APPENDIX E

RE: POTENTIAL TRIGGER EVENTS AT RIVER LAWN, TONBRIDGE

ADVICE

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1. I am asked to advise the Barden Residents Association ("the Applicant") whether its application to register land at River Lawn, Tonbridge ("the Land") as a town or village green ("TVG") is precluded by virtue of a trigger event under sch 1A of the Commons Act 2006.

2. In short, my view is that there has been no trigger event. The Land is not identified for potential development in a development plan document. It is identified as an area of open space which should be retained. There application for planning permission was not made "in relation to" the Land, as it did not propose any development on the Land.

3. My advice is given in the context of two opinions from Annabel Graham Paul, dated 19 March 2019 and 28 May 2019, and an advice from Richard Ground QC dated 2 May 2019. Having considered those documents very carefully, I remain of the view expressed above. Whilst it is clearly arguable, even "strongly arguable", that a trigger event has occurred, my view on balance is that a court would conclude that there has been no trigger event.

4. My advice addresses each of the mooted trigger events in turn, and focusses on the reasons given by Tonbridge and Malling Borough Council ("the Objector") in support of its case that a trigger event has occurred.

DEVELOPMENT PLAN

5. The Objector's case that a trigger event has occurred under this head hinges on policy CP23 of the Core Strategy and the LDF Tonbridge Central Area Action Plan ("the AAP"), which together are said

to have a similar effect to the provisions considered by the High Court and subsequently the Court of Appeal in *Wiltshire Council v Cooper Estates* [2019] EWCA Civ 840.

6. CP23 and the AAP do not have that effect, in my view. The settlement boundary in *Cooper* differentiated between an area within which there was a presumption in favour of development, where development needs would be met, and an area within which there was a presumption of refusal. It thus 'identified' the whole of the area within the settlement boundary "for potential development": High Court [63], Court of Appeal [45]. The AAP does not serve that purpose and neither it nor CP23 contains any general presumption in favour of development; they do not identify an area of "developable land" (Court of Appeal, [65]) as did the settlement boundary policy in *Cooper*.

7. The vision in CP23 is for development of *certain parts* of Tonbridge Town Centre only. CP23 explains that "the policy for Tonbridge Town Centre is to provide for a sustainable development *pattern*" (emphasis added). This will specifically include (a) "the provision of environmental enhancements and public spaces" at the waterfront, and (f) "enhancements to the public realm *including protecting and enhancing important open spaces*" (emphasis added). The importance of public spaces at the waterfront for the overall vision is made clear at 6.3.52 of the supporting text.

8. The AAP also supports development in *certain parts* of the area only. It articulates a spatial strategy in section 4 which prioritises the existing character and structure of the area, with specific "proposals" for new development forming a second, balancing, element to the strategy:

> 4.1.1 The Master Plan for Central Tonbridge (Fig 1) places the area's existing assets, including its extensive waterfront and market town identity, at the heart of the regeneration objectives. Opportunities to reinforce the structure and enhance the

environmental quality of the town centre are balanced with proposals for new development…

9. With respect to the Southbank Quarter (where the Land is located), the supporting text at 4.1.9, relied on by the Objector, is explicit in stating that "[o]pportunities for accommodating a mix of new uses… are identified" in the AAP. In other words, where there is potential (an opportunity) for development, that has been specifically identified. The spatial strategy articulated in the AAP thus does not support a reading which regards the whole of the Southbank Quarter as having been 'identified for potential development'.

10. The Land is not in a part of the area identified for potential development. It is clear from the spatial strategy at 4.3.16-17 that 'Riverside Gardens' (i.e. the Land) is envisaged to remain as a public space. The issue identified with it is that it is "underused and can feel threatening". The specific measure proposed to resolve this concern is the creation of an active frontage of development onto the Land. At this point the spatial strategy speaks of "opportunities" (mirroring the language of 4.1.9 referred to above) "for mixed-use infill to enhance the built form, making a clear distinction between public fronts of buildings and private backs". The 'infill' proposed is thus to the existing 'built form' surrounding the Land, so as to present 'public fronts' to the Land rather than, as in many cases at present, 'private backs', and thus to increase the use of the Land itself.

11. It is also of some significance that the development strategy identifies a lack of open space, and a requirement for more (at 5.1.9). This sets a general context within which it is highly unlikely that the AAP would be identifying the limited open space that does exist (such as the Land) for potential development.

