

From: Graham Rusling – Public Rights of Way and Access Service Manager

To: Regulation Committee Member Panel – 28 January 2020 –

Subject: Village Green Application – VGA677 – River Lawn - Tonbridge

Classification: Unrestricted

Summary:

In 2018 the County Council received an application to record a parcel of land known as River Lawn at Tonbridge as village green. In following the County Council's procedure for the determination of village green applications enquiries were made of the Local Planning Authority as to whether the land was affected by any trigger events under section 15C and Schedule 1A of the Commons Act 2006.

It was the view of Tonbridge and Malling Borough Council that two trigger events affected the land in question and therefore the application should not be accepted by the County Council.

The Public Rights of Way and Access Service took advice on Tonbridge and Malling BC's view and that initial advice concluded that the right to register a village green had not been excluded by a trigger event. The advice further recommended that the County Council as Registration Authority should keep the decision as to whether there had been trigger events under review while consulting further on the application.

Further opinion was submitted by Tonbridge and Malling BC in respect of the trigger events and representation sought from the applicant on the same matter. Tonbridge and Malling BC and the applicant are at variance as to whether trigger events do exclude the land from registration.

Further advice has been taken on the matter and the Regulation Committee is recommended to find that the right to apply to register the land as a TVG has been suspended by virtue of a 'trigger event'.

Recommendation(s):

The Regulation Committee is recommended to decline to determine the application to register a village green at River Lawn Tonbridge.

The Regulation Committee is asked to note the potential risks associated with a challenge to its decision.

1. Background

- 1.1 Kent County Council is the Town and Village Green Registration Authority for its area. The procedure for managing applications followed by the County Council is set out in the Commons Registration (England) Regulations 2014.
- 1.2 In April 2018 an application was submitted 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 village green application site is outlined in blue on the map provided as **Appendix A**. The land in question is owned by Tonbridge and Malling Borough Council who have resolved to dispose of it¹.
- 1.3 In following the procedure for managing applications, before accepting an application the County Council makes enquiries of the relevant planning authority as to whether registration of the land is prohibited by a trigger event as set out in Schedule 1A of the Commons Act of 2006.
- 1.4 Where an event as set out in the first column of relevant schedule (Schedule 1A of the Commons Act 2006) has occurred in relation to the land then the right to record a village green has ceased unless a corresponding entry in the second column has occurred; a terminating event.
- 1.5 In response to the County Council's enquiry Tonbridge and Malling BC were of the view that two trigger events prohibited registration of the land as a Village Green:
 - i) The Tonbridge Central Area Action Plan 2008, an adopted development plan which identified all of the land for potential development, and
 - ii) A grant of planning permission for a CCTV column. Planning application TM/04/02708/FL, which related to much of the site
- 1.6 Opinion was taken in respect of the view of Tonbridge and Malling BC. That opinion, River Lawn second opinion is included at **Appendix B**. That opinion concluded that:
 - i) the development plan did not identify the land for "potential development".
 - ii) in respect of the land covered by the CCTV planning permission, it was not clear whether there had been a corresponding terminating event in respect of the permission such as the period in which the development must be begun had expired without the development taking place.The opinion also advised that the County Council should proceed with the application while keeping the matter of trigger events under consideration.
- 1.7 On the basis of the advice the Public Rights of Way and Access Service was to start consultation on the application in March 2019. This was initially delayed, on the advice of the Monitoring Officer, as a result of two periods of purdah for local and European elections respectively.

¹ TMBC decision number: D170066CAB 11 October 2017

1.8 The matter was further complicated as judgement in the matter of Wiltshire County Council and Cooper Estates Limited was handed down in May 2019. This case was of direct bearing to the matter of development plans and trigger events. During this period further representation was received from Tonbridge and Malling BC on the matter of the trigger events. In addition it was confirmed that the development permitted under Planning Permission TM/04/02708 had been properly publicised and that the development had subsequently taken place. Further opinion was taken in light of these representations.

1.9 The further arguments advanced are summarised most succinctly in the Third Opinion to the County Council, provided as **Appendix C**. That opinion concluded that:

i) There were now strong arguments being advanced by the Borough Council that a trigger event had occurred because the whole of the land is “sufficiently identified for development in the development plan” and

ii) Part of the site is subject to a “planning application “ trigger event. Although as not all of the site fell within the red line boundary identified in the planning application the applicant may wish to amend their application.

