Claim No: CO/1208/2017

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

PLANNING COURT

B E T W E E N :

THE QUEEN

(on the application of COTHAM SCHOOL)

Claimant

-and –

BRISTOL CITY COUNCIL

Defendant

(1) DAVID MAYER

(2) BRISTOL UNIVERSITY

(3) ROCKLEAZE RANGERS FOOTBALL CLUB

Interested Parties

CLAIMANT'S SKELETON ARGUMENT

Hearing Date:	21-22 November 2017
Time Estimate:	1 1/2 days (excluding judgment)
Suggested Pre-reading:	Inspector's Report CB/2/101; Officer's Report to Committee CB/525; Minutes of PROW Committee, CB/2/197; Emails received by and sent by Chairman of the PROW Committee: CB/5/561, 566, 567, 570 and 573; Witness statements of Nathan Allen, Stephanie French, David Mayer and Councillor Abraham CB/301-328; Skeleton argument of Claimant, Defendant and 1st IP (up to 1 day).
References:	CB/x/x relates to the Core Bundle, then the tab and then the page, SB/x/x relates to the Supplementary Bundle then the tab and then the page.

INTRODUCTION AND MAIN ISSUES

1. The claim before the Court is an application for judicial review of the Defendant's decision of 12 December 2016 to register land at Stoke Lodge as a village green contrary to the advice of a barrister, Mr Philip Petchey ("the Inspector").

2. After an 8 day inquiry and 3 site visits the Inspector who is a specialist in village green law recommended that the site should not be registered as a town or village green. This was because there were at all times clear signs that the Inspector found, as a matter of fact, would have been seen by users of the land that made the use contentious. This was consistent with at least 18 of the applicant's witnesses having seen those signs.

3. The claim proceeds with the permission of Holgate J,[1] as amended with the permission of Fraser J,[2] who together gave permission on all grounds. The claim raises the following issues for determination:

   (i) Whether the Defendant erred in law by finding the land to have been use "as of right" (Ground 1);

   (ii) Whether the Defendant took into account an immaterial consideration (Ground 2(a));

   (iii) Whether the Defendant acted in breach of the rules of natural justice (Ground 2(b));

   (iv) Whether the Defendant failed to supply adequate reasons for departing from their Inspector's recommendation on contentious user (Ground 3);

[1] **[CB/1/93]**.

[2] **[CB/1/100.43]**.

(v) Whether the Defendant failed to supply adequate reasons for rejecting the Claimant's submission on implied license (Ground 4); and

(vi) Whether the Defendant erred in law by finding the principle of statutory incompatibility not engaged (Ground 5).

The Parties

4. The Claimant is an academy school established and maintained under the Academies Act 2010. The Claimant is a company limited by guarantee (Company No. 7732888). On 31 August 2011, the Defendant granted the Claimant a 125-year lease of land at Stoke Lodge playing fields, Shirehampton Road, Bristol ("the Land").

5. The Claimant School has around 1480 pupils some of whom have complex family arrangements making the need for safeguarding of pupils particularly important.[3]

6. In order to fulfil its statutory requirements to provide Physical Education ("PE"), the Claimant needs additional land because its school site has very restricted space.[4] The Land was used as its playing field. However, as the Claimant's head teacher explained to the Inquiry, following a risk assessment and consideration of safeguarding duties, the Claimant had to cease using the Land for PE without the Land being properly secured[5]. The Land is the only offsite land in which the School have an interest. The School currently uses Bristol University's playing fields at Coombe Dingle for PE. This is unsatisfactory for the School as the University's playing fields are expensive to use and the School does not have security of tenure. Indeed, the Claimant's head teacher explained to the Inquiry that if the village green application was successful "the school would be put in an

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[3] Paragraph 254 Inspector's report (IR) **[CB/2/147]**
[4] IR 261 **[CB/2/148]**
[5] IR 257 and 258 **[CB/2/148]**

incredibly difficult position given the cost of Coombe Dingle".[6] The Inspector accepted that if the village green application was successful "...registration will evidently prevent the School from using the land for physical education"[7].

7. The Defendant is the Commons Registration Authority responsible for the determination of applications to register land as a new town or village green pursuant to Part I of the Commons Act 2006.

<u>The Application</u>

8. On 7 March 2011 the First Interested Party, David Mayer, ('the Applicant') made an application on behalf of an unincorporated association, "Save Stoke Lodge Parkland", to register the Land as a new town or village green. The Applicant subsequently confirmed that the application was made by him.

9. The application attracted objections from the Claimant, the Defendant, in its capacity as landowner, the University of Bristol and Rockleaze Rangers Football Club.

10. In accordance with established practice, the Defendant instructed the Inspector, a specialist in the law of village greens, to consider the evidence and make a recommendation as to whether it should accede to the application or reject it.

11. A non-statutory local inquiry sat between 20-24 June, 27-28 June and 13 July 2016 at which the Claimant was represented by counsel. The Defendant as landowner was also represented by counsel and objected to the application. The Applicant represented himself.

12. On 14 October 2016, the Inspector produced a detailed report ("IR") **[CB/2/101-192]** which recommended that the application be dismissed on the basis that all of the statutory criteria had not been met.

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[6] IR 270 **[CB/2/150]**
[7] IR 451 **[CB/2/188]**

13. On 6 December 2016, a meeting was held with the local ward councillor, Councillor John Goulandris, the Applicant and a large number of local residents interested in his application.

14. Within an email dated 7 December 2016 sent at 19:47[8] to the Chairman of the Defendant's Public Rights of Way and Greens Committee ("the Committee"), Councillor Peter Abraham, from the Druid Fountain Neighbourhood Watch, it is explained that the meeting was attended by over 100 people and was convened to:

> *"…discuss the next steps in the campaign to have Stoke Lodge Playing Fields declared a Town or Village Green (TVG). The meeting was addressed by John Goulandris, our local Councillor, and David Mayer, the Chairman of the SSLP group. They explained clearly what action needs to be taken both immediately and, possible, in the coming weeks."*

The email continues:

> *"what is required within the next 24 hours, is for all those who wish to see the playing fields retained for the benefit of local residents to write to the Council."*

15. That suggestion generated a high level of correspondence with the Defendant Council, which has since been disclosed to the Claimant within these proceedings, but was not known to the Claimant at the time the Applicant's application was being determined.

