretary of State appointed an inspector to hold a public inquiry to decide whether the order should be confirmed. The inspector found that her task was to decide whether there was cogent evidence to show on the balance of probabilities that the map was in error and the statement was correct. She concluded that she could not resolve the conflict between the map and the statement, and refused to confirm the order. The council sought judicial review of the inspector's decision.

E

On the claim—

F

Held, (1) that for the purposes of section 56 of the Wildlife and Countryside Act 1981, the definitive map was the primary and source document, and if the accompanying statement could not be read as supplying particulars of the position of the footpath shown on the map then the position as shown on the map prevailed over the position described in the statement; and that, therefore, the definitive map was conclusive evidence unless and until review under section 53(2) (post, paras 38, 73).

G

(2) Allowing the claim, that at review under section 53(2) neither the map nor its accompanying statement was conclusive evidence of its contents; that in the case of irreconcilable conflict between the map and the statement, there was no evidential presumption that the map was correct and the statement was not; that each should be accorded the weight which analysis of the documents themselves and the extrinsic evidence, including the situation on the ground on the relevant date, demonstrated was appropriate; that the judgment to be exercised was whether, under section 53(3)(c)(iii), any particulars contained in the map and statement required modification unless it emerged that either a new footpath should be added or the footpath shown on the map, or part of it, should be deleted altogether; that the inspector had wrongly applied a presumption in favour of the map at the expense of the statement and failed to give consideration to the merits, if any, in the particularity with which the terms of the statement were drawn; and that since the inspector's decision might have been different if she had not done so, it would be quashed (post, paras 64, 67, 72–73).

H

¹ Wildlife and Countryside Act 1981, s 53: see post, para 14.
S 56: see post, para 16.

1104

**R (Norfolk County Council) v Environment Secretary (QBD)
Pitchford J****[2006] 1 WLR**

Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] 1 WLR 1264, CA distinguished. A

The following cases are referred to in the judgment:

R v Secretary of State for the Environment, Ex p Burrows [1991] 2 QB 354; [1990] 3 WLR 1070; [1990] 3 All ER 490, CA

R v Secretary of State for the Environment, Ex p Kent County Council (1994) 93 LGR 322 B

R (Leicestershire County Council) v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 (Admin)

Rubinstein v Secretary of State for the Environment (1987) 57 P & CR 111

Simplex G E (Holdings) v Secretary of State for the Environment (1988) 57 P & CR 306, CA

Suffolk County Council v Mason [1979] AC 705; [1979] 2 WLR 571; [1979] 2 All ER 369, HL(E) C

Todd v Secretary of State for the Environment, Food and Rural Affairs [2004] EWHC 1450 (Admin); [2004] 1 WLR 2471; [2004] 4 All ER 497

Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] EWCA Civ 266; [2001] 1 WLR 1264; [2001] 3 All ER 166, CA

Walwin (L E) & Partners Ltd v West Sussex County Council [1975] 3 All ER 604

No additional cases were cited in argument. D

CLAIM for judicial review

By a claim form issued on 10 May 2004 the claimant, Norfolk County Council, sought judicial review of the decision contained in a letter dated 17 February 2004 of Mrs Erica Eden, an inspector appointed by the Secretary of State for the Environment, Food and Rural Affairs, by which she refused to confirm the Norfolk County Council (Pentney Footpath No 12 (Part)) Modification Order 2003, made by the claimant on 3 March 2003, modifying the claimant's definitive map and statement so that the position of Footpath No 12 as shown on the map was in conformity with its position as described in the statement. E

The facts are stated in the judgment.

George Laurence QC and *Ross Crail* for the claimant council. F

Timothy Morshead for the Secretary of State.

Cur adv vult

10 February 2005. **PITCHFORD J** handed down the following judgment.

1 This is an application for judicial review of the decision of the defendant's inspector of 17 February 2004 refusing to confirm the Norfolk County Council (Pentney Footpath No 12 (Part)) Modification Order 2003. G

2 The claimant is the surveying authority for the county of Norfolk. The definitive map and statement for the county includes a public footpath in the parish of Pentney, known as Pentney Footpath No 12 ("FP12"). Its southern junction is with Back Lane in the village of Pentney. The footpath proceeds in a generally northern direction, through the grounds of a residential property, across fields until, after some 536 metres at its northern extremity, it meets, at a footbridge in the parish of East Winch, Footpath No 11 ("FP11"). FP11 continues also in a generally northern direction until it terminates, after about 804 metres, at a level crossing on the King's Lynn H

A to Swaffham A47 road. The definitive map is drawn to a scale of six inches to one mile. I have converted to metric measurement as did the inspector. The relevant part of the statement accompanying the map reads:

B “Footpath No 12 (Narborough Road to parish boundary). Starts from the Narborough Road by a field gate between Morton’s shop and the King William IV public house and runs northwards to the parish boundary, where it joins East Winch Footpath No 11 at a footbridge.”

C 3 There is no evidence before me (nor was there before the inspector) whether the former name of Back Lane was Narborough Road but Back Lane is one of two routes through Pentney to Narborough. The position on the ground at which FP12 meets Back Lane as depicted in the definitive map is the western edge of the grounds of Bramborne House on the north side of Back Lane (point C: see para 4 below). The junction as described by the definitive statement is some 30 metres to the east, on the same road, at a field gate which used to be situated between the two properties, Morton’s shop and the King William IV public house (point B). On 13 August 2000 Mr and Mrs Osborne, owners of Bramborne House, made a request of the claimant to modify the definitive map in conformity with the definitive statement. Investigations commenced.

D 4 On 3 March 2003 the claimant made the order identified in para 1 under section 53(2)(b) of the Wildlife and Countryside Act 1981. Annexed to the order was the order map. Attached to this judgment is a copy of the order map identifying points A, B and C, with the additional points “Q” and “R” annotated upon it*. Objections to the order were received from E Mr R G Sizeland (since deceased), owner of the King William IV public house, and others. The inspector held a public local inquiry under section 53 of and Schedule 15 to the Wildlife and Countryside Act 1981 on 16 and 17 December 2003. The inspector did not make a decision whether the definitive statement, despite its apparent inconsistency with the definitive map, could be read compatibly with the map as explained below. As she was invited by the parties, she treated the issue as one of incompatibility between F the map and the statement and proceeded to judge between them. Her decision letter refusing to confirm the order was issued on 17 February 2004. The claim was issued on 10 May 2004 and permission to proceed was granted by Sullivan J on 6 July 2004.

G 5 The claimant’s case is that as a matter of law the statement should have been given precedence over the map; alternatively, that the inspector, when judging the cogency of the oral and documentary evidence before her, wrongly failed to accord evidential weight to the statement. Four issues arise for decision. (1) When there is a conflict between the terms of the definitive map and its accompanying statement which should, if either, as a matter of law, prevail? (2) In the event of conflict what evidential weight, if any, should be accorded by the surveying authority and/or the inspector to the H map on the one hand and the statement on the other? (3) Did the inspector err in her approach to the question whether the claimant’s order should be confirmed? (4) If there was an error in the inspector’s approach, should her decision be disturbed?

* Reporter’s note. The order map is not reproduced in this report.

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6 Issues 1 and 2 require an examination of the statutory scheme under which the definitive map and statement were prepared. A

The statutory scheme

7 The definitive map and statement, as they affect FP12, have not been modified since they were issued under Part IV of the National Parks and Access to the Countryside Act 1949 some time after the “relevant date”, 21 November 1956. B

8 Section 27 of the 1949 Act required the claimant to carry out a survey of public rights of way and to prepare a *draft* map of its area showing footpaths and bridleways “wherever in their opinion such a right of way subsisted, or is reasonably alleged to have subsisted, at the relevant date”, the relevant date being a date not earlier than six months before notice of preparation of the map was published. The claimant was required to annex to the draft map a statement specifying the relevant date and “such particulars appearing . . . to be reasonably alleged as to the position and width [of any public path or other way shown on the map] . . . as . . . it is expedient to record in the statement”. By section 28 the claimant had an obligation to consult district and parish councils enabling the councils to provide relevant information. C

9 Following publication of the draft map, section 29 enabled any landowner affected by it to require the claimant to identify the documents of which it took account when preparing the draft map. If objection or representation was received, the claimant was required to consider it and notify the landowner of its determination whether, and in what respect, to modify the draft map. There was a right of appeal to the minister, heard by an inspector. D

10 Once the draft map and statement (as/if modified) were complete section 30 required the claimant to prepare a *provisional* map and statement notice of which was to appear in the “London Gazette” and at least one local newspaper. Section 31 gave a right of appeal to any owner, lessee or occupier of land to which the notice related, to quarter sessions, with a further right of appeal to the High Court upon a point of law. E

11 Finally, following all the foregoing procedures, section 32 required the claimant to prepare the *definitive* map and statement with notice to the “London Gazette” and a local newspaper where copies could be inspected. The particulars to be contained were those in the provisional map and statement (as/if modified) and every statement was to contain the relevant date specified in the corresponding provisional statement. The procedure, which culminated in the publication of the definitive map and statement, produced a statutory presumption of the conclusiveness of public rights of way which the map and statement showed. F

12 Thus, by section 32(4) of the 1949 Act:

“A definitive map and statement prepared under subsection (1) of this section shall be conclusive as to the particulars contained therein in accordance with the foregoing provisions of this section to the following extent, that is to say—(a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date . . . a footpath as shown on the map . . . and (c) where by virtue of the foregoing paragraphs of this subsection the map is conclusive evidence, as at any G

- A date, as to a public path . . . shown thereon, any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at the relevant date . . .”

