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 BRISTOL CITY COUNCIL (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 <u>be retained</u> 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 Bristol City Council 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.

| | **Further Submission by Bristol City Council** on 28th April 2015 | **Response by the Applicant on 14th June 2015** to the Further Submission issued by Bristol City Council opposite |
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| | IN THE MATTER OF SECTION 15 OF THE COMMONS ACT 2006<br>AND IN THE MATTER OF AN APPLICATION TO REGISTER<br>STOKE LODGE, BRISTOL, AS A TOWN OR VILLAGE GREEN | |
| | SUBMISSIONS ON BEHALF OF THE OBJECTOR,<br>BRISTOL CITY COUNCIL,<br>PURSUANT TO THE DIRECTIONS OF THE INSPECTOR | |
| | Introduction | Please refer to our Introduction and Summary included above in section 1a setting out why we contend that the decision to deny the TVG Application within the *Newhaven* Judgement is not relevant to our TVG Application at Stoke Lodge Parkland.<br><br>We have set out above in section 1a why we consider that the *Newhaven* case 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].**<br><br>In support of our arguments contained below we refer to our Application and all our previous responses to objections raised, including those issued on: -<br>i. Application dated 04.03.11 (3 volumes) |

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| | | ii. Responses (4 off) dated 30.01.2<br>iii. Responses (2 off) dated 31.03.12<br>iv. Response (1 off) dated 05.10.12<br>v. Response (1 off) dated 31.01.13<br>vi. Legal Statement dated 31.01.13 (included as part of v above)<br>vii. Response (1 off) dated 10.03.13<br>viii. Response (1 off) dated 31.07.13<br>ix. Response (1 off) dated 26.08.13<br>x. Responses (4 off) dated 16.12.13<br>xi. Responses (3 off) dated 14.06.15<br><br>For ease of reference electronic copies of all our documents are available on our web site: - www.stokelodgetvg.co.uk |
| 1b | The Inspector has directed that the any person interested may make submissions to him in respect of the application, specifically relating to:<br>(1) The decision of the Supreme Court in R (oao Newhaven Port and ] v. East Sussex County Council [2015] UKSC 7 ('Newhaven')<br>(2) The decision of the Supreme Court in R (oao Barkas) v. North Yorkshire County Council [2014] UKSC 31 ('Barkas')<br>(3) The position of the Inspector given his appearance as advocate in Newhaven. | Please refer to our Introduction and Summary included above in section 1a |
| 2 | Bristol City Council's stance is:<br><br>(1) The decision in Newhaven provides another (alternative) reason | We contend that: -<br><br>i. The decision in the *Newhaven* Judgement, issued by the Supreme Court on the 25th February 2015, is not relevant to |

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| | for refusing the application, the land being held for educational purposes that are inconsistent with the consequences of registration of the land as a TVG:<br><br>(2) Barkas is of no direct relevance to the application;<br><br>(3) The inspector should not further consider the application. | the TVG Application at Stoke Lodge for the reasons set out in our Introduction and Summary included above in section 1a.<br><br>ii. We agree with BCC that *Barkas* has no relevance for the reasons set out in our Introduction and Summary included above in section 1a.<br><br>iii. Mr Petchey should be retained as the Inspector for this TVG Application for the reasons set out in our Introduction and Summary included above in section 1a.<br><br>iv. Furthermore we do not think BCC should ask for a change because they are in opposition to the Inspector's First Recommendation. |
| | **Newhaven** | |
| 3 | The ratio of Newhaven is that section 15 of the Commons Act 2006 is to be found at para. [93]:<br><br>"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." | We contend that the full content of clause **[93] ,** as opposed to the extract opposite, clarifies that if an objection to a TVG Application, based on statutory incompatibility, is to succeed it must be based on the parallel needs (both required) to demonstrate an appropriate "Statutory Purpose" such as the working harbour at Newhaven; additionally that the constraints, imposed by a 2006 Commons Act Registration, would create an incompatibility to the existing delivery of the "Statutory Purpose", i.e. merely having a "Statutory Purpose" is not sufficient to defeat a TVG Application.<br><br>We maintain that the provision of playing fields at Stoke Lodge is not a Statutory Purpose à la *Newhaven.* |