16. Within that correspondence a recurring submission was made, concerning the adequacy of the signage and, in particular, the applicability of the decision of the Court of Appeal in ***Winterburn v Bennett*** [2016] EWCA Civ. 482. For example, in an email sent to Defendant on 7 December 2016 at 22:14, titled "PROW&GC 12th December – Stoke Lodge TVG"[9] it is said as follows:

> *"Signs – or rather lack thereof*
>
> *I understand that the inspector has recommended refusal of TVG status on the grounds of 'signs', citing a 'Winterburn' case in his*

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[8] **[CB/5/562].**
[9] **[CB/5/559].**

> *report. However, this is very different that the nature and use of Stoke Lodge land is completely different and the signs on Stoke Lodge would not be seen by almost all local users of the land."*

17. Similar emails were sent making the same point to Councillor Abraham, concerning the applicability of the ***Winterburn*** judgment. See for example: on 7 December 2016 at 16:53,[10] and 17:24[11] and on 8 December 2016 at 11:05.[12]

18. In response to these emails, the Chairman of the Committee, Councillor Peter Abraham, determining the Applicant's application, responded, assuring the sender that *"members will taken* [sic] *into account your views".*[13]

19. The Defendant Council did not pass this correspondence to the Claimant to comment, or mention that an entirely novel point, the applicability of ***Winterburn***, was now a live issue before the decision maker.

20. On 12 December 2016, the Inspector's recommendation was reported to the Committee together with a covering officer's report **[CB/4/525-536]**. The officer's report summarised the Inspector's recommendation that the application be rejected on the basis that public use of the Land was rendered contentious by suitably worded prohibitory signs until at least 1996. Accordingly, the application had failed to make out all the statutory criteria and should be rejected.

21. However, from the draft minutes **[CB/2/197-202]** received 2 February 2017, the Vice-Chairman of the Committee, Councillor Bolton, proposed that the recommendation be rejected. The motion was seconded by Councillor Kent. Three members were in favour and three were opposed, the Chairman exercised a casting vote in favour and

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[10] **[CB/5/566].**
[11] **[CB/5/561]**.
[12] **[CB/5/567].**
[13] See for example **[CB/5/573]**, an email sent by Councilor Abrahams on 7 December 2016 at 20:20.

therefore the Committee recommendation was rejected and the application approved. The reason given for rejecting the Inspector's recommendation on 'as of right' use was **[CB/2/202]**:

> *"(iv) Three members of the Committee considered that the facts in Winterburn v Bennett [2016] EWCA Civ 482 were not the same as the facts of this case. Unlike the car park in that case Stoke Lodge Playing Fields is a large piece of land (about 22 acres) and there were only three signs. The small number of signs on such a large site was not sufficient to make the use of the land contentious."*

22. On 13 December 2016 an email was sent to Councillor Abraham at 13:52[14] which thanked him, and Councillor Goulandris, *"for your contributions to the long running campaign to have Stoke Lodge Parkland saved for everyone"*. Furthermore, the sender expressed the view that *"we all hope that our emails and letters helped to inform them"*.

LEGAL FRAMEWORK

Statutes

23. In so far as is relevant, s.15 Commons Act 2006 ("the 2006 Act") presently provides as follows:

> *"**15 Registration of greens***
>
> *(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.*
>
> *(2) This subsection applies where–*
>
> *(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
>
> *(b) they continue to do so at the time of the application.*
>
> *(3) This subsection applies where–*

[14] **[CB/5/570]**.

> *(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
> *(b) they ceased to do so before the time of the application but after the commencement of this section; and*
>
> *(c) the application is made within [the relevant period]*

24. The procedural framework for the determination of applications under s.15 of the 2006 Act within administrative area of Bristol is set-out within the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (SI 2007/457). In particular, Regulation 9 provides as follows:

> ***"9 Information about disposal of applications, and procedure on rejection -***
>
> *(1) When the registration authority has disposed of an application and, if it has granted the application, has made the necessary registration, it must give written notice of the fact to—*
> *a. every concerned authority,*
> *b. the applicant, and*
> *c. every person whose address is known to the registration authority and who objected to the application.*
>
> *(2) Such notice must include, where the registration authority has granted the application, details of the registration, and, where it has rejected the application, the reasons for the rejection.*

Relevant legal principles

25. All the statutory criteria must be made out in order for an application to be successful. As Lord Bingham held in ***R(Beresford) v Sunderland City Council*** [2003] UKHL 60, [2004] 1 AC 889 at [2]:

> *"It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers*

must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met."

Use as of right

26. To be use "as of right" within the meaning of s.15 of the 2006 Act, use must be without force, secrecy or permission: ***R v Oxfordshire County Council, ex parte Sunningwell Parish Council*** [2000] 1 AC 335 per Lord Hoffmann at p.350.

27. Use "without force" means more than simply use without physical force, it means without protest on the part of the landowner. As Richards LJ explained in ***Winterburn v Bennett*** [2016] EWCA Civ. 482, [2017] 1 WLR 646 at [13]:

> *"The phrase "without force" carries rather more than its literal meaning. It is not enough for the person asserting the right to show that he has not used violence. He must show that his user was not contentious or allowed only under protest. This appeal is concerned with what constitutes protest on the part of the owner of the land for these purposes."*

28. Patten LJ held in ***Taylor v Betterment Properties (Weymouth) Limited*** [2012] EWCA Civ. 250, [2012] 2 P & CR 3 at [38] that:

> *"If the landowner displays his opposition to the use of his land by erecting a suitably worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable."*

29. Once a landowner has made his protest to the use of his land by local inhabitants clear via the erection of sufficient suitably worded signs, he is not obliged to take further steps to prevent public use maturing into legal rights. As Richards LJ held in ***Winterburn*** at [39]-[40]:

> *"39 In his skeleton argument, Mr Gaunt submitted that there was a power in the owner of the car park to stop the user "by the simple expedient of erecting a chain across the entrance to the car park, or objecting orally, or writing letters of objection, or*

threatening or commencing legal proceedings, but the owner conspicuously abstained from doing any of these." In the course of his oral submissions, Mr Gaunt suggested that, if one level of protest was insufficient to stop the unlawful parking, a more potent step should be taken, leading ultimately to the commencement and the prosecution of legal proceedings."

"40 In my judgment, there is no warrant in the authorities or in principle for requiring an owner of land to take these steps in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings."

Statutory incompatibility

30. In ***R(Newhaven Port & Properties Limited) v East Sussex County Council*** [2015] UKSC 7, [2015] AC 1547 the principle of statutory incompatibility was identified by Lord Neuberger PSC and Lord Hodge JSC in this way at [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.

31. Whilst noting that the law prescription is applied to the village greens by analogy only, 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, his Lordship commented:

> *"91. … 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."*

32. Accordingly, the Supreme Court found that registration of the land in question would conflict with the duties imposed upon it by Parliament and accordingly that the land had been wrongly registered.

