

KENT COUNTY COUNCIL

REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Council Chamber, Sessions House, County Hall, Maidstone on Tuesday, 28 January 2020.

PRESENT: Mr A H T Bowles (Chairman), Mr S C Manion (Vice-Chairman), Mr I S Chittenden, Mr J M Ozog and Mr R A Pascoe

IN ATTENDANCE: Mr G Rusling (Public Rights of Way & Access Service Manager), Ms S Bonser (Senior Solicitor. Invicta Law) and Mr A Tait (Democratic Services Officer)

UNRESTRICTED ITEMS

1. Village Green Application - VGA677 River Lawn, Tonbridge
(Item 3)

(1) The following supplementary documents had been circulated to all parties prior to the meeting:

- Statement made by the Barden Residents Association;
- Submissions on behalf of the applicant by Alexander Greaves (Francis Taylor Building);
- Statement by Tonbridge and Malling BC;
- Submissions by Jonathan Clay, Cornerstone Barristers.

(2) The Public Rights of Way and Access Service Manager introduced his report by explaining that KCC was the Town and Village Green Registration Authority for its area. The procedure for managing applications followed by the County Council was set out in the Commons Registration (England) Regulations 2014.

(3) An application had been submitted in April 2018 by the Barden Residents' Association to record an area of land known as River Lawn, in the centre of Tonbridge as a village green. The land in question was owned by Tonbridge and Malling BC who had resolved to dispose of it.

(4) The Public Rights of Way and Access Service Manager said that before an application could be accepted by the County Council it was required to make enquiries of the relevant planning authority as to whether registration of the land was prohibited by a trigger event as set out in Schedule 1A of the Commons Act of 2006. In response to this enquiry, Tonbridge and Malling BC had set out the view that two trigger events prohibited registration of the land as a Village Green. These were:

a) that the Tonbridge Central Area Action Plan 2008 identified all of the land for potential development, and

b) Planning permission had been given for a CCTV column which related to much of the site

(5) The Public Rights of Way Service had consequently sought legal Opinion in respect of the view put forward by Tonbridge and Malling BC. This Opinion had concluded that the development plan did not identify the land for “potential development” and that it was not clear in respect of the land covered by the CCTV planning permission, whether there had been a corresponding terminating event in respect of the permission in which the period when the development had to begin had expired without the development taking place. The Opinion had also advised that the County Council should proceed with the application while keeping the matter of trigger events under consideration.

(6) On the basis of this advice the Public Rights of Way and Access Service had intended to start consultation on the application in March 2019. This was initially delayed, on the advice of the County Council’s Monitoring Officer, due to the two pre-election periods for the Local Government and European elections.

(7) The Public Rights of Way and Access Service Manager went on to say that the matter had been further complicated when the judgement in the matter of Wiltshire County Council and Cooper Estates Limited had been handed down in May 2019. This case had a direct bearing on the question of development plans and trigger events. Further representations were received during this period from Tonbridge and Malling BC on the matter of the trigger events. These representations also confirmed that the CCTV development permitted under Planning Permission TM/04/02708 had been properly publicised and that it had subsequently taken place. Further Opinion had been taken in light of these representations.

(8) The Public Rights of Way and Access Services Manager said that the further Opinion had advised that there were now strong arguments being advanced by the Borough Council that a trigger event had occurred because the whole of the land was “sufficiently identified for development in the development plan” and that part of the site was subject to a “planning application “ trigger event. Although not all of the site fell within the red line boundary identified in the planning application, the applicant (Tonbridge and Malling BC) might wish to amend its application.

(9) The Opinion had also advised that the applicant should as a matter of procedural fairness be provided with the opportunity to make submissions on the point of the trigger events before a final decision was made by the County Council as Registration Authority. Highlighted amongst those points on which the opportunity for submissions should be invited was whether reference in Schedule 1A(1) of the Commons Registration Act 2006 “in relation to the land” should in the case of a planning application relate to the red line boundary of a planning application, or to the development within the application.

(10) The applicant’s response on the matter of the trigger events. This submission asserted that there had been no trigger event because the land had

not identified for development in the Tonbridge Central Area Action Plan 2008. It had, instead, been identified as an area of open space which should be retained, and that Planning Application TM/04/02708/FL had not been made in relation to the application land as it did not propose any development on it.