13 Accordingly, the definitive map and statement have stood unmodified since preparation, probably in the early 1960s, as conclusive evidence of FP12.

- B 14 Section 33 of the 1949 Act and its later amendment by the Countryside Act 1968 provided for periodical review and, as required, revision of the definitive map and statement in certain circumstances. Those provisions have been replaced by section 53 of the Wildlife and Countryside Act 1981, which provides:

- C “(2) As regards every definitive map and statement, the surveying authority shall—(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.
- D

- E “(3) The events referred to in subsection (2) are as follows . . . (c) 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 to which this Part applies . . . (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.”

- F 15 The claimant made its FP12 order under section 53(2) and (3)(c)(i) and (iii), removing the footpath between points A and C on the attached plan and adding a footpath between points A and B.

16 It is agreed that for present purposes the effect of section 32(4) of the 1949 Act as to the conclusiveness of the map and statement respectively is the same as under the re-enactment in section 56 of the 1981 Act. Section 56 of the Wildlife and Countryside Act 1981 reads:

- G “(1) A definitive map and statement shall be conclusive evidence as to the particulars contained therein *to the following extent*, namely—(a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway *as shown on the map*, and that the public had thereover a right of way on foot . . . (e) *where by virtue of the foregoing paragraphs the map is conclusive evidence*, as at any date, as to a highway shown thereon, *any particulars contained in the statement as to the position or width thereof* shall be conclusive evidence as to the position or width thereof at that date . . .”
- H

“(4) A document purporting to be certified on behalf of the surveying authority to be a copy of or of any part of a definitive map or statement as modified in accordance with the provisions of this Part shall be receivable

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in evidence and shall be deemed, unless the contrary is shown, to be such a copy.” (My emphasis.)

The inspector’s decision

17 The claimant and the objectors proceeded before the inspector upon the common ground that the terms of the map and the statement were irreconcilable. Thus, at para 7 of her decision letter, the inspector wrote:

“The main issue is therefore whether the evidence discovered by the council, when considered with all other relevant evidence available, shows that, on the balance of probabilities, the definitive map and statement require modification because: there is no public right of way over land shown on the map and statement as a highway of any description or any other particulars require modification; and a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates.”

And, at para 8:

“The case for the order rests on an error having been made on the definitive map, that the description in the definitive statement is correct and that the map should be amended accordingly.”

And, at para 9:

“Department of the Environment Circular 2/93, Annex B advises surveying authorities that in the case of deletions the conclusive evidential effect of definitive maps and statements means that the evidence must show that no right of way existed at the relevant date of the definitive map on which the way was first shown. The relevant date in this case is 21 November 1956.”

And finally, at para 10:

“I do not consider that I can look at the events specified in section 53(3)(c)(i) and (iii) in isolation, as they are interdependent. I will consider whether there is cogent evidence to show on the balance of probabilities that the map is in error and the statement is correct.”

It is this evidential presumption applied by the inspector at the expense of the statement which is challenged by the claimant.

18 Having considered the oral and documentary evidence, including Ordnance Survey maps of 1885, 1888/91, 1905 and 1906, parish council minutes of 1901 and 1956 and photographs, and having carried out a site visit with and without the parties, the inspector concluded, at para 81 of her decision letter:

“I have considered if there is cogent evidence as to whether the map is incorrect and therefore there is no public right of way or the statement is correct and therefore the path subsists or is reasonably alleged to subsist. I find that the evidence shows there is no physical path on the line to be deleted and there is no evidence that use has taken place. There is also no evidence of substance that there is no public right of way. The map evidence for the path to be added is tenuous and undermined by the different lines shown by the parish council and others. I am not satisfied,

A on the balance of probabilities, that the parish council descriptions are sufficiently clear when put in the balance against the lack of substantiated use by the public and the obstructions in the 1950s to show that a path subsists or is even reasonably alleged to subsist. I find that on the evidence available to me I cannot resolve the conflict between the map and statement and therefore I am unable to confirm the order.”

B *Issue (1)—the claimant’s case*

19 Mr Laurence submits on behalf of the claimant that, as a matter of statutory construction, the definitive statement takes precedence over the definitive map. Accordingly, in law, the conflict between the two should have been resolved in favour of the statement.

C 20 Mr Laurence’s argument begins with a consideration of section 53. There is no machinery in the statute specifically designed to provide for resolution of a conflict between the map and its statement. There is, as far as counsel are aware, no existing authority upon the means by which and the principles upon which such a conflict is to be resolved by a surveying authority, an inspector or, indeed, a member of the public wishing to know what rights of way exist.

D 21 There are, under section 53, two possibilities: either section 53(3)(c)(i) and (iii) can be applied together to remove one path and insert another, or in the alternative, under paragraph (iii) “any other particulars contained in the map and statement” can be modified: *R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354, 389B, per Glidewell LJ. However, neither approach will be effective unless
E “the discovery of evidence” demonstrates the need for modification. What if there is no new evidence (that is evidence discovered since publication of the definitive map and statement) or the evidence provides a stalemate, as in the case of FP12? There ought to be, it is submitted, a means of establishing what is the true route of FP12, if necessary by the imposition of a presumption that one will prevail, in the case of conflict, over the other.

F 22 Since there was, under section 33 of the 1949 Act before amendment in 1968, no means by which a way could be *removed* from the map or particulars amended (as under section 53(3)(c)(iii) of the 1981 Act), it was important that there was a reliable way of resolving conflict so as to identify what the route actually was. Description in words being the more precise medium, it is submitted that Parliament should be taken to have intended the statement to prevail. It is highly improbable that Parliament intended
G thereafter to reverse the precedence between the map and the statement.

C 23 The claimant argues that in any event the words of section 56(1)(e) of the 1981 Act provide the answer. If the statement purports to contain particulars of the footpath, then those particulars must prevail since “any particulars contained in the statement as to the position . . . thereof shall be conclusive”. The statement does purport to contain particulars of FP12. It says so. It matters not, the claimant submits, whether the way shown on the
H map is in conflict with the terms of the statement as to the footpath’s position provided that the map and statement identify the same footpath, as is the case with FP12. Once that requirement is satisfied the particulars in the statement prevail by reason of the terms of paragraph (e). The general in paragraph (a) yields to the particular in paragraph (e).

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24 This construction, so it is submitted, makes practical good sense. The map and statement must be read together: see *L E Walwin & Partners Ltd v West Sussex County Council* [1975] 3 All ER 604, 608J. It is not necessary to pore over the map, which may have been prepared on a small scale and without attention to detail, to see whether it describes the same route as the statement. In the *Walwin* case the map and statement when read together demonstrated that the right of way extended to the foreshore. It is necessary for the interested member of the public only to establish that the map in general shows a path which the statement purports to particularise.

Issue (1)—the defendant's case

25 It is the defendant's case that where irreconcilable conflict exists the map prevails. The map was prepared under a statutory duty (section 27(1) of the 1949 Act) to mark upon it any, and every, footpath which, in the opinion of the claimant, subsisted or was reasonably alleged to have subsisted on 11 November 1956. There was a duty (section 27(4)) to identify the relevant date in the definitive statement ("shall annex thereto a statement specifying the relevant date") but no duty, only a discretion, to include particulars of the position of any footpath ("as in the opinion of the authority it is expedient to record in the statement").

26 The primacy of the map was recognised by the words used in section 29(2) of the 1949 Act giving any owner of land "to which the draft map and statement relate" the right to identification and inspection of the "documents (if any) creating or modifying any of the rights of way shown on the *draft map*". Furthermore, the landowner would not have been entitled to challenge at quarter sessions a footpath described in the statement, only a footpath marked on the map, since section 31(1) applied to any owner of land shown on the map to which the notice of the provisional map related, "being land on which the *map* shows a public path . . ." Objection could be taken under section 31(1)(a)–(d) only in respect of a way shown on the map.

