IN THE MATTER OF THE APPLICATION TO REGISTER

STOKE LODGE PARKLAND, BRISTOL, BS9 1BN

AS A TOWN OR VILLAGE GREEN.

FURTHER SUBMISSION BY THE APPLICANT DATED - 14th June 2015

PURSUANT TO THE DIRECTIONS OF THE INSPECTOR (dated 6th March 2015)

BASED ON THE SUPREME COURT JUDGEMENT

IN THE *NEWHAVEN* CASE – (dated 25th February 2015).

TOGETHER WITH

THE APPLICANTS RESPONSE TO THE FURTHER SUBMISSION

BY COTHAM ACADEMY (dated 28TH April 2015).

1a. INTRODUCTION AND SUMMARY

We submit that the Judgement in the *Newhaven* case has no relevance to our Town or Village Green (TVG) Application and in particular there is no incompatibility with Statutory Purpose should Stoke Lodge Parkland be registered as a TVG for the reasons set out below.

1.1. BACKGROUND

- 22nd May 2013: Inspector issued his Report and Recommendation that Stoke Lodge Parkland should be registered as a TVG.

- 26th March 2014: Inspector issued Further Directions confirming deferral of further consideration until the Supreme Court Judgement in the *Newhaven* case is issued. Inspector would then issue Further Directions.

- 25th Feb 2015: Supreme Court issued Judgement in the case of *R* (*Newhaven Port and Properties Limited) v East Sussex County Council and another* ***[2015] UKSC 7.*** (Copy attached as Appendix 1)

- 6th March 2015: Inspector issued Further Directions requesting further submissions from the Objectors based on the *Newhaven* Judgement; and subsequent further submissions from the Applicant.

1.2. THE BASIS OF THE *NEWHAVEN* APPEAL

The *Newhaven* Appeal was concerned with three issues. See clause **[24]** of the Judgement:

i. Can bathing on the foreshore be "as of right"?

ii. Is public use of the Beach at Newhaven, as part of the Harbour, "as of right" or "with permission" and hence "by right" in light of the Byelaws?

iii. Would registration of Land within the Harbour be incompatible with some other statutory function to which the land was to be put?

1.3. APPLICATION TO THIS CASE

The *Newhaven* Appeal was allowed by The Supreme Court based on the particular circumstances at Newhaven Port, a working Harbour. However the particular circumstances at Stoke Lodge Parkland are very different and we submit that: -

i. There is no foreshore (or equivalent) at Stoke Lodge Parkland and hence this issue is not relevant to the Application at Stoke Lodge Parkland and should be ignored; albeit that it was found that *"members of the public, and therefore inhabitants of the locality, used the Beach for bathing "as of right" and not "by right" ". See clause* **[51]** from the Judgement.

ii. The Supreme Court found in its Judgement that the Byelaws at Newhaven Harbour did contain an implied licence and use by the public was "with permission" and hence "by right" and not "as of right". See clause **[73]** of the Judgement.

However, there are no Byelaws at Stoke Lodge Parkland and it is agreed by all parties that use by the public is "without permission" and hence the findings in the

Newhaven case under this heading are not relevant to the Application at Stoke Lodge Parkland and should be ignored.

iii. Within the *Newhaven* Judgement there was reference to the revised Judgement in the *R (Barkas) v North Yorkshire Council* **[2014] UKSC 31** handed down by the Supreme Court on 21st May 2014.

Within our Inspector's Further Directions dated 6th March 2015, there was also reference to the same revised Judgement *(Barkas)* and its possible relevance to the Application at Stoke Lodge Parkland.

We contend that the revised judgement re *Barkas* clarifies the position that where land is held for the purpose of "free open public recreation", then public use is "with permission" and hence "by right" and not "as of right".

However, the Land at Stoke Lodge Parkland is not held for the purpose of "free open public recreation" (<u>not</u> disputed by the objectors) and hence this Judgement re *Barkas* is not relevant to the Application at Stoke Lodge Parkland and should be ignored.

iv. The Supreme Court found in its *Newhaven* Judgement, at clause **[94]**, that *"There is an incompatibility between the 2006 Act and statutory regime which confers harbour powers on the NPP to operate a working harbour……"*. However, the particular circumstances that support this Judgement are quite specific. See clauses **[94, 95, 96, & 97]** from the Judgement for a full explanation.

v. In summary we submit that the Judgement in the *Newhaven* case is based on the need for their site to continue to function as a working harbour, as their primary purpose, as established and enshrined in The Newhaven Harbour and Ouse Lower Navigation Act 1863 and the Newhaven Harbour Improvement Act 1878 (see Judgement clauses **[2-14]**).

These require them to maintain and preserve on an ongoing basis (from that date) the existing Built and Natural Infrastructure (including dredging of the sea bed and the foreshore, and maintenance and preservation of the existing quays and

breakwaters etc); all critical for the operation of the harbour i.e. to retain the existing status quo and comply with their statutory purpose to facilitate the safe passage of ships in and out of the harbour.