33. ***Newhaven*** was considered in ***R(Lancashire County Council) v Secretary of State for Environment, Food and Rural Affairs*** [2016] EWHC 1238 (Admin.). Ouseley J held at [67] that land held under the Education Acts and Regulations made thereunder was land to which the Commons Act 2006 scheme did apply. Ouseley J held at [79]-[80] that the relevant question was "*can LCC carry out its educational functions if the public has the right to use Areas A-D for recreational purposes*" and found at [80]-[81] that:

> *"79. … There is a spectrum of statutory bodies and statutory duties in relation to land which could be impeded by public rights of access for recreation, and the duty to avoid damaging its surface on pain of criminal penalty. What is envisaged for a specific Act to be in conflict with the general Commons Act , and to override it by necessary implication, is that the statutory ownership of the land should bring specific statutory duties or functions in relation to that specific land which are prevented or*

hindered by its use for public recreation after registration. It is not enough that the duty could be performed on the land in question but could also be performed on other land, even if less conveniently. That does not essentially require evidence of the statutory body's intentions because it should be clear from the statutory function taken with the nature and location of the land in question. In Newhaven, the provision which governed it as a harbour authority showed that the land or beach in question could be required for harbour works including dredging and the construction of breakwaters for a working harbour with public obligations to fulfil. Public recreational access as of right would be incompatible with that function. The land in question was obviously significant to the future performance by the harbour authority of its duties."

"80. Here the loss of Areas A-D or A or B may be an inconvenience to varying degrees. But it cannot be said that the general educational functions of LCC required this specific land to be used for educational purposes. The land was not central or even significant to the performance of the general educational duties. It is not enough that, after registration, LCC could only use the land for a limited range of educational purposes, nor that it might have to look elsewhere for land. Its general statutory educational functions can still be undertaken even if no educational functions could be undertaken on this specific land compatibly with public recreational use. A closer relationship is required between the performance of the function and the use of the particular land before conflict with public recreational use can give rise to statutory incompatibility. That is going to be a hard test to satisfy for public bodies with general functions which do not specifically or in reality have to be performed on the land in question. In Newhaven, the importance of the beach to possible future needs of the harbour was obvious. This highlights the difference between a specific statutory function which requires the use of specific identifiable land, and a general statutory function which can be performed, more or less conveniently without the land in question."

34. The matter was reconsidered in ***R(NHS Property Services Ltd) v Surrey County Council*** [2016] EWHC 1715 (Admin.), [2016] 4 WLR 130. Gilbart J approach the question differently at [134]**:**

"134 I turn now to consider the relevant statutory powers in the instant case. I have set them out in an earlier passage of this judgement. It is clear that there was no general power in any of the relevant bodies to hold land. Land could only be acquired or held if done so for the purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of

> *providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No-one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use."*

35. It should be noted that the ***Lancashire*** and ***NHS*** cases were heard before the Court of Appeal on 4-5 October 2017, before Jackson, Lindblom and Thirwall LJJ. Judgment was reserved.

36. In the absence of a special Act regulating the use of the land, as was the case in ***Newhaven,*** the decision taker must consider the duties upon the landowner in relation to the application land. If the statutory duties of the landowner cannot be performed without the use of the application land without registration as a village green, or are severely hampered by the registration, statutory incompatibility arises and, as a matter of construction, the statutory scheme of registration of new greens does not apply.

37. In all three cases, the statutory construction exercise was considered at the point of registration and not at the point the application was made see: ***Newhaven*** at [96]-[97], ***Lancashire*** at [79]-[81] and ***NHS*** at [137]. There is a sound justification for that approach. As Lord Hoffmann held in ***Oxford City Council v Oxfordshire County Council*** [2006] UKHL 25, [2006] 2 AC 674 at [49] rights are only created on registration. Prior to registration there could be no statutory incompatibility, because a landowner would always be able to discharge the duties imposed by Parliament and evict trespassers who interfered with the discharge of those duties. It is only upon registration that the landowner would not be able to discharge those duties. That is because s.29 Commons Act 1876 and s.12 Inclosure Act 1857 create a wide ranging criminal liability for interference with the exercise of lawful sports and pastimes by local inhabitants on

registered greens. Furthermore, it would give rise to civil liability in the form of a private nuisance.

38. Dove J came to the same conclusion when the issue fell to be determined in ***Ramblers Association v SSEFRA*** [2017] EWHC 716 (Admin.) at [43]-[46], in the context of the dedication of a new public right of way under s.31 Highways Act 1980.

Duty to supply reasons for acceding to an application

39. The Defendant was under a common law duty to supply reasons for acceding to the application contrary to officer's advice, see: ***R(NHS Property Services Ltd) v Surrey County Council*** [2016] EWHC 1715 (Admin.), [2016] 4 WLR 130 per Gilbart J at [107]. The standard of reasoning will be that: *"the losing party knows why they lost and what the legal justification was for doing so"*,[15] in line with the *obiter* of Lord Brown in ***South Buckinghamshire District Council v Porter (No.2)*** [2004] UKHL 33, [2004] 1 WLR 1853 at [36]:

> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the*

[15] At [111].

> *court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."*

40. It should be noted that neither the duty to provide reasons, nor the standard of reasoning required to depart from an Inspector's recommendation to reject an application was disputed by the Appellant in the ***NHS*** case before the Court of Appeal.

<u>Duty to determine the application in accordance with the duty of fairness</u>

41. The Defendant was under an obligation to determine the Applicant's application in accordance with the duty of fairness.

42. In ***Broadview Energy Developments Limited v Secretary of State for Communities and Local Government*** [2016] EWCA Civ. 562, the Court of Appeal considered the particular obligations of a political decision maker to discharge the duty of fairness when determining a planning appeal. Whilst the judgment did not consider the determination of applications to register land as a village green, it is submitted the principles apply all the more readily.

43. Having considered the rules and guidance informing planning decisions made by a Minister, Longmore LJ (with whom Lewison and McCombe LLJ agreed) identified at [25], a *"fundamental principle of the common law which requires a decision-maker to listen to and take into account both sides of an argument, encapsulated in the Latin phrase "audi alteram partem""*.

