NVG37 – Applicant's Closing Submissions

1) Introduction

During the course of the inquiry the inspector heard evidence from 13 members of the parish and in addition from the local Member of Parliament the Rt Hon Andrew Griffiths.

The 13 parish-based witnesses were as follows: -

Mr Arnold Burston of 9 Twentylands (red bundle pages 89 – 94), user since 1966

Mrs Cherry Burston of 9 Twentylands (red bundle pages 78 – 88), user since 1973

Mr Roy Crosland of 28 Twentylands (red bundle pages 95 -101), user since 1977

Mr David Dale of 36 Walford Road (red bundle pages 114 – 121), user since 1999

Mr Barry Edwards of 54 Church Road (red bundle pages 122 – 128), user since 1990

Mrs Barbra Evans of 37 Walford Road (red bundle pages 463 – 468), user since 1987

Prof Roger Gawthorpe of 214 Station Road (red bundle pages 136 – 142), user since 1986

Mr Geoff Hailstone of 87 Meadow View (red bundle pages 150 – 157), user since 1995

Mr Charlie Hayes of 44 Walford Road (red bundle pages174 – 181), user since 2003

Mr Paul Salisbury of 5 Twentylands (red bundle pages 246 – 255), user since 1976

Mrs Alison Sharpe of 12 Forest School Street (red bundle pages 256 – 262), user since 2004

Mr Jake Chatburn of 12 Forest School Street (see mother's evidence above)

Mr Scott Richardson of 10 Forest School Street (red bundle pages 689 – 698), user since 1984

The 13 witnesses heard in person represent a sample of 8.78% of the 148 witness forms submitted for the inquiry.

Out of the 13 witnesses 8 have lived locally using the land for over 20 years and several were able to evidence the condition of the land and fencing going back far before the 20-year reference period which in this case is April 1993 to April 2013. There has been evidence from the 1960's through to the present day.

In respect of the decision which needs to be made on the application, the applicant believes it will be in the minds of both Bellway and the Inspector that a judgement in

favour of the applicant would have broad reaching consequence in respect of their intended development of the site. Naturally the impact on the landowner should be a major part of the Inspector's considerations in a case of this type.

The applicant would, within this context, wish to draw the Inspectors attention to the facts that this application was made in April 2013 when the site was under the ownership of the college who bought it for a token sum. It has come to be owned by Bellway through a combination of an administrative error on behalf of Staffordshire County Council who failed to notify Burton College of the Village Green application followed by a lack of thorough due diligence on behalf of Bellway who failed to ask all of the appropriate questions to the registration authority before buying this land.

It is not a situation of the applicant's making that Bellway finds itself with much to lose from this situation and the applicant would simply ask that this background is borne in mind when the Inspector is compiling his report.

2) Commons Act 2006, section 15.

The tests for a successful Village Green Application are set out in statute – within the 2006 Commons act and also within case law.

The applicant would like to take the opportunity to sum up the application against the tests which he understands must be met.

2.1) A significant number

This matter is dealt with through the provision of 148 sets of witness evidence. This represents, in the understanding of the applicant, a very significant volume of witness evidence for this type of Inquiry which reflects the broad use of this site by the local community. Witnesses have commented on not only their own use of the land but also the simple fact that the land has regularly been used by large numbers of people who they see and speak to whilst on the site. There are 520 personal reports of a variety of uses for sports and pastimes and 1268 observed uses.

2.2) Of the inhabitants of a locality, or in any neighbourhood within a locality.

The applicant is relying on the definition of locality to be the parish of Rolleston on Dove. It should be noted that there are several green spaces in use in the village and as such many residents will naturally use the space nearest to their own home. Accordingly, the bulk of witness evidence is from residents who live reasonably close to the site.

The definition of locality being applied is consistent with the direction set in the case of R v Staffordshire County Council (known as the McAlpine case) although it is the view of the applicant that this definition can be somewhat prejudicial to applications from close to the border of a parish as is the case with this application. Accordingly,

there is some witness evidence from the parish of Stretton parts of which neighbour the site.

It is the understanding of the applicant that normally around 1% of a locality providing evidence would be sufficient to meet the test in terms of number of witnesses from within a locality. The current population of Rolleston on Dove is 3267 (based on the 2011 census) and the number of witnesses is 148 meaning 4.53% have given evidence about their use of the land.

The applicant would add furthermore that there are 58 witnesses who have used the land for the full 20-year period in question from 1993 to 2013 which is 1.78% of the parish and looking beyond the 20 year period there are 11 users reporting at least 50 years use of the land. Just to put that into context they used the land when it was part of a local farm, they continued to use it while it was part of the Forest of Needwood School and through its use by Burton College then further forward to the present ownership by Bellway.

In terms of the combined years of use of the land among witnesses during the specific 20-year reference period it stands at over 2000 years of combined use at an average of just over 13.5 years per witness.

There are 15 users who report daily use of the site for the full 20-year reference period.

If we breakdown the 148 witnesses there are 3 who have never resided within the parish boundary 6 Graham Anderson, 7 Marilyn Anderson and 66 Mr and Mrs Jeffrey.

Of the remaining 145 there are 140 who still reside within the parish and 5 others who lived in the parish during their use of the site but have subsequently moved out of the parish. These 5 are: - 8 Simon Anderson, 27 Michael Chinn 28 Donna Clark, 99 Thomas Sanderson and 120 Jeanette Wilson.

In terms of quantifying a total number of evidenced users if we breakdown the 148 sets of evidence there are 22 who report no accompanying family when they use the land. There are a further 116 who report use with family but do not specify the number of family members and then a further 10 evidence forms who define use by themselves plus an additional 26 specific users (i.e. 36 in total).