There is no such Act governing the provision of pitches at Stoke Lodge Parkland.

vi. **Even if** the provision of Playing Fields at Stoke Lodge is a Statutory Purpose - and we contend that it is not – it is certainly not in the way that Newhaven Port has a Statutory Purpose as a working harbour (i.e. totally dependent on the sea, the estuary, the river and the built infrastructure to enable safe passage and docking of shipping to facilitate every aspect of their *raison d'être*). **It is evident** that both Bristol City Council as the Education Authority and Cotham School (latterly as a self governing Academy assuming the role of the Education Authority) discharged that duty during the whole qualifying period with Stoke Lodge as it currently is. **This** was whilst sharing the Parkland with the Community engaged in lawful sports and pastimes, "as of right", for a period of over 20 years; all as found by the Inspector in his Report and Recommendation dated 22.05.15 hence confirming that no incompatibility exists.

vii. Critically, no vital infrastructure that requires maintenance and preservation exists at Stoke Lodge on the Land included within the TVG Application. Furthermore none is required to comply with the provision of Playing Fields. The existing Pavilion, which we have repeatedly agreed is not fit for purpose and requires refurbishment, is not included within the TVG Application Land and Cotham are free to carry out this work irrespective of the outcome of the TVG Application. This freedom to act applies equally to the maintenance workshop and garage although this structure appears to be in reasonable condition currently. The TVG Application relates only to the grassed areas shown in the plan included within the Application dated 4th March 2011 and further clarified in our letter dated 11th March 2013 and hence all fencing/walls whether owned by BCC or adjacent property owners are excluded from the Application. There is also a plot of land alongside Shirehampton road that has been excluded from the TVG (See Application dated 04.03.11, volume 1 of 3, tab 4, plan two, together with the letter of clarification to the Registration Authority dated 11.03.13). The House and grounds are also excluded

from the TVG Application and are also excluded from the 125 year Lease enjoyed by Cotham Academy.

Notably, 12 pitches exist at Stoke Lodge Parkland and the available land at Stoke Lodge Parkland is finite and no further pitches could be accommodated there. Furthermore, Cotham have never used more than three pitches throughout the whole qualifying period. (See the Inspectors Report and Recommendation dated 22.05.13 page 4, clause 14). Additionally, Cotham has its own Sports Hall at its main site and uses a range of other playing field and pitch providers. If Cotham require more than 12 pitches they must look elsewhere for the additional facilities.

viii. Any grounds maintenance can continue unimpeded, as it has for the past 68 years, as detailed in the 125 year Lease entered into by Cotham Academy setting out all their responsibilities and obligations; as it is done at *Redcar*, where grounds maintenance continues unimpeded whilst being registered as a TVG.

ix. <u>The Supreme Court did not consider any future development plans from Newhaven Ports and Properties (NPP).</u> See Clause **[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……".*

In support of the above, clause **[101]** confirms that; -

> *"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."*

We contend therefore that the Judgement is based on the existing circumstances at Newhaven and cannot be used to justify an unrelated objection based on future development plans (imagined or real).

x. We consider it pertinent to point out again that: -

a. Stoke Lodge Parkland is approximately 3 miles from Cotham Academy School buildings. Use of Stoke Lodge Parkland has evolved successfully and

harmoniously on a shared basis for over 68 years, which means that enclosure, and Community exclusion, is not necessary, unlike for the fields in the Cotham main site where adjacent school buildings might need protection.

b. Cotham Academy use was minimal during the qualifying period (see Inspector's report and recommendation dated 22.05.15).

c. Cotham Academy has sports provision at the school site including a new multi use Sports Hall.

d. Cotham Academy uses a range of other sports playing fields providers.

e. The amount of space to provide pitches at Stoke Lodge is finite and no further pitches can be accommodated. However, the number of pitches available is far more than the number required to meet the needs of Cotham Academy. (See the Inspectors Report and Recommendation dated 22.05.13 page 4, clause 14.)

f. Throughout the qualifying period (and before, since 1946/7) the Community have used Stoke Lodge Parkland engaging in lawful sports and pastimes, as of right, on a shared basis with the Formal Sports users, co-existing harmoniously, with no impediment to the schools or sports clubs. The survey of Community use conducted over 6 days in August 2010 (see our Application dated 4th March 2011, evidence tab 19 – Appendix 15) highlights 373 Community interviews of sub set of users in the period of the survey, which gives a projected annual usage of between 22,000 and 38,000. Because the survey was conducted outside term time then school use during this period was obviously zero.

1.4. ADDITIONAL PRECEDENTS CONFIRMED IN THE *NEWHAVEN* JUDGEMENT

Importantly, and with particular relevance to Stoke Lodge Parkland, and in support of the above arguments, the Judgement also sets out clear precedents and examples of where Statutory incompatibility cannot be used as a "catch all" to deny legitimate Town or Village Green Applications. See clauses **[98, 99, 100 & 101]** confirming that

the examples presented as evidence, at the *Newhaven* Appeal, by the respondents can be "*distinguished"* (differentiated) from the circumstances at Newhaven Harbour. Namely: -

a. *New Windsor Corporation v Mellor* [1975]. "*.....In recent times it had been used as a sports ground and more recently it was used as to (sic) half as a car park and half as a school playground. No question of statutory incompatibility arose".* (Emphasis added).

b. *Trap Grounds. "…….there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to statutory incompatibility." (Emphasis added).*

c. *Lewis v Redcar. "…..Again there was no question of any statutory incompatibility." (Emphasis added).*

We therefore submit that Stoke Lodge falls into this category of *"distinguished"* (differentiated) sites registered as Town or Village Green(s) particularly as per *Redcar* above.