(11) The Public Rights and Access Services Manager said that both Tonbridge and Malling BC and the applicant had then been given further opportunity to comment. Tonbridge and Malling BC had provided further advice dated 31 July 2019 that re-emphasised and expanded on its earlier submissions in response to the applicant's submission. Both the applicant and Tonbridge and Malling BC then confirmed that they were satisfied that they had nothing further to add to their arguments at that point.

(12) Further Legal Opinion (fifth opinion) had now been taken to assist the County Council in reaching its decision on trigger events. In summary that Opinion had concluded that:

- (a) the law was far from settled in respect of the specific points that had arisen in respect of this matter. Therefore, whatever the decision taken, a challenge by way of Judicial review was probable;
- (b) the registration authority was bound to reach a decision (one way or the other) on whether either, or both, trigger events applied in this case;
- (c) in the Barrister's view, there had been a trigger event in relation to the whole of the land because the land was identified for potential development in the development plan and therefore registration of the land as a village green was prohibited; and
- (d) in the Barrister's view, there was no trigger event by virtue of the publicity of a planning application because the development concerned was outside the boundaries of the potential Town or Village Green land.

(13) The Public Rights of Way and Access Services Manager moved on to set out the options available to the Panel. These were to conclude that:-

- (a) the Core Strategy Policy CP23 and Tonbridge Central Area Action Plan 2008 constituted a trigger event which prevented registration of the land as a village green. In which case the application should be rejected for determination;
- (b) the planning application TM/04/02708 was a trigger event which prevented the registration of the majority of the land as a village green. In this case it might be possible for the applicant to amend the application and seek to register that small proportion of the land not covered by the trigger event;
- (c) both the Tonbridge Central Area Plan 2008 and planning application TM/04/02708 were trigger events which prevented registration. In this case the application should be rejected for determination; and
- (d) no trigger events affected the land to which the application related. In this case, the County Council would continue to consider the application.

(14) The Public Rights of Way and Access Services Manager confirmed that the possibility of the County Council of its own volition referring the matter to the High Court for a declaration had been considered but discounted. This was because Oxfordshire County Council had taken this approach and been severely criticised by the Court. There was, consequently, no alternative to actually reaching a decision, even though the possibility existed of it being judicially reviewed.

(15) The Public Rights and Access Services Manager concluded his presentation by amending the recommendation in paragraph 4. This amendment clarified that the trigger event had occurred under section 15C and Schedule 1A (Ground 4) of the Commons Act 2006 in that Core Strategy CP23 of the Tonbridge and Malling Core Strategy and the Tonbridge Central Area Plan 2008 identified the land for potential development.

(16) Mr Mark Hood addressed the Panel on behalf of the applicants. He said that the Barden Residents Association had been forced to apply for Village Green status in order to protect their half acre of open space from possible development by the Council, which was supposed to represent them.

(17) Mr Hood continued that the Barden Residents' Association had supported a long campaign by *Keep River Lawn Green* to protect this plot of land which had been purchased by Tonbridge Urban District Council after the First World War in order to prevent the buildings backing onto the High Street from encroaching onto the waterfront of the River Medway. In 1921 the Urban District Council's surveyor had summed up their intentions as being: "*to continue the River Walk along the bank to Corner Boatyard and Avebury Avenue ... levelling up the remainder of the site to provide a greensward for recreational purposes, screening the back of the High Street properties with a row of trees ... I anticipate that the improvement would effect a marked transformation and would be of great value in the future to the inhabitants of the immediate neighbourhood*".

(18) Mr Hood then said that over the years, many organisations had attempted to build on the space in question. These had included the Tonbridge Womens Citizens' Association in 1926 and the Royal British Legion. All of these applications had been refused. Now it was Tonbridge and Malling BC itself which was pushing for development.

(19) Mr Hood said that the Barden Residents' Association wanted to enhance and protect this space in the manner set out in the Tonbridge Town Centre Action Plan in 2008. The adoption of this Plan had been identified as a trigger event by the very Council of which he was now a Member. It asserted that it included references to the use of the land across River Lawn. He believed that the Plan specifically identified the outline of the open space with the clear intention that no built form was introduced into this space.