The opinion further 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 is 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. These boundaries have been marked on the plan provided at Appendix A.

1.10 Tonbridge and Malling BC provided a further opinion on the point of the red line boundary, concluding that the land should relate to the red line boundary of the planning application. **Appendix D**

1.11 The applicant was given the opportunity to make submissions. It was requested that these related only to the matter of the trigger events in line with the County Council’s third opinion. The applicant appointed a barrister who provided a submission on the matter of the trigger events. The submission asserted that there had been no trigger event because:

i) The land is not identified for development in the Tonbridge Central Area Action Plan 2008. It is identified as an area of open space which should be retained. And,

ii) Planning application TM/04/02708/FL was not made in relation to the application land as it did not propose any development on the land.

The submission is provided as **Appendix E**.

1.12 Tonbridge and Malling Borough Council and the applicant were given further opportunity to comment, Tonbridge and Malling providing a further advice

dated 31 July 2019 that re-emphasised and expanded on its earlier submissions in response to the applicants 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.

1.13 It now falls to the County Council to reach a decision on the matter of trigger events. Further Legal Opinion, fifth opinion to the County Council, has been taken to assist in reaching that decision and is included at **Appendix F**. In summary that opinion concludes that:

i) The law is far from settled in respect of the specific points that arise in respect of this matter. Therefore, whatever the decision taken, a challenge by way of Judicial review is probable.

ii) That the registration authority is bound to reach a decision – one way or the other – on whether either, or both, trigger events apply in this case.

iii) That, in the barrister's view, there has been a trigger event in relation to the whole of the land because the land is identified for potential development in the development plan and therefore registration of the land as a village green is prohibited. The barrister's view, having read the submissions of the Applicant, is that there is no trigger event by virtue of the publicity of a planning application because the development concerned was outside the boundaries of the TVG land.

2. Options

2.1 There are a number of potential decisions available to the County Council:

a) To conclude that the Core Strategy Policy CP23 and Tonbridge Central Area Action Plan 2008 is a trigger event and prevents registration of the land as a village green. In which case the application should be rejected for determination.

b) To conclude that the planning application TM/04/02708 is a trigger event and prevents the registration of the majority of the land as a village green. In this case it may be possible for the applicant to amend their application and seek to register that small proportion of the land not covered by the trigger event.

c) To conclude that both the Tonbridge Central Area Plan 2008 and planning application TM/04/02708 are trigger events and prevent registration; in which case the application should be rejected for determination.

d) To conclude that no trigger events affect the land to which the application relates and therefore to continue to consider the application.

2.2 The possibility of the County Council referring the matter to the High Court for a declaration, of its own volition, was considered and has been discounted. Such an approach had been taken by Oxfordshire County Council and was criticised by the Court¹.

2.3 Whatever the decision reached by the Regulation Committee Member Panel there is the potential that decision may be challenged by way of Judicial

Review. Both the Applicant and Planning Authority having reached opposing conclusions on the matter of trigger events.

3. Financial

- 3.1 Inevitably there are significant legal costs to the County Council in dealing with an application for judicial review even should an application ultimately not reach the Court. The Regulation Committee are asked to note this potential financial impact but, as advised, there are no other options available to the registration authority other than to reach a decision.

4. Recommendation

Recommendation:

The Regulation Committee Member Panel is recommended to:

- i) Reject the application to record River Lawn as a village green on the basis that a trigger event, has occurred and therefore registration of the land is prohibited.
- ii) Note the probability that any decision taken may be subject to Judicial Review with the financial implications associated with the defence of such an action.

7. Background Documents

- I. Appendix A – Plan of application site.**
- II. Appendix B - River Lawn – Second opinion to KCC**
- III. Appendix C - River Lawn – Third opinion to KCC**
- IV. Appendix D - River Lawn – TMBC opinion on the planning application red line boundary.**
- V. Appendix E - River Lawn – Applicants submission on the application of trigger events to the application site.**
- VI. Appendix F - River Lawn – Fifth opinion to KCC**

8. Contact details

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ⁱ Oxfordshire County Council v Oxford City Council 2006.