1.5. INSPECTOR

Mr Petchey asks at the end of his Further Directions dated 6th March 2015 about whether there is any objection to him continuing to sit as an Inspector to consider the possible impact of the *Newhaven* Judgement and the Other Matters previously defined by the Inspector in his Further Directions dated 26th March 2014.

We agree with the comments made by Cotham in their submission dated 28th April 2015.

However, we disagree strongly with the assertions used by Bristol City Council in their submission dated 28th April 2015 on this matter.

Clearly the Objectors do not agree on this matter and our view should carry as much weight as the Objectors combined.

Mr Petchey is a recognised expert in this area of the Law and has a distinguished reputation for detail and thoroughness and applying the Law appropriately without fear or favour. To suggest that he may act outside his professional creed and ethics we find highly regrettable.

But more importantly the *Newhaven* Judgement is very complicated and technically specific. As one of the team of Barristers involved he is better acquainted with the legal issues than most to interpret the Judgement in relation to Stoke Lodge Parkland.

Additionally, the Objectors have already required the Registration Authority to accumulate a substantial bill in Inspector costs, paid for by the Council Tax payers of Bristol.

Bristol City Council, as an Objector, has also accumulated a very substantial legal debt for in-house lawyers and external lawyers paid for by the Council Tax payers of Bristol, based on their repeated objections to date. It would be quite irresponsible, especially in a period of austerity, to appoint a new Inspector to spend yet more unnecessary time and cost familiarising themselves with this lengthy case and all its correspondence. Once again all the costs would be paid for by the Council Tax payers of Bristol with no justifiable reason.

We therefore consider that, in view of the current Inspector's specialist knowledge and in the interest of common sense and cost, there should be no change in the Inspector at such an advanced stage in the proceedings.

1.6. SUMMARY

i. We contend that the Judgement in the *Newhaven* case is not relevant to the different circumstances at Stoke Lodge Parkland, and the Land included within the TVG Application, and should be ignored in this case. Registration of Stoke Lodge Parkland as a TVG in accordance with the 2006 Commons Act', based on shared use by the Community "as of right"' is not incompatible with continuing to provide the existing playing fields for Formal Sport at Stoke Lodge. As evidenced above.

ii. Importantly, the Inspector has already recommended registration of Stoke Lodge Parkland as a TVG based on evidenced significant and extensive ongoing Community use on the Land for in excess of 20 years (since 1947) engaged in lawful sports and pastimes, as of right. Throughout this period the Community has co-existed harmoniously with the Formal Sports users, have never impeded that use and wish that situation to continue, as per the *Redcar* case.

iii. We consider that it is the best interest of all parties that Mr Petchey be retained as the Inspector for the reasons set above.

iv. Further to our Introduction and summary above we set out in the table below our detailed response to the Further Submission from Cotham Academy dated 28th April 2015

1.7. ADDENDUM

We submit that there will be additional constraints on the objector's aspiration to excavate, level, or otherwise alter the sub-structure and boundaries deriving from the geological and topological nature of the site, which we have discussed later in this document.

	Legal Submission on Newhaven on behalf of Cotham School dated 28.04.15	**Response by the Applicant dated 14th June 2015** To the Legal Submission by Cotham Academy opposite
	SUBMISSIONS ON NEWHAVEN.	
1b	INTRODUCTION AND SUMMARY	Please see our Introduction and Summary above. We have set out above in section 1a why we consider that the *Newhaven* decision has no relevance to the circumstances at Stoke Lodge Parkland and should play no part in deciding the outcome of the Town or Village Green (TVG) Application at Stoke Lodge Parkland; save only where the Judgement confirms that no statutory conflict exists with regard to the cases submitted by the respondents at clauses **[98-101].** In support of our arguments contained below we refer to our Application and all our previous responses to objections raised, including those issued on: - i. Application dated 04.03.11 (3 volumes) ii. Responses (4 off) dated 30.01.2 iii. Responses (2 off) dated 31.03.12 iv. Response (1 off) dated 05.10.12 v. Response (1 off) dated 31.01.13 vi. Legal Statement dated 31.01.13 (included as part of v above) vii. Response (1 off) dated 10.03.13 viii. Response (1 off) dated 31.07.13 ix. Response (1 off) dated 26.08.13 x. Responses (4 off) dated 16.12.13 xi. Responses (3 off) dated 14.06.15 For ease of reference electronic copies of all our documents are