(20) The Action Plan clearly identified River Lawn for public realm enhancements and illustrated where it expected development to arise and which areas would remain as open public spaces. The maps included in the plan specifically the Proposals Map, The Master Plan and Fig4 Policy Annex PA/TCA1

defined where the Council envisaged placing its landmark building; where the active frontages for the anticipated built forms would occur; and the limits of the footprints of development allocations.

(21) Mr Hood added that Policy TCA 11(f) was very clearly plotted on the Proposals Map and limited the development area to the frontages of the commercial buildings in River Lawn Road to the East and to the footprint of the Teen and Twenty site to the South West.

(22) Mr Hood summarised his representations on the Tonbridge Centre Action Plan 2008 by saying that it covered the entirety of the town centre but specifically identified River Lawn as a public space to be enhanced. Its Policy TCA11 clearly acknowledged “a landmark building as identified on the proposals map.” That building was nearing completion. It was not on River Lawn and the public realm enhancements would not include crowbarring them into the limited space around this new development, replacing lawn and trees that were wholly within a Conservation Area. At no point in the Action Plan was the Lawn Green area itself identified as being suitable for development.

(23) Mr Hood then turned to the Planning Application for a CCTV camera. He said that this development actually stood outside of the footprint of the land which he wished to see registration as a Village Green. The red line in the Plan appeared to be an illustration of the scope of visibility achieved by the camera rather than an illustration of the extent of the development.

(24) Mr Hood concluded his presentation by saying that the residents did not want to lose this cherished space and had emphatically supported candidates who campaigned specifically to save it from development in both South Tonbridge wards in May 2019.

(25) Mr Alexander Greaves addressed the Panel on behalf of the applicant. He said that, although the report had clarified that the recommendation had not identified the planning application for the CCTV camera as a trigger event, he still intended to explain his thinking on this point.

(26) Mr Greaves continued that the application had been made to install a CCTV camera and associated equipment on a pole up to 6m in height above ground level. This was to be located in River Lawn Road as identified by a red dot within a black circle on the site location plan he had submitted to accompany his presentation. The red lines on this plan were arbitrary and there was no reason to believe that the development related to a larger area than the black circle because the permission granted would not allow the camera to be located anywhere else. It was plainly not a development for a change of use. He therefore agreed with the advice given to KCC by Annabel Graham Paul of Counsel that the application to install a CCTV camera did not constitute a trigger event.

(27) Mr Greaves then turned to the question of whether the Tonbridge and Malling Development Plan constituted a trigger event. The Judgement in the *Wiltshire Council vs Cooper Estates* was very significant and needed to be interpreted correctly. He referred to Paragraph 62 of the High Court Judgement

which set out that it was necessary to consider the application by reference to the specific plan and plan policies. Paragraph 29 of the Appeal Court Judgement stated that a development plan document had to be construed as a whole. In the case before the Courts, the Wiltshire Development Plan had expressly stated that there would be a presumption in favour of development, and the area in question had also been identified for development. In paragraph 65 of the High Court Judgement, it had been noted that there were no constraints on development that applied to the land. Likewise, Paragraph 46 of the Court of Appeal Judgement by Lord Lewison had explicitly stated that it was not the case that there were any countervailing policies in the Wiltshire Development Plan. Lord Floyd had agreed that there had been nothing in the Policy as a whole to contradict Policies CP1 and CP2 of the Wiltshire Development Plan which identified the land for potential development.

(28) Mr Greaves then said that the Tonbridge and Malling Development Plan differed from that in Wiltshire. Its Core Strategy was a high level strategic document, whereas Wiltshire's Development Plan was in part (as set out in Paragraph 44 of the High Court Judgement) a document which set out to manage development.