27 Mr Morshead argues that under section 56(1)(a) and (e) of the 1981 Act the particulars in the statement could only be conclusive evidence of that of which the map itself is conclusive, namely the position of the footpath "as shown on the map" and could not be conclusive of a footpath which was not shown on the map. In the case of a conflict between the two the particulars in the statement could not prevail since if they did, the condition upon which the conclusiveness of the statement depended (viz the conclusiveness of the map under paragraph (a)) would be deprived of effect.

28 The defendant does not agree that words of description provide a more precise form of identification than a map. They may or may not, depending upon the precision of the words used and the quality of the markings on the map. The claimed precision of words should not form any aid to construction of the section.

29 My attention was drawn to guidance issued by the minister on 17 February 1950 to county councils and others for the approach to the surveying task under sections 27 and 28 of the 1949 Act. Both parties relied upon it, the claimant to demonstrate the particularity with which the statement was concerned, and the defendant to demonstrate that the statement depended for its existence upon the identification of rights of way already shown on the map. The minister informed councils that the paper *Surveys and Maps of Public Rights of Way* published by the Commons,

A Open Spaces and Footpaths Preservation Society in collaboration with the Ramblers Association contained methods “approved as suitable for the purpose by the department”. It was advised that the map should be drawn and that the ways marked should be walked. Long paths should be divided and separately numbered. At para (h) of section 3 the pamphlet read:

B “The number of each path should be placed on the map as closely as possible to its starting point, this being clearly described at the beginning of the entry, referring to that path in the schedule.”

At para (j) it continued:

C “It is advisable to show on the maps with the appropriate symbol suggested in section 4 below, the position of every stile, gate, or other means of passage . . .”

The symbol for a field gate was “FG”. The commencement of FP12 from Back Lane was marked on the definitive map with “FG”.

30 At section 5, “The schedule”, the pamphlet advised:

D “This will accompany the maps and will form part of the survey. It will be the basis for the ‘statement’ which the Act requires that every surveying authority should prepare . . . Entries in the schedule should be concise but should contain all the detailed information about each path which cannot be conveniently recorded on the maps but is necessary for the purposes of the survey, or is likely to be helpful to the highway authority in respect of its duty to maintain all public paths.”

At para (b):

E “Entries in the schedule should be numbered to correspond with each path separately numbered on the map. Directly after the number give the symbol distinguishing the status of the path . . . and if considered helpful, the name of the path or its ultimate destination; *next describe its starting point* and then give concise information about such features occurring on the path, including symbols shown on the map, which require further explanation . . .” (Original emphasis.)

F 31 Mr Morshead submitted that the purpose of the guidance and of the statutory procedure was to create simplicity and clarity for ramblers and others who would not be expected to examine the minutiae of the statement. He relied upon the opinion of Lord Diplock expressed in *Suffolk County Council v Mason* [1979] AC 705, 715:

G “The way in which ramblers . . . are to be benefited is by providing them with an easy and conclusive way of proving their rights to walk . . . on particular routes.”

H 32 Thus, Mr Morshead submits, the map comes first and it is upon the map that the statement depends for any effect it may have. The correct approach to interpretation of the definitive map and statement is to examine them together and to decide whether, as a matter of fact and degree, the particulars in the statement can properly be regarded as describing the position of the footpath shown on the map. He tests this approach by posing the hypothetical question, what if the particulars purport to be describing FP12 but in fact describe the route along Chancery Lane between Strand and

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Holborn? It would be obvious that the statement was not doing what it purported to do and would have to be ignored. Whether the statement could be read consistently with the map would depend upon a number of factors but, unless it could be read consistently with the map, the map must prevail until new evidence permitted adjustment by modification order upheld, if necessary, by the inspector.

Issue (1)—conclusion

33 Having examined the terms of sections 29 and 31 of the 1949 Act, I consider that they are of limited assistance in a construction of section 32 and its modern equivalent, section 56 of the 1981 Act. Section 29(3) enabled the council, by its appointed person, to consider “any representation or objection . . . as to anything contained in or omitted from the *draft map*” who “shall determine what (if any) modification of the particulars contained in the *draft map and statement* appears . . . to be requisite in consequence thereof”.

34 Section 31(1)(c) enabled the applicant to quarter sessions to challenge the position of the public right of way “as indicated in the provisional *map and statement*”. Section 31(4) enabled quarter sessions, when declaring that it was not proved there was a public right of way over the applicant’s land as shown on the *map*, to make a further declaration in an appropriate case (where others interested had been given the opportunity to be heard), that there existed a right of way over other land and it was *that* “right of way which the surveying authority had in view when they showed on the map the disputed public path . . .” By subsection (5), where the landowner disputed the position or width of a right of way shown on the *map*, quarter sessions was empowered to make a declaration of the true position or width of the right of way “(being different both from that specified in the application and from that indicated in the provisional *map and statement*)”, provided that “every owner, lessee and occupier of any land which would be affected by the declaration” had an opportunity of appearing.

35 While it is right to say that qualification to make an application depended upon ownership of land shown on the map over which a right of way was marked, where there was a reasonable possibility of a finding either (1) that the right of way in fact existed over land owned by others, or (2) that the position of the right of way was other than that contained in the map or in the application, those interested should have been heard. Accordingly, the machinery existed for hearings to be held for the purpose of resolving the disputed route of FP12, at which both the owners of both the King William IV public house and the predecessors in title to the land now known as Bramborne House could have taken part. I find it distinctly unlikely that the owner of land over which a disputed public path was described in the statement would have been shut out simply because the map did not appear to show the same path.

36 I do not derive much assistance from the minister’s guidance since, it seems to me, the chances of error in the map, on the one hand, and the statement, on the other, were about equal. Neither one nor the other was more likely to be right in the absence of examination of features on the ground. Such an examination might or might not have been able to resolve the conflict. The fact the map was prepared first did not make it more likely

A that it was accurate and particulars in the statement inaccurate. All these considerations beg the question whether the map was to take precedence in the event of conflict.

37 I also agree with submissions made to me in writing in reply that while there was a statutory duty to prepare a map and a discretion what particulars, if any, to include in the statement, the fact the discretion was exercised itself demonstrates the importance which the surveying authority
B was attached to those particulars. In the *Walwin* case [1975] 3 All ER 604 the definitive map was inconclusive whether the path reached the foreshore while the statement was specific. The definitive statement (which was also consistent with the provisional map and statement) provided particulars missing from the map.

38 I am, however, persuaded that the correct approach to interpretation
C of the definitive map and statement must be a practical one. They should be examined together with a view to resolving the question whether they are truly in conflict or the statement can properly be read as describing the position of the right of way. If they are in conflict, then the map must take precedence since the discretionary particulars depend for their existence upon the conclusiveness of the obligatory map. Unless the statement can properly be interpreted as describing the same footpath as that shown on
D the map, then the statement cannot be regarded as conclusive evidence of the position of the footpath shown on the map. The question whether the statement does describe the position of a footpath shown on the map is, I accept, a matter of fact and degree. That the statement purports, by reference to the same footpath designation number, to specify the position of a footpath similarly designated on the map is some but, in my view,
E inconclusive evidence that it in fact does so.

39 Had it been my task to make a judgment whether the particulars of FP12 contained in the statement should properly be regarded as describing the same right of way as that depicted on the map, I would have regarded the argument that they did as at least respectable.

40 I reach this view after a consideration of section 31 of the 1949 Act.
F Section 31(1)(c) enabled a landowner to assert at quarter sessions that “the *position* . . . of that part of the land over which the public right of way subsisted . . . was as specified in the application, and not as indicated in the provisional map and statement” (my emphasis). Section 31(3) and (5) gave power to quarter sessions to refuse the application or to make a declaration that the *position* of the right of way was as stated in the application or, if different from that shown in the application and in the map and statement,
G the true *position* as proved by the evidence. However, section 31(5) required that before the latter declaration could be made, those interested in “any land which would be affected by the declaration” rather than simply “the land” should be given the opportunity to be heard. This requirement implies that Parliament recognised the possibility of an error in the “position” of the right of way marked on a map of such magnitude that the true position
H of the same right of way was in fact across land owned by a person other than the section 31 applicant. Since the purpose of the discretionary particulars was to provide detail and clarity as to the position of a right of way shown on the map, it seems to me probable that it was Parliament’s intention, by this means, to facilitate certainty where possible rather than to set up obstacles to certainty.

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41 During argument Mr Morshead accepted that if in a *Leicestershire County Council* situation (see paras 43 and 51 below) the map had a path immediately to one side of the boundary, while the statement described a way across the land immediately on the other side of the boundary (therefore in different occupation or ownership) the statement could reasonably be held to be describing the position of the footpath marked on the map. In my view, this was an appropriate concession. It seems to me the judgment whether the statement was describing the position of the footpath marked on the map need not require the precision of a slide-rule.