If we assume from the census data (see blue bundle page 24) an average of 2.3 users per household who say they used the land with their family this represents 116 households x 2.3 = 267. If we add to this the 22 single users and 36 identified users then the grand total is 325 out of a population of 3267 which equates to 9.95% of the parish.

2.3) Use “as of right”

The issue as to whether use has been as of right appears to be the largest area of contention between the parties and as such it will undoubtedly attract the largest volume of commentary from both objector and applicant.

In the sections that follow the applicant has endeavoured to breakdown the issues into relevant sub headings for the ease of the audience reading these closing comments: -

2.3.1) Without Force

2.3.1.1) Fencing

Evidence has been given that the landowner during the qualifying period did not take any meaningful measures to repair the fencing with the exception of the gate on Fairfield Avenue which was addressed due to concerns over possible vehicular access to the site as opposed to pedestrian access. The applicant wishes to make clear that the application is not reliant on use of this gate throughout to 20-year period, but would wish to note that from 1993 to around 1998 the gate would appear to be unlocked and without signage meaning use of the gate in that period would be peaceable and as of right.

During the accompanied site visit there was no evidence of fencing having been repaired (e.g. patch repairs) and despite the evidence of Godfrey Payne and Karen Proctor that fencing ‘would have’ been repaired by College staff there is no practical evidence to support this. It is noteworthy that neither Mr Payne nor Mrs Proctor gave evidence in person and their evidence could not be tested through cross examination. The applicant simply wishes this evidence to be weighted accordingly.

The applicant would like to draw the Inspector’s attention to the covenant at page 19 of the Blue bundle which expresses that the Western half of the site is subject to a requirement to both install and critically to maintain a 6 foot fence of concrete posts and wire mesh. It is clear that this covenant was not followed by the college and the applicant wishes to infer that the decision or choice not to maintain fencing, in light of this covenant, can only be considered a deliberate choice by the college which should in the applicant’s opinion render access through gaps in fencing to be considered peaceable and therefore as of right. This covenant specifically, had it been followed, would have prevented access at points 16, 17, 18, 19, 20 and 21 (access points are shown on a modified version of page 128 of the Blue bundle of which the Inspector possessed the original).

Partly relating to the point above the applicant furthermore notes that at Page 89 of the Blue bundle (see bottom email from the principal Keith Norris) that the behaviour and decision making undertaken by the College could give rise to what he

refers to as a common land claim. Given that this perspective is derived from advice provided by the college's legal advisors the applicant would invite the inspector to take a broad view of firstly the college's decision to ignore the fencing covenant and secondly, it's failure to take steps to repair existing gaps in fencing against the apparent advice of its own legal advisors. In the applicant's mind when viewed as a collective such decision making appears to be freely allowing continued access to the land by the local community.

It is also noteworthy that photographic evidence at Blue bundle pages 59 and 60 showed evidence of damage to fencing by falling tree branches, this view was compounded on the accompanied site visit and should have an impact on how the Inspector may view access made through entry points 16, 17 and 18. We heard from Mr Barry Edwards, the former chair of the parish council, that the parish would take away fallen branches which lay across or on its side of the boundary of the site at this location. The applicant offers that access through natural damage is not forcible and therefore should be considered to be as of right.

The applicant also wishes to share an observation that entry points along the West of the site and at 18 in the South West corner are now on public land and sit outside of the claimed TVG land as does the access in the North West corner leading onto Meadow View. The applicant poses the general question as to whether access onto any land which is not part of a claimed TVG site can be considered to be with force and therefore detrimental to the prospects of that TVG application.

Additionally, in respect of fencing the applicant wishes to reference the evidence of Mrs Cherry Burston who was instructed by her teachers in the late 1970's to use access point 18 to visit Craythorn Golf Club for golf practice with some other sixth form students. The applicant advances that such use of this access by the school formalises it as it is used for official school business comparable to the access enjoyed through the school gates which were not closed or locked. It should therefore follow that access through this point cannot be considered to be by force and therefore should be allowed to contribute as use as of right.

In submissions it is probable that Mr Edwards will raise the issue that some gaps in hedges and fencing have expanded through use over time. He will no doubt go on to that that such expansion somehow represents a continuation of access by use of force. The applicant's perspective is fairly simplistic which is that the access has been sufficiently large for an adult person to pass through since the 1960's and naturally through volume of use over time some additional wear has taken place. This is no doubt accidental in nature and a reasonable analogy is the development of a pot hole in a road. It has not arisen intentionally and is not the fault of any one driver but despite this the pot hole still exists and over time it will grow. Despite searching

extensively, the applicant has been unable to unearth any case law making direct reference to this type of wear and therefore has arrived at the conclusion that it is an accepted consequence of access through gaps in hedges and fencing. The key point remains to be whether such access is considered to be peaceable or not.

Finally, on the subject of fencing the applicant wishes to make a specific point about the southern boundary. Between points 16 and 18 there are significant stretches where some concrete posts are still evident but there is no obvious visible sign of any wire mesh that may have been between these posts. The applicant wishes to point out that a reasonable person approaching these access points would be unclear whether any given section was ever fenced off or alternately whether it was a gap in fencing deliberately left open to allow access. The relevance of this point is that the fencing was in such a poor condition as to create a situation where acquiescence of rights through neglect of the boundary reaches a stage where even the most reasonable person cannot judge between their entry being peaceable or not.

2.3.1.2) Signage

Although the sign that was erected at Fairfield Avenue is no longer present if it were to be present it would logically face outwards from the field facing people coming towards the field from Fairfield Avenue. There is wear on a metal post next to the gate that would strongly suggest this. As such it would not be able to be seen and read from within the field itself and given that Fairfield Avenue is a cul de sac it would have been seen by very few people indeed perhaps other than the residents of the cul de sac itself.