44. Longmore LJ observed at [26] that a central facet of the principle is that "a decision maker must not entertain representations from one party without finding out what other parties have to say on the matter", nevertheless:

> *"… the principle has to be applied sensibly. If a party to an inquiry or an object seeks to bombard a minister with post-inquiry representations which are merely repetitive of the*

representations made at the inquiry itself and every time that happened the Minister was obliged to circulate the representations for comment, the decision-making process could easily be subverted. That is effectively what has happened in this case so far as the written correspondence and representations are concerned; he has merely made his decision in the light of all the evidence given and representations made to the inspector which were known to all the parties ...”

45. As such, it is fundamental component of the duty to act fairly that a decision taker hears both sides. Entertaining representations made by one party, without affording the other parties an opportunity to comment, is a breach of that duty. The Court will not enquire in such a situation whether the complainant was actually prejudiced, *“it was sufficient that he might have been”* see Longmore LJ in ***Broadview*** at [31], commenting on ***Kanda v Government of the Federation of Malaya*** [1962] AC 322 per Lord Denning at 337.

FACTUAL BACKGROUND

THE INSPECTOR’S REPORT

Overall conclusions

46. At the end of the IR, the Inspector reached the following conclusions **[CB/2/191]**:

“462 I recommend that the land be not registered as a town or village green because in the relevant twenty year period use by local people has not been as of right. Otherwise my recommendation would have been that the land should be registered. I do not think that any of the other reasons argued for by the objectors should lead to the rejection of the application.”

The Inspector’s treatment of whether the use was “as of right”

47. The Inspector started by recording the presence of three signs erected by the former Avon County Council during the qualifying period as follows:[16]

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

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[16] IR13 **[CB/2/104]**

> *In particular the exercising of dogs or horses, flying model aircraft parking vehicles or the use of motorcycles and the carrying on of any other activity which causes or permits nuisance or disturbance to the annoyance of persons lawfully using the playing field will render the offender liable to prosecution for an offence under section 40 of the Local Government (Miscellaneous Provisions) Act 1982. Requests for authorised use should be made to the Director of Education*
>
> *COUNTY OF AVON"*

48. He then recorded what each of the Applicant's witnesses said. In particular he recorded that 18 of their witnesses to the inquiry said that they saw the signs:

   (i) Professor Preece said "He was aware of the two Avon County Council signs..." [para 40] **[CB/2/110]**

   (ii) Korky Davey first noticed the signs in the "*late 80s or early 90s*". [para 56] **[CB/2/112-113]**

   (iii) Fiona Evans "*had a vague memory of seeing an Avon County Council sign when she was 8*" [para 68] **[CB/2/114]**

   (iv) Mr Elderton would sometimes use access 3. [para 84] **[CB/2/117-118]** This is where the Inspector found as a fact there had been a sign.

   (v) Stewart Mason "*was familiar with two signs*". [para 91] **[CB/2/119]**

   (vi) Brian McKenna spoke of "*a few old Avon County Council signs on the land."* [para 96] **[CB/2/120]**

   (vii) Andrew Shaw *"...could remember was a dilapidated sign near Stoke Lodge"*. [para 107] **[CB/2/122]**

   (viii) Malcom Davies *"was aware of a sign at access point [3]."* [para 114] **[CB/2/123]**

(ix) Peter Hobbs *"was conscious of the Avon sings going up many years ago"* and *"was aware of only two Avon County Council signs"*. [para 119] **[CB/2/123-124]**

(x) Mr Shinner "*was aware of two Avon County Council signs on the land...*". [para 123] **[CB/2/124]**

(xi) Mr Wright *"was aware of two Avon County Council sings on the land"*. [para 131] **[CB/2/126]**

(xii) Mr Bennett *"had seen the Avon County Council signs near access points [3] and [7]."* [para 136] **[CB/2/127]**

(xiii) Ms Macara *"recognised the Avon County Council signs."* [para 146] **[CB/2/129]**

(xiv) Mr Baker "*was aware of two Avon County Council signs ...*". [para 154] **[CB/2/131]**

(xv) Jonathan Wyatt had a visual impairment. [para 164] **[CB/2/132]**

(xvi) William Hayes *"believed that there were Avon County Council signs at two other entrances."* [para 173] **[CB/2/110]**

(xvii) Christopher Anderson *"did see one of the two Avon County Council signs... "*. [para 181] **[CB/2/135]**

(xviii) Gabrielle Huggins *"was aware of the Avon County Council signs near access points [3] and [7]."* [para 193] **[CB/2/137]**

(xix) Sharon Parsons *"recognised the Avon County Council signs near access points [3] and [7]."* [para 201] **[CB/2/138]**

49. The Inspector analysed the question of "as of right" at IR 361-412 **[CB/2/168-178]**. Having summarised the law, the Inspector found as follows:

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

50. The Inspector then applied the law to those finding of facts and concluded that the situation and wording of the signs rendered use recreational use contentious as follows **[CB/2/173-174]**:

"389. I consider that the three Avon County Council signs were at the time of their erection as a matter of fact sufficient to make the use of the land contentious. I bear in mind that no notices were erected at points [4] and [5]. However many people would necessarily have walked passed the signs at access points [1] and [3], and of course quite a few did. Moreover I have accepted that local people have gone all over the land. The corollary of this is that they would have seen one of the signs. I appreciate that not everyone may have "registered" the signs but given that there are of reasonable size and in prominent positions on the land that is not the fault of Avon County Council. I have note that of the evidence questionnaires submitted with the application, half referred to the existence of signs. I think that the other half will not generally be people who were not aware of the signs because the never saw them (because, for example, they used only access points [4] and [5]) but people who never "registered" the signs. Thus I think the reasonable landowner would have considered that he had done enough to render use contentious i.e. by posting notices at what he would perceive to be the principal entrances to the site. There was a suggestion that they may from time to time have been obscured by vegetation but as of my site visits they were clearly visible and there is no reason to think that they were not clearly visible at all times throughout the relevant period."

"390. The other point that I need to consider is the argument that the signs were obsolete following the abolition of Avon County Council. I think that there are two points here. First, I think that if someone comes across an old and decrepit sign saying "Trespassers Keep Out" he might from all the circumstances consider that it was of no continuing application. Second, although the fact that a sign says "Avon County Council" rather than "Bristol City Council" does not mean that the day after Bristol City Council takes over from Avon County Council the

notice ceases to have any effect, someone might well wonder, say, ten years after Avon County Council ceased to exist whether any particular sign that it had put up had continuing effect. These may be interesting points but it seems to me that the do not fall for determination in the present case. The two Avon County Council signs that are still in place, though clearly not new, are not decrepit; and the one that was at access point [12], although subject to some graffiti before it was removed, was similarly not decrepit as shown in the photograph dating from 2007. Further, at the beginning of the twenty year period, Avon County Council was still in existence."