		available on our web site: - www.stokelodgetvg.co.uk
1.1	By further directions dated 6 March 2015 submissions were invited on the relevance of ***Newhaven***[1] to this application for the designation of the education playing fields at Stoke Lodge as a Town and Village Green (TVG). The decision was previously adjourned expressly to await the Supreme Court decision in this case because the Newhaven point was capable of being decisive against the application[2].	"*education playing fields"* is not an adequate description of the Land included within the TVG Application: It is only partly used by schools for sports education, and by Formal Sports clubs (booked and paid for) limited to the area contained within the 125 year Lease signed by Cotham, but more widely by the Community. This includes local residents and their children in lawful sports and pastimes, as of right, who use the whole of the Parkland including large areas outside the pitch areas including the arboretum. For evidence please refer to our survey of use contained within the Application, Volume 1 of 3, dated 4th March 2011 tab 19 Appendix XV, and the Statements contained within Volumes 2 & 3 of 3. But for the record the Inspector previously recommended registration as a TVG and then subsequently agreed to defer the decision pending the outcome of the *Newhaven* Appeal, but did express some doubt of its relevance. We still maintain that it is not *"decisive"* in our Application for the reasons set out in our Introduction and Summary in section 1a above (We return to this point in section 2.14 below).
1.2	In summary the principle of statutory incompatibility set out in ***Newhaven*** applies to this case and this means that the village green application should be refused. In those circumstances it can be refused as a matter of law without the need for an Inquiry being held. However if that submission is not upheld the proper course it is submitted is to hold an Inquiry.	We contend that this assertion by this Objector is flawed for the reasons set out in our Introduction and Summary in section 1a above. The incompatibility issue is a matter of law, not evidence; hence we do not see the benefit of holding an Inquiry on this issue. We do recognise that the Inspector has made his views known on holding

		a public inquiry re the sign in the Adult Learning Centre in his Further Directions dated 11th September 2013, 30th January 2014, 26th March 2014 and 6th March 2015.
2	**NEWHAVEN AND STATUTORY INCOMPATIBILITY.**	
	Principle	
2.1	In ***Newhaven*** the principle of statutory incompatibility was set out in this way in the leading judgment of Lord Neuberger PSC and Lord Hodge JSC[3]. *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. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in Bennion, Statutory Interpretation , 6th ed (2013), p 281:*	This extract from Clause [93] from the *Newhaven* Judgement needs to be read in conjunction with clauses [2-18], [93] and [94-97] to gain a fuller understanding of the determining facts on this matter in this case. These additional clauses explain in detail why the Supreme Court found in favour of the Appellant and denied the TVG application based on the special and particular circumstances at Newhaven. We contend that the circumstances at Stoke Lodge Parkland are significantly different from those at Newhaven and that the decision to deny the TVG at Newhaven cannot be applied at Stoke Lodge Parkland for the reasons given in Section 1a above. Furthermore clauses [98-101] confirm the precedent for Local Authority Land to be registered as a TVG and clause [101] states that: - *"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".*

	"Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."	
2.2	Lord Neuberger drew support from the historical position that both in English Law and Scots law the passage of time would not result in prescriptive acquisition against a public authority which acquired land for a specified purpose. He said the following. *"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 on would be incompatible with those purposes. That approach is also consistent with the Irish case, McEvoy v Great Northern Railway Co [1900] 2 IR 325 (Palles CB at pp 334–336), which proceeded on the basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription."*	For ease of reference the extract opposite is taken from clause [91] where Lord Neuberger gives this introduction and background to the Section of the Judgement headed; - "*Statutory incompatibility; statutory construction"* His words preceding the quotation opposite have been omitted; his actual words are: - *"As we have said, the rules of prescriptive acquisition apply by analogy because Parliament in legislating for the registration of town and village greens has chosen similar wording (including "as of right" in lawful sports and pastimes in the 1965 and 2006 Acts. It is, none the less…….prescription".* He went on to deliver the reasons for his decision in clauses [94-97]. Furthermore he then confirmed in clauses [98-101] that it can be lawful *"for land held by public bodies could be registered as town or village greens."* and clause [101] states that: - *"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". Accordingly we contend that the *Newhaven* Judgement is not applicable to our TVG Application for the reasons set out in Section 1a above.
	Application to this case.	
2.3	Applying this test to the facts of this case there are essentially 2 stages to consider. i) Firstly whether the land was acquired for a specified statutory purpose. ii) Secondly whether that purpose is incompatible with registration for a town or village green ("TVG").	We object to the wording of these statements because we contend that they are presumptive and misleading since it has not been established if the provision of playing fields at Stoke Lodge Parkland is a critical factor in any Statutory Purpose that Cotham Academy may have akin to that shown to exist at Newhaven as a working harbour. We maintain that it has not for the reasons set out in Section 1a above. Furthermore, even if Stoke Lodge Parkland is found to be a vital factor to a Strategic Purpose then that purpose has been discharged satisfactorily to date with the playing fields in their current state and importantly there are no buildings or infrastructure requiring ongoing maintenance on the Land contained within the TVG Application. Therefore Registration as a TVG will not create any incompatibility. Please refer to the *Newhaven* Judgement paragraph [101] : - *The ownership of land by a public body, such as a local authority, which has statutory powers that can apply in future to develop land, is not in itself sufficient to create a statutory incompatibility.*