Some witnesses could vaguely remember the sign at Fairfield Avenue (circa 1998) and also the locking of the Fairfield Avenue gate in 2005, some could also recall the 2017 signs (which Mr Salisbury evidence stated were poorly constructed and unlikely to survive for long in an exposed and blustery environment) but nobody at all remembers the 2005 signs. This lack of recollection of one out of three purported activities relating to signage is in my experience as an investigator a very unusual position, especially given that at the time of giving their evidence none of the witnesses would have any insight that this would become a somewhat pivotal issue within the application.

The applicant would like firstly to make a reference to the Fairfield Avenue sign. When we conducted the site visit it was apparent that the signpost remained in place and that placement of the sign, based on wear and rusting of one surface of the post, would have faced outwards form the field being visible to those approaching the gates along Fairfield Avenue. The applicant would advance that this sign would not have been visible to the vast majority of users of the college field due to their elevated position at the top part of the bank above the Fairfield Avenue gates.

Accordingly, it would not be appropriate to rely on this sign alone to determine that use of the field was, by the majority of users, with force. This could only be said of those users entering via Fairfield Avenue itself who would be aware of the signs, but given that the gates were locked from 2005 and the road is but a few houses this would not impact users in any meaningful quantity.

If, as Mr Edwards advances, the college erected signs in 2006 at "each and every entrance and exit point" based on the advice of Martineau Johnson referred to at page 103 of the Blue bundle then, due to the fact that there were 24 identified entry and exit points from the land, 4 interesting observations arise.

Firstly, how did they deal with the entrances to the site in the forms of 14 gates in the boundary fences of surrounding houses? We heard directly from 2 owners of gates (Mr Crosland and Mr Hayes) and neither recalled any sign in 2005- 2006 and I am confident that they would remember such an eventuality had it arisen. In addition, both witnesses were asked if they had received any correspondence either from the college or Bellway about their gates and neither had heard from either of the landowners.

The second observation is that the Applicant would have expected to see further evidence as to the difficulty of the task of placing signs at each and every entrance and exit, as an example for a member of staff to have responded to say that the scale of the task is large (due to the volume of gates and missing fencing) and therefore to seek clarification from the College's hierarchy how best to proceed in the face of such difficulties, as an example and e-mail asking "how do you want me to deal with putting signs on people's gates? Is it going to be OK for me to do that?". We should bear in mind here that the College's own legal representatives Martineau Johnson refer to the Southern Boundary as "non-existent" and whilst this is somewhat overstating the condition it must be asked how the College intended to place signs at locations numbered 17 and 18 given the lack of remaining fencing in the area. In short, this situation is not a simple exercise where an employee can simply turn up and put up a few signs without encountering some meaningful practical difficulty.

Thirdly, unlike in the Betterment case (see para 94 which references the evidence of Mr Sackley a sign-writer), we have no direct evidence at all in respect of the alleged erection of signs in 2006. In the course of the evidence provided by Mr Woolcott who had been asked by the Inspector to explain the scarcity of evidence from the College on this and other points that Mr Woolcott stated that the College's files and administration were not in good order. Based on this position the applicant elected not to cross examine Mr Woolcott stating simply that the evidence that had been given by Mr Woolcott was entirely reflective of his own dealings with the college. The applicant offers that set against the shared opinions of both parties the

administration of the College, which is known to be poor, should not be relied upon for the determination of such a critical point.

There is a fourth observation is that the person who allegedly confirms the erection of the 2006 signs is a Mr I Starkey who appears not to be an employee of the college – he is simply an advisor and we know not how he came to make his report, it certainly does not state that he visited the site and confirmed the condition in person. It is also noted that out of the 5 meetings where the Rolleston site was discussed he was only in attendance for two meetings and between the first and second meetings his job title appears to change from acting Finance Director to External Advisor. Mr Starkey was unable to be contacted and could not be called to give evidence, consequently the reliability of his comment is unproven at best. This should be considered against the direct personal evidence of witnesses who gave oral evidence on this point and were subject to cross examination.

These four observations combined give rise to very significant doubt that the so called "2006 signs" were ever present. When we reflect on the Inquiry itself there is no practical evidence of the existence of the alleged 2006 signs. There is no direct evidence from any witness on behalf of the objector to state that they were present. There is no order placed for the production of signs nor any invoice from a sign maker. What the inspector is left with is the evidence off witnesses living and accessing the site who say these particular signs were not present when other signs (Fairfield Avenue and the 2017 signs) could easily be accounted for in evidence and this must be compared against the minutes contained in the bundle where just one person, who is not an employee of the College, claims that they were present.

In submissions it is possible that the objector may make reference to pages 106 – 112 of the Blue bundle and in particular that at pages 106 – 107 there is a reference to 2 requests which the college had received to use the land. This could mistakenly be taken to be proof that the 2006 signs had indeed been erected. However, if the Inspector were to read on, he would note that the first request is from a football team based outside the village who is seeking use of pitches because their home ground is no longer available. There is no reference within the correspondence to signs. The second request is not present in the bundle (a further example of unreliable administration) but there is a reply to Heidi Light who was Clerk to the Parish Council at this time. Based on the evidence available it is not possible to infer in any way that either of these requests arose due to the erection of signs in the period prior to receipt of the correspondence.

It is the position of the applicant that it would be unjust to determine that the 2006 signs were erected on the balance of the evidence which was made available at the inquiry.

Overall the view the applicant offers is that the only sign which is accepted was present during the reference period was that at Fairfield Avenue in around 1998.

2.3.1.3) Prevention of use.