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| | More broadly, the underlying principle is one of statutory construction: the Commons Act 2006 is to be interpreted so as not to permit the registration of TVG rights where land is during the relevant 20 year period held by the landowner pursuant to a particular statutory duty, and the performance of that statutory duty would be interfered with were the land to be subject to TVG rights. | We further contend that the detailed reasons for the Supreme Court accepting the Appeal on behalf of NPP with regard to incompatibility with Statutory Purpose at Newhaven are set out in paragraphs [94 – 97] none of which applies at Stoke Lodge.<br><br>Furthermore at paragraph [101] it states that: -<br><br>"*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.*"<br><br>Additionally at paragraphs [98 – 101] the Supreme Court set out cases where sites were far more closely aligned with Stoke Lodge, In particular *Redcar*: -<br><br>"…can be readily distinguished from this case."<br><br>We further maintain that: -<br><br>i. It has not been shown that the provision of playing fields, at this remote site where use by Cotham is minimal in comparison with the capacity of pitches, has a Statutory Purpose as defined within the *Newhaven* Judgement as existing with regard to the working harbour on the mouth of the river Ouse.<br><br>ii. If the playing fields at Stoke Lodge do have a Statutory Purpose then that statutory purpose has been met over the |

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| | | 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*.<br><br>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 existing buildings and infrastructure.<br><br>iv. There are no such buildings and infrastructure on the Land included within the TVG. Refer to our Introduction and Summary included above in section 1a paragraphs [vii and viii].<br><br>v. Hence registration would not create an incompatibility. |
| 4 | The leading judgment was given jointly by Lord Neuberger P and Lord Hodge, with whom Lady Hale DP, and Lord Sumption agreed. The discussion of the incompatibility principle is to be found in the leading judgment at paras. [75] to [102]. Lord Carnwath would have preferred not to have reached a decision, and appeared to favour a more nuanced application of section 15 in such circumstances (para. [139]). | We refer to our response in section 3 above |
| 5 | Applying the *ratio* to the present application, the following issues arise:<br><br>(1) Is the Council a 'statutory undertaker' for these purposes? | We maintain that BCC have: -<br><br>i. Failed to demonstrate the provision of playing fields at Stoke Lodge Parkland is a "Statutory Purpose" as found in the *Newhaven* case. |

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| | (2) If not, should the principle nonetheless apply to the Council?<br><br>(3) Does the Council have powers to acquire land compulsorily?<br><br>(4) Does the Council have powers to hold and use that land for defined statutory purposes?<br><br>(5) Would the rights acquired by user by the public under section 15 be incompatible with the continuing use of the land for those statutory purposes? | ii. Failed to demonstrate how or why registration as a TVG would create an incompatibility.<br><br>In stark contrast we contend that we have demonstrated that registration as a TVG would not create an incompatibility. Please refer to our Introduction and Summary included above in section 1a. |
| | **(1) <u>Is the Council a 'statutory undertaker' for these purposes?</u>** | |
| 6 | The term 'statutory undertaker' is a term referring to a person authorised by statute to provide services of public utility, often to do with transport or the provision of commodities. For example, section 262(1) Town and Country Planning Act 1990 provides:<br><br>"(1) Subject to the following provisions of this section, in this Act "statutory undertakers" means persons authorised by any enactment to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking or any undertaking for the supply | This argument of 'statutory undertaker' leads nowhere because BCC have failed to: -<br><br>Demonstrate that the provision of playing fields at Stoke Lodge is a vital "Statutory Purpose" as found in the *Newhaven* case.<br><br>Furthermore it is defeated by clause [101] of the *Newhaven* Judgement. (see section 3 above).<br><br>Additionally, we maintain that Stoke Lodge can be differentiated from the circumstances at Newhaven, as described in clauses [98-101] of the *Newhaven* Judgement, particularly as per *Redcar*. |

