

**APPENDIX C**  
**RE: POTENTIAL TRIGGER EVENTS AT RIVER LAWN, TONBRIDGE**

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**THIRD OPINION**

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**Introduction**

1. I am asked to advise Kent County Council as 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). This is my third advice on this matter and has been necessitated by substantially new arguments having been put forward by Tonbridge and Malling Borough Council, the landowner, in relation to the applicability of the LDF Tonbridge Central Area Action Plan.
  
2. In summary, the Borough Council’s position is:
  - (i) 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.
  
  - (ii) Further, that 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).

**The Development Plan**

3. The Borough Council state that there is a “strong argument” that the LDF Tonbridge Central Area Action Plan (‘the AAP’) identifies the land for potential development when it is considered as a whole on the basis of the law as it is at the moment. This should lead the registration authority to refuse to consider the whole of the TVG application site.

4. In particular, the Borough Council relies on:

Core Strategy Policy CP 23 which provides that: “The policy for Tonbridge Town Centre is to provide for a sustainable development pattern of retail, employment, housing and leisure uses, and a range of other services to regenerate and enhance the vitality and viability of the Town Centre by:

- (a) Maximising the use of the waterfront with appropriate mixed-use developments and the provision of environmental enhancements and public spaces;

And The Area Action Plan which provides that:

1.1.4 This Area Action Plan (AAP) has been directly informed by the Master Plan (see Fig 1)

...

4.1.9 To the west of the High Street the Southbank Quarter (7) is to be revitalised with enhancements to the public realm, improved pedestrian accessibility to the High Street and Medway Riverside, and short-stay parking. Opportunities for accommodating a mix of new uses, including specialist retail, cafes, and residential development are identified to increase activity within the quarter.

5. Area 7 includes the TVG application site (see Figure 1 of the AAP).
6. Public Realm enhancements are dealt with for this site at 4.3.16 and are shown on Figure 2 of the AAP. Paragraph 4.3.16 provides as follows:

Riverside Gardens (3)

4.3.16 Riverside Gardens, adjoins the River Medway and has close links to the High Street. It features a number of attractive, mature trees. However the space is underused and can feel threatening, particularly during the evening and at night. It is therefore important to improve this important riverside location, providing opportunities for mixed-use infill to enhance the built form, making a clear

distinction between public fronts of buildings and private backs and extend the times when the area is used.

7. Further, the Borough Council relies on AAP Policy TCA2 1 which provides: “Within the Central Area [which includes the TVG application site] planning permission will be granted for uses which support the regeneration of the Town Centre including, on identified sites retail, business, leisure, cultural and community activities, entertainment, health services, education, offices, food and drink outlets and residential use.”
8. The Borough Council argue that the overall policy for the Central Area in the AAP (which includes River Lawn) provides for a presumption in favour of mixed-use development which supports regeneration and Policy TCA2 1 provides, more specifically, that planning permission *will* be granted for uses which support the regeneration of the Town Centre. They state that this is sufficient to identify the area for potential development when read with the proposals map that makes it clear that this site is within the Central Area.
9. In addition, the Borough Council points to the AAP proposals map which shows the TVG application site in light blue and identified as a secondary shopping centre. Paragraph 7.3.8ff of the AAP deals with the ‘Southbank Quarter’ which includes this site. It states: “The Master Plan identifies this area as having considerable potential with opportunities for accommodating a mix of uses, including specialist retail, cafes and apartments. Development which would enhance the attractiveness of the riverside environment and would contribute to the area’s tourism offer will be encouraged.
10. Allied to this, Policy TCA7 states: “Development in the Southbank Quarter, as defined on the Proposals Map, should be of an appropriate scale and form to integrate the riverside environment with the existing retail function of this area, through high quality design and enhancement to the public realm, and improved pedestrian activity.”

11. The Borough Council argues that when this policy is read together with TCA2 and the presumption in favour of development that supports regeneration in the Central Area it is clear that this land has been identified for potential development in the plan.

### **R (Cooper Estates) v Wiltshire Council**

12. For convenience, I will repeat what I set out in my first and second advices regarding the authority of Cooper, relied on by the Borough Council.