If we look at the evidence submitted 94 witnesses state that they have never been prevented use of the site. 42 comment that they have been prevented by Bellway since the erection of Heras fencing in December 2017 which is outside the reference period. There is only 1 witness who says he was refused permission and this person is the secretary of the cricket club who makes reference to a written application for permission to use the site which was indeed declined. This can be found in the Red bundle at pages 494 to 496.

If we look then at the question as to whether attempts were made to prevent use through fencing and notices 94 witnesses make reference to prevention outside the reference period by Bellway's Harras fencing in December 2017. 29 witnesses state that they have never been prevented, 3 more make reference to partial fencing around the site, 1 makes reference to a fencing repair by the college, this person lives on Walford road not far from Fairfield Avenue which we know was repaired and finally 1 makes reference to recently placed signs which were put up along with fencing by Bellway in December 2017 and also in March and April 2017 by the College.

Whilst it is accepted that there has at some point in time there has been some access by force (in the 1960s) it has been well evidenced that this predates the qualifying period and was never "made good" by the College.

2.3.2) Without secrecy

The applicant suspects the Inspector has rarely been faced with such a volume of witness evidence as to the open and obvious use of a piece of claimed land. Witnesses have given evidence which when summarised is that none of the 13 were ever subjected to any challenge as to their use of the land meaning their use can qualify as being 'as of right' reference Mrs G Taylor v Betterment Properties.

In respect of the secrecy point we should of course consider the existence of 14 houses who have gated access directly onto the site and could not possibly be considered to be secret in any way. The existence of these gates shows with absolute clarity that the College made no meaningful attempt to limit or control use of the land. It would have been a very simple step given the resources of the college for them to write to homeowners and inform them that access was not permitted. This however could have been controversial as it was a well-known fact that the headmaster of the Forest of Needwood School had a gate built in his residence at 22 Twentylands in order to minimise his commute to work. Other residents simply felt it

was acceptable to do likewise and on this basis the majority of these gates were in place before the closure of the school and therefore were present throughout the reference period with one witness (Mr Hayes) explaining that his gate was put in place for some 13 years out of the 20-year reference period and it was never contested.

There are 15 reports form witnesses that they have definitely been seen by the landowner, there are also many comments expressing uncertainty over this question, I suspect this is because people were unclear who the representatives of the landowner were. The responses of witnesses also underline the lack of presence for the landowner and as a secondary feature they also demonstrate that the witnesses who answered in the negative or were uncertain have not received any personal challenge as to their use of the land.

This background goes to show that access to the land was completely open and transparent with residents having the freedom to make use of the land with the absolute knowledge of the landowner.

2.3.3) Without permission

In documents provided by the college (pages 110 to 127 of the Blue bundle) they appear, as a matter of policy, to have refused permission when it was requested in writing by residents. At the same time, they have ignored or turned a blind eye to use without permission (or as of right) which means they can be considered to have acquiesced their rights as landowners faced with use of their land by the local community.

In terms of the witnesses who gave oral evidence at the Inquiry 12 of the 13 had no permission. Mr Arnold Burston may have had permission at some point, granted as he wandered through the college buildings, but at 88 years of age and following a lengthy cross examination he did appear somewhat tired and perhaps a little confused when he gave his answer on this point. It was unclear whether the permission was for access through the college or whether it was to use the land.

2.3.4) Addressing the alleged Rights of Way issue.

During examination a number of witnesses did discuss a circular route around the site and indeed also discussed using a route diagonally across the site so I can understand why this point was raised by Mr Edwards.

It is worthy of note that several witnesses described their walks as leisurely (rather than a solely as a means to get from A to B) and there does appear to be case law which classifies a leisurely walk as a pastime – with a reference to “wandering’ being made in Abercromby vs Town Comrs. of Femroy (1900) and the applicant would wish the Inspector to consider the distinction between walking which is with the purpose

of getting from A to B i.e. use of land as a right of way as opposed to walking for a leisurely purpose which would be aligned with such use being 'as of right'.

The computer analysis of witness evidence shows 520 reported activities performed directly by witnesses and 1286 observed activities upon the land.

A total of 38 different uses are referenced as being either participated in or observed. These include games like rounders, football and cricket which by their nature will take place over a larger section of ground than just a narrow path. It also included pastimes like kite flying or model aircraft flying which whilst often performed in smaller groups will tend to take place away from the perimeter in order to safeguard both other users of the land but also the kite or plane in the event of a crash landing.

It is no doubt the view of the objector that walking and dog walking should somehow be discounted from these statistics as they will claim they only relate to use of the land as a right of way, but this is not a view shared by the applicant. We heard from several dog walkers that they would often stop and chat to others whilst walking the site or take in the views or even observe wildlife. We also heard from some users that they would at times vary their route to more meander around the field. Such supplementary activity should not be rejected out of hand – it paints a picture of a piece of land where people meet, talk, relax and pass time which is entirely within the spirit of use "as of right".

In addition, when the aerial photographs were discussed a number of witnesses stated that the path towards the perimeter had become more apparent over time as the mowing of the site had reduced in frequency and then ceased in or around 2012. With the centre of the field becoming more grassed than previous it would become more prevalent that walkers and dog walkers would migrate towards the perimeter of the field.

It is worthy of note that a worn path appearing in the aerial photographs form 2009 onward is visible some 16 years through the 20-year reference period that the inspector is considering and therefore is only a noteworthy factor for 20% of the of the qualifying period.

It is not the view of the applicant or indeed that of the witnesses that the existence of a worn path in later years should be interpreted to mean that the interior of the field was either unused or that it ceased to be used in any meaningful capacity – a matter on which we heard directly from Paul Salisbury whose children played football and cricket on the land often in the evenings, at weekends and during school holiday in the early part of the qualifying period. We heard from Mr Scott Richardson that his children had played on the land and learned to ride their bikes up on it. We finally heard directly from Jake Chatburn that he would regularly play in the centre of

the field with his sister and their friends even towards the end of the qualifying period when the grass had been allowed to grow longer.