42 The measurement on the definitive map between points B and C is 1 to 2 millimetres, represented on the ground by a distance of 30 metres. It seems to me that this is within the tolerance permitting a conclusion that the statement was indeed providing particulars of the public right of way marked on the map. This is not, however, a judgment the inspector was called upon to make because the case was presented to her as one of conflict. As to the means of resolution of the issue what is the right of way in the absence of discovery of evidence, it is my view that the appropriate course would be an application for a declaration.

Issue (2)—authority

43 My attention was drawn to two first instance decisions: *R v Secretary of State for the Environment, Ex p Kent County Council* (1994) 93 LGR 322 and *R (Leicestershire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 171 (Admin). Neither was concerned with a conflict between the definitive map and its statement. Both were concerned with competing routes. In the *Kent County Council* case 93 LGR 322 it was common ground between those before the inspector that there was a right of way between points A and B on the map and also common ground that there was no right of way between points B and C. The county council was seeking to delete the whole length of the right of way between points A (B2067 road) and C (footpath FP AE588). At a first public inquiry the inspector proposed that route B–C be removed and B–D added so as to maintain a footpath from the B2067 road at point A to FP AE588 at point D via point B. At a second inquiry the evidence persuaded the inspector there was no public right of way between points B–D. He declined to delete any part of the footpath A–C on the grounds that, despite the common ground between the parties, section 56(1)(a) of the 1981 Act rendered conclusive the evidence of the map and statement. There was a public right of way but its route was uncertain. He could not use powers available under section 53(3)(c)(iii) to delete the whole length of the footpath. The council should consider using its powers under sections 118 and 119 of the Highways Act 1980, as amended, to stop up or divert highways.

44 The decision was criticised by the county council on the ground that “having decided that part of the line shown on the definitive map and statement did not represent a right of way and that the precise location of the original right of way was uncertain and unidentifiable the inspector should have confirmed” the deletion of the whole. Turner J found, at p 331:

“It seems inherently improbable that what was contemplated by section 53 was the deletion in its entirety of a footpath . . . of a kind

A mentioned in section 56 of the 1981 Act, the existence, but not the route, of which was never in doubt.”

45 The Secretary of State submitted that section 53(3)(c)(iii) could only be called into play where, on the evidence, it was shown that there was *no* right of way, not merely a question of its route over the ground. Had the inspector acceded to the order, part of a footpath known to exist would have
B been deleted. Turner J accepted the Secretary of State’s argument.

46 Mr Laurence argues that the *Kent County Council* case was wrongly decided. It was common ground that no right of way existed between points B and C. At the least the inspector should have exercised his power under section 53(3)(c)(iii) to delete the path between those points, since paragraph (iii) enabled the removal of *a* right of way over land shown on the map and statement, or the modification of any other particulars shown on the map
C and statement. I do not understand Mr Morshead to dispute that section 53 did in fact give the inspector power to delete part of the footpath provided he was satisfied it was “requisite in consequence of the occurrence” of the paragraph (iii) event. He explains the decision by reference to the position taken by the county council on the application for review. It was still seeking the removal of the whole footpath and, on any view, that would not have
D been appropriate. I agree.

47 Before turning to the *Leicestershire County Council* case I should consider the decision of the Court of Appeal in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 WLR 1264 upon the status of the definitive map. Again it should be noted that there was no conflict between the map and statement. The terms of the statement did not feature in Lord Phillips of Worth Matravers MR’s judgment. Information
E gathered during the survey prepared under section 27 of the National Parks and Access to the Countryside Act 1949 led a rural district council to record the existence of a bridleway 3 miles in length. The bridleway became bridleway 8 in the definitive map and statement. Later inquiries led the county council to believe that there was a public right of way but on foot, not on horseback. Eventually the inspector concluded that there was no
F right of way of any description along bridleway 8 save for a short stretch along a highway called Sawley Lodge Drive.

48 I need not rehearse the arguments for and against the inspector’s decision, which was upheld. What is relevant for present purposes are the observations of Lord Phillips MR upon the effect of the statutory scheme. Lord Phillips MR said, at para 38:

G “Where the . . . inspector . . . has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus
H that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult

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will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.”

49 Lord Phillips MR noted with approval, at para 39, that it was in consequence of the decision of the Court of Appeal in *R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354 that the Secretaries of State for the Environment and Wales issued guidance in Circulars 18/90 and 45/90 emphasising the importance of the definitive map as a source of evidence:

“The evidence needed to remove a public right from such an authoritative record, will need to be cogent. The procedures for identifying and recording public rights of way have, in successive legislation, been comprehensive and thorough. Whilst they do not preclude errors, particularly where recent research has uncovered previously unknown evidence, or where the review procedures have never been implemented, they would tend to suggest that it is unlikely that a large number of errors would have been perpetuated for up to 40 years, without being questioned earlier.”

50 It is notable that the inspector’s decision to remove the bridleway had the effect of creating culs-de-sac for footpaths which, before its removal, had joined it. None the less the court held that the inspector was entitled to reach the decision he did on the evidence.

51 In the *Leicestershire County Council* case [2003] EWHC 171 (Admin) it was common ground that there was a right of way along FP B19 to a main road. The issue was whether the right of way entered and crossed the land of Glebe Cottage or the land of Manor Cottage (which adjoined each other) to emerge on to that main road. The map showed the path traversing land within the curtilage of Glebe Cottage and the inspector declined to modify the map. There were no relevant particulars of the footpath in the statement. Collins J was considering an oral application for leave which was, if appropriate, to be treated as the substantive application after full argument. The application was dismissed. Collins J held that the burden of disproving the particulars on the map in favour of an alternative route was similar to that which applied to remove a footpath from the map altogether. He said, at para 28:

“If he [the inspector] is in doubt and if he is not persuaded that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive . . .”

Issue (2)—the claimant’s case

52 Mr Laurence submits that the presumption that the definitive map and statement are, when they are consistent, correct means that the statement of itself must be accorded weight. The conclusion in *Trevelyan’s* case [2001] 1 WLR 1264 that the statutory procedure under the 1949 Act gives rise to a presumption that evidence existed at the time the map was prepared, applies as much to the statement as it does to the map. Accordingly, where they are in conflict with one another and new evidence is

A being considered it is not permissible to start from the point that the map is correct unless outweighed by the extrinsic evidence.

53 There were three approaches which, it is submitted, the inspector could have adopted: (1) the statement should have prevailed as a matter of law (see issue (1) above); (2) in the event that neither the map nor the statement prevailed as a matter of law, the statement, by reason of its particularity, should have outweighed the map as a source of evidence; or
B (3) neither the statement nor the map gave rise to any presumption but the cogency of each should have been judged together with the relevant extrinsic evidence to decide which, if either, described the correct route.

54 The claimant's case is that the inspector fell into error by adopting none of these approaches. Instead, she started from the presumption that the map was correct and required cogent evidence to demonstrate that the map
C was wrong and the statement was correct. She should at least, it is submitted, have regarded the words used in the statement as some evidence of the existence of the order right of way. They were compiled under the same statutory scheme as the map and deserved the same careful consideration as the map. The reference in the statement to the precise position of the field gate appears to have been afforded no weight, when on
D any view, it must have been a detail which required close examination. In the absence of a presumption of law in favour of the statement as contended, the real test on the facts of this case was, in the light of the extrinsic evidence in support of the map and the statement respectively, which was, on a balance of probability, correct.

55 I was invited to pay regard to the opinion of Purchas LJ in *R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354, 380:

E “It would, in my judgment, be strange if the detailed and extensive provisions of section 53 were to be inhibited in important or material respects from achieving an accurate, up-to-date record. This would be particularly so if, notwithstanding the discovery of new evidence, an error which had been detected on the definitive map or in the statement would nevertheless be perpetuated.”

F *Issue (2)—the defendant's case*

56 Mr Morshead submitted that once the inspector was presented with a conflict between the map and the statement she had no alternative but to apply the *Trevelyan* presumption to the map. The statement had been put aside because it did not provide particulars of the way shown on the map.
G Therefore, it had no evidential status. The only inference which the statement could support was that an error in the preparation of the map and statement had occurred. It did not assist the judgment whether the error was in the map or the statement. By reason of the primacy of the definitive map, evidence on a balance of probability was required to displace it. That could be achieved by adducing evidence of the manner in which the error had occurred (of which there was none) or evidence that the only public right of
H way was that depicted in the order map (which was insufficient).

Issue (2)—conclusion

57 I have already accepted Mr Morshead's submission that, subject to modification, the definitive map must be regarded as authoritative. It does

not, in my view, follow that there must be a presumption in favour of the map at the expense of the statement during the process of review. It is necessary to consider the statutory provisions under which modification of the definitive map and statement is achieved.