12. The policies in the AAP reflect the spatial strategy of identifying only certain sites within the area for potential development. TCA2 is supportive of the grant of planning permission "for uses which

support the regeneration of the Town Centre including, *on identified sites* retail, business" etc (emphasis added). The listed uses will thus be supported *on identified sites*. It is clear from 7.6.1, which cross refers to TCA2, that these 'identified sites' are the allocated sites shown on the proposals map.

13. The Land is not an "identified site" on which one of the listed uses would be supported. Furthermore, the spatial strategy set out in the AAP makes clear that it is continued use of the Land as open space that will best "support the regeneration of the Town Centre". Even if some other use for the Land could be conceived of, which did not fall within the list, it would not command support from this policy.

14. The site which *is* identified on the proposals map, in accordance with the spatial strategy and TCA2, is the allocation TCA11(f). This allocation surrounds the Land on two sides and does not materially overlap with it. The allocation corresponds to the areas of built development which currently present a somewhat unappealing frontage to the Land. That allocation is made subject in the policy text to "public realm enhancements at River Lawn and River Lawn Road in accordance with policy TCA10". Policy TCA10.3(c) identifies those areas as ones where enhancements to the public realm should indeed be promoted. The proposals map marks the general area of the Land with a yellow dot, again signifying 'public realm enhancements'.

15. Read together, and in the light of the AAP's spatial strategy, these policies seem to me to be inconsistent in principle with development of the Land (although such development could of course be approved as a departure from them on the basis of material considerations). The AAP has identified the areas around the Land forpotential development. The Land itself is to remain as public realm. It is to be enhanced precisely through the development of the areas around it to create an active frontage, increasing the safety and usage of the Land. A change of use of the Land would take it outside the public realm as conceived of in the AAP. Any built development would have the same

effect and would also necessarily confuse the intended relationship with the surrounding active frontage, presenting both a public front and a private back to whatever remained of the open space.

16. Policy TCA7 is, unsurprisingly, entirely consistent with this position. It is part of a suite of policies (TCA3-TCA8) dealing with which retail uses should go where in the area as a whole. It does not, in terms, support the principle of development of any part of the area; that is the province of TCA2 and TCA11, discussed above. TCA7 simply sets down requirements which any 'development in the Southbank Quarter' must meet. Those requirements specifically include "enhancement to the public realm, and improved pedestrian activity", which corresponds with the spatial strategy and the goal of retaining the Land as open space with an improved frontage of development surrounding it.

17. The fact that the Land is washed over on the proposals map by the light blue colour referable to policies TCA5-7 is therefore not a matter of great importance in the current context. It is 'identified' in this sense by the proposals map and accompanying policies, but as the Court of Appeal in *Cooper* made clear at [41], identification alone is not enough "because suspension of the right [to apply for registration as a TVG] depends on the consequences" of the identification. In this case, the consequence is simply that further requirements are imposed in respect of any development proposals that may be brought forward; requirements which would in fact be inconsistent with development of the Land.

18. For all these reasons, those parts of the development plan relied on by the Objector do not in my view identify the Land for potential development. On the contrary, it seems to me that they identify the Land as an area of open space/public realm which should remain as such, and which should be enhanced by the provision of surrounding active frontages through development.

PLANNING PERMISSION

19. An application for planning permission was made in 2004 for the provision of CCTV. Planning permission was subsequently granted and implemented in late 2004 ("the Permission"). There is no suggestion from the Objector that the development approved by the Permission was on the Land. Nevertheless, the publication of the application is said to have been a trigger event, in respect of which no terminating event has occurred. This is on the basis that the 'red line' area of the Permission did include the Land.

20. The crucial step in the Objector's reasoning is to argue that the Permission was made "in relation to" the Land. Whether or not that is correct depends on the construction of the words "an application for planning permission… in relation to the land". Although the Objector's position is clearly arguable, it is not correct in my view, for the following reasons.

21. The words "the land" refer to the land in respect of which an application for TVG registration is contemplated. This is clear from the terms of s15C(1). The application for planning permission must therefore be made "in relation to" that land specifically. On the face of it, an application for planning permission for development which is not on the land in question is not made "in relation to" that specific parcel of land. That is the natural meaning of the words.

22. Nevertheless, the words "in relation to" are capable of having different meanings. It is therefore necessary to have regard to the purpose of the legislation in seeking to construe them.

23. As the High Court explained in *Cooper* at [31], a trigger event linked to a planning application:

> must self-evidently be "in relation to the land" since a proposal on land not subject to a registration application would not fall within the statutory mischief of registration which would inhibit development. Equally, the terminating event for an application (refusal,

withdrawal etc) is tailored to the mischief of an application for registration inhibiting future development.