Beyond these reports we also heard evidence from both Roy Crosland and Charlie Hayes who live facing the proposed TVG site. Both of these witnesses spoke of their observations that the land, whilst used most frequently by walkers and dog walkers is also used for other activities albeit at a lower frequency. Mr Hayes also described his own activities upon the field with his grandchildren.

At page 69 of the Blue bundle the college filed a statement under Section 31(6) of the Highways Act rebutting any public highway or footpath over the site. It is the understanding of the Applicant that the Inspector must judge on a practical basis the steps taken by the landowner to prevent use and preserve his or her rights to the land. In this respect the statement appears to be at odds with the open use of the land by the local community. Put simply the college did not put into meaningful practice whatever thoughts lay behind the statement they submitted and in the applicant's view it was a paper exercise only with no material impact on the users of the land.

The applicant believes that in his reference to the Radley lakes case Mr. Edwards is attempting to form a picture in the mind of the Inspector that is comparing the two locations. In respect of geography it is the applicant's view that a lake surrounded by a narrow path will very understandably be used as a circular walking route, in the Radley lakes case there were 39 witnesses who gave oral evidence and as their evidence was carefully catalogued by Mr Vivian Chapman QC we can establish that the overwhelming majority of them identified walking as a predominant use, in some cases it is the only reported form of use. There was in addition much more limited evidence of occasional use for cycling, swimming, jet-ski practice and earlier in the reference period the lakes were used to a lesser degree for fishing. I note that there was no precise statistical summary of evidence attempting to quantify usage.

In his comments Mr Edwards also made reference to the Cheltenham builders' case at para 30. This states that in that particular case the applicant had failed to prove use of sufficient parts of the land for the claim to succeed. The reason for this was that much of the land was overgrown and incapable to have been used in the way the witnesses in the case had described. The applicant sees no parallel here with the College Field application. The land is flat, well drained and through to almost the end of the reference period was kept well mown, latterly mown with a reduced frequency. There has been no doubt expressed that the evidence of local users was genuine and to the best of their recollection. The volume of evidence should naturally lead to the reasonable conclusion that the whole of the land was used over the reference period. The applicant would not wish the Inspector to become

confused about this situation due to the fact that usage post 2013 has altered as the grass has grown making use for activities like cricket and football no longer appropriate. That is the condition now in 2019, as opposed to the condition as it was during the reference period.

Based on these observations of both the case law and witness evidence the Applicant would very much like to draw the Inspector's attention back to the case at hand and to the appendix on use which shows the use of the field as observed by the witnesses.

The Applicant has identified 13 activities which by their very nature do not involve the use of a path as a right of way. The number of instances these activities are reported by witnesses are shown in a table below: -

Activity	Carried out by witnesses in person	Observed by the witnesses as an activity performed by others
Children playing	52	143
Football	22	97
Flying kites	21	115
Team games	13	55
Cricket	10	59
Sledging	9	9
Picnicking	8	61
Rounders	4	35
Golf	2	7
Flying model planes	2	15
Camping	1	0
Bonfire party	1	9
Total	145	605

In summary there are 145 reports of use other than as a form of right of way reported directly by witnesses and a further 605 observed forms of use which cannot be considered to be as a right of way. This is significantly greater than the volume of evidence, not associated with use as a right of way, which was provided in the Radley lakes case.

To put things into context 47.7% of the available evidence in respect of the College Fields is related to use not analogous with designation as a right of way.

It would therefore be an extremely significant disappointment to the community having provided such a meaningful amount of evidence in respect of varied usage for their case to fail on this point.

2.4) In lawful sports and pastimes.

Appended to this submission are 2 graphs showing the full use of the land as identified in the electronic summary the Inspector requested in his directions. These show 520 instances of use by witnesses and 1268 observed uses.

The Objector has made reference to the Laing Homes case (R v Buckinghamshire County Council and the Secretary of State for Environment, Food and Rural Affairs) however, the volume of witness evidence contained within the College Fields application means there can be little question that the test from the Laing case is easily overcome.

3) Response to other issues raised in the objectors closing remarks.

During the final day of the Inquiry the Inspector gave opportunity for the Objector to run through their evidence and make some verbal submissions.

It is noted by the Applicant that this step was very sporting in its nature and has given the Applicant a fair chance to respond to those issues.

In the section that follows the Applicant will provide his response.

3.1) Trespassory use

It is the understanding of the Applicant that use gained by force cannot be considered to be peaceable and therefore such use cannot be considered to qualify in terms of being as of right.

We heard from Mr Burston that there were openings in the fencing and hedges in the late 1960s when he was employed as a teacher at the Forest of Needwood School.

Subsequently we heard from Mr Salisbury and Mrs Burston both of whom had been pupils at the school in the 1970s that the same gaps in fencing and hedges were present at that time.

Mrs Burston added that sixth form students had been instructed by teaching staff to use point number 18 to exit from school for physical education activities at the Craythorne Golf Club.

Furthermore, we heard from multiple witnesses that the initial damage to fencing and hedges was the work of school children seeking a shorter route between school and home i.e. breaking out of the grounds rather than local residents breaking in.

Within the case of Taylor vs Betterment para 58 page 654 of the Blue bundle it is noted that the test for peaceable use is whether a reasonable person would conclude that a landowner was objecting to their use of the land. As we know the

gaps in fencing and hedges are long established prior to the commencement of the 20-year reference period, in fact we know they were present for approaching 30 years prior to the commencement of the reference period. The evidence is that other than at Fairfield Avenue there were no signs visible to local people and accordingly there was nothing that would indicate to the reasonable person that their use was anything other than as of right.