2.4	The answer to the first question is that all of the land was either acquired or appropriated for the purpose of education. This is set out comprehensively in the first Report of Philip Petchey of 22 May 2013.[paragraphs 15-18 all the land is thereby covered]	We agree with the contents of the Inspector's Report dated 22.05.13. However, we refer to paragraphs [9- 27] of his Report to give a better appreciation of all the facts. We particularly refer to his paragraph 14 which sets out in detail the available pitches and the use by Cotham School during the qualifying period. We also refer to his sub note 6 under paragraph 14 on page 4; - *"I imagine that the fact that the site is distant from the school is one of the reasons why it is not used very much by the school;….."*
2.5	It is also clear that it has been used for educational purposes from these detailed paragraphs of the May 22 2013 Report.	We maintain that the Land at Stoke Lodge has been used for the past 68 years to provide playing fields for Formal sport whilst continuing to be used by the Community for lawful sports and pastimes, as of right for a period of over 20 years on a shared and harmonious basis as per the 2006 Act and as per *Redcar*. The use of the word "purposes" here is being used to build a twisted version of reality and a false premise.
2.6	The Academy was set up pursuant to a statute regime, akin to a statutory undertaker, and is obliged by a variety of means to use its assets for educational and ancillary purposes. Any reversion on the expiry or other termination of the lease would be back to the Council who would revert to holding it for the same statutory purpose of education.	The Academy was set up in September 2011 i.e. after the date of our TVG Application (4th March 2011) hence this fact is irrelevant to our Application. However it is interesting to note that the 125 year Lease signed by Cotham on 31st August 2011 was done so in the clear and certain knowledge that a TVG Application had been submitted 6 months earlier for Stoke Lodge Parkland. We must therefore construe that the Application did not prevent them from signing the Lease and it

		was not a matter of concern to them or their legal advisors. Even if the provision of "Education" to the children of Bristol by the Local Authority is found to be a Statutory Purpose, the provision of playing fields at Stoke Lodge cannot hold the same "Strategic" importance.
2.7	Thus there can be no doubt that the land has been held for the statutory purpose of education.	Please refer to paragraph 2.6 above. It is quite wrong to mix up the strategic Statutory Purpose of Education to all the children within Bristol with the tactical provision of playing fields when use is very low compared with capacity and alternatives are used.
	Incompatibility between statutory purpose of education/TVG Registration.	We contend that the heading should be; - **Is the provision of underused playing fields at Stoke Lodge a Statutory Purpose, as in the *Newhaven* Judgement? If so, does the registration of Stoke Lodge as a TVG create an incompatibility that puts their existing use as playing fields at risk?**
2.8	Lord Neuberger in ***Newhaven*** pithily summarised the effect of the Victorian Statutes which would take effect in the event of TVG registration. *95 The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation— section 12 of the Inclosure Act 1857 (20 & 21 Vict c 31)—or to encroach on or interfere*	This highlights the objectors concern that if TVG is granted they will be prevented from developing the Land in the future. We contend that Lord Neuberger in *Newhaven* summarised in paragraphs [94-97] the reason(s) why the particular circumstances at Newhaven did lead to an incompatibility; primarily emanating from the need to maintain and preserve existing structures and infrastructure.

	with the green— section 29 of the Commons Act 1876 (39 & 40 Vict c 56). See the Oxfordshire case [2006] 2 AC 674 , per Lord Hoffmann, at para 56.	There are no such structures or infrastructure at Stoke Lodge Parkland, and infrastructure such as the pavilion and workshop/tractor-store are not included within the TVG Application and hence the reasons for granting the Appeal at Newhaven do not apply at Stoke Lodge. In paragraph [96] Lord Neuberger confirms that they did not consider "*NPP's plans for the future"* and hence did not form part of the Judgement. Furthermore in paragraphs [98-101] Lord Neuberger confirms that the cases submitted by the Respondents can be distinguished (differentiated) from *Newhaven* and that there was "no question of statutory incompatibility." Importantly in paragraph [101] Lord Neuberger states that: - *"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…"*
2.9	Lord Neuberger then said that it was not necessary for the parties to lead evidence of future plans because it was a working harbour. Registration of the beach could impede use of the quay for vessels, prevent dredging the Harbour in a way that affected the Beach and may restrict the Port to alter the breakwater.[4] Thus future potential requirements of the Port would have been incompatible with TVG	We contend that the objector has presented a false and misleading conclusion to the words contained in the Judgement. The Breakwater is an <u>existing</u> structure that needs maintaining, preserving and adapting in a natural and changing environment, explaining the use of the word "alter". Hence future <u>new</u> development was not considered and forms no part of the