58 By section 53(2)(b) and (3)(c) of the Wildlife and Countryside Act 1981 (see para 14 above) the surveying authority is required to make such order modifying the map and statement as appears to them requisite upon the discovery of evidence which (when considered with all other relevant evidence) shows that (i) a right of way not shown in the map and statement subsists or is reasonably alleged to subsist; or (ii) a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description; or (iii) there is no public right of way over land shown in the map and statement; or any other particulars contained in the map and statement require modification.

59 By subsection (4) the modifications which may be made under subsection (2) shall include the addition to the statement of particulars as to the position of any public path which is or is to be shown on the map.

60 Throughout the relevant sections of the Act the map and statement are treated as complementary. That is not surprising since the object of the surveying exercise under the 1949 Act was to achieve certainty and, therefore, compatibility. Save for the second qualifying clause of subsection (3)(c)(iii) ("or any . . . particulars contained in the map and statement require modification") section 53(3)(c) does not appear to contemplate any modification required in consequence of a conflict between the definitive map and its statement.

61 In the event that the order is opposed and a local inquiry held, the Secretary of State's inspector is required to make a judgment whether on a balance of probability each modification ordered should be confirmed. In *Todd v Secretary of State for the Environment, Food and Rural Affairs* [2004] 1 WLR 2471, Evans-Lombe J, in a wide-ranging and closely considered review held that the standard of proof to be applied by the inspector to the determination of the order modification was the civil standard. While the lower standard "reasonably alleged to subsist" was sufficient under section 53(3)(c)(i) to produce a modification order adding a public right of way, the local public inquiry is held to resolve the competing evidence. At that stage the inspector is deciding what will be entered in the definitive map as, under section 56, conclusive evidence. It cannot have been Parliament's intention to require a lower standard of proof to change the map in order to add a right of way (section 53(3)(c)(i)) than to change the map in order to delete a right of way (section 53(3)(c)(iii)). I find the reasoning (at pp 2493–2496) and the conclusion compelling.

62 In the usual case the inspector will commence with the *Trevelyan* evidential presumption that the map is correct. However, it is apparent that the Court of Appeal in *Trevelyan's* case [2001] 1 WLR 1264 did not have in mind the possibility of a conflict between the map and the statement when identifying and explaining the reasons for the presumption in favour of a public right of way shown on the map. The reason for the presumption is encapsulated in two sentences in the quotation from para 38 of Lord Phillips MR's judgment set out at para 48 above:

"If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map.

- A In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed.”

The very fact that the map and statement are in conflict tends to demonstrate that an error occurred in the preparation either of the map or the statement or possibly both. It does not seem to me that in circumstances such as these the factual assumption of regularity in the preparation of the map but irregularity in the preparation of the statement can be justified.

- B 63 I cannot agree with Mr Morshead’s argument that once the primacy of the map under section 56 is acknowledged the contents of the statement are of no value in a consideration of the evidence by the inspector; nor do I accept that in a case of conflict the *Trevelyan* presumption applies in favour of the map at the expense of the statement. It is important to distinguish between two forms of “presumption”. Section 56 renders the map
- C conclusive evidence. As Glidewell LJ observed in *R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354, 388–389:

- “There are two alternative ways in which the deletion and downgrading provisions in section 53(3) may be reconciled with the provisions of section 56. The first is that adopted by Taylor J in *Rubinstein v Secretary of State for the Environment* (1987) 57 P & CR
- D 111, namely by treating section 56 as pre-eminent and as limiting the operation of section 53(3). The alternative course is to interpret section 56 as not applying to the review process in section 53 at all so that the review starts from what is shown in the definitive map, but does not for its purposes treat the definitive map as conclusive. For all other purposes within the limits laid down by section 56(1) the definitive map is
- E conclusive. In particular it is conclusive evidence in any dispute that may arise between a landowner . . . and . . . [users] . . .”

Rubinstein v Secretary of State for the Environment 57 P & CR 111 was overruled by the court in *Burrows’s* case. The only presumption capable of applying at the review stage is thus the evidential presumption identified by the court in *Trevelyan’s* case.

- F 64 Where the map and statement conflict as to the position of a public right of way I can see no basis for the application of an evidential presumption in favour of one at the expense of the other. As Mr Laurence rightly observes, the fact-finder starts from the position that both the map and the statement were prepared following the correct procedures. Save perhaps in the case of demonstrably false particulars in the statement, the natural inference is that the surveying authority was at least attempting
- G conscientiously to record the position of the footpath shown on the map. What is required at review is, in my judgment, simply a consideration which (or which other) route, on a balance of probability, is correct, if any, in the light of all the relevant evidence, including the terms of the map and statement. The judgment being exercised in a case such as this is whether, under section 53(3)(c)(iii), any particulars in the map and statement require
- H modification unless it emerges that either a new footpath should be added or the footpath shown on the map, or part of it, should be deleted altogether. It may, by an examination of the documents together and an inspection on the ground, be a straightforward task to identify the mistake or inaccuracy in the preparation of the documents. It would be inappropriate in such an exercise to impose what would be an artificial presumption in favour of one

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document or the other simply because, until modification, it is treated as the primary document. For example, the precision of terms used in the statement may, by reference to features on the ground, provide a compelling case, subject to extrinsic evidence, that an error was made in the marking of the way on the map. On the other hand, the terms of the statement may be so at odds with natural features on the ground that it demonstrably cannot be relied upon for any purpose.

Issue (3)—the inspector's approach

65 At para 7 of her decision letter (see para 17 above) the inspector identified the issue with which she was faced as “whether the evidence discovered . . . when considered with all other relevant evidence available shows that, on the balance of probabilities, the definitive map and statement require modification . . .” This statement is, as it stands, an accurate representation of the issue before the inspector. However, at paras 9 and 10 the inspector introduced an evidential presumption in favour of the map. At para 9 she referred to Department of the Environment Circular 2/93, Annex B, the successor of Circular 18/90 approved by the court in *Trevelyan's* case [2001] 1 WLR 1264, and interpreted the effect of the circular as

“in the case of deletions the conclusive evidential effect of definitive maps and statements means that the evidence must show that no right of way existed at the relevant date of the definitive map on which the way was first shown.”

At para 10 she further interpreted her task as a consideration “whether there is cogent evidence to show on the balance of probabilities that the map is in error and the statement is correct”.

66 In her conclusions (see para 18 above) the inspector first posed the question whether “there is cogent evidence as to whether the map is incorrect”. While finding that there was no evidence of the path on any map other than the definitive map, no evidence of use and no physical path to be seen, the inspector also found there was no evidence of substance that there was no public right of way. She then concluded that the evidence in favour of the footpath as described in the order modification was “tenuous and undermined by the different lines shown by the parish council and others”. Finally, the inspector found that she could not “resolve the conflict between the map and statement” and could not, therefore, confirm the order.

67 Had there been a realistic possibility either that there was no public right of way between FP11 and Back Lane or that the position of FP12 was different from that shown both on the definitive map and the order map, the inspector was at liberty to make separate decisions under section 53(3)(c)(i) and (iii) and, subject to a further inquiry if necessary, to have proposed a different position altogether. However, as she wrote at para 10 of her decision letter, she regarded the paragraph (i) and paragraph (iii) considerations as interdependent and proceeded to make a choice between the definitive map and statement. When she did so she applied the *Trevelyan* evidential presumption in favour of the position shown on the map. In my judgment, for the reasons I have given in paras 57–64, the application of that presumption on the facts of this case was not warranted.

- A 68 I shall not leave this aspect of the claim without expressing my sympathy for the inspector's position. She was dealing with a factual situation which, in the experience of specialist counsel before me, was unique. It does not appear that she was invited, first, to consider whether the statement *could* be reconciled with the map; nor does she appear to have received submissions upon the existence or otherwise of an evidential presumption in favour of one document or the other. It is entirely understandable that the inspector should have proceeded as the issues were presented to her and that she believed the *Trevelyan* presumption applied to the map at the expense of the statement.
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Issue (4)—discretionary relief

- C 69 One of the factual issues of concern to the inspector was: if the commencement of FP12 was between the King William IV public house and the shop, what route did it take northwards from position Q? Did it, as the order modification delineated, proceed in a smooth north north-westerly direction, or did it take a dog leg to the west somewhere to the north of positions Q and R before proceeding northwards along the line C–A? The evidence was conflicting. Mr Morshead argues that since this was a principal and sustainable reason for the inspector's conclusion that she could not be satisfied on a balance of probabilities that a path existed along the line B–A, this court should not interfere. It was an issue of fact.
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- E 70 Mr Laurence counters that the inspector should not have rejected the order modification. The terms of the statement were sufficiently precise to have deserved weight. Had the inspector approached the statement in this way, and not commenced her examination with a presumption against it, it is at least arguable she would have been drawn to make a decision which of the competing routes to the north of position Q was correct on a balance of probability. Further, the inspector should not have rejected path A–B on the ground that part of it was unsubstantiated. The inspector had power under Schedule 15 to the 1981 Act, subject to a further public inquiry if necessary, to confirm that part of the order modification which was proved (adding a footpath along the line B–Q and deleting the footpath along the line C–R) and to reject that part of the order modification between points Q and A. Mr Morshead rejoined that the inspector does not appear to have been invited to consider such a proposal.
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- G 71 I recognise and propose to give full effect to the principle that the inspector's decision should not be disturbed unless it was reached upon an incorrect application of the law, or was irrational, and upon reconsideration the decision would arguably have been different: see *Simplex G E (Holdings) v Secretary of State for the Environment* (1988) 57 P & CR 306.