"391. I thus conclude that signs which were sufficient to render use of the land contentious were in place at the beginning of the twenty year period (1991) and that such use was contentious until at least the time when Avon County Council ceased to exist 1996. This means that the Applicant has failed to establish that use was as of right throughout the relevant twenty year period and the application must fail/."

<u>The Inspector's treatment of statutory incompatibility</u>

51. The Inspector dealt with the issue of statutory incompatibility at IR 413-452 **[CB/2/178-188]**, directing himself at IR435 **[CB/2/184]** as follows:

"Developing this theme, it seems to me that if there is in practice nothing that is consistent with its statutory purposes that a statutory holder of land can do with that land if it subject to rights of recreation by the public, the principle of statutory incompatibility applies. If on the other hand, there is something that he can do with the land, the principle will not apply."

52. The Inspector next found that the date at which the analysis is carried out is the date on which the application was made, rather than the date at which it is determined at IR436 **[CB/2/185]** thus:

"In the absence of authority, I would have thought that the test is whether there is any such incompatibility at the date of the application. I appreciate that it could be argued that the test is whether it is reasonably foreseeable at the date of the application (or immediately before) that there might be statutory incompatibility; and also that the date for assessing incompatibility is the date the application falls to be determined, not when it is made. However the difficulty with the first

proposition is that it is always foreseeable that in some wise that the land might be used in a way that is incompatible with registration – in this case, for example, as a school. As regards the date for assessing incompatibility being the date of determination, this would appear to enable the local authority so to organise matters that there certainly is a statutory incompatibility at the relevant time, even though there was not at the date of the application90. My conclusion would accordingly be that. on the approach set out at paragraph 435 above, at the date of the application (7 March 2011) there was no incompatibility because the land was being used both by the school and by local people for lawful sports and pastimes."

53. The Inspector found in the alternative that, at the point of determination, there was also no incompatibility at IR445 **[CB/2/186-188]**:

> *"445. It seems to me that the approach of Gilbart J [in NHS] emphasises the basis of the principle as one of statutory construction95. I get the impression that he considered that it was simply a question of looking at the relevant statutory powers and duties and considering their compatibility with registration as they stand. If this be correct the date on which one examined statutory incompatibility would only matter if the statutory use changed after the application. In the present case it is true that the land has vested in an Academy since the application, but the nature of the powers and duties of the Academy are similar to those of Bristol City Council as education authority before it. Accordingly I do not think that applying his approach, a different conclusion is reached if one looks to the date of the determination of the application. It seems to me that if the Academy could demonstrate that they could not provide the physical education which they were required to provide without using the land in a way incompatible with recreational use by local people (ie by fencing it off), Ouseley J contemplates that the principle of statutory incompatibility might apply. At the moment of course they do provide such physical education (at the Combe Dingle Sports Complex). B4 says that the situation is unsustainable, pointing to the cost; and of course there can be no guarantee of the Combe Dingle facilities continuing to be available. I am not discounting that evidence if I say that although it seems to me that it is possible that the School might not be able to carry on with its current arrangements at Coombe Dingle, it is difficult to see that it would not be able to make some alternative arrangements if it became necessary. Narrowly, I think that the position as of now is that there is no statutory incompatibility as envisaged by Ouseley J [in Lancashire]; and it seems to me wrong in principle that future incompatibility might*

be sufficient to hold that the principle of statutory incompatibility applies in the present case."

…

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

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

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

...

451 Standing back, it seems to me that, if the correct time to look at the matter is the date of the application, the proposition that there is statutory incompatibility in the present case lacks conviction because at that time both the school and local people were using the land in a way that was not incompatible. If the correct time to look at the matter is now – i.e. the time at which a decision on the application falls to be made – I think it has some force because registration will evidently preclude the School from using the land for physical education. Accordingly, I think that the date at which the issue falls to be examined may be key to this issue. I consider that a Court would hold that the relevant

> *date is the date of the application and therefore, however the matter ultimately be rationalised, I think that the argument on statutory incompatibility would fail.*

GROUNDS OF CLAIM

<u>Ground 1: Error of law as to whether the use was "as of right"</u>

54. All the statutory requirements must be met see: ***Beresford*** per Lord Bingham at [2]. It is an express statutory requirement that the use of the land be "as of right", which is recreational use that is not contentious see: ***Sunningwell*** per Lord Hoffmann at p.350. The erection of suitably worded signs is capable of rendering use contentious see: ***Betterment*** per Pattern LJ at [38]. Even if the sign is not enforced, no further action is required on the part of the landowner to render use by trespassers contentious see: ***Winterburn*** per Richards LJ at [13].

55. The Defendant's draft minutes of the Committee meeting record that the Defendant accepted the Inspector's finding of fact that, between 1991-1996, there were three signs erected by Avon County Council which prohibited trespassers and served to render the use of the Land by members of the public contentious **[CB/2/197-202]**.

56. The qualifying period of use ran from 1991-2011. The Applicant therefore failed to establish 20 years of use "as of right" as a consequence of prohibitory signs for the first five years of the qualifying period. The statutory criteria could not therefore be met. That was the clear and justified basis for the Inspector's recommendation to reject the application. Nevertheless, the Defendant rejected the Inspector's and Officer's recommendation and acceded to the Applicant's application.

57. It is quite clear that the Inspector having considered the evidence of those that were before him reached a conclusion of fact from his observations of what they said and where they said they walked that:

"The corollary of this is that they would have seen one of the signs. "[17]

58. This is an entirely unsurprising conclusion bearing in mind that 18 of the applicant's own witnesses positively said that they had seen the signs.

59. The Inspector dealt with the written evidence saying that it was "*congruent with the oral evidence of user*"[18] and of less weight. Thus having reached the conclusion that the witnesses he heard from saw the signs he reached the same conclusions about those who filled in a form that they saw the signs even if they did not register them. This was an unsurprising inference of fact.