24. The statute thus aimed at correcting the mischief of TVG registration inhibiting development. In the Court of Appeal's more positive formulation, the policy was that "whether or not to protect a piece of recreational land with identified development potential should be achieved through the planning system and not by means of registration of a TVG" [47].

25. In view of that statutory mischief/policy, the 'relationship' denoted by the phrase "in relation to" must be a sufficiently close one that the registration of the land as a TVG would in some way prevent or have the potential to interfere with the carrying out of the development approved by the planning permission. The statutory policy thus confirms the natural meaning of the words explained above.

26. The statutory policy seems to me to be inconsistent with the Objector's approach. That approach would deprive local residents of their right to register land as a TVG even though registration would have no effect whatsoever on development approved by a planning permission.

27. The Objector's advice of 2 May 2019 does not consider this statutory purpose as explained by the High Court and Court of Appeal in *Cooper*. Instead, it makes two arguments in support of its construction of the words "in relation to the land" in Sch 1A of the Commons Act 2006: (1) a textual argument based on the provisions in the Town and Country Planning (Applications) Regulations 1988 and its successors and (2) a policy argument that any other approach would "create uncertainty" as there is no other plan to which reference can be made than the 'red line' plan. These are clear and comprehensible arguments, but neither is sufficient to displace the natural meaning of the words, confirmed by reference to the statutory purpose.

28. As to the textual argument, the Commons Act 2006 does not specifically refer to the plan submitted under the planning provisions discussed by the Objector. It is correct that both sets of provisions use cognates of the verb 'to relate'. As explained above, however, that is a word of flexible meaning which may connote a closer or more distant 'relationship' depending on the context. The context of the planning provisions is primarily procedural. The aim is to 'identify' land to which the application 'relates', in other words to enable the determining authority to understand which land is under consideration. For those purposes, it may not matter particularly how the boundaries of the land are drawn.

29. The facts of the instant case are very much in point. It is not clear why large parts of River Lawn have been included within the red line area of an application for development proposed to occur outside of River Lawn itself. The line could have been drawn more narrowly around the actual site of the CCTV camera, or more broadly (some parts of River Lawn have, equally inexplicably, been excluded from the red line area). It does not matter for the purposes of the planning authority whether the broad or narrow area is chosen as long as it can 'identify' the location of the CCTV camera itself.

30. In another case (for example, an application for change of use of open land) the exact boundaries of the land 'identified' by the plan accompanying the application will be more significant. In such a case the red line area will correspond with the area subject or potentially subject to the development applied for. The planning system does not differentiate between the two situations because it does not need to; the distinction is however highly significant from the point of view of the legislation introducing trigger events in the TVG system. The statutory context of the verb 'to relate' is thus not the same. In the planning context it is capable of connoting a much looser relationship than it does in the TVG context.

31. The Objector complains that this will "cause uncertainty". It does not cause any uncertainty on the facts of the present case. On the correct interpretation the application was clearly not made "in relation to" the Land as it did not seek permission for any development on the Land. This test is perfectly capable of clear application.

32. The Objector's advice assumes that there must be a plan which shows the land "in relation to" which a planning application is made; it says that the red line plan is the only such plan available. The assumption is, however, unsound. Parliament has provided for other trigger events which do not depend on the precise identification of land to which they apply on a plan. The Court of Appeal in *Cooper* at [40] concluded that land could be identified for the purpose of the trigger event there under consideration by "a verbal description of the parcels" or even "by reference to prescribed criteria". There is therefore no reason to suppose that Parliament required a specific plan to exist. Insofar as this amounts to 'uncertainty', it is a level of uncertainty with which Parliament was clearly comfortable in setting the trigger events.

33. The Objector's advice has also referred to the fact that the 'red line' plan submitted with the planning application will have been subject to public inspection and consultation. That may be so, but it does not mean that the plan is necessarily of any significance for the purpose of preventing TVG registration. If a landowner wishes to achieve 'certainty' in that respect then he has available the procedure in s15A-B, also introduced by the Growth and Infrastructure Act 2013. The purpose of s15C is not about achieving 'certainty' but aboutachieving something of substance - namely preventing TVG registration from interfering with past, present or future development of land. It seems to me that the construction I have proposed will achieve that object, whereas the Objector's will considerably exceed it.

34. For all of these reasons, my conclusion on balance is that a court would not find that a trigger event had occurred on the facts of this case.

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