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| | of hydraulic power and a relevant airport operator (within the meaning of Part V of the Airports Act 1986)."<br><br>A local authority such as the Council is not a statutory undertaker within that narrow sense. | Importantly, any statutory purpose that may, or may not, exist has been met throughout the qualifying period and there are no grounds similar to *Newhaven* that would create an incompatibility should the TVG Application be registered. |
| | **(2) If not, should the principle nonetheless apply to the Council?** | |
| 7 | It should. The case that Newhaven decides relates to a statutory undertaking, but the principle that it applies is one of statutory construction by reason of statutory inconsistency between two statutory regimes (see para. [93] *ibid.*). There is no reason why that principle should not apply to a local authority, and reasons both of principle and logic, and derived from the judgment, which indicate that it should and does. | Please refer to our response in section 6 above.<br><br>Neither '*principle'* nor '*logic'* can equate the Stoke Lodge Parkland case to *Newhaven*; nor the function of BCC with regard to the circumstances at the Application site be equated to 'undertaker' as cited within the Act quoted opposite. |
| 8 | First, as with a statutory undertaker, a local authority is a creature of statute. It has only such powers and is subject to such duties as Parliament imposes or requires:<br><br>R v. Somerset CC ex p. Fewings [1995] 3 All ER 20 at 25a-c per Sir Thomas Bingham MR.<br><br>Although in Newhaven the harbour undertaker was subject to very | Please refer to our response in section 6 above.<br><br>Furthermore we do not accept the assertions contained within the last paragraph in the section opposite. We cannot rewrite the law to suit a flawed argument. |

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| | restricted geographical limitations by statute, and in that sense highly specific, a statutory undertaking need not be so limited. Indeed, before privatisation many national institutions were 'statutory undertakings', and their statutory duties derived historically from 'clauses' acts such as the Harbour Clauses Act 1847 that was relevant in Newhaven. What is required is that Parliament has imposed duties on a body of a specific nature. To the extent that a local authority is subject to such provisions, then the authority must consider whether the operation of section 15 is inconsistent with the exercise of those powers and duties. If it is, then Parliament did not intend section 15 to interfere with the exercise of those powers and duties, and the consequence (according to the majority in Newhaven) is that section 15 does not operate at all. | |
| 9 | Secondly, the discussion in the judgment extended to considering the position of local authorities under this principle, given that in three cases land held by local authorities was registered as a TVG (at paras. [98] – [101]). The point that distinguished those cases from Newhaven was not the mere fact that the landowner was a local authority (if it was, no doubt their Lordships would simply have said so) but that the particular purpose for which the land was held was not 'inconsistent' with registration:<br><br>"In our view, therefore, these cases do not assist the respondents. The | We contend that this argument is defeated by clause [101] (as mentioned by the objector):-<br><br>"*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.*"<br><br>Please refer also to all the allied reasons set out in our Introduction and Summary included in section 1a above. |

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| | 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." | |
| 10 | In none of the three cases discussed was the statutory inconsistency point argued, and the Court considered that in no case was the purpose for which the land held either a statutory purpose[1]. | We maintain that the *Newhaven* case was decided on the parallel points that: -<br><br>i. The harbour has a very precise and mandatory "Statutory Purpose" located within a highly defined location.<br><br>ii. Registration as a TVG would create an incompatibility because the Commons Act 2006 would prevent NPP Ltd from maintaining and preserving the <u>existing</u> built and natural infrastructure (quays and dredging etc).<br><br>iii. Importantly both are required to win the case<br><br>We contend that neither of the two points above exists at Stoke Lodge and no incompatibility would be created should the TVG Application be registered. |
| | **(3) <u>Does the Council have powers to acquire land compulsorily?</u>** | |
| 11 | This is a relevant matter insofar as the existence of a right to acquire | We contend that this argument leads nowhere as it does not relate |