Mr. Edwards on behalf of the objector intends to rely on paragraphs 60 – 64 of the Betterment case at page 655 of the Blue bundle, this in turn references aspects of the Redcar case.

It will no doubt be the position of the Objector that historical damage to hedges and fencing renders all future use to be 'by force'. Mr. Edwards in his verbal submissions put forward a position that there would need to be a positive act from a landowner to create a condition whereby future use would be seen to be as of right. This logic would appear to infer that once land has been accessed by force through a gap in a hedge or damaged fence then it will forevermore be unable to be claimed as Village Green, this feels to be a somewhat extreme position and is overwhelmingly favorable towards even the most careless of landowners.

The Applicant understands this to be a pivotal mater within the assessment of the College Fields application and would wish to pass comment on Mr. Edwards assertion.

Firstly, in the case of the College Fields the land in question changes hands. It goes from being under the ownership of Staffordshire Country Council to being under the control of the College at the beginning of the reference period in 1993.

The Applicant wishes to use an analogy around the taking over of the site. If, as an example, a person purchased a house and as part of purchasing that house established that their fencing and hedging was in poor condition the new homeowner would have a choice to make, whether to leave the condition as they found it or to make it good. If we extend the analogy further and say that the new homeowner had either small children or pets that they wished to contain within their boundary then there would be a motivation for them to act upon the damaged fencing and hedging.

The Applicant would assert that at the point the College took over the land in question they were well aware of the use by local people, they did not know well how that use had come about or how long it had been happening for, yet they made a choice to leave the status quo. The Applicant asserts that the choice made by the

College upon taking ownership of the land counts as a positive action that would render ongoing use of the land by the community to be peaceable. Their inaction at this important period of time shows very significant acquiescence of their rights as a landowner.

Paragraph 74 of Redcar (at page 611 of the Blue bundle) states that a landowner who acquiesces in the face of an act which gives rise to the assertion of a right and who does not complain for a sufficiently long time will lose his right to complain about the activity. It is the Applicant's view that this statement represents the precise condition in respect of the management of the College Fields by the landowner.

The second key point in time is in 2005 where they are in receipt of legal advice from Martineau Johnson suggesting that they may wish to make repairs to the fencing around the site to protect their rights. No doubt the Objector will point out that at page (103) of the bundle the advice is 'and/or' in respect of fencing or signage, but the point being made by the Applicant is that this again is a key decision making time for the landowner and they decided to take no action in respect of fencing despite knowing that leaving the fencing unrepaired would continue to provide access to users who were accruing rights to the land.

I would like to make a brief aside here about the contemporaneous legal position in 2005 which is that it was prior to Betterment (2012) and also prior to Redcar (2010) and also prior to Winterburn (2016) so at the time in question the prevailing best practice would have been to rely on both signs and fencing and no doubt a professional advisor at the time would have guided the landowner in this direction.

Finally in this area the Applicant would make reference to a strong positive act which is that upon the closure of the site in 2003 the College continued to regularly mow the site. This mowing continued past the period in 2005 when the College was considering its position in respect of the land. The mowing subsequently reduced in frequency we heard in around 2009 and stopped around 2012. The College no longer made any active use of the site for sporting purposes from 2003 onwards and we can see from the aerial photographs at (pages 162 – 163 of the Blue bundle) that the pitches were no longer marked and goalposts were no longer present.

A very similar condition is referred to within the Beresford case at para 41 – 42 (page 554 of the Blue Bundle) and appears to be a relevant factor for decision making, giving a strong precedent for the College Fields application.

Given that the College was no longer making any active use of this land then the only sensible conclusion to reach is that the continued mowing of the grass was for the benefit of users from the local community and it is this act above the others which the Applicant feels can be most comfortably relied upon to show the College's acceptance that use of the land was continuing in a peaceable manner on an as of right basis.

Finally, it may be relied upon by the Objector that the submission of a Section 31(6) statement to the Highways Authority in 2005 as pages 67 - 68 of the Blue Bundle was a vehicle by which the College was asserting its rights as a landowner. The Applicant's opinion in regard to this is that this action was not seen by or known to users of the land and as such it did not impact of the understanding of a reasonable person that their use of the land was in any way contentious. It is this practical assessment which the Applicant feels should be applied by the Inspector.

Although the College appeared to have had some intention to protect their rights, which is referred to through their internal discussions in 2005 and 2006 there does appear to be an enormous chasm in terms of how that intention was conveyed outwardly and put into practice. At para 49 of Betterment (page 653 of the Blue bundle) it is identified that there must be some form of communication to the user to express that their use of the land is contentious and the applicant wishes to point out that such communication in the form of either signage or repairs to fencing or by verbal challenge simply did not take place practically such that it would be understood by a reasonable user of the land that their use was no longer as of right.

3.2) Interruption in availability of the site / displacement

It has been the evidence of witnesses that despite the demolition works in 2002 that the remaining access points to the site (other than those through or around the edge of the college buildings) were unaffected and that they remained in common use throughout the qualifying period.

In respect of the issue of possible displacement when the land was in use for sporting activities by the College the first observation of the Applicant is that many witnesses have spoken of use of the land at mornings, evenings, weekends and in school holidays. This pattern of use will understandably reduce the instances whereby there was potential for displacement.

It is also very much noteworthy that the land had space for 4 football pitches and 1 rugby pitch and there is no evidence to suggest that these were ever all in use at the same time. Accordingly, there would be ample space for members of the community

to use the remaining land without giving rise to any perceptible conflict between users with each feeling they were present as equals.

In numerical terms, with different age groups of students likely to be playing on different days around 20% of the land (one pitch out of five) would probably have been in use at any one time.