	registration which therefore prevented registration.	Judgement.
2.10	It was not an answer to this point that the Harbour and beach had operated successfully together in the past and so could post registration. The Supreme Court expressly distinguished ***R (Lewis) v Redcar and Cleveland Borough Council*** (No 2 [2010] 2AC 70 because in that case there was no suggestion of statutory incompatibility and it was not asserted that the council had acquired and held the land for any specific statutory purpose. Lord Neuberger said at paragraph 100 the following. *"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."*	We agree that: - "*It was not an answer to this point that the Harbour and beach had operated successfully together in the past and so could post registration."* However, it is important to explain why it failed, which was because registration under the Commons Act 2006 would prevent (by law) building works required for the maintenance and preservation of existing structures and infrastructure essential for the Statutory Purpose of Newhaven Port as a working harbour to continue. And not for the reason asserted by the Objector opposite.
2.11	That could not be more different from this case where it has been accepted that the land was acquired and held for educational purposes. In a case where land is acquired and held for a particular statutory purpose the question is whether the statutory purpose is	The argument in this case is whether registration as a TVG under the Commons Act 2006 would create an incompatibility at Stoke Lodge Parkland. We maintain that: - i. It has not been shown that the provision of playing fields, at

	impeded.	this remote site where use by Cotham is minimal in comparison with the capacity of pitches, has a Statutory Purpose as found within the *Newhaven* Judgement for a working harbour on the mouth of the river Ouse. ii. If the playing fields at Stoke Lodge do have a Statutory Purpose then that statutory purpose has been met over the past 20 years on a shared and harmonious basis with the Community engaging in lawful sports and pastimes, as of right, with the existing pitches, as per *Redcar*. So far no potential incompatibility with statutory purpose has been demonstrated. iii. The *Newhaven* Judgement with regard to incompatibility is based on the need for NPP Ltd to retain the ability to maintain and preserve its <u>existing</u> buildings and infrastructure. iv. There are no such buildings and infrastructure on the Land included within the TVG Application at Stoke Lodge Parkland. v. Hence registration would not create an incompatibility.
2.12	On the facts of this case the education purposes of the application site would clearly be impeded in a comparable way to ***Newhaven***. [see paragraph 96 Lord Neuberger.] The educational purpose would be impeded for example in the following ways.	We disagree with this assertion for the reasons set out below and included within our Introduction and Summary in section 1a above.

	i) TVG registration would prevent the school from stopping people coming on to the site when children's sport was occurring; this would create significant safeguarding issues for the school in ensuring the safety of the children in their care. Thus it would clearly impede the use of the sports facilities for educational purposes.	We contend that this matter has not been a problem for more than the past 20 years for Cotham and other schools, since 1947, and cannot see why that situation should change. Formal Sport has never been impeded and Community use has never been challenged. This suggestion by Cotham Academy is reverting to the original BCC Briefing Note of 2010, which BCC Cabinet had agreed would not be implemented. (For evidence see our Application dated 4th March 2011, vol 1 of 3, evidence tabs 10, 12 and 14). Additionally we refer to the letter from Charlotte Leslie MP, Member of Parliament for Bristol North West dated 30th July 2010 (copy attached as Appendix 8) where she states that; - *"…. There are two main reasons put forward by Council officers to support the fencing; To prevent dog mess on the playing field and for the safety of the Cotham School pupils.* *I believe both reasons to be red herrings. Having spoken to a cross section of local users, including sports users, it is clear that there is little dog mess – certainly no more than seen on The Downs' pitches. The solution would be helped by the provision of dog mess bins, which curiously the Council have refused to provide. (now provided by the Community).* *As regards to the general safety of the Cotham School pupils, there is of course a requirement to keep pupils safe. However, pupils are*

		only on site to play sports matches and are closely supervised by teachers. There is no need for the pupils to be "fenced in". *To use "health and safety" as a reason to spend £1m of taxpayers' money on fencing is ludicrous. David Cameron has made it quite clear that there has to be a sensible, pragmatic approach to health and safety laws and the growth of the compensation culture. ……"* Charlotte Leslie MP goes on to mention the announcement to be made by Cllr Clare Campion-Smith, Bristol City Council Executive Cabinet Member for Education at the forthcoming Neighbourhood Partnership Meeting on 15th September 2010. As we have evidenced previously in our Application dated 4th March 2011 (evidence tab 14 Appendix X) Cllr Clare Campion-Smith did confirm at that meeting, on behalf of the whole Cabinet, *"that no fencing would be erected".* We maintain that the situation at present does not "create significant safeguarding issues for the school" as there is no evidence to support this assertion and no anecdotal chatter. Furthermore Cotham have a very lengthy and detailed Safeguarding policy to manage the situation, available on their web site for inspection, together with numerous procedure notes. Indeed we have repeatedly confirmed that the Community welcomes the Formal sports users. Additionally we refer to all the public open space throughout the City where this style of shared use is not questioned.

