

APPENDIX B
RE: POTENTIAL TRIGGER EVENTS AT RIVER LAWN, TONBRIDGE

SECOND OPINION

Introduction

1. I am asked to advise the registration authority, Kent County Council ('the registration authority') whether the right to apply for registration of River Lawn, Tonbridge as a town or village green is prohibited by the 'trigger events' under s 15C and Sch 1A of the Commons Act 2006 (inserted by s. 14 of the Growth and Infrastructure Act 2013).
2. This is my second opinion in relation to this matter which is drafted in light of the comments made by Tonbridge and Malling Borough Council in the email from Adrian Stanfield dated 22 January 2019 at 15:32. It supersedes and should be taken to replace my first opinion of 7 January 2019.
3. In summary, Tonbridge and Malling Borough Council allege that there has been a trigger event in relation to the whole of the application land under s 1A(4) of the Commons Act 2006 because there is a development plan which identifies all the land for potential development.
4. The Council further alleges that there has been a trigger event on part of the site by way of a grant of planning permission for CCTV under Schedule 1A(1).

Legislation

5. Section 15C provides that: “The right under s. 15(1) to apply to register land as a town or village green ceases to apply if an event specified in the first column of the Table set out in the relevant Schedule has occurred in relation to the land (“a trigger event”). Where the right under s. 15(1) has ceased to apply because of the occurrence of a trigger event, it becomes exercisable again only if an event specified in the corresponding entry in the second column of the Table set out in the relevant Schedule occurs in relation to the land (“a terminating event”).
6. Schedule 1A paragraph 4 provides that the following is a trigger event: “A Development plan document which identifies the land for potential development is adopted under section 23(2) or (3) of the 2004 Act.”
7. Schedule 1A paragraph 1 provides that the following is a trigger event: “An application for planning permission in relation to the land which would be determined under s. 70 of the 1990 Act is first publicised in accordance with the requirements imposed by a development order by virtue of s. 65(1) of that Act”.
8. The corresponding terminating events are either that the application is withdrawn, a decision to decline to determine the application is made under s. 70A of the 1990 Act, in circumstances where planning permission is refused, all means of challenging the refusal are exhausted and the decision is upheld or, in circumstances where planning permission is granted, the period within which the development to which the permission relates must be begun expires without the development having been begun.
9. These statutory exclusions on rights to register land as a town or village green arose in response to the recommendations of the Penfold Review of non-planning consents (July 2010) which made recommendations to remove barriers to development and investment, caused by non-planning consents including the registration of town and village greens.

The Development Plan

10. The Council rely on the Tonbridge Central Area Action Plan 2008. An Area Action Plan is a development plan document (see Regulation 6 of the Town and Country Planning (Local Development (England) Regulations 2004). Additionally, there can be no doubt that this is a development plan document which was adopted in 2008 under s. 23 of the Planning and Compulsory Purchase Act 2004.
11. The Council claim that the land is 'identified' in that document for 'potential development'. They point to the identification of the site as a secondary retail area on the proposals map. In that area Policy TCA5 provides that: "Proposals for non-retail uses at street level will be considered favourably if they satisfy the following criteria" and then five criteria are set out including matters such as street scene, window display, maintenance of the vitality of the area as a shopping destination, impact on traffic generation and character and appearance of the Conservation Area.

R (Cooper Estates) v Wiltshire Council

12. There has been one High Court authority considering the scope of the word 'identifies' in Schedule 1A and that is Cooper Estates [2018] EWHC 1704. In that case the landowner applied to the High Court to quash the registration of its land as a village green on the basis that the land was sufficiently identified for development by way of: (1) a "settlement strategy" for the county within the Wiltshire Core Strategy 2015 which identified settlements where sustainable development would take place and (2) a "delivery strategy" which made a presumption in favour of sustainable development within defined boundaries (identified on a plan) of specific settlements. Elvin J, sitting as Deputy High Court Judge, held that where a site fell within the boundary line of the relevant market town (to which the development presumption applied), it was adequately "identified" within the meaning of Sch 1A.

13. In particular, he found that the word “potential” in “potential development” was a broad concept and should not be equated with likelihood or probability that the land would be so developed.
14. The registration authority is requested to note that permission to appeal this judgment has been granted and I understand from counsel for the Respondents that the Court of Appeal hearing is listed for early May 2019. Therefore, this advice is based on the High Court position, which is potentially subject to change as a result of consideration by the Court of Appeal.
15. The ratio of the judgment may be found from [33] – [37] and [58] – [69].
16. I will summarise it for the purposes of this advice as follows:
 - (1) Where land falls within the scope of a development plan, the mere encouragement of certain categories of development is unlikely to be sufficient, as this would unduly restrict rights of applicants to register village greens.
 - (2) It is necessary to show a connection between the plan, the policies, and the land in question.
 - (3) Allocation would be the paradigm example but identification could be through preferred areas for development, opportunity areas, reserved areas etc.
 - (4) The fact that land may be only part of a wider parcel of land which is identified is no bar to the application of paragraph 4.
 - (5) It is a question of fact on the basis of each plan and, in interpreting an individual plan, it is necessary to consider the language Parliament has used (“identifies” which means to ‘establish the identity of’) in the context of the mischief which s. 15C and Sch 1A were intended to meet (i.e. the Penfold review).
 - (6) The existence of constraints affecting the land or the policies may be relevant, but their mere existence is not a reason for ruling out the area from being identified for potential development, since many if not most sites are subject to

some constraints, even if they are of the more mundane variety such as design and highway capacity.