(29) Mr Greaves then turned to the Tonbridge and Malling Development Plan itself. He said that Policy CP23 in the Core Strategy was preceded by a passage which said that the Area Action Plan for Tonbridge Central would provide a framework to facilitate appropriate, high quality development. Policy CP23 did not itself identify land for development. Policy TC11 (f) of the Area Action Plan set out that River Lawn would receive public realm enhancements to mitigate the residential developments proposed for the general area. This should be understood as environmental enhancements. The Policy did not actually identify the River Lawn site as land for development. The Policy called for development on identified sites, but the proposals map did not identify the River Lawn VG application site in this way. The yellow star on the map was just below this site. The yellow dots on the proposals map ran along the River Medway. This meant that the "public realm enhancements" described in Policy TCA11 (f) were in fact enhancements to the adjoining river area. The Area Action Plan when read as a whole indicated that the public realm enhancements were to take the form of an active frontage, a new lighting strategy and enhanced pedestrian links. None of these would affect the River Lawn VG application site which was identified as part of a Conservation Area on the proposals map.

(30) Mr Greaves then stated that the effect of reading Policies TCA2 (which set the criteria for mixed development) and TCA11 together was to demonstrate that there was no intention to develop the River Lawn VG application site. Policy TCA7 should be read as a policy for the design of proposals that came forward and did not indicate that there was any intention to develop the site under discussion.

(31) Mr Greaves said that overall, there were many policies within the Tonbridge and Malling Development Plan and identified: Core Strategy Policy CS23 (f), and Action Plan Policies TCA (a), TCA 10 (4), TCA7, TCA10 (3), and TCA11 (f). He asserted that because of these policies, the Development Plan

was radically different from that of Wiltshire CC which had been the subject of the Court of Appeal Judgement on trigger events.

(32) Mr Greaves concluded his presentation by saying that his reasons for disagreeing with Annabel Graham Paul's Opinion had been set out on paragraphs 19 to 27 of his supplementary representations. In his view, there had been no trigger event because the Development Plan proposals involved enhancing the River Lawn VG application site from the outside rather than through development of the site. He asked the Panel to depart from Annabel Graham Paul's Opinion for this reason.

(33) Mr Jonathan Clay (Cornerstone Chambers) spoke in reply on behalf of Tonbridge and Malling BC. He said that when considering Village Green applications, the only factors that could be taken into account were facts and law. There was no leeway to consider the merits of an application for registration.

(34) Mr Clay then noted Mr Hood's statement that the application had been made to prevent buildings being erected on green open space. He said that this consideration was entirely irrelevant to the Panel's deliberations.

(35) Mr Clay went on to say that the Court of Appeal had stated that it was important to understand why legislation concerning the insertion of trigger events into the Commons Act had been passed. Parliament had become concerned that village green applications were being promoted in order to frustrate the democratic planning process rather than to protect recreational rights.

(36) Mr Clay then turned to the Tonbridge and Malling Development Plan. He said that it identified the site as having potential for development. This could refer to building development or to change of use applications. Examples of the latter could be engineering operations, lighting columns, pathways, parking spaces, toilets or market stalls, flood protection, infill between buildings or extensions. The Tonbridge Central Area Action Plan identified the area for potential development

(37) Mr Clay quoted paragraphs 4.3.16 and 4.3.17 of the Tonbridge Central Area Action Plan. The former stated that mixed-use infill would be supported in the Riverside Gardens Area. The latter described the lighting strategy to improve the area. Both of these paragraphs described planning development covering the VG application site.

(38) Mr Clay concluded his presentation by saying that the Tonbridge and Malling Development Plan took the form of downward-cascading documents with the Core Strategy informing the provisions of the Area Action Plans. He rebutted the argument that the Development Plan intended to keep the Village Green application site free from all development by saying that this was never stated in the Plan and that it was intended to make improvements. He was therefore in agreement with the Opinion of Annabel Graham Paul.

(39) During discussion of the options available, the Public Rights of Way and Access Services Manager confirmed, for the avoidance of doubt, that the recommendation was to reject the application on the grounds that a trigger event had occurred by virtue of the provision for development within the Tonbridge and

Malling Development Plan. It had not occurred as a result of the application to install a CCTV camera.

(40) On being put to the vote, the recommendations contained within the report were unanimously carried as amended in paragraph (15) above.

(41) RESOLVED to:-

- (a) reject the application to record River Lawn as a village green on the basis that a trigger event has occurred under section 15C and Schedule 1A (Ground 4) of the Commons Act 2006 as a result of land being identified for potential development in Core Strategy Policy CP23 and the Tonbridge Central Area Action Plan 2008; and
- (b) note the probability that the decision taken may be subject to Judicial Review with the financial implications associated with the defence of such an action.