THE BRISTOL CITY COUNCIL

CHEYNE ROAD TO PARRY'S LANE & SHIREHAMPTON ROAD TO WEST DENE

DEFINITIVE MAP MODIFICATION ORDER 2024

OBJECTION OF COTHAM SCHOOL

INTRODUCTION

1. The effect of the Order would be to add four new public footpaths over land demised to Cotham School ("the School").

2. The School is an academy school. It is operated and managed by Cotham School Ltd and run as a not-for-profit charitable trust. It is funded by the Department for Education and provides free-at-the-point-of-use education for the residents of Bristol.

3. The School does not have sufficient land on its main site to meet the statutory requirements for outdoor space. Accordingly, and for that purpose, the School is entitled to possess the playing fields at Stoke Lodge Playing Fields, Stoke Bishop, Bristol, BS9 1BN ("the Land") by virtue of a lease, executed with Bristol City Council on 31 August 2011 for a term of 125 years.

4. Pursuant to paragraphs 3(1)(c) and 7(1), Schedule 15 Wildlife and Countryside Act 1981, the School hereby **OBJECTS** to the Order and request the matter be referred to the Secretary of State, so that a public local inquiry may be convened to determine whether to confirm the Order.

GROUNDS OF OBJECTION

The date the use was called into question

5. The School submits that the signs at Points S1 and S2 on Plan 1 (APP1) circa 1985 were sufficient to call into question the right of the public to pass and repass over the land.

6. In order for the right of the public to have been "brought into question by notice as aforesaid or otherwise" (within the meaning of what is now subs.(2)) there must be some act which raises the issue of the status of the way sufficient to bring it home to the public that their right to use the way is being challenged, so that they must be apprised of the challenge and have a reasonable opportunity of meeting it, see: ***Fairey v Southampton County Council*** [1956] 2 QB 439, 456-458.

7. The House of Lords accepted that erecting a notice was sufficient to bring the user into question, see ***Godmanchester Town County v Secretary of State for the Environment, Food and Rural Affairs*** [2008] 1 AC 221 at [24], [38] and [40].

8. The relevant time period for the routes 2, 3 and 4 is therefore 1965-1985. If that is the case, there plainly is insufficient evidence to demonstrate use **by the public** (as opposed to the occasional trespasser) **for the full 20-year period**.

9. The remainder of this Objection is on the premise that the use was called into question when the application was made, with a resulting qualifying period of **1998-2018.**

Ground 1: Use not in the character of a right of way

Legal Approach

10. It is settled that the character of a right of way is distinct from a right to wander over the land in the nature of *jus spatiandi,* see ***Attorney General v Antrobus*** [1905] Ch 188, 206 "*the cases establish that a public road is prima facie a road that leads from one public place to another public place*". As Lightman J accepted of the words at s.31 Highways Act 1980 in ***Oxfordshire County Council v Oxford City Council*** [2004] Ch 253 at [101]:

> "The true meaning and effect of the words is that the user must be as a right of passage over a more or less defined route and not a mere indefinite passing over land. It is not possible to have a public right indefinitely to stray or meander over land or go where you like"

11. Lightman J then proceeded to offer guidance for decision makers faced with a situation where the public's use of tracks on land might be referable to a public right of way or the acquisition of rights to use the land as a green. At [102]-[103] he said:

> "If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a presumption. The answer must depend on how the matter would have appeared to the owner of the land … Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily

be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green)."

Three different scenarios require separate consideration. The first scenario is where the user may be a qualifying user for either a claim to dedication as a public highway or for a prescriptive claim to a green or for both. The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e g, an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e g, fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights."

12. Lightman J's analysis was endorsed by Lord Hoffmann on final appeal as "sensible suggestions", see [2006] 2 AC 674 at [68].

13. Moreover, ***Oxfordshire*** was also followed by the High Court in ***R(Allaway) v Oxfordshire County Council*** [2016] EWHC 2677 (Admin) at [51], at [52] Patterson J added this:

"That means that what the inspector described as the principal activity, namely, walking, and walking a dog, jogging or pushing a pram on a defined track on the potential TVG may be recreational use of land as a

> green and part of the total such recreational use if, in all the circumstances, it is such as to suggest to the reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land."

Application

14. The Council, as commons registration authority, has recently considered the public use over the land 1998-2018 and concluded that it was not in the character of a right of way.