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| | land compulsorily indicates that Parliament considered that the function it conferred on the body was sufficiently important that it was given the right to interfere with property rights on payment of compensation. The inference must be that Parliament would not have intend the ownership of land so acquired to interfered with by the informal creation of public and inconsistent rights under the Commons Act 2006. The issue here is whether Parliament conferred power on the authority so to act; not whether it exercised that power. | to the circumstances at Stoke Lodge Parkland which was purchased on the open market in 1946/7. Please refer to our response in sections 3 and 10 above and our Introduction and Summary included in section 1a above. |
| 12 | The land was acquired in part for educational purpose, and in part for housing purposes, in 1946 and 1947; by 1980 all of the application land was held for educational purposes (Report of Inspector dated 22nd. May 2013, paras. 15 - 18). The land acquired for educational purposes was acquired under the provisions of the Local Government Act 1933; as to the majority of the land initially acquired for housing purposes, it was acquired under the powers contained in the Housing Act 1944, and would have been appropriated as to part for education purposes under section 163 of the 1933 Act; and in 1980 as to the balance under section 122 Local Government Act 1972. The Although the acquisitions were by treaty, the Council at all material times had power to acquire the land compulsorily – see section 90(1) Education Act 1944.. | We contend that this argument leads nowhere. Please refer to our response in section 10 above and our Introduction and Summary included in section 1a above. |
| | **(4) Does the Council have powers to hold and use that land for** | |

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| | **defined statutory purposes?** | |
| 13 | The land has been held during the relevant 20 year period as a playing fields used by Cotham School; and as to part of the period at least pursuant to a Transfer of Control Agreement between Cotham School and the University of Bristol dated 1st. August 2009[2] | We contend that this argument leads nowhere. Please refer to our response in section 10 above and our Introduction and Summary included in section 1a above.<br><br>For the record: -<br><br>i. The playing fields at Stoke Lodge Parkland were initially used by Fairfield school until their relocation to a new site in circa 2002.<br><br>ii. Cotham School then used the playing fields as an LA school up until their registration as an Academy (i.e. self governing outside LA control) in September 2011.<br><br>iii. Coincidental with their Academy status Cotham signed a 125 year Lease on the playing surfaces part of the Parkland at Stoke Lodge on 31st August 2011.<br><br>iv. This Lease was entered into by Cotham in the clear and certain knowledge that a TVG Application had been submitted by us 6 months earlier.<br><br>v. We must therefore construe that the TVG Application did not prevent Cotham from signing the Lease and it was not a matter of concern to them or their legal advisors.<br><br>vi. These considerations also apply to Bristol City Council and |

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| | | their legal team.<br><br>vii. With regard to the role of the University of Bristol: -<br><br>a. The document referred to is a sub-contract agreement to cut the grass, mark out the pitches, erect the goals. Also to undertake bookings and collect fees from Formal Sports users.<br>b. UoB have no right of ownership they are merely a sub contractor employed by Cotham Academy as their grounds maintenance contractor.<br><br>Throughout the qualifying period the Community have engaged in lawful sports and pastimes on the whole of the Land described in the Application, as of right, on a shared and harmonious basis with the Schools and Formal Sport users, as per *Redcar.* |
| 14 | The City Council as an education authority has been subject to various statutory formulations of a duty to provide adequate recreational facilities in its schools for its pupils. The relevant provisions are:<br><br>Until 1996, section 53(1) Education Act 1944 (as amended);<br><br>Until 2006, section 508 Education Act 1996[3];<br><br>From 2006, sections 507A and 507B Education Act 1996. | We contend that this argument leads nowhere. Please refer to our response in section 10 above and our Introduction and Summary included in section 1a above.<br><br>Importantly Stoke Lodge is remote from Cotham Academy (and Fairfield previously) and provides a facility but not a Statutory Purpose. Recreational facilities need to be provided at the main school site, not 3 miles distant.<br><br>Furthermore Stoke Lodge Parkland has evolved over 68years of shared use as per *Redcar*. |

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| 15 | Being held for educational purposes, the land has at material times been held for the purposes set out in section 507A and 507B Education Act 19964, which provide:<br><br>"(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.<br><br>(2) For the purposes of subsection (1) a local authority may—<br><br>(a) establish, maintain and manage, or assist the establishment, maintenance and management of—<br><br>(i) camps, holiday classes, playing fields, play centres, and<br><br>(ii) other places, including playgrounds, gymnasiums and swimming baths not appropriated to any school or other educational institution,<br><br>at which facilities for recreation and social and physical training are available for persons receiving primary or secondary education; | We contend that this argument leads nowhere. Please refer to our response in section 3 & 10 above and our Introduction and Summary included in section 1a above.<br><br>Use of the playing fields by Cotham Academy is set out in detail in the Inspector's Report and Recommendation dated 22nd May 2013.<br><br>Clearly Cotham's use is minimal compared with the capacity available. |