17. On the facts of the Wiltshire Core Strategy, Elvin J was persuaded that the land was adequately 'identified for development' because there was a clear settlement boundary marked on the plan which encompassed the land (albeit it was greater than it) and the plan identified it for "development" by creating a presumption in favour of development within the settlement boundary (and, by contrast, providing for the refusal of applications that fell outside that boundary). This, and the fact that the policy was a development management tool which would guide the determination of a planning application, supported Elvin J's view that the plan identified that land for potential development. The potentially significant number of constraints did not take the plan outside paragraph 4.

Policy TCA 5 (Upper High Street)

18. I have considered the contents of the Tonbridge Area Action Plan. The proposals map identifies the site as part of the secondary retail area subject to Policies TCA 5, 6 and 7.

19. The particular policy relating to this area is TCA 5 (Upper High Street).

20. The introductory text to the policy states as follows:

7.3.2 Within the Town Centre there are three areas of retail activity of a secondary nature which focus on serving more specific needs and demands where it is important to retain shopping and facilities to serve residents, local businesses and growing tourist interest. Secondary frontages provide greater opportunities for a diversity of uses contributing to the health of the Town Centre. These areas are defined on the Proposals Map.

7.3.3 Many of the small shops in these areas are of the type that change proprietors fairly often, according to the particular strengths of the market, especially for antiques and specialist goods. A more flexible approach in the peripheral areas may help to ensure that premises remain occupied and the area lively. These are also areas where residential accommodation above the shopping frontage will be encouraged provided it is compatible with the commercial activities at street level.

7.3.4 The individual character and strengths of these areas should be recognised and promoted. New development for retail use will be encouraged providing it is of a scale, form and character compatible with the surrounding areas and the extent to which proposals would bring about overall benefits in terms of economic regeneration, environmental enhancement and conservation and cultural aims for the Town Centre.

7.3.5 Proposals for non-retail uses would need to be considered in relation to similar criteria established in Policy TCA03. The aim is to restrict development which would be detrimental to the inherent characters of the individual areas and their attractiveness, in terms of over concentrations of a particular activity and the inappropriate role of prominent buildings and / or frontages in the street scene. Each of the secondary shopping areas is dealt with below.

7.3.6 The Upper High Street area which includes Bank Street/Castle Street has considerable potential for up-grading and development for a range of uses such as specialist shops, restaurants, cafes, crafts and gift shops and other tourist related uses. New development at the former Cattle Market site will assist in animating the area and adding to the immediate residential population. As a result, the area will become safer and demand for supporting activities will increase.

20. The text of TCA 5 states:

1. In the Upper High Street area, as defined on the Proposals Map, development should enhance the attractiveness of the Conservation Area. Development which

would contribute to the area's tourism offer will be positively sought. Buildings of importance in the street scene need to be retained and refurbished whilst others of less quality could be redeveloped. Any such development should actively promote and enhance the architectural, archaeological and historic features of Tonbridge Town Centre including;

- a) listed buildings and their settings;
- b) buildings which although not listed, form an integral part of Tonbridge Conservation Area and its setting;
- c) the street pattern and historic property boundaries; and d) complementary shop fronts and advertisement design, including illumination.

2. Proposals for non-retail uses at street level will be considered favourably if they satisfy the following criteria:

- a) the vitality and viability of the area as a shopping destination is maintained without cumulatively creating an over concentration of non-retail uses within a continuous block, as identified in Fig 5;
- b) a contribution is made to the street scene in terms of high quality design while promoting a safe environment;
- c) proposals for town centre Financial and Professional Services (A2) should include an appropriate window display at ground floor level;
- d) the levels of traffic generation and the visual impact of car parking/servicing arrangements or other environmental problems which could have an adverse impact on the character of the area are limited; and
- e) the character and appearance of the Tonbridge Conservation Area is preserved.

Policy TCA 11 allocates particular sites within the plan area for a range of specific developments. The registration land is not one of those sites.