- H 72 I do not believe it is necessary to resolve the question whether the inspector should have exercised her wider powers under Schedule 15 to recommend confirmation with modifications because I have concluded that the application of the evidential presumption in favour of the definitive map and against the statement undermines the factual conclusions reached by the inspector. It is, I agree with Mr Morshead, entirely possible that the inspector's decision would have been the same had no such presumption been applied. The inspector went so far as to conclude that it had not been shown that the path A–B subsisted or was even reasonably alleged to exist. However, her decision upon the path A–B which, according to her approach

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was the only alternative candidate available, was reached upon application of a test that *cogent* evidence was required to displace an evidential presumption that path A–C was correct. It is hardly surprising that the inspector was influenced by inconsistencies in the evidence as to part of the route A–B to conclude that the presumption had not been displaced. It is not, in these circumstances, possible to conclude that upon fresh consideration the result would necessarily be the same. Unhindered by the presumption the inspector may have adopted a less sceptical approach to the task of ascertaining which was the probable route.

73 Thus, it is my judgment that: (1) For the purposes of section 56 of the Wildlife and Countryside Act 1981, the definitive map is the primary and source document. If the accompanying statement cannot be read as supplying particulars of the position of the footpath shown on the map then the position as shown on the map prevails over the position described in the statement. It is conclusive evidence unless and until review under section 53(2). As the absence of authority in this fertile area of litigation demonstrates, the number of occasions when the statement cannot be regarded as compatible with the map will be rare. The question whether they are in irreconcilable conflict is a matter of fact and degree. In reaching a conclusion whether the statement can be reconciled with the map, a degree of tolerance is permissible, depending upon the relative particularity and apparent accuracy with which each document is drawn. Extrinsic evidence is not relevant to this exercise save for a comparison between the documents and the situation on the ground at or about the “relevant date”. (2) At review, neither the map nor its accompanying statement is conclusive evidence of its contents. In the case of irreconcilable conflict between the map and the statement, there is no evidential presumption that the map is correct and the statement not correct. The conflict is evidence of error in the preparation of the map and statement which displaces the *Trevelyan* presumption. Each should be accorded the weight analysis of the documents themselves and the extrinsic evidence, including the situation on the ground at the relevant date, demonstrates is appropriate. (3) The inspector wrongly applied a presumption in favour of the map at the expense of its statement and failed to give any consideration to the merits, if any, in the particularity with which the terms of the statement were drawn. Had she approached the issues before her untroubled by an evidential presumption for the map and against the statement she might have concluded that the order modification was correct on a balance of probability. (4) Accordingly, the inspector’s decision must be quashed. I shall hear further submissions upon consequential relief.

*Claim allowed.
Leave to appeal refused.*

Solicitors: Solicitor, Norfolk County Council, Norwich; Solicitor to the Department for the Environment, Food and Rural Affairs.

Reported by THAMALA PERERA, Barrister

Appendix 10.8

***Trevelyan v Secretary of State for the
Environment, Transport and the Regions [2001]
1 W.L.R.1264***

Court of Appeal

A

***Trevelyan v Secretary of State for the Environment, Transport
and the Regions**

[2001] EWCA Civ 266

2001 Jan 30;
Feb 23

Lord Phillips of Worth Matravers MR, Simon Brown
and Longmore LJ

B

Highway—Right of way—Definitive map—Map showing bridleway—Landowner claiming right of way never existed and seeking deletion of bridleway from map—Power of inspector to confirm order for deletion—Whether evidence to justify inclusion of bridleway on map to be presumed—Standard of proof required to establish way marked on map by mistake—Wildlife and Countryside Act 1981 (c 69), s 53, Sch 15

C

Landowners across whose land a bridleway was shown on the definitive map applied to the county council under section 53(5) of the Wildlife and Countryside Act 1981¹ for deletion of part of the bridleway from the map on the ground that it had never been a right of way. The council considered that there was insufficient evidence of use by horse riders to justify its designation as a bridleway but sufficient evidence of use on foot for it to be included on the definitive map as a footpath and refused to make an order for deletion. The Secretary of State allowed an appeal by the landowners and directed the council to make an order deleting the relevant part of the bridleway from the map. The order was duly made but could not take effect until confirmed by the Secretary of State, who had to consider any objections or representations made. Objections having been made, the Secretary of State appointed an inspector to hold a local inquiry and decide whether the order should be confirmed with or without modifications. The inspector concluded that no right of way existed over the relevant part of the bridleway, and accordingly ordered its deletion with a minor modification. Further objections caused the holding of a further inquiry after which the inspector upheld his original decision. The judge dismissed an application by the applicant under paragraph 12 of Schedule 15 to the 1981 Act for the order to be quashed.

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On appeal by the applicant—

Held, dismissing the appeal, (1) that, where, in the course of an inquiry to consider objections or representations concerning a proposed order to modify the definitive map under section 53 of the 1981 Act, facts came to light which persuaded the inspector that the definitive map should depart from the proposed order, it was open to him under Schedule 15 to the Act to make an order modifying the proposed order accordingly, subject to any consequent representations and objections; and that the inspector had therefore had power to confirm the order deleting part of a bridleway subject to a modification substituting a footpath (post, pp 1273B–C, 1278D).

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(2) That, in considering whether a right of way marked on a definitive map did in fact exist, there was an initial presumption that it did and, in the absence of evidence to the contrary, it should be assumed that the proper procedures had been followed in compiling the map and thus that such evidence existed; that the standard of proof required to justify a finding that no right of way existed was no more than the balance of probabilities, but there had to be evidence of some substance to outweigh the initial presumption that the right of way existed; that the more time that elapsed the more difficult it would be to adduce positive evidence establishing that a right of way had been marked by mistake on the definitive map; and that, accordingly, since the

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¹ Wildlife and Countryside Act 1981, s 53: see post, p 1268D–H.
Sch 15: see post, pp 1271H–1272C.

- A inspector had correctly directed himself on the evidential effect of the definitive map and made a finding of fact which manifestly satisfied the test required to justify a finding that the bridleway in question had been marked on the map in error, he had been entitled to reach the decision that he did (post, pp 1276B–D, 1277D–E, 1278D).
Decision of Latham J affirmed.

B The following cases are referred to in the judgment of Lord Phillips of Worth Matravers MR:

R v National Assembly for Wales, Ex p Robinson (2000) 80 P & CR 348
R v Secretary of State for the Environment, Ex p Burrows [1991] 2 QB 354; [1990] 3 WLR 1070; [1990] 3 All ER 490, CA
R v Secretary of State for the Environment, Ex p Hood [1975] QB 891; [1975] 3 WLR 172; [1975] 3 All ER 243, CA
Rubinstein v Secretary of State for the Environment (1987) 57 P & CR 111

C The following additional cases were cited in argument:

Morgan v Hertfordshire County Council (1965) 63 LGR 456, CA
Parry v Secretary of State for the Environment (unreported) 8 June 1998, Sedley J
R v Secretary of State for the Environment, Ex p Billson [1999] QB 374; [1998] 3 WLR 1240; [1998] 2 All ER 587
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)