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| | (b) organise games, expeditions and other activities for such persons; and<br>(c) defray, or contribute towards, the expenses of such games, expeditions and other activities.<br><br>(3) When making arrangements for the provision of facilities or the organisation of activities in the exercise of their powers under subsection (2), a local authority must, in particular, have regard to the expediency of co-operating with any voluntary societies or bodies whose objects include the provision of facilities or the organisation of activities of a similar character."<br><br>Section 507B contains analogous provisions relating to secondary education. | |
| 16 | The required specifications for playing fields were set out in the:<br><br>Education (School Premises) Regulations 1981<br><br>Education (School Premises) Regulations 1996;<br><br>Education (School Premises) Regulations 1999 and the | We contend that this argument leads nowhere. Please refer to our response in section 10 above and our Introduction and Summary included in section 1a above.<br><br>The number of pitches at Stoke Lodge is 12. This number cannot be increased within the Land available at Stoke Lodge. If Cotham require additional pitches they must be sourced from elsewhere.<br><br>However, the use by Cotham Academy of Stoke Lodge throughout |

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| | School Premises (England) Regulations 2012.<br><br>The 1999 Regulations substantially re-enacted the 1996 Regulations and can be taken as typical. The 1996 Regulations provided:<br><br>"24 Playing fields<br><br>(1) This regulation shall apply in the case of a school for pupils who have attained the age of 8 years (whether or not the school also has pupils who have not attained that age) other than a pupil referral unit.<br><br>(2) In the case of any school to which this regulation applies, team game playing fields shall be provided which satisfy the provisions specified in Schedule 2."<br><br>Schedule 2 to the 1999 Regulations is annexed to this submission. | the whole qualifying period is well quantified and is set out in great detail in the Inspector's Report and Recommendation dated 22nd May 2013, clause [14], page 4. i.e. *"Cotham School, on average, use three pitches for five hours a week……."*. That is a total of five hours per week with use limited to 3 of the 12 pitches available. Hence Cotham's use is minimal in relation to capacity.<br><br>See our response at the Annex Schedule 2. |
| 17 | It follows that the Council is obliged to hold the land for (*inter alia*[5]) these purposes; and it has in fact held the land for these purposes from, at the latest, 1980 (when the last 1.19 acres was appropriated to that purpose). | The purpose of the TVG Application is to ensure that the Land is preserved in perpetuity as playing fields for schools and Formal Sports users, co-existing harmoniously on a shared basis with the Community engaged in lawful sports and pastimes, as of right, as it has since 1947. As per *Redcar*. |

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| | | Ownership and use of the Land will not change as a result of registration as a TVG. |
| | **(5) Would the rights acquired by user by the public under section 15 be incompatible with the continuing use of the land for those statutory purposes?** | |
| 18 | It is two fundamental elements of the entitlement to use land as a TVG by local inhabitants that the relative use of the land by the landowner on the one hand and the inhabitants on the other is established as at the time that the TVG is established; and that any disputes between the parties as to use is to be resolved by mutual 'give and take''<br>See R v. Redcar & Cleveland BC oao Lewis [2010] 2 All ER 613 at [46] – [47] per Lord Walker; Lord Hope at [74]; Lord Brown at [100], [102]; Lord Kerr at [115].<br><br>The point is that the inhabitants' use because entrenched, and subject only to reasonable variation on the basis of *quid pro quo*. What additional usage the landowner needs he cannot require – he can only negotiate, and give something in return. | We reiterate that the Community has used the Land indulging in lawful sports and pastimes, as of right, throughout the qualifying period (and before, since 1947) whilst coexisting harmoniously with the Schools and Formal Sports users (booked and paid for).<br><br>This has never been a problem in the past and the Community do not want it to change for any reason. |
| 19 | That entitlement is inconsistent with the Council's obligation to utilise the land for education purposes if that obligation requires the Council | This argument is defeated by clause [101] of the *Newhaven* Judgement: - |