15. That was consistent with the recommendation of its independent barrister Inspector in his Report dated 14 October 2016, which considered the period 1991-2011, see para.399

> "The suggestion is that most of the use has been by dog walkers who, in order to give their dog the longest possible walk stuck to the edges of the land; and that others – runner, for example – also stuck to the edges of the land. This was the picture of use of the land painted by F3**. Against this was the evidence of local people who spoke of going all over the land and, in particular, walking over the area of the pitches when they were not in use.** But even on this basis, it is a very large area of land and, although those who used it invariably spoke of seeing others using it in the course of their use, on no view were there generally large numbers of people using it at the same time." [emphasis added]

16. Having born in mind the approach of Lightman J in ***Oxfordshire***, the Council accepted the Inspector's advice that the use of the land was in the nature of a village green use not a public right of way.

17. That is plainly inconsistent with a conclusion that the use was, in the same period, simultaneously, in the character of a right of way.

18. Indeed, the aerial photographs do not bear out a worn path matching the alleged routes, which supports the contention that the Council were right first time around.

Ground 2: No actual enjoyment for a full period of 20-years

Legal Approach

19. In ***Wright v Secretary of State for the Environment, Food and Rural Affairs*** [2016] EWHC 1053 (Admin) Ouseley J held at [22] that "*… the Inspector has to be persuaded on the evidence that the user in question endured through the whole of the twenty year period, and that this has to cover each of the routes in question".*

20. Similarly, "*[u]se or non-use is a question of fact; the cause of any non-use is not the issue",* see: ***Roxlena v Secretary of State for the Environment, Food and Rural Affairs*** [2017] EWHC 2651 (Admin) at [73].

21. The 1980 Act "*… must refer to actual use, not the mere opportunity for the public to enter if they had so wished, and cannot be relied upon as an indication that such use was inferred …",* ***Easteye Ltd v Malhotra Property Investments Ltd*** [2020] EWHC 2606 (Ch) at [143].

22. Accordingly, "*[a] period of nineteen-and-a-half years is not the same as a "full period of 20 years",* see ***Berry v Secretary of State for the Environment, Food and Rural Affairs*** [2006] EWHC 2498 (Admin) at [25].

23. The necessary threshold of evidence was recently summarized by Ouseley J in ***Wright v Secretary of State for the Environment, Food & Rural Affairs*** [2016] EWHC 1053 (Admin) at [21]:

> "[t]he relevant law is not contentious. *Mann v Brodie* (1885) 10 App. Cas. 378 shows that use must be by a sufficient number of people to show that it was use by the public, a number which may vary from case to case. *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11, [2010] 2 AC 70, and others cited in it, deal with the quality of the user. The use had to be **sufficient to bring home to the mind of the reasonable non-absentee**

> **landowner that the public were asserting a continuous right to use each route in question**. The user over the twenty year period did not have to be by the same people." [Emphasis added]

24. As the Lord Hope held in ***Cumbernauld & Kilsyth District Council v Dollar Land (Cumernauld) Ltd*** (1992) SLT 1035, the user must be of such an amount and of such a manner *"as would reasonably be regarded as being the assertion of a public right"* at p.1041.

Application

25. In total, 155 user evidence forms were submitted claiming use of the Application Routes. Of these:
    a. 57 people claimed use of Route 1 between 1946 and 2018;
    b. 39 people claimed use of Route 2 between 1965 and 2018;
    c. 25 people claimed use of route 3 between 1960 and 2018; and
    d. 34 people claimed use of route 4 between 1946 and 2018.

26. Moreover, paragraphs 343-348 of the October 2016 report, the Inspector recorded the use made of the Land by the Claimant, together with clubs, societies and the University of Bristol for physical education, football, rugby, cricket, athletics and occasionally, sports days.

27. At paragraph 350, the Inspector noted (without disagreement) that whenever a pitch was used by a school or by a sports club it had exclusive use of the part of the land for that period and no-one claiming to walk a dog or fly a kite interrupted the game.

28. The Inspector went on to find at paragraphs 351, that:

> "The evidence went to show that, subject to occasional issues with dogs, use by local people could co-exist with use by the schools and sports clubs.

> This was not just a matter of local people going on to the land only when the schools and clubs were not on it. The evidence generally indicated that there was plenty of room elsewhere on the land when it was being used by schools and clubs".

29. The only rational inference to draw from such evidence is that the use was not sufficient use by the public for a full period of 20-years to manifest the assertion of a public right.