60. In ***Colleen v Minister of Housing*** [1971] 1 WLR 433 the Court of Appeal held that a decision maker should not overrule the Inspector on an inference of fact in the similar context of a minister not following findings of fact of an Inspector in a compulsory purchase context:

per Lord Denning MR at 437 H:

"I can see no possible justification for the Minister in overruling the inspector. There was no material whatever on which he could do so. I know that on matters of planning policy the Minister can overrule the inspector, and need not send it back to him, as happened in Luke v Minister of Housing and Local Government [1968] 1 Q.B. 172. But the question of what is "reasonably necessary" is not planning policy. It is an inference of fact on which the Minister should not overrule the inspector's recommendation us less there is material sufficient for the purpose. There was none here"

And, Sachs LJ at 439 F said:

"The Minister, therefore, cannot come to a conclusion of fact contrary to that which the inspector found in this case unless there was evidence before the latter on which he (the Minister) could form that contrary conclusion. Upon the inquiry, an inspector is, of course, entitled to use the evidence of his own eyes, evidence which he is an expert, in this case he was an architect, can accept. The Minister, on the other hand, can only look at what is on the record. He cannot, as against the subject, avail himself of other expert evidence from within the

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[17] IR389 **[CB/2/173]**

[18] IR204 **[CB/2/139]**

Ministry-at any rate, without informing the subject and giving him an opportunity to deal with that evidence on the lines which are set out in regard to a parallel matter in the Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962"

61. It would be wholly wrong for the Committee here to overrule the Inspector as to whether witnesses, from whom they did not hear evidence, saw the signs.

62. Thus after an 8 day inquiry there was a finding of fact that there were 3 signs which would have been seen by the users. The inescapable legal consequence of such a factual finding is spelt out in ***Betterment*** at [38]:

> *"38 If the landowner displays his opposition to the use of his land by erecting a suitably worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable"*

63. Accordingly, the Defendant erred in law by acceding to the Applicant's application without all the statutory criteria having been met and not following a finding of fact that led inexorably to the refusal of the application.

64. The Defendant does not appear to suggest that the Committee disagreed with the Inspector's finding of fact that all the users would have seen the signs, or his advice on the law that the signs were adequately worded to render the use contentious from 1991-1996. Rather, it is said that three signs were not "sufficient in number"[19] to render the use contentious. That reveals a straightforward failure to apply the law as declared by the Court of Appeal in ***Betterment*** at [38] to a clear and unchallenged finding of fact. Accordingly, the Defendant plainly erred in law.

65. The Interested Party's attempt to distinguish ***Winterburn*** is therefore not relevant. In any event, it is wrong. ***Winterburn*** was settling a

[19] Defendant's DGD, para.31 **[CB/1/100.7-100.8]**.

general proposition that in situations where a landowner communicates his objection to the use of his land (in accordance with ***Betterment*)** further objection is not necessary to render subsequent use contentious and therefore not as of right. No part of the judgment of Richards LJ on that general proposition is fact sensitive. Furthermore, there is no principled basis to confine the ambit of ***Winterburn*** to the acquisition of prescriptive easements.

66. The Applicant's submission that ***Winterburn*** is *per incuriam* is hopeless. First, the *obiter* observation of Lord Hoffmann in ***R(Godmanchester Town Council) v SSE*** [2008] 1 AC 221 at [24] is concerned with the evidence necessary to demonstrate a lack of an intention to dedicate at s.31(1) Highways Act 1980, not the actions required to render use contentious. Second, reliance upon those parts of ***R(Beresford) v Sunderland CC*** [2004] 1 AC 889 which support a proposition that where the public ignore signs the use may still be as of right is misplaced. Lord Neuberger PSC held in ***R(Barkas) v North Yorkshire CC*** [2015] AC 195 at [38] that paragraphs [43]-[50] in ***Beresford*** should not be relied upon because *"they include passages which are simply wrong in principle and contrary to well established authority …"*. Contrary to the Applicant's submission in its Detailed Grounds,[20] those paragraphs within ***Beresford*** are related to use of land as of right following the erection of signs (see Lord Scott at [47]) and not the effect of the statutory holding powers. That is plain from Lord Neuberger's observation at [37]:

> *"I do not agree with Lord Scott's view in para 47 that public use of a site, on which the owner has erected a sign permitting use as a village green, would be "as of right". It would amount to a temporary permissive use so long as the permission subsists, as the public use would be "by right"."*

[20] Para.21 **[CB/1/100.28-100.29]**.

<u>Ground 2(a) Took into Account an Irrelevant Matter/ breach of natural justice</u>

67. The evidence of Nathan Allen **[CB/3/301-302]** in relation to the meeting was the following:

> *"I recall that at more than one point Councillor Abraham interjected during the Committee debate with his personal recollection of being an Avon Councillor.*
>
> *At one point, Councillor Abraham stated that Avon County Council had an 'embargo' on dog mess across Bristol. He stated that signage went up and that sites including Stoke Lodge were locked. However, following complaint from many residents the site was reopened and the public were allowed in.*
>
> *Following comments made by Councillor Kent about the relevance of the signs diminishing over time, Councillor Abraham again interjected stating that 'in his opinion' the mistake of the authority was to leave the signs in place as the authority never actually agreed with them."*

68. This is recorded in a similar way in the Committee clerk's handwritten notes of the meeting of 12 December 2016 **[CB/4/543]**:

> *Abraham.*
>
> *Across city – concern dog fouling*
>
> *Gate stock lodge locked*
>
> *Signs may have been put up then*
>
> *Embargo 3/4 days.*
>
> *County council – education ownership told not to lock gates*
>
> *Case Proven – Paints picture*

69. Thus the Chair who casted not only his normal vote but the casting vote took into account his subjective views of what Avon intended by the signs.

70. As is well settled, the subjective intention of the landowner is, as a matter of law, is irrelevant, see: ***R (Oxfordshire and Bucks Mental Health NHS) v Oxfordshire County Council*** [2010] EWHC 530 (Admin.) per HHJ Wacksman QC at [22(vii)].

71. In addition, the new material disclosed in July 2017, much of which was sent to the Councillors without disclosing it to the Claimant or officers of the Council contained many matters that were not relevant. However on very many of the representations the Chairman of the Committee responded "*to assure you I am sure members will taken into account your views*".

<u>Ground 2(b) Breach of Natural Justice</u>

72. In any event it is clearly a breach of natural justice after an 8-day inquiry to raise new anecdotal factual points which have not been tested in cross-examination for the first time in the debate section of the meeting when the objectors do not have a chance to respond.

73. The Defendant further acted in breach of the duty of fairness by entertaining a wholly new point and evidence, the application of ***Winterburn*** to the particular facts in this case, without affording the Claimant the opportunity to comment upon it. The presumption is therefore that the Claimant was prejudiced and that the decision should be quashed: see ***Broadview*** at [25]-[26] and [31].

74. The issue was raised in private email correspondence with the Defendant Council and, in particular, directly with the Chairman of the Committee determining the Applicant's application, Councillor Abraham. Councillor Abraham expressly undertook to senders that he and other members of the decision-making committee would take into account their representations. Councillor Abraham voted (and indeed utilised his casting vote) to accede to the Applicant's application on the basis that the ***Winterburn*** case was not applicable.