	ii) TVG registration would prevent levelling and drainage works that would be beneficial for educational purposes but could interrupt its use for exercise and recreation. For example the creation of a fenced synthetic surface may well be highly beneficial for educational use but the creation of this would interfere with use and enjoyment as a place for exercise and recreation. Thus TVG registration would impede the specific educational purpose for which the land has been acquired and held. Similarly drainage works required to improve the playing fields may well interrupt use for informal recreation but could well be necessary for formal games but not for informal dog walking.	The potential for the future development of new buildings and infrastructure was not considered by the Supreme Court in delivering their *Newhaven* Judgement It was excluded at clause [96] : - *"……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 have referred."* It was dismissed at clause [101] : - *"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 approach aligns with the way in which TVG Applications under the Commons Act 2006 are decided. The wish list in the section opposite of future developments has not been required for the past 20 years and should not be considered relevant to our TVG Application. For the record routine and regular maintenance of the pitches and the grasslands can and will continue as previously. In addition due to the geological and topological nature of the site,

		levelling for a synthetic surface would create enormous problems of drainage through the bedrock which is very near the surface (as in the Land immediately adjacent), and impact upon the specimen trees that all have TPOs.
	iii) There may be educational benefits of having a building on the TVG application site for the purposes education which would be prevented by TVG registration. The siting of the current building may be able to be improved and the TVG application would prevent that happening even if all the educational experts and planning authority and landowners were in favour. The TVG registration would certainly impede the Academy/Council from pursuing such projects for educational benefit on the land.	We refer to our answer in the above section (2.12 ii)) above. We contend that this assertion is hypothetical and pure speculation is irrelevant and should be ignored. Stoke Lodge is circa 3 miles remote from Cotham. The existing pavilion can be refurbished/rebuilt (subject to planning permission) in its current location i.e. outside the Land included within the TVG Application, or other land outside the TVG Application. The workshop and tractor store can be refurbished/rebuilt (subject to planning permission) in its current location i.e. outside the Land included within the TVG Application. There is a plot of land alongside Shirehampton Road contained within the Cotham lease but excluded from the TVG Application specifically for this purpose together with the provision of children's play facilities. For evidence see our Application dated 4th March 2011, tab 4, section 4 supplement, paragraph b) iv. There are additional playing fields within 250m of the pavilion at the University of Bristol, Coombe Dingle sports centre including all-

		weather pitches, used by many schools including Cotham.
2.13	Expectations and demands for educational sport and recreation for the School change over time and Registration would impede the pursuit of the purpose for which the land has been acquired and held. All this is apparent for these school playing fields without leading further evidence. It is not necessary for evidence to be led for this purpose just as it was not in ***Newhaven***. [para 96 of ***Newhaven***]	We refer to our answer in the above section (2.12 ii)) above. Furthermore we contend that Formal Sports use and Community use are not mutually exclusive as evidenced by the Inspector's Report and Recommendation dated 22nd May 2013.
2.14	Mr Petchey at paragraph 67 of his May 2013 report dealt with the statutory incompatibility point as the law was laid out by the Court of Appeal. Clearly now the position has been reversed by the Supreme Court so as he has carefully and fairly directed the issue needs to be reconsidered. One of the potential difficulties of this argument that was anticipated when the law was differently set out by the Court of Appeal was that the alleged assurances given as to the future availability of the land. However ***Newhaven*** has made it plain that the "question of incompatibility is one of statutory construction[5]". Thus even if such assurances were made they do not have a bearing on an exercise of statutory construction and that now does not prevent a successful statutory incompatibility argument.	We disagree with these assertions and refer not only to the comments by Mr Petchey in his report dated 22.05.13: - *[67] "Relying on the judgement of Ouseley J in R (Newhaven Port and Properties Limited) v East Sussex County Council, the City Council argue that registration of the application site as a town or village green would be incompatible with future development of the land which was foreseeable in accordance with the educational purposes for which it is held. Ouseley J's judgement in this respect in this respect was reversed on appeal and the Court of Appeal refused permission to appeal. Permission is now being sought to appeal to the Supreme Court on this point. As the law stands there is obviously no basis for the City Council's argument based on the incompatibility of registration with the exercise of its statutory powers. I think that it is appropriate to add that this would appear to be a difficult argument on the facts of this case in the light of the assurances that have been given to local people by the Council that the land will remain available for their use in future".* (emphasis

		added by the Applicant) but also to Mr Petchey's comments in his; - i. Further Directions dated 11 Sept 2013, page 5, under heading **Newhaven: -** *"The unsuccessful landowners in the Newhaven case have applied to the Supreme Court to appeal on (inter alia) the statutory incompatibility point. It is expected that the Supreme Court will decide whether or not to permit the appeal in the course of the forthcoming legal term.* *I do not think that I understand the factual basis for a "Newhaven" submission since the application site specifically excludes the part of the fields that have been proposed for new changing rooms and play equipment; but this, no doubt, could be made clear. It will be helpful to have the City Council's detailed submissions on this point in due course."* (emphasis added by the Applicant) ii. Further Directions dated 30.01.14 [1] *"... In my Further Directions dated 11 September 2013 I indicated that it might be appropriate to defer the matter pending the Supreme Court's consideration of this issue, and this remains my view. In my Report dated 22 May 2013 and Further Directions dated 11 September 2013 I did indeed express some doubt as to how (on the assumption that statutory incompatibility was a valid objection to registration), an argument on statutory compatibility might be formulated; but of course how it might be formulated is capable of being affected by what the Supreme Court say (if it upholds the*