Having read in full the TW logistics vs Essex case there are some interesting parallels but also some very significant differences in respect of the facts of the two cases.

Firstly, looking at the aerial photographs which give us some indication as to the level of use of the 4 football and 1 rugby pitches that were marked on the field at the start of the reference period. The Applicant would summarise as follows: -

The March 1993 image (blue bundle B page 154) shows minor wear to the 2 football pitches towards the Western edge of the field. The other 2 football pitches and rugby pitch appear almost pristine.

The May 1993 image (blue bundle B page 156) shows less wear than the March image to the same 2 pitches. The remaining 3 pitches appear without wear.

The June 1995 image (blue bundle B page 158) has no perceptible wear on any pitch.

The November 1999 image (blue bundle B page 159) shows more significant wear to the pitch at the Western edge and lesser wear to the pitch closest to the southern boundary.

The June 2000 image (blue bundle B page 161) shows no perceptible wear to any pitch.

The June 2003 image (blue bundle B page 163) shows no marked pitches and no obvious wear to the ground.

If we summarise what the aerial photographs show us over the 20-year period in question there appears to be some meaningful use in 2009 only. Given that this photograph is taken in November when the ground tends to be wet and cuts up fairly easily it is impossible to give an indication what quantity of use it took to reach this state. We also do not know what proportion of use was from the college pupils and what proportion of the wear may have been attributable to use by the local community.

There is no reliable evidence put forward by the Objector in respect to quantifying the College's use of the land for sporting purposes but based on what we can glean from the aerial photographs it would appear to be minimal.

During evidence in chief a number of witnesses were asked about their observations of the frequency of use of the land by the College. Their responses varied depending

on what time of day or day of the week the witness made use of the field they reported either not having seen the College use the land at all or they reported infrequent use.

An additional question was put to witnesses who had answered in the positive in respect of seeing first-hand use of the land for sports purposes by the College. These witnesses were asked whether they had been unable to carry out their intended use of the land because they found the College using the desired part of the land for sports purposes and none answered that they had to stop or change their plan.

The Applicant is not surprised by this as the site is of reasonable size which would easily accommodate multiple users at the same time. In addition, the lack of wear to pitches would tend to correlate strongly with the low frequency of use reported by witnesses.

Additionally, it was likely to be the case that sports and leisure students were playing competitive matches – so in all likelihood that would mean that 50% of games would be played away from home and therefore only in alternate weeks would they play on the College Field.

In terms of key facts about use of the field by students for sporting purposes it appears based on the evidence to have been minimal during the period 1993 – 2003 and then nothing thereafter. This means the remaining 10 years from 2003 – 2013 there was no use at all.

In the TW logistics vs Essex case, much was made of the number of vehicle movements across the site and the corresponding amount of time the land was unavailable for other users. The finding in the TW logistics case was that use was insufficient to be fatal to the claim and that was with detailed analysis of the transport office records and the observations of 2 local residents.

The Applicant would advance an argument that there is no meaningful evidence to support the Objector's position that members of the community were displaced in any significant capacity when College football matches may have been occurring. It is however accepted that out of common courtesy local residents did not interfere with matches but this is perfectly normal behaviour and should not be misinterpreted as displacement that would render their use of the land not to be as of right.

4) Commentary on other relevant TVG cases

The applicant, having read a number of relevant case precedents would wish to share some observations in the following section.

4.1 Laing vs Buckinghamshire

The main significance of this case surrounds the efforts of a landowner to prevent use of his land through the repairing of fencing and placement of signs to asset his control over the land.

The specifics were that repeated damage of fencing took place to the extent that the landowner could no longer graze cattle on the land and the repeated making of signs coupled with the family of the farmer frequently warning off trespassers rendered the use of the land to not be peaceable and therefore not as of right.

If we contrast that situation with the College Fields application there is only evidence that one set of gates / fencing were put in place and one sign was erected during the entire reference period and both of these relate to Fairfield Avenue which is not one of the entry points being heavily replied upon by the Applicant.

There is one parallel with the Laing case the Applicant would wish to mention which is the existence of an absentee landlord. In the College Fields case the site has been unattended since early 2003 which is 11 years of the 20-year reference period, or 55% of the relevant time.

4.2) Beresford vs Sunderland

The regular cutting of grass is one similarity with the College Fields case (see paragraphs 41 – 43 of Beresford at Blue bundle page 554) and this was recognised as indicating some willingness for users to enter the site for recreational purposes and the same inviting condition existed on the College Fields through to around 2012, near the end of the reference period.

The case goes on to discuss the attitude of the owners to use by the public and this was labelled acquiescent or tolerant which again is the same as the College Fields application.

This judgement then sets out an expectation that a landowner must take some action if they wish to prevent use and assert their rights over the use of the land. This could be in the form of fencing, signage or by asking people to leave the land. These issues have been a matter for witness evidence in this case and the Applicant feels little of meaning has been done to stop rights from being acquired through the acquiescence of the College.

4.3) Oxfordshire County Council vs Oxford City Council (Trap Grounds)

This case referred to the attempt to register scrubland which was dissected by walking paths. There was much discussion that the land did not appear to be what one would expect from a traditional village green.

The discussion centred on the fact that much of the use was limited to walking and whether that and that alone could constitute lawful pastimes.

Clearly there are significant differences to the College Fields case here whereby the TVG land at the College Field does appear much more like a traditional green, even more so when it is neatly mowed. The Objector makes much of the fact that there is significant use by both walkers and dog walkers but this is a narrow view and ignores the multitude of other uses contained within the witness evidence submitted.