75. It was clearly unfair to the Claimant to rely on evidence which went to issues such as the signs without taking any step to show this to the Claimant. Having held an Inquiry and had evidence tested in cross examination and having had a report from an experienced Inspector

the Chairman of the Committee permitted direct factual representations to be submitted and expressly took them into account without:

(i) Showing them to the Claimant;

(ii) Without showing them to the Inspector who had made the report to ask for advice; and

(iii) Without showing them to the officer who was advising them at the Committee meeting.

76. No other step was taken at the meeting to alert the Claimant to the private correspondence that was sent to the Chairman of the Committee and expressly said will be "taken into account".[21] That is what he said to people at the time and is to be preferred to the post decision rationalisation in paragraph 9 of his witness statement at **[CB/3/321]**. It is accepted by him that none of these emails were disclosed until well after the decision. [paragraph 10 **[CB/3/321]**] In fact the Claimant school were asked to make their representations before those that supported the village green and were not given any opportunity to respond to the point that was new to them.

77. Even now without knowing the identity of the witnesses giving evidence to the Committee, behind the back of the Claimant, it is not possible to work out whether it was inconsistent with the evidence they gave to the Inquiry and tested under cross examination.

78. The Defendant therefore acted in breach of the duty of fairness by entertaining points made to it without affording the other parties, including the Claimant, an opportunity to comment upon them.

79. In addition the Chairman of the Committee was content prior to the meeting to indicate to those who were in favour or the village green that he needed to come to a "*sensible decision*" and that "*I assure you I*

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[21] See by way of example **[CB/5/573-4]**

have it in hand".[22] He indicated to those in favour of the village green that he was "*Happy to chat*". It was after that email that the Applicant changed his stance and rather than seeking to have the meeting adjourned sought to have his application determined.

80. There is no basis for the Court to exercise its discretion not to quash the decision in the circumstances, given that the private representations were not only material but determinative to the decision to accede to the application, as clearly illustrated by the Defendant's minutes, see: [**CB/2/191-202]** in which the applicability of ***Winterburn*** is the sole basis recorded for departing from the Inspector's recommendation.

81. It is suggested that because there was one paragraph that dealt with the point that the facts in ***Winterburn*** were different in the closing submissions that in some way the Claimant was aware that the Applicant was going to take this point in the meeting.

82. The reality is that the point that the IP was taking publicly was that the matter should be adjourned because ***Winterburn*** was wrongly decided. The Applicant was applying for an adjournment on this basis. This is borne out by the documents. Firstly the application for this adjournment was made on 7 November 2016. **[SB/9/1025-7]** It was this stance that the officers advising the Committee thought was going to be position of the Applicant in their report. It was this stance that they gave legal advice on. In fact specific legal advice was given on this issue of the deferment at page **[CB/4/534]**. It was this point that the Claimant school took advice on and addressed in their representations. **[see SB/10/14281429]**

83. The point about the facts being different to ***Winterburn*** and this providing an excuse to refuse the application contrary to the Inspector's advice was not covered in the written advice to the

[22] **[CB/5/571].**

Committee by officers. Thus neither the officers nor the Claimant could possibly be aware that this was going to be the point that the Applicant was going to take following the Inspector's Report without any proper notice before the Committee. They had no real opportunity to make legal submissions on this issue.

84. Furthermore the Chairman of the Committee, in his witness statement of 9 November 2017, has explained that he conducted research as to the ***Winterburn*** case. He said at paragraph 22 of his witness statement that "unlike the ***Winterburn*** case, which according to my research..". **[CB/3/324]** It is surprising that, following a 9-day inquiry with an expert in village green law advising the Defendant, the Chairman based his conclusion on the critical issue for him on his own non-lawyer legal research and without seeking specific legal advice (which would have been readily available to him) on that research. The exact facts of ***Winterburn*** were not the issue but rather the principle it laid down and if he had got legal advice he would have been apprised of this rather than doing his own research. In any event it would appear that his own research was at least in part done for him in correspondence sent to him by the supporters of the TVG and not sent to the Applicant. This appears from **[CB/5/569]** which is either the Applicant or a principal supporter of the TVG sending the photographs of the ***Winterburn*** case to the ward councillor who supported their case who in turn sent them on to the Chairman of the Committee without sending them to the Claimant. He particularly pointed out that the photos were at the end.

Ground 3 – Failure to supply adequate reasons for not following the Inspector on contentiousness.

85. The Defendant failed to supply any adequate reasons, for departing from the Inspector's and Officer's recommendation to reject the application. The Claimant is accordingly prejudiced by the Defendant's failure to supply reasons as it does not know "*why they lost and what*

the legal justification was for doing so" contrary to the common law duty upon them when acceding to an application to register land as a new green contrary to the Inspector's advice see: ***NHS*** per Gilbart J at [111].

86. The suggested reason for acceding to the application in the draft minutes was that **[CB/2/202]**:

> *"(iv) Three members of the committee considered that the facts in Winterburn v Bennett ... were not the same as the facts of this case. Unlike the car park in that case Stoke Lodge Playing Fields is a large piece of land (about 22 acres) and there were only three signs. The small number of signs on such a large site was not sufficient to make the use of the land contentious."*

87. This is a reason that clearly goes behind the findings of fact of the Inspector that the users of the land actually saw the signs. It does not explain why the Committee considered that they were able to go behind that finding of fact or how the Committee arrived at a different finding of fact to that of the Inspector who heard evidence as to where people walked, what they saw and who went on several site visits.

88. Alternatively, the reason reveals an immaterial consideration was taken into account, namely a new test that there needs to be a *proportionate* number of signs to the size of the land, which is wrong in law. There clearly is not, nor could there be, such a test of proportionality when the important thing is whether the signs were seen. Here the inspector concluded they were actually seen by the users.

Ground 4. Failure to give reasons for rejecting the submission based on Mann v Somerset.

89. Both the Claimant and the Council as landowner made a submission based on ***R(Mann) v Somerset County Council*** [2012] EWHC B14 (Admin.) that the exclusion for sports days in the 20 year period and by licenses for formal games amount to an exclusion that would have made use at other times by implied permission. The Inspector reported

and accepted the evidence of Mr Martin about the sports days [IR 284] **[CB/2/152]**. However neither the Inspector nor the committee addressed this argument in the light of the evidence at the Inquiry.

90. This was a point that was expressly before the Committee because the Defendant, as landowner, particularly made the point that this issue had not been dealt with in the Inspector's report and would need to be addressed if the Committee was going to grant the application to register **[CB/4/523-524]**.