		argument that statutory incompatibility is capable of being an objection to registration). (emphasis added by the Applicant) *[2] However having said that it might be appropriate to defer the matter depending on the Supreme Court's consideration of the issue does not mean necessarily that it* ***is*** *appropriate to do so. Although there may be an application for expedition in the Newhaven case, it may well not be heard for many months yet – possibly not until next year. It is not intrinsically desirable for the present case to be held up for so long.* *[3] As regards the Applicant, the position is that he and local people currently enjoy free access to the application site. Accordingly from his point of view, it seems to me that there is no particular need for urgency – even though I do recognise that, as a generality, he would wish that the matter to be resolved as soon as possible. Bristol City Council's position is clear, and I would imagine that the other objectors would be of the same mind as the City Council. However I cannot be certain of this and their line might be that they would prefer the matter to be further considered expeditiously (without of course being able to pray in aid the statutory incompatibility argument).* *[4] What I shall do accordingly is to indicate that I am minded to defer further consideration of this matter subject to any submissions to the contrary received by the Registration Authority within 15 days of the date of these further directions, namely* ***4 pm on Friday 14 February2014****……..."*

		It is clear from the above that Mr Petchey had a complete grasp of all the facts concerning the *Newhaven* appeal and that he had applied that knowledge appropriately to our TVG Application at Stoke Lodge Parkland. We maintain that i. The *Newhaven* Judgement is particular to the special circumstances at Newhaven with special reference to need to continue with the ongoing maintenance of existing buildings and infrastructure to fulfil their statutory purpose. ii. We contend that the circumstances relating to the provision of playing fields at Stoke Lodge Parkland are without a statutory purpose comparable to the circumstances within the harbour at Newhaven and are significantly different based on the fact that there are no buildings or infrastructure on the Land included within the TVG Application. iii. We contend that the comments made by Mr Petchey were well considered and accurate as he had the advantage of being part of the Legal Team acting on behalf of NPP Ltd and therefore having a better insight than most of the facts of the argument at *Newhaven* and Stoke Lodge Parkland. iv. We therefore maintain that the comments by Mr Petchey are still relevant.
2.15	Thus there would be clear statutory incompatibility in registering	We maintain that the *Newhaven* Judgement is not relevant to the

	this as a TVG which would impede the educational function that this land was acquired and held for. Accordingly the Registration Authority can and should refuse this application now without the need for an Inquiry.	circumstances at Stoke Lodge Parkland and our Application should be accepted and registered for the reasons set out above.
	OTHER MATTERS	
2.16	If however the Registration Authority does not accept this submission the School submit that it would be necessary to have an Inquiry to determine fairly the other issues.	Mr Petchey has already set out his thoughts on this matter in his Further Directions dated 11th September 2013, 30th January 2014 and notably 26th March 2014.
2.17	Mr Petchey asks at the end of his Further Directions dated 6 March 2015 about whether there is any objection to him continuing to sit as an Inspector. Cotham School does not object to Mr Petchey's on the basis of him being an advocate in ***Newhaven.*** However if he does feel he is not able to deal with this matter it would be better for him to step down now so that a new Inspector can be appointed to advise the Registration Authority.	Mr Petchey asks at the end of his Further Directions dated 6th March 2015 about whether there is any objection to him continuing to sit as an Inspector to consider the <u>possible</u> impact of the *Newhaven* Judgement and the Other Matters previously defined by the Inspector in his Further Directions dated 26th March 2014. We agree with the comments made by Cotham in their submission dated 28th April 2015. However, we disagree strongly with the assertions used by Bristol City Council in their submission dated 28th April 2015 on this matter. Clearly the Objectors do not agree on this matter and our view should carry as much weight as the Objectors <u>combined</u>. Mr Petchey is a recognised expert in this area of the Law and has a distinguished reputation for detail and thoroughness and

		applying the Law appropriately without fear or favour. To suggest that he may act outside his professional creed and ethics we find highly regrettable. But more importantly the *Newhaven* Judgement is very complicated and technically specific. As one of the team of Barristers involved he is better acquainted with the legal issues than most to interpret the Judgement in relation to Stoke Lodge Parkland. Additionally, the Objectors have already required the Registration Authority to accumulate a substantial bill in Inspector costs, paid for by the Council Tax payers of Bristol. Bristol City Council, as an Objector, has also accumulated a very substantial legal debt for in-house lawyers and external lawyers paid for by the Council Tax payers of Bristol, based on their repeated objections to date. It would be quite irresponsible, especially in a period of austerity, to appoint a new Inspector to spend yet more unnecessary time and cost familiarising themselves with this lengthy case and all its correspondence. Once again all the costs would be paid for by the Council Tax payers of Bristol with no justifiable reason. We therefore consider that, in view of the current Inspector's specialist knowledge and in the interest of common sense and cost, there should be no change in the Inspector at such an advanced stage in the proceedings.

2.18	**Richard Ground** 28 April 2015 **Cornerstone Barristers** 2-3 Gray's Inn Square London WC1R 5JH.	**Submitted by: -** *D Mayer* **David Mayer** **On behalf of** **Save Stoke Lodge Parkland** 14th June 2015