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| | to use the land in a manner that would infringe the established TVG rights of the local inhabitants. In Newhaven the Supreme Court held that such an inconsistency existed even though, as a matter of fact, there had been no inconsistency (or at least no evidence of it) during the relevant 20 year period. Lord Neuberger held at [96]:<br><br>"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."<br><br>His Lordship held that the registration of the land as a TVG would impede the use of the adjoining quay to moor vessels, but there was no suggestion that vessels had ever been impeded from mooring during the relevant 20 year period. It remained a *potential* conflict, which would arise if the harbour was ever to be put to a more intense use[6]. | "*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.*"<br><br>The clause opposite, [96] supports our Application because: -<br><br>i. It clarifies the tenet that registration at Newhaven would be incompatible because NPP Ltd would be prevented from maintaining and preserving their existing built and natural infrastructure.<br><br>ii. We have argued in our Introduction and Summary (section 1a above) that no such infrastructure exists on the Land included within the TVG Application at Stoke Lodge.<br><br>iii. We contend that this would have been observed and confirmed by the Inspector as part of his site inspection on 21st February 2013.<br><br>iv. Re the final paragraph opposite the conflict is not brought about by the presence of the Community; it is based on the fact (in law) that NPP Ltd would be prevented from carrying out necessary building works to retain the safe use of the existing infrastructure and hence fail to meet their Statutory Purpose if the TVG Application was successful. |

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| 20 | In the same manner, if the Council required more frequent use or intense use of the land for educational purposes, it could not be thought that Parliament intended the informal use of recreation on the land to preclude the exercise of and compliance with the Council's statutory duty. | The number of pitches at Stoke Lodge is 12. This number cannot be increased within the Land available at Stoke Lodge. If Cotham require additional pitches they must be sourced from elsewhere.<br><br>However, the use by Cotham Academy of Stoke Lodge throughout the whole qualifying period is well quantified and is set out in great detail in the Inspector's Report and Recommendation dated 22nd May 2013, clause [14], page 4. i.e. *"Cotham School, on average, use three pitches for five hours a week……."*. Hence Cotham's use is minimal in relation to capacity.<br><br>We contend that the objector has not demonstrated that use of the playing fields at Stoke Lodge is a statutory purpose and furthermore Community use has never impeded Formal Sports use to date and there is no reason to expect this to change. |
| 21 | Further, the effect of the registration of the land as a TVG would be to prevent any form of physical development on or alteration to the land, however trivial, including for example its fencing. – see Newhaven at [95]. If therefore as part of its statutory duty to provide educational facilities it was considered necessary to install an all-weather pitch[7]; or to provide fencing to catch rugby balls[8] or to protect the highway from cricket balls; to separate spectators from school children, or to provide ancillary buildings to contain mowers or equipment, or to build a gymnasium; none of these steps could be taken, however sensible or necessary. These are examples of appropriate, but | We contend that the arguments opposite are flawed and irrelevant and should be ignored because: -<br><br>i. The boundary fencing/ walls provided by adjacent property owners are excluded from the TVG Application. The boundary fencing/walls owned by BCC are also excluded from the TVG Application (as per the Cotham Lease) .<br><br>ii. Future development was not considered and does not form part of the *Newhaven* Judgement, See clauses [96]<br><br>iii. In support of clause [96], clause [101] of the *Newhaven* |