91. There is no dispute that the Claimant raised a discrete argument to resist the Applicant's application, based on the judgment of HHJ Owen QC in ***R(Mann) v Somerset County Council*** [2012] EWHC B14 (Admin.) see paragraphs 5.15-5.22 of its closing submissions **[SB/7/752-753]**. It is also not disputed that the Inspector does not mention the ***Mann*** judgment at any point in his Report, nor does the Defendant tackle the submission separately.

92. What is instead said is that the facts of ***Mann*** simply did not apply because members of the public could still use some of the land during the sports days and those two days were in any event *de minimis.* That is simply wrong. In ***Mann*** there were only 3-4 exclusions during the beer festivals and carnival, none of which excluded the users from the whole site. Those facts were sufficient to persuade HHJ Owen QC that the use of the whole site for recreational activities was therefore by implied permission.

93. Similarly, it is no answer that the Inspector and Defendant dealt with a separate submission of the Claimant that the use by the Claimant and others disrupted the use of the land so as to prevent twenty years of continuous use (see IR, 343-366 **[CB/2/164-168]**).

94. It is not possible to conclude that the outcome would have been highly likely to have been the same, based on the Inspector's findings in 2013.

That is because the Inspector did not appear to then have the evidence of Mr Martin or others, nor even visited the site, see: paragraph 63 **[SB/10/1123]**.

95. The Inspector and Defendant simply fail to deal with the submission that the use of the land was by implied permission, and therefore not qualifying use, as a consequence of the exclusion of the public from parts of the site by the landowner.

Ground 5 – Error of law as to the application of the doctrine of statutory incompatibility

96. The Inspector, and by continuation the Defendant in accepting all of the inspector's findings in relation to the statutory criteria other than in relation the "as of right element", made three distinct errors of law in this regard.

97. **First**, the Inspector directed himself to analysing the situation at the point of the application rather than at the point the application is determined **[CB/2/188]**. Not only is that a departure from the approach of the courts see: ***Newhaven*** at [96]-[97], ***Lancashire*** at [79]-[81], ***NHS*** at [137] and ***Ramblers*** at [43]-[46] (where the issue fell for express determination) it is also contrary to principle. Up and until the point of registration, no incompatibility can ever arise. That is because the landowner would always be able to evict the trespassers, assert their proprietary rights and thus perform their statutory duties without legal barrier. That is not the case upon registration. Accordingly, the Inspector was in error to assess the situation in 2011 (the point of the application), rather than in 2016 (the point of determination). There is nothing in ***TW Logistics Ltd v Essex CC*** [2017] EWHC 185 (Ch.) which disturbs that approach, indeed as Barling J held at [178] the statutory incompatibility principle in ***Newhaven*** was a "manifestly very different issue" to the issue in ***TW Logistics***.

98. The Inspector found that if the correct time to look at the matter was now then the statutory incompatibly argument had force. He said **[CB/2/188]**:

> *451… If the correct time to look at the matter is now – i.e. the time at which a decision on the application falls to be made – I think it has some force because registration will evidently preclude the School from using the land for physical education. Accordingly, I think that the date at which the issue falls to be examined may be key to this issue. I consider that a Court would hold that the relevant date is the date of the application and therefore, however the matter ultimately be rationalised, I think that the argument on statutory incompatibility would fail.*

99. **Secondly** the Inspector was wrong to conclude that a finding by the Secretary of State not to consent to the disposal of the playing fields would make the village green registration void but that statutory incompatibility does not arise. The Claimant is prevented from disposing of land without notifying the Secretary of State and complying with his directions; see paragraph 17(2) and (5) of Schedule 1 of Academies Act**.** Disposal is defined in paragraph 17 (8) (b) as follows:

> *(b) references to a disposal of land include references to a change of use of the land in cases where the land is no longer to be used for the purposes of an Academy.*

100. It is clear that the Inspector found that registration would preclude the School from using the Land for PE. This effectively amounts to a disposal and statutory incompatibility would arise because there would be a disposal which would not be in accordance with the Academies Act mechanism. The Inspector's suggestion at IR449 **[CB/2/188-189]** that the registration would be void if that occurred is not based on authority and the correct route is statutory incompatibility to avoid that conflict.

101. **<u>Thirdly</u>** the Inspector was correct to note at IR445 **[CB/2/186-187]** that should the Claimant not be able to conduct its statutory duties to perform physical education without the Land, statutory incompatibility would arise. However, the Inspector was in error to find that the Claimant's duties did not conflict with registration under the Commons Act 2006 and thus override it by necessary implication on the basis of a speculation that the Claimant was able to make some other, unspecified, arrangements. The Claimant's evidence, via the school's Principal, that it could not perform its statutory duties to provide physical education beyond the short-term without the Land should have led the Inspector and Defendant to conclude statutory incompatibility arose. Having failed to make that finding, the Defendant further erred in law.

102. Even if the Inspector was correct that the correct time to look at matters was at the date of the application he was in legal error for two reasons.

    (i) Firstly under section 77 of the School Standards and Framework Act 1998 the body running the land cannot do anything that is intended or likely to result in a change of use of playing fields without permission from the Secretary of State. It would be incompatible with that to allow the village green registration to bypass that system designed to keep playing fields from changing use.

    (ii) Secondly it is necessary to look at whether at that date it could reasonably be foreseen that there would be incompatibility. Lord Neuberger PSC held in ***Newhaven*** that incompatibility "was to be assessed by reference to what could reasonably be foreseen" at [78]. The Inspector concluded that "it could be argued that the test is whether it is reasonably foreseeable" and then rejects that in paragraph 436 **[CB/2/185]**. The Inspector wrongly suggested

that he did not need to work out what could be reasonably foreseen but rather there was no incompatibility because at the application date the "*land was being used both by the school and by local people*"[23]. If this argument were correct, in ***Newhaven*** itself there would have been no statutory incompatibility because it was used for both. The Supreme Court unlike the Inspector here went on to consider the future. Here the evidence before the Inspector was that standards of safeguarding were increasing all the time such that even in 2011 it was perfectly foreseeable that registration could prevent usage. This was the position that was evident to the Inspector by 2016 where he said "*registration will evidently preclude the school from using the land for physical education*"[24].

CONCLUSION

103. The Claimant therefore seeks an order declaring the decision of the Defendant to accede to the Applicant's application to be unlawful and an order quashing that decision. Further, the Claimant seeks an order that the Defendant pay the Claimant's costs.

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[23] IR436 **[CB/2/185]**

[24] IR437 **[CB/2/185]**