Ground 3: No enjoyment "as of right"

Legal Approach

30. The phrase "as of right" was found held to have a single unified meaning in the Highways Act 1980 and the Commons Registration Authority 1965, to mean without force, secrecy or permission, see ***R v Oxfordshire County Council, ex parte Sunningwell PC*** [2000] 1 AC 335, 355H.

31. It is well established that erecting a suitably worded sign can render the public use contentious and thereby not "as of right", notwithstanding there is not actual force, see ***R(Lewis) v Redcar & Cleveland BC*** [2010] 2 AC 70 at [88].

Application

32. At the commencement of the qualifying period in 1998, there were three signs on the Land.

33. The signs were erected by Avon County Council at the main entrances to the Land (S1, S2 and S3) to the north, east and south.

34. The signs read as follows:

"MEMBERS OF THE PUBLIC ARE WARNED

NOT TO TRESPASS ON THIS PLAYING FIELD

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

COUNTY OF AVON"

35. In 2009, the sign at the southern entrance (S2), was replaced with a new sign. That sign read as follows:

"BRISTOL CITY COUNCIL

Private Grounds
These grounds are private property and there is no right of public access. Legal action will be taken against any trespassers.
Any request for the use of these grounds should be made in writing to the divisional director of Property and Local Taxation.
The exercising of dogs on these grounds is forbidden".

36. Until 23 July 2013, the two Avon County Council signs and one Bristol City Council sign remained visible on the Land and their contents legible.

37. The signs were effective in wording and location to render the user evidence relied upon contentious.

38. That has been the consistent conclusion whenever this point has been previously considered, see:

    a. By Council's Inspector in 2016, IR,391:

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

b. By the officers of the Council when advising the Committee to accept that advice their report to the 12 December 2016 Public Rights of Way Committee.

c. By the High Court in ***R(Cotham School) v Bristol City Council*** [2018] EWHC 1022 (Admin) at [56] (quashing the Council's rejection of that advice):

"However, that was no basis upon which to depart from the Inspector's conclusions given that both the Inspector and the committee were at one as to the legal significance of the signs when Avon County Council first erected them."

d. By the Council when resolving to accept the Inspector's advice to reject the application on 25 June 2018.

e. By the Council's Inspector in 2023, IR,148:

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

f. By the officers of the Council when they advised the Committee to again accept that advice on 28 June 2023.

39. It would be perverse for the Council to now conclude the users were acting "as of right", in light of those previous findings.

Ground 4: No use "without interruption"

Legal Approach

40. In ***Merstham Manor v Coulsdon and Purley UDC*** [1937] 2 K.B. 77 Hilbery J considered the expression "without interruption" and said at 85:

> "I therefore think that the word "interruption" in the expression in the Act 'without interruption' is properly to be construed as meaning actual and physical stopping of the enjoyment, and not that the enjoyment has been free of any acts which merely challenge the public to that enjoyment."

41. In ***Lewis v Thomas*** [1950] 1 K.B. 438 it was held that in determining whether the user of a right of way has been "as of right without interruption" the following considerations should be borne in mind:

    a. *Interruption* means "interruption in fact."

    b. The presence or absence of a challenge may well be a relevant circumstance in determining whether truthfully there has been interruption in fact.

    c. The circumstances in which the barring of the way takes place and the absence of any intention to stop anybody going along it—if it be the case—will be a relevant circumstance.

    d. A deliberate barring of a way for an appreciable period will not necessarily lose its effect merely because no one happened to try to use the way during that period.

Application

42. In the alternative to Grounds 2 and 3, the School submits the use of the playing fields was sufficient to amount to an interruption, in that:
    a. It did in fact interrupt the use of the routes;

    b. There was challenge to the use of the Land during the time when the fields were in use for School activities;

    c. The intention was indeed to stop people accessing the land; and

    d. People did indeed try to use the land and avoided the playing fields whilst they were in use.

43. In the alternative, if the Council find the user was not in fact disrupted by the playing of games because people continued to use the routes, the user would not be "as of right" because it would amount to the commission of a criminal offence contrary to s.40 of the Local Government (Miscellaneous Provisions) Act 1982 and s.547 Education Act 1996, see: ***Network Rail Infrastructure Ltd v Welsh Ministers*** [2020] EWHC 1993 (Admin).