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| | (potentially) prohibited use. Indeed, the Applicant acknowledges that the Council, the school and the University would be committing a criminal offence were they to take any steps to alter the structure of the land, even if that alteration was a necessary step in the provision of necessary educational facilities at the premises. | Judgement sets down the Supreme Court's finding with regard to future development: -<br><br>"*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.*"<br><br>iv. Clauses [98 – 101] highlight where: -<br><br>*The County Council (the Respondent) 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 (Newhaven).*<br><br>*We maintain that the TVG Application at Stoke Lodge Parkland falls into this category for the reasons set out in our Introduction and Summary in section 1a above.*<br><br>v. If it is found that the provision of playing fields at Stoke Lodge Parkland is a "Statutory Purpose" (*à la Newhaven),* and we contend that it does not, then the LA and Cotham Academy met their statutory purpose with the pitches and the playing field in its current state, which would not change if the Land is registered as a TVG.<br><br>vi. We contend that protection from rugby balls and cricket balls has not been an issue since 1947 requiring special measures and is therefore not relevant to this TVG Application.<br><br>vii. We contend that separating school children from the |

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| | | Community by excluding the Community from all pitches whether they are in use or not has not been an issue since 1947 requiring special measures and furthermore was specifically rejected by the Bristol City Council Cabinet in 2010 as advised by the Cabinet Member for Children and Young People (including Education) Cllr Clare Campion Smith at the Neighbourhood Partnership Meeting on 15th September 2010. For evidence please refer to our TVG Application dated the 4th March 2011, evidence tab 14 – Appendix X.<br><br>viii. The existing pavilion and workshop and tractor store are excluded from the TVG Application and are therefore not subject to any building restriction as a result of the TVG Application.<br><br>ix. Cotham Academy already has a new multipurpose Sports Hall/Gymnasium at their main site. However there is a plot of land adjacent to Shirehampton Road specifically excluded from the TVG Application to provide Children's Play Facilities and other buildings as required so could provide an alternative site for a new pavilion etc.<br><br>x. 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. |
| 22 | The applicant's response to the initial objections of both the Council | The point at issue is whether or not TVG registration at Stoke Lodge Parkland would create an incompatibility with the existing |

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| | and the school make it plain that they wish to prevent any form of development on this land, and to preserve it as it is. It follows that, as in Newhaven, there is a potential inconsistency as between the restraint imposed by the Commons Act 2006 and the future carrying out of work under statutory obligation and powers. | playing fields contained within the Application Land, based on the *Newhaven* Judgement<br><br>We contend that it would not because the provision of playing fields at Stoke Lodge is not a "Statutory Purpose" as understood and established in the *Newhaven* case for the working harbour located on the mouth of the river Ouse, and even if it is found that it is a "Statutory Purpose" then; -<br><br>i. Any statutory purpose has been satisfied with the playing fields in their current state<br><br>ii. No existing built Infrastructure requiring ongoing maintenance and preservation within the TVG Application Land as per the *Newhaven* Judgement clauses [94 -97].<br><br>iii. Clause [101] clarifies that: -<br><br>"*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."*<br><br>iv. Clause [96] clarifies that the *Newhaven* Judgement is based on existing infrastructure and excludes any potential future development whether real or imagined.<br><br>v. Clauses [98 – 101] give examples of where sites with TVG registration can be "distinguished" (differentiated) from the Judgement at *Newhaven*, notably *Redcar*. |

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| 23 | The registration authority should therefore be advised that the application should be refused for this reason. | In stark contrast we maintain that, for the reasons set out above, the Inspector should re-confirm the recommendation set out in his Report and Recommendation dated 22nd May 2013 and the Registration Authority be advised to register Stoke Lodge Parkland as a TVG. |
| | **(6) Barkas** | |
| 24 | The Council does not make any further submissions based on Barkas. | We agree with BCC that *Barkas* has no relevance for the reasons set out in our Introduction and Summary included above in section 1a. |
| | **(7) The Inspector** | |
| 25 | The Council notes that the Inspector was junior counsel for the successful appellant in Newhaven. Whilst the Council welcomes the inspector's expertise, and consider that the role of advocate and judge can be properly adopted by an advocate in respect of the same issue at different times, that is not always the perception; and as regards the merits and outcome of this application, feelings may run high. it would be of concern that if the Inspector and consequently the registration authority were to accede to the Objectors' submissions the applicants were to consider that they had not been fairly treated; and equally it would be inappropriate for the Inspector to lean towards the applicants position in order to avoid such a perception. The prudent course would be for the Inspector to advise the authority to instruct | 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.<br><br>We agree with the comments made by Cotham in their submission dated 28th April 2015.<br><br>However, we disagree strongly with the assertions used by Bristol City Council in their submission dated 28th April 2015 on this matter.<br><br>Clearly the Objectors do not agree on this matter and our view |