APPEAL from Latham J

- By a notice of appeal dated 12 April 2000 the applicant, John Trevelyan, suing on behalf of himself and all other members of the Ramblers Association, appealed with the leave of Laws LJ from the order of Latham J made on 24 January 2000 dismissing with costs his application dated 3 June 1999 for an order quashing the decision of the respondent, the Secretary of State for the Environment, Transport and the Regions, given by the inspector appointed by him for the purpose by letter dated 1 April 1999, whereby the Lancashire County Council (Definitive Map and Statement of Public Rights of Way) (Definitive Map Modification) (No 7) Order 1996 deleting part of bridleway no 8, Sawley, was confirmed. The grounds of appeal were: (1) in determining whether to make (or confirm) a definitive map modification order deleting a way from the definitive map pursuant to section 53(2)(b) and (3)(c)(iii) of the Wildlife and Countryside Act 1981 a surveying authority (or the Secretary of State or an inspector appointed by the Secretary of State) had to carry out an exercise in evaluating “relevant evidence”. That evidence included the evidence for the existence of the way afforded by its original inclusion on the definitive map. The judge erred in law in his approach to the manner in which the Secretary of State’s inspector carried out that exercise; (2) the approach which the judge ought to have adopted was (a) that the original inclusion of a way on the definitive map pursuant to section 27 of the National Parks and Access to the Countryside Act 1949 (the predecessor legislation to the 1981 Act) meant that the relevant surveying authority had to have been satisfied that a right of way as so shown subsisted, or at least was “reasonably alleged” to subsist, at the relevant date, and that accordingly there had to have been evidential material to support that allegation and to so satisfy the authority; (b) the onus was on the applicant for a definitive map modification order under section 53(2) and (3)(c)(iii) of the 1981 Act deleting the way to prove (if he

could) that there was not or could not have been such evidential material available at the time, and there was no onus on the objector to prove that there was such evidential material available at the time or what it was; (c) the mere absence at the time when the application to delete came to be considered of positive evidence of what evidential material was available at the time to support the allegation that the right of way subsisted at the relevant date did not rebut the inferences in (a) or warrant an inference that there was no or insufficient such material; (3) had the judge adopted that approach, he would have held that the decision under challenge could not stand because the inspector (a) failed to attach any weight at all to the fact of the original inclusion of the part of bridleway no 8 the subject of the modification order on the definitive map, the evidential significance of which inclusion was strengthened by the actions of Mr and Mrs Hindley and Mr Fernie (successively owners of the affected land during the definitive map preparation process) from which it was to be inferred (in the absence of evidence to the contrary, of which there was none before the inspector) that they too accepted the existence of a public right of way over it and had to have had evidential grounds for so doing, (b) did not ask himself whether the applicants for the order had discharged the onus of proving that there was or could have been no or no sufficient evidential material available at the time to support the allegation that at the relevant date bridleway rights (or rights on foot) subsisted over the part of bridleway no 8 or to entitle the surveying authority to conclude that allegation to be reasonably made, (c) did not find, and could not on the evidence before him have found, that the applicants for the order had discharged that onus, (d) none the less failed to consider the evidence against the background that there had been (albeit no longer available) additional evidential material for the existence of bridleway rights (or rights on foot) over the part of bridleway no 8 sufficient to satisfy the surveying authority that the allegation of their existence was reasonable, (e) wrongly left altogether out of account in evaluating the evidence for and against the existence of a public right of way over that part of bridleway no 8 (whether on foot and on horseback or on foot alone) the evidence for its existence afforded by its original inclusion on the definitive map and the inferences to be drawn from that coupled with the part played by the landowners in the definitive map preparation process; (4) the judge erred in law in adopting the approach that (a) no weight was to be given to the original inclusion of a way on the definitive map as evidence of its existence unless positive evidence was adduced of what evidential material was available at the time to support its inclusion and there was shown to have been significant probative material for that purpose, (b) there being no such positive evidence adduced before the inspector, the inspector was therefore entitled to give no weight to the inclusion of that part of bridleway no 8 on the definitive map (either of itself or coupled with the participation of the then owners of the affected land in the definitive map preparation process) as evidence of its status as a public highway, (c) the judge, like the inspector, thus mistakenly reversed the onus of proof; (5) the inspector's decision failed to explain or justify how the deletion claimed could stand with the retention of (i) the remainder of bridleway no 8 and/or (ii) footpaths 28 and 29; and the judge erred in law in failing to quash the decision on that additional basis.

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A The facts are stated in the judgment of Lord Phillips of Worth Matravers MR.

George Laurence QC and Rhodri Price Lewis for the applicant.
John Hobson QC for the Secretary of State.

Cur adv vult

B 23 February. The following judgments were handed down.

LORD PHILLIPS OF WORTH MATRAVERS MR

1 This is an appeal from the Queen's Bench Division, Crown Office List against the judgment of Latham J.

C 2 Some 20 years ago, for the benefit of those who enjoy walking in the countryside, the Lancashire County Council designated as a long distance footpath the Ribble Way, which follows the course of the river of that name. In so doing they followed rights of way depicted as such on the relevant definitive map. So long as a right of way is shown on that map, its existence is conclusively demonstrated. Legislation provides, however, a procedure that can lead to the deletion from a definitive map of rights of way that have been marked on it in error. Mr and Mrs Lord live in Sawley Lodge in the parish of Sawley and own the land around it. They bought their home in 1976. The Ribble Way passes through their land along bridleway 8. This proved unwelcome, for some who walked along this bridleway trespassed from it and committed acts of vandalism. Mr and Mrs Lord then discovered evidence which led them to conclude that bridleway 8 had been marked on the definitive map in error where there was, in fact, no right of way. In 1985 they began the appropriate procedure to get deleted from the definitive map that part of bridleway 8 which crossed their land. I shall describe this part from now on simply as "bridleway 8", although in due course I shall have to address the fact that it did not include the easternmost section of bridleway 8. The procedure that Mr and Mrs Lord put in train followed a course more tortuous and lengthy than the Ribble Way, but culminated in an order made by the respondent on 1 April 1999 deleting a large part of bridleway 8 from the definitive map. Mr Trevelyan, the appellant, was until recently the deputy director of the Ramblers Association. He appealed to Latham J to have the respondent's order quashed. That appeal failed. He now appeals to us with the permission of Laws LJ, who rightly took the view that the case raises a point of principle as to the correct approach to be adopted when considering whether a right of way should be deleted from the definitive map.

The facts

3 I shall adapt the clear statement of the relevant facts and statutory provisions set out by Latham J in his judgment, for these are not contentious.

H 4 The definitive map in question was published on 10 August 1973. It was prepared pursuant to the provisions of the National Parks and Access to Countryside Act 1949. Section 27 required the relevant authority, in this case Lancashire County Council, to survey land over which a right of way was alleged to subsist and to prepare a map showing such a right of way whenever in its opinion such a right of way subsisted, or was reasonably

alleged to have subsisted, at the relevant date. For the purposes of the present case, the relevant date was 22 September 1952. In order to carry out this duty, section 28 required the county council to consult with rural district councils. Section 29 then required a draft map to be prepared and advertised, and made provision for objections and determination by the county council of such objections. In the light of such objections, the county council was empowered to modify the map. A right was then given by section 29(5) for objections to any such modification to be dealt with by way of appeal to the Secretary of State, who was, in turn, empowered to hold a local inquiry under section 29(6). At the completion of that process, section 30 provided for the preparation of a provisional map; and section 31 entitled any person aggrieved to appeal to quarter sessions. By section 32, the county council was then obliged to prepare the definitive map. By section 32(4), designation of a right of way on such a map was deemed to be conclusive evidence that there was at the relevant date the right of way so designated. Section 33 required the county council to keep the definitive map under review, and provided for amendment by way of addition or modification but not deletion.

5 The relevant authorities were first given power to delete a right of way in limited circumstances by Schedule 3 to the Countryside Act 1968. The power to delete with which this appeal is concerned was however given by section 53 of the Wildlife and Countryside Act 1981, which provides:

“(2) As regards every definitive map and statement, the surveying authority shall—(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

“(3) The events referred to in subsection (2) are as follows . . . (c) 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 to which this Part applies; (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification . . .

“(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of application under this subsection.”

A 6 Schedules 14 and 15 to the 1981 Act make complicated provision for the procedures to be adopted in the event of any issues arising under section 53. By Schedule 14, an authority to whom any application is made for an order under section 53 is to investigate the matter and come to a determination. If the authority decides not to make an order, the applicant may appeal to the Secretary of State, who is to give such directions as appear
B to him necessary in the light of his decision on the appeal. By Schedule 15, where an authority has made an order, but there are objections, the order is to be submitted to the Secretary of State, who may appoint an inspector to hold an inquiry and to determine whether or not to confirm the order. In circumstances which I shall consider in greater detail in due course, it is open to the inspector to confirm an order with modifications. If the order is confirmed, but with modifications, and there are objections to the
C modifications, the Secretary of State is again required to hold a local inquiry or give the objectors an opportunity to be heard by an inspector before coming to a final decision. Paragraph 12 of the Schedule entitles any person aggrieved by the confirmation of an order on the grounds that it is outside the powers of section 53 or 54 to appeal to the High Court. This is the jurisdiction invoked in the present proceedings.