Ground 5: Contrary indication

Legal Approach

44. The House of Lords has now held in ***R. (on the application of Godmanchester Town Council v Secretary of State for Environment, Food and Rural Affairs & Cambridgeshire CC*** [2008] 1 AC 221 that upon the true construction of s.31(1), "intention" meant what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be.

Application

45. In the alternative to Ground 3, the erection of the signs was sufficient to manifest a contrary to indicate to dedicate the land within the scope of s.31(3) Highways Act 1980.

Ground 6: No capacity of the person in possession to dedicate

Legal Approach

46. By s.31(8) Highway Act 1980 a person or body has no capacity to dedicate land as a highway, if the existence of a highway would be incompatible with the statutory purposes for which the land is held, see: ***British Transport Commission v Westmorland County Council*** [1958] AC 216. That was a question of fact and assessed by reference to what could reasonably be foreseen.

47. The relevant date to consider that question is the point at which the question to make the order, see ***Ramblers Association v Secretary of State for Environment Food and Rural Affairs*** [2017] EWHC 716 (Admin).

48. In ***Easteye Ltd v Malhotra Property Investments Ltd*** [2020] EWHC 2606 (Ch), the issue arose as to whether dedication of a right of way along an alley during the period it was owned by a charity was prevented by s.31(8). The Court held that s.31(8) only prevents a deemed dedication where the secondary use would preclude the landowner from using the land for the purpose for which it is held. If the land can be used for the statutory or public purpose consistently with the secondary use, there is no bar to dedication. The test of incompatibility is one of fact and is judged by what can be reasonably foreseen and guarded against, not that which is possible but improbable.

Application

49. The land over which the land runs is held by the County Council for the purposes of education. The County Council as landowner was (during the period of qualifying user 1984-2004) and remains under a number of duties which bear on its use of the land, these are as follows:

    a. **Section 8 Education Act 1994**: which imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character and equipment.

    b. **Sections 13 and 14 Education Act 1996**: which require local authorities to contribute to the development of the community by securing efficient primary and secondary education.

    c. **Section 542 Education Act 1996**: which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations 2012 (SI 2012/1943) suitable outside space for physical education and outside play; and

    d. **Section 175 Education Act 2002**: which requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children".

50. The School, as leasee in possession, is also under several duties:

    a. **Part 4 Education and Skills Act 2008**, the School is under a duty to comply with "relevant standards". Pursuant to her powers at s.94 of the 2008, the Secretary of State made the Education (Independent School Standards) Regulations 2014 (SI 2014/3283) which comprise the "relevant standards"

for Part 4 of the 2008 Act. By regulation 3 of the 2014 Regulations, the School must provide suitable outdoor space for physical education and room to play outside.

b. **Section 173(3A) Education Act 2002,** the School must exercise its functions with a view to safeguarding and promoting the welfare of children receiving education or training at the Academy.

51. The compatibility of land held subject to those duties with the exercise of rights of access was explored in ***R(Lancashire County Council) v Secretary of State for Environment, Food and Rural Affairs*** [2021] AC 194. That case concerned whether land held for the purposes of education could be registered as a village green under s.15 Commons Act 2006. The Court held that the exercise of a right to indulge in lawful sports and pastimes by local inhabitants would be incompatible with the powers and duties under which the land was held.

52. At [65] Lord Carnwath (with whom Lord Sales and Lady Black agreed) held that the education legislation:

> "… requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children". The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place."

53. Whilst ***Lancashire*** was a case dealing with the rights which arise on registration of a village green rather than the capacity to dedicate land as a right of way, the substantive point is the same. The creation of a public highway would be incompatible with the City Council and School's safeguarding duties because it would preclude the School from preventing access to the land by the general

public at any time. It would, for example, no longer be permitted to lock the gates or restrict access to the land with dogs.

54. Accordingly, applying the law in ***Westmorland*** and ***Ramblers*** (above), the County Council (as landowner) nor the School (as leasee) did not and does not have the capacity to dedicate the way as a highway.

CONCLUSION

55. There is insufficient evidence to demonstrate the assertion of a public right and ample evidence to demonstrate such use as did occur was contentious. Accordingly, no presumption of dedication can arise under s.31 Highways Act 1980 or at common law.

56. In any event, there is clear evidence of a contrary indication to dedicate such that any presumption would be defeated.

57. The School therefore **OBJECTS** to the confirmation of the Order and requires that the question of confirmation be referred to the Secretary of State.

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20 October 2024.