This judgement considered the prioritisation of rights between owner and users, especially in the case where use had been through trespass. Whilst the Applicant understands the principle in the case it has not been evidenced that the use of the College Fields has been through trespass during the reference period. It is suggested that the actions of the owner as described earlier in this document gave rise to a condition were use could be considered to be peaceable and therefore not tresspassory in nature.

4.4) Taylor vs Betterment

It is noteworthy that the Curtis family and their employees made the effort to attend in person to give their evidence (see para 27 and 28 at page 646 of the bundle) and the Applicant has little doubt that was highly influential in the decision that was reached, especially at the evidence of the applicant in this case was to no signs were present or seen by witnesses. They were also able to evidence the manufacture and payment for their signs as provided by a Mr Sackley a sign writer local to the area. The Applicant imagines this was a very influential point. There is of course no such practical evidence put before the Inspector in this case and I would again ask the Inspector to note that weakness.

The case then goes on to consider the expectation on a landowner to make effort to protect their rights such that subsequent use cannot be considered peaceable. This makes clear that some communication from the landowner to users is required. The point of contention in the College Field application is the lack of evidenced efforts

form the landowner throughout the reference period to assert their rights and in the Applicant's view the efforts of the college falls well short of the efforts made by the Curtis family and their staff.

There is no disagreement from the Applicant that in the face of opposition from the landowner use of their land will not be peaceable and therefore cannot be as of right. However, what we have in the College Fields case is a factual dispute, most notably over the alleged erection of signage in 2005 – 2006 that would have put local people on notice that their use of the land was contested.

4.5) Winterburn vs Bennett

This case centres on the access of car parking space between a fish and chip shop and a neighbouring landowners premises. One critical factor was the continuous presence of signs, visible to all comers, for the full 20 year reference period stating that the land was private and for the use of patrons only.

The principles here are that a landowner who can stop a right becoming asserted but who does not act quickly enough may risk losing their rights through negligence. It is also said that in that circumstance quiet possession can be acquired.

There are elements of the Betterment and Laing cases contained within. One issue is the removal or vandalism of signs, which in the College Fields case is a subject of dispute between the parties. The Applicant offers that the 2005 – 2006 signs were never erected and the 2017 signs which are not contested were flimsy and detached in poor weather. It is not accepted that signs were repeatedly removed through vandalism.

The view of the Applicant is that the tests associated with positioning and frequency of signage are not met by the efforts of the College such that they can rely convincingly on the Winterburn vs Bennett judgement.

Paragraphs 4 and 5 of this judgement (page 665 of the blue bundle) set out the critical points of the case. It states at paragraph 4 that there had been 12 – 15 occasions when users of the car park had been challenged. In contrast there are no reported verbal challenges in the evidence relating to the College Fields site.

The Winterburn case goes on at paragraph 5 to state there were 2 signs advising that use of the land was for private patrons only and therefore that any other use, in this case by patrons of the fish and chip shop, would be by force and therefore could not

qualify as use ‘as of right’. There was one sign placed on a wall and another in the window of the private members club. The critical point is that the signs were present for the full reference period and they were clearly visible to all users entering the site either in car or on foot.

Contained within the College Fields site and within the reference period there was a sign at Fairfield Avenue from around 1998 and further signs put up by the College and then subsequently by Bellway in March / April 2017 and December 2017 respectively. The later 2 being after the end of the reference period.
There is no sign placed such that it would have been seen by the majority of users and no sign present throughout the whole reference period. In respect of this matter it is the view of the Applicant that the direct evidence of multiple witnesses, especially those with a gate direct onto the land in question, should take precedent over the uncorroborated paper evidence on which the objector is relying.

Mr. Edwards kindly drew our attention to paragraphs 36 and 37 of the Winterburn case at page 670 of the Blue bundle and the Applicant understands the basic principle that users who ignore signs cannot be considered to be peaceable and therefore cannot be considered to be users as of right, however, the Applicant contests that there is sufficient evidence in the College Fields case to reach this conclusion for the reasons stated above.

Within the Winterburn case the Applicant would however wish to draw the Inspector’s attention to an extract of paragraph 37, again at page 670 of the blue bundle where Justice Richards states that ‘the issue is whether the owner has taken sufficient steps as to effectively indicate that the unlawful user is not acquiesced in’. It is the opinion of the Applicant that within the College Fields case there is no evidence of oral challenge of users, the only evidence in respect of fencing repair is the installation of gates at the Fairfield Avenue entrance in 2005 and there is no evidence of effective signage (other than at Fairfield Avenue) which is just one possible entry point out of 24. Set against this backdrop it is the Applicant’s position that the College Fields case is clearly one of very significant if not overwhelming acquiescence on the part of the College.

5. Conclusion

At the inquiry the Applicant’s Member of Parliament kindly spoke about his experience of working with the general public and he referenced the nature of people and their tendency in many cases towards apathy.

He went on to say that Rolleston on Dove was an active community and one that had, through the early adoption of the Localism Act tried to shape its future in respect of housing stock and development. He commented that he felt the handling of the Neighbourhood Plan by ESBC had been unfair to the community as the preferences of local people had been ignored which was outside the spirit of the legislation.

He further added that in his experience as an MP it was unheard of for a TVG application to have the level of active support that this application has received from the local community.

The Inspector subsequently kindly noted the consistent attendance of the local community throughout the four days of the public inquiry which was a visual indication that this application is of importance to the local community.

The Applicant has attempted to make clear both in evidence and in submissions that the belief of the community is that they were using this land as of right for well in excess of the 20-year qualifying period.

In summary, within these written submissions, it is the clear belief of the Applicant that all of the relevant tests have been evidenced sufficiently in order to afford a successful outcome.

Accordingly, the villagers of Rolleston on Dove look forward to many more years of enjoyment from their continued use of the College Fields site.