D 7 The right of way in question was not delineated on any maps before the coming into force of the 1949 Act. The survey of the relevant area for the purposes of that Act was carried out by Mr W Proctor, who was the Sawley parish representative on the Bowland Rural District Council, which was responsible for the survey on behalf of the Lancashire County Council. This was done between December 1950 and February 1951. Information
E supplied by Mr Proctor led the Bowland Rural District Council to record a right of way for those on foot or horseback running from the public highway in Sawley, along the drive leading to Sawley Lodge, and then across open fields, generally following the line of the River Ribble, through woods, eventually returning to the public highway. Its length was approximately three miles. It was identified on the definitive map as bridleway 8. The survey form delineating the route of the right of way did not include any
F explanation as to the nature of the evidence supporting the claim.

8 The land over which it ran had originally formed part of the Sawley Estate, which had, until 1949, been owned by Mr Fattorini. After his death it was split up. The land over which the western half of the claimed bridleway passed was purchased in August 1950 by Mr and Mrs Hindley. When, as a result of the survey, the county council produced the draft
C definitive map in 1953, including bridleway 8, Mr and Mrs Hindley objected to the map on two grounds. First they objected to the alignment of bridleway 8, on the grounds that it should have been shown running closer to the river; second, they objected to the inclusion of part of another bridleway, bridleway 20. These objections were accepted by the county council; and, eventually, the requisite amendments were duly recorded in 1965 in the notice given by the county council of proposed modifications to
H the draft definitive map.

9 In 1967 Mrs Fernie bought Sawley Lodge; and in 1970 Mr Fernie bought the remainder of the land which had been owned by Mr and Mrs Hindley across which part of the claimed bridleway ran. In July 1970 the provisional map was published, retaining the modification to

bridleway 8 to which I have already referred. Mr Fernie applied to quarter sessions under section 31(1) of the 1949 Act on the grounds that there was no public right of way along part of bridleway 8, and another bridleway, no 16. He also applied on the same grounds in relation to parts of two footpaths, numbered 11 and 17. He withdrew his objection in relation to bridleways 8 and 16; and the county council accepted that there was no right of way over the relevant parts of the two footpaths, which were deleted. The definitive map was accordingly published on 10 August 1973, including bridleway 8.

10 In 1976 Mr and Mrs Fernie sold the land to Mr and Mrs Lord. The latter became concerned about the bridleway when it was included on the first Ordnance Survey map published after the definitive map, in 1979. The use of the bridleway increased, with instances of trespass and vandalism. They complained to the county council in 1980. The county council, however, had in mind their plan for the Ribble Way, which, it was proposed, should include bridleway 8. It was concerned that walkers would be put at risk by the use of the bridleway by horse riders, and suggested that the right of way be downgraded to a footpath. Mr and Mrs Lord were not prepared to agree. None the less, they reluctantly accepted the positioning of Ribble Way signs along bridleway 8, on the understanding that that would be entirely without prejudice to their contention that no public right of way of any description existed along the route.

11 In 1985 Mr and Mrs Lord applied to the Lancashire County Council under section 53(5) of the 1981 Act for an order deleting bridleway 8 from the definitive map on the grounds that it had never been a right of way. The county council considered that there was insufficient evidence of use by horse riders to justify its designation as a bridleway, but that there was sufficient evidence of use on foot to justify it being included on the definitive map as a footpath. The applicants appealed to the Secretary of State for the Environment. Before the appeal was considered, Taylor J in *Rubinstein v Secretary of State for the Environment* (1987) 57 P & CR 111 held that, because of the conclusive nature of inclusion of a right of way on the definitive map as at the relevant date, section 53(3)(c)(iii) could only involve consideration of evidence relating to matters after the relevant date, for example the physical destruction of the land over which the right of way was said to exist. The Secretary of State accordingly dismissed Mr and Mrs Lord's appeal.

12 However, *Rubinstein's* case was overruled by the Court of Appeal in *R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354. The court held, in effect, that, if evidence came to light to show that a mistake had been made in drawing up the definitive map, then such a mistake could be corrected in either of the three ways envisaged in section 53(3)(c) of the 1981 Act. The objective of these provisions was to ensure that the definitive map provided as accurate a picture as possible of the relevant rights of way.

13 Mr and Mrs Lord were advised that they could submit a new application to delete bridleway 8, which they did. The county council, on considering the evidence, again concluded that a right of way existed, but that it was a right of way on foot and not on horseback. Mr and Mrs Lord exercised their right of appeal under Schedule 14 to the Secretary of State,

A who allowed the appeal on 21 December 1994 and directed the county council to make an order to delete bridleway 8 from the definitive map.

14 At this point complications ensued which it is unnecessary to recount. Suffice it to say that an order was made in due course by the county council which complied with the Secretary of State's direction. Under the relevant procedure, this order could not take effect until confirmed by the Secretary of State. Before confirmation, the Secretary of State had to consider any representations or objections duly made in relation to it. Objections were made and the Secretary of State exercised his statutory power to appoint an inspector to hold a local inquiry into the matter. This had the effect of delegating to the inspector the task of deciding whether or not the order should be confirmed, with or without modifications.

15 Despite the decision of the Secretary of State, the county council remained of the view that, while no bridleway existed, the evidence demonstrated that there was a right of way in the form of a footpath. Accordingly at the inquiry they urged the inspector to confirm the Secretary of State's order, subject to a modification that would replace the deleted bridleway with a footpath. The Ramblers Association objected to the order, contending that the bridleway was properly marked on the map and should not be deleted or modified. Alternatively, they supported the modification proposed by the county council. The South Pennine Packhorse Trails Trust also objected to the order on the ground that it could not be demonstrated that there had been any error in depicting bridleway 8 on the definitive map.

16 The inspector, after a seven-day inquiry, gave his first decision on 18 December 1997. In this he concluded that there was no right of way of any description along bridleway 8, save for a stretch from the public highway along Sawley Lodge Drive to the junction with another bridleway, bridleway 16. He therefore proposed to make the order with a modification so as to leave this short stretch of bridleway 8 on the map. This triggered the right to make further objections, which were considered at a further public inquiry, as a result of which the inspector upheld his original decision in a letter of 1 April 1999. Although the latter was the final order, against which the appellant applied to Latham J, the relevant reasoning was contained in the original decision letter of 18 December 1997.

The options open to the inspector and the decision that he reached

17 The order challenged before the inspector directed that bridleway 8 should be deleted from the definitive map. It was undoubtedly open to the inspector to confirm the order, or alternatively to decide that the order should not be confirmed. He was in doubt, however, as to whether it was open to him to accede to the submission of the county council that he should modify the order by substituting a footpath for bridleway 8.

18 The powers of the inspector were derived from Schedule 15 to the 1981 Act, which provides, in so far as relevant:

H "Opposed orders

"7(1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.

“(2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall either—(a) cause a local inquiry to be held; or . . .” A

“(3) On considering any representations or objections duly made and the report of the person appointed to hold the inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications.” B

“Restriction on power to confirm orders with modifications

“8(1) The Secretary of State shall not confirm an order with modifications so as—(a) to affect land not affected by the order; (b) not to show any way shown in the order or to show any way not so shown; or (c) to show as a highway of one description a way which is shown in the order as a highway of another description, except after complying with the requirements of sub-paragraph (2).” C

19 Sub-paragraph (2) makes provision for representations and objections to the proposed modification and a further public inquiry to consider these.

20 The inspector, acting on behalf of the Secretary of State, was rightly satisfied that he could and should act pursuant to paragraph 8(1)(b) in confirming the order subject to a modification which left on the definitive map the portion of bridleway 8 which followed the course of Sawley Lodge Drive. His doubts as to his power to make the modification proposed by the county council were expressed in the following passage of his decision letter: D

“The county council were, nevertheless, seeking to modify the order to show the order path as a footpath to the north of the junction with bridleway 16. Their justification for this was that the Secretary of State’s decision requiring the order to be made, with which they disagreed, was only part of the procedural process of Schedules 14 and 15 to the 1981 Act leading to the testing of all the available evidence both written and oral at a public inquiry. However, it does not seem to me that an order which, as written, quotes section 53(3)(c)(iii) and states ‘that there is no public right of way over land shown in the map and statement as a highway of any description’ and does not proceed with the alternative wording of the subsection can be modified to show a public right of way, other than for the retention of parts of bridleway 8. I regard this as fundamental in this case.” E

21 On behalf of Mr Trevelyan, Mr Laurence submitted that the inspector had erred in concluding that it was not open to him to confirm the order subject to a modification which substituted for bridleway 8 a footpath. He accepted that this could not be done under paragraph 8(1)(c) because there was no “way which is shown in the order” for which a footpath could be substituted. He argued, however, that the proposed modification fell within paragraph 8(1)(b) in that it showed a way not shown in the order. F

22 For the Secretary of State, Mr Hobson supported the conclusion of the inspector. He argued that to depict a footpath in place of bridleway 8, when the order directed that the bridleway should be deleted, could not be G