Assessment

21. Whilst the judgment in Cooper Estates makes clear that land ‘identified’ for potential development is broader than land ‘allocated’ for development and ‘potential’ should be given a broad meaning and should not be equated with likelihood or probability that the land will actually be developed, I consider it is necessary carefully to scrutinise whether the registration land is in fact identified for any development at all by Policy TCA 5.
22. I have not visited the site but, from the plans I have seen, the registration land is shown as an irregular area of open space behind the Tonbridge Teen and Twenty Club bounded by the Club, the River Medway and River Lawn Road. There are two marked paths which cross it. One side of the land bounds a street, River Lawn Road, although I understand that there may be a small strip of land abutting River Lawn Road that has been excluded from the application site. There are no other (or possibly, no) street facing parts of the land.
23. Turning to the potential relevance of Policy TCA 5, the reference to ‘development enhancing the Conservation Area’ in paragraph 1 of the policy is not, in my view, any identification of the area for potential development in and of itself. It is simply a statement that – if development occurs – it should enhance the attractiveness of the Conservation Area. Similarly, development which contributes to tourism is not an identification of the area for tourism development; it is merely a recognition that that is a good thing which should be encouraged. Retention of buildings of importance in the street scene cannot be of relevance to this part of open space.
24. The Council rely in their submissions, as I read them, more on paragraph 2 of Policy TCA 5 (see paragraph 2.2 of their submissions). That provides that proposals for non-retail uses at street level “will be considered favourably if” they satisfy various criteria. Paragraph 7.3.5 of the supporting text states, in relation to non-retail uses, that the “aim is to restrict development which would be detrimental to the inherent character of the individual areas and their attractiveness, in terms of over concentrations of a particular activity and the inappropriate role of prominent buildings and / or frontages in the street scene”.

25. In my view, this text is not identifying open space, such as the registration land, for potential development. It is providing restrictions on the changing of existing retail space into non-retail uses, or the establishment of new buildings on the street front, limiting those uses to 'street level' (i.e. ground floor frontages) and providing a number of other constraints. As a starting point, even adopting the broadest interpretation, it could only apply to a very small part of the registration land along the boundary with River Lawn Road (if indeed the site does bound River Lawn Road), because that is the only street frontage.
26. In the Wiltshire Core Strategy, there was a "presumption in favour" of sustainable development throughout the settlement. By contrast, even in relation to the part of the site which bounds River Lawn Road, I do not see how paragraph 2 of TCA 5 could provide any kind of encouragement, let alone 'identification' of the registration land, for development. It is a "considered favourably if" policy – there is no presumption in favour of development or an opportunity area or a reserved area or a preferred area for development. It is in essence a restrictive policy to ensure that the vitality and viability of the area as a shopping destination is not undermined by a proliferation of non-retail development.
27. As I have said, each case turns on its own facts and – unfortunately – the drafting of Schedule 1A paragraph 4 has introduced an element of uncertainty, as the judgment in Cooper and the forthcoming appeal demonstrates. Therefore, I can only provide my own view as to the likely interpretation a Court would give Policy TCA 5 in relation to the registration land and the comments of the High Court in Cooper. However, my advice to the registration authority is that, even adopting the broad interpretation of Schedule 1A in line with the Penfold Report advocated in Cooper, Policy TCA 5 does not 'identify' the registration land for 'potential development'.

The Planning Application

28. The Council rely on the grant of planning permission on 13 September 2004 for the installation of one CCTV camera and associated equipment on part of the land.
29. I accept that it does not matter whether a trigger event has occurred before or after the commencement of s. 15C (see s. 16(4) of the Growth and Infrastructure Act 2013) and thus the planning permission could constitute a trigger event. The Act does not restrict the subject matter of a planning permission in any way.
30. However, the Council does not say whether this planning permission was ever implemented or not. If CCTV was not installed, then the planning permission will have expired which is a terminating event under Sch 1A paragraph 1(d). If it was installed, then the Act is unclear whether or not a terminating event applies or whether the trigger event is negated by the implementation of the planning permission. However, absent positive evidence from the landowner that (a) the CCTV was installed and (b) this means that there is no terminating event, then I do not consider that the registration authority can form a judgment as to whether a trigger event applies.

Procedure

31. In the circumstances, I would advise that in order to avoid delay the registration authority should continue to proceed with consultation on the application. The issue of whether registration of all or part of the land is excluded by one or two trigger events should remain under review and a final decision should await further comments from the parties.
32. It would also be helpful for the parties to consider the position if the planning permission trigger event applies (but not the development plan trigger event) whether it would be appropriate for the registration authority to amend the village green application boundary to exclude the land covered by the CCTV permission.

Conclusion

33. For the reasons I have set out, I do not consider that the right to register the land as village green is excluded by a trigger event in Schedule 1A. The development plan does not, in my view, 'identify' the land for 'potential development', although this is a matter of policy interpretation in light of the High Court comments in Cooper and I can only give my opinion as to the view a Court is most likely to take. There is therefore a risk that others may challenge my views on this.
34. In relation to the part of the land covered by the CCTV planning permission, this may constitute a trigger event in relation to that part of the land, but further consideration is needed as to whether there has been a corresponding terminating event.
35. The registration authority should keep the decision as to whether there has been one or two trigger events under review and may need to consider, in the situation that the planning permission trigger event applies, but not the development plan trigger event, whether it is appropriate to amend the village green application boundary.
36. Please do let me know if any questions arise as a result of this advice or if I can be of further assistance.

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