13. 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.

14. 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.

15. 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.

16. The ratio of the judgment may be found from [33] – [37] and [58] – [69].

17. 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.

18. 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.

### **Application of Cooper to the Tonbridge AAP**

19. I was not persuaded that the original submissions made by the Borough Council, in reliance on AAP Policy TCA5, showed that any of the TVG application site was ‘identified’ for potential development.

20. However, I consider that there are now much stronger arguments that CS Policy CP 23 and the AAP Policies TCA2 1 and TCA7 (together with their supporting text) are sufficient to identify the TVG site for potential development. This is because the TVG application site appears to be part of Riverside Gardens which, in turn, is part of the Southbank Quarter which, in turn, is within Tonbridge Central Area. The whole of the Tonbridge Central Area is identified for a sustainable mixed use development pattern. Specifically, within the Southbank Quarter, opportunities for accommodating a mix of new uses, including specialist retail, cafes, and residential development are identified. And more specifically, within Riverside Gardens, opportunities are provided for mixed-use infill to enhance the built form, making clear distinction between public fronts of buildings and private backs and extend the times when the area is used. This would appear to be similar (if not the same) to the facts of Cooper where there was a ‘presumption in favour’ of sustainable development throughout the settlement.

21. However, 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 the development plan in relation to the registration land and the comments of the High Court in Cooper. Even the Borough Council accept that their interpretation of the AAP gives rise to a “strong argument” that the land is identified for potential development – they do not go so far as to say that it is conclusive that the land is so identified.

22. In view of the uncertainty and as a matter of procedural fairness, I have advised that the TVG Applicant should be given the opportunity to respond on the applicability of the trigger event before a final decision is made by the registration authority. I consider it would be helpful if the Applicant is given a copy of this advice in order to understand the case being made.

### **The Planning Application**

23. 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 (Ref: TM/04/02708/FL) in the context of Schedule 1A(1) which 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”.

24. The planning application may be publicised before the commencement of s. 15C (see s. 16(4) of the Growth and Infrastructure Act 2013). The Act does not restrict the subject matter of a planning permission in any way.

25. Following further information being sought by the registration authority, the Borough Council has provided evidence that (i) the planning application was properly publicised and (ii) the CCTV was installed and thus the permission was implemented. The expiry of a planning permission is a terminating event under Sch 1A paragraph 1(d), but the implementation of a planning permission is not. Accordingly, there does not appear to be any applicable terminating event.

26. I understand that the development itself (the CCTV) is not on the TVG application land, however the red line boundary of the planning application encompasses part of the TVG land. I cannot find any authority which establishes whether the words “in relation to the land” in Schedule 1A(1) should be taken to be referable to the red line

boundary of a planning application, or to the development within the planning application itself. This point does not yet appear to have been tested in the courts. In my view, regrettably, the drafting of the trigger event provisions is open to interpretation and there may be an argument that a planning application for development which is outside the TVG site itself should not fall within the trigger event provisions, simply on account of the drawing of the red line boundary; or that Parliament cannot have intended the trigger events to be applied in this way.

27. Given the importance of the decision and the potential uncertainty – as well as the need for procedural fairness – I would again advise that the registration authority give the TVG Applicant the opportunity to make any submissions on this point before a final decision is made.

### **Procedure**

28. As I have already advised, 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 the comments of the Applicant (should the Applicant chose to take up this opportunity to make submissions).

29. If a decision is reached that the planning permission trigger event applies – but not the development plan trigger event – then the Applicant will need to consider whether to apply to the registration authority to amend the area of land to which the TVG application relates.

### **Conclusion**

30. I consider that there are now strong arguments being advanced by the Borough Council that there is a trigger event in relation to the whole of the land because it is



sufficiently identified for potential development in the development plan and, in any event, part of the site is subject to a 'planning application' trigger event.

31. However, given the uncertainty of the law in this area and as a matter of procedural fairness, I consider that submissions should be invited from the TVG Applicant on these matters before a final decision is made by the registration authority. I have suggested that this advice is disclosed to the Applicant in order to explain the case being made.
32. 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.
33. 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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**19 March 2019**