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| | alternative counsel to continue with the inquiry. | should carry as much weight as the Objectors combined.<br><br>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.<br><br>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.<br><br>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.<br><br>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.<br><br>We therefore consider that, in view of the current Inspector's |

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| | | 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. |
| | 28th. April 2015<br><br>Leslie Blohm Q.C.<br>St. John's Chambers,<br>101 Victoria Street,<br>Bristol,<br>BS1 6PU | **Submitted by: -**<br><br>*D Mayer*<br>**David Mayer**<br>**On behalf of**<br>**Save Stoke Lodge Parkland**<br><br>14th June 2015 |
| | | |
| | | Please see Annexe below on pages 34 & 35 |

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Annexe

**SCHEDULE 2**

**PLAYING FIELDS**

**Regulation 24**

**1**

In this Schedule any reference to a school is a reference to a school to which regulation 24 applies.

**2**

(1) Subject to sub-paragraph (2), the grassed area of team game playing fields provided for any school shall be such that it can sustain the playing of team games thereon by pupils at the school for 7 hours a week during school terms.

(2) This paragraph shall not apply in relation to so much of team game playing fields as exceeds the minimum area specified in paragraph 3.

**3**

(1) The team game playing fields provided for any school shall be of a minimum total area determined (subject to sub-paragraph (2)) in accordance with the following Table by reference to the number of pupils at the school who have attained the age of 8 years and that area shall be the area specified opposite the entry in column (1) of the Table within which that number falls--

(a) in column (2) thereof, in the case of a school with pupils who have not attained the age of 11 years; and

(b) in column (3) thereof, in the case of any other school.

(2) Should the number of pupils at the school who have attained the age of 8 years exceed 1,950, the team game playing fields shall be of a minimum total area equal to the aggregate of--

(a) 70,000$m^2$, in the case of a school mentioned in sub-paragraph (1)(a), or 75,000$m^2$, in the case of any other school; and

(b) 5,000$m^2$ for each complete 150 by which the said number of pupils exceeds 1,801.

This schedule provides a planning guide that relates to a proposed school, still in the design stages, with integral sports provision and is not relevant to the playing fields at Stoke Lodge which has a finite area and a finite number of pitches.

There are 12 pitches at Stoke Lodge, that number cannot be increased.

Cotham use at Stoke lodge is limited to three pitches for a grand total of 5 hours per week. i.e. their use is minimal in relation to capacity.

TABLE
Minimum area of team game playing fields for schools

| | *Minimum total area in $m^2$* | |
|---|---|---|
| *(1)* *Total number of pupils who have attained the age of 8 years (entries to be construed inclusive of both numbers specified)* | *(2)* *Schools with pupils who have not attained the age of 11 years* | *(3)* *Other schools* |
| 100 or fewer | 2,500 | 5,000 |
| 101 to 200 | 5,000 | 10,000 |
| 201 to 300 | 10,000 | 15,000 |
| 301 to 400 | 15,000 | 20,000 |
| 401 to 500 | 20,000 | 25,000 |
| 501 to 600 | 25,000 | 30,000 |
| 601 to 750 | 30,000 | 35,000 |
| 751 to 900 | 35,000 | 40,000 |
| 901 to 1,050 | 40,000 | 45,000 |
| 1,051 to 1,200 | 45,000 | 50,000 |
| 1,201 to 1,350 | 50,000 | 55,000 |
| 1,351 to 1,500 | 55,000 | 60,000 |
| 1,501 to 1,650 | 60,000 | 65,000 |
| 1,651 to 1,800 | 65,000 | 70,000 |
| 1,801 to 1,950 | 70,000 | 75,000 |

(3) For the purposes of this paragraph any part of team game playing fields which has an all weather surface, (that is to say a hard porous surface, a synthetic surface or a polymeric surface) may be treated as if it were twice its actual area."