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

FIFTH OPINION

Introduction

1. This is my fifth advice in relation to 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.

2. Since my fourth opinion of 28 May 2019, further submissions have been received from the Objector in response to an opinion by Cain Ormondroyd provided by the Applicant. I consider that the full arguments have now been produced by both sides and the registration authority must now proceed to make a determination on this matter.

3. The Objector has previously argued that the whole of the land is subject to a trigger event under s 1A(4) of the Commons Act 2006 because there is a development plan which identifies all the land for potential development. Further, the Objector has argued 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).

Is the land identified for potential development?

Previous Advice:

4. I have previously set out the broad interpretation given to the words 'potential' development and 'identified' in Wiltshire Council v Cooper Estates Strategic Land Ltd [2019] EWCA Civ 840. It does not mean that the land will be developed. However, the mere fact that land is included within a settlement boundary is not enough to suspend the right to apply to register a TVG. Suspension of the right depends on the consequences, as set out in the development plan document, of land being within a settlement boundary.

5. I also previously advised that I considered 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. However, I noted that the matter was not clear-cut and Schedule 1A paragraph 4 has introduced an element of uncertainty. 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.

The Most Recent Arguments of the Parties:

6. The Applicant's opinion argues that CP23 and the AAP do not identify all areas within Tonbridge Town Centre for development. The emphasis is on providing a sustainable development "pattern" and this includes "protecting and enhancing important open spaces". In relation to the AAP, the Applicant again argues that there is no more than an "opportunity" for accommodating a mix of new uses. The land itself subject to the TVG application 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 development onto the land and 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. In sum, the Applicant argues that the land itself is not envisaged to be developed – it is to remain as public realm to be enhanced through development of the areas around it to create an active frontage, increasing the safety and usage of the land.

7. The fact that it is washed over on the proposals map by the light blue colour is neither here nor there because, although it is 'identified', it is not identified for 'potential development'.

It is noted that Cooper made clear that identification is not enough – suspension of the right to apply for TVG registration depends on the consequences (see [41]).

8. In response, the Objector has argued by way of Third Advice from Richard Ground QC that 'potential' is a very broad concept. There is a general presumption in Policy TCA2 1 in the Central Area for granting planning permission that supports the regeneration of the Town Centre. Furthermore, within Area 7 (which includes River Lawn) there are opportunities for accommodating a mix of new uses. Policy CP23 talks of maximising the use of the waterfront with appropriate mixed-use developments and the provision of environmental enhancements and public spaces. There is no countervailing policy that protects the site as open space from development.

My Advice:

9. Whether or not the land is identified for potential development is a matter of judgement based on an interpretation of the development plan. The courts have made clear that, ultimately, the proper interpretation of a development plan is a matter for the Court and not for a local authority to judge (see Tesco Stores v Dundee [2012] UKSC 13). I can therefore only provide my view as to the more likely interpretation that a Court will take. This is by no means a clear-cut case and there is a real risk that – whichever side the registration authority comes down on – another decision-maker, or Court, could take a different view.

10. I accept what the Applicant's representative says that River Lawn itself is unlikely to be developed with any significant amount of built development. It appears from the AAP that the intention is that it should be improved in terms of its amenity value by increasing security and overlooking by infilling and developing active inward looking frontages around the site. However, there is no dispute that River Lawn is 'identified' in the development plan in both the CS Policy CP 23 and the AAP policies. The question is what is it identified for i.e. what are the consequences of identification?

11. In my opinion, River Lawn is identified for potential development. This may well not be intensive built development, but development can take many forms. Section 55 of the Town and Country Planning Act 1990 defines development as the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any

material change in the use of any buildings or other land. Building operations includes demolition of buildings, rebuilding, structural alterations or additions to buildings and other operations normally undertaken by a person carrying on business as a builder. Accordingly, things such as public realm enhancements, landscaping works, increased security measures (e.g. installation of CCTV masts), provision of a parkland bandstand or kiosk-type structure could all come within the definition of development.

12. Looked at it in this way, I can see that River Lawn is identified as an area where planning permission should be granted for development that supports regeneration (along with the rest of Area 7). The provision of environmental enhancements and public spaces, which may be relevant to River Lawn itself in Policy CP23, could well involve development.

13. The parties agree that the word 'potential' has been held by the Court of Appeal in Cooper to be a very broad concept. It is not qualified, and is not to be equated with likelihood or probability. It does not mean that the land necessarily will be developed.

14. The fact that the Borough Council has chosen not to include River Lawn within a policy protecting the area from development as open space reinforces my view that this piece of land is identified as having the potential to be developed in some way (not necessary with buildings all over it) to support the regeneration of the Town Centre.

15. I do, however, reiterate that these are difficult questions of policy interpretation, and the matter is not clear-cut. There is therefore a risk to the registration authority of a successful Court challenge, whichever interpretation is adopted.

Is there a planning application which was publicized in relation to part of the land?

Previous Advice:

16. I previously advised – and it is not disputed – that there was a planning application for the installation of one CCTV camera and associated equipment which was properly publicized under the relevant development order at the time. The red line of the planning application encompassed part of the TVG land, but the actual camera and associated equipment (i.e. the

development) was outside the site. Planning permission was granted and the CCTV installed. There is thus no relevant terminating event.

17. My concern was that there is no Court authority establishing what is meant in Schedule 1A(1) by 'in relation to the land' and whether the fact that the red line boundary encompassed part of the TVG land was enough, in circumstances where the development itself was not on the land. The Objector made submissions which I considered and concluded that a Court would be more likely to find that the red line boundary defines the scope of 'in relation to the land' than not.

The Most Recent Arguments of the Parties:

18. Since then, the Applicant's representative has stated that the Objector's position is 'clearly arguable', but not correct, because the natural meaning of the words means that an application for planning permission for development which is not on the TVG land itself cannot be in relation to that specific parcel of land itself.

19. The High Court in Cooper at [31] is cited where it was stated that 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". The Applicant argues that the statutory policy is inconsistent with the Objector's approach. The fact that the red line boundary could have been drawn much tighter around the CCTV development is prayed in aid to reinforce this. Whilst it might not matter for the purposes of a planning application where the red line is drawn, it has fundamental significance if it is to be relied on in the context of the legislation introducing trigger events in the TVG system. The verb 'to relate' is thus not the same in the two different systems.

20. In response, the Objector relies on [47] of the Court of Appeal judgment in Cooper, where it was said that the policy underlying the trigger events: "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 be means of registration of a TVG". The Objector argues that the Applicant's position is unworkable and the only plan which can be used to determine

whether or not there is a planning application in relation to the plan is the red line boundary on the planning application itself.

21. I am bound to say that, having now received submissions on this point from the Applicant, I am more persuaded that the planning application trigger event should *not* apply where there is no actual development on the TVG application land. I reach this view because the interpretation of 'in relation to the land' in the context of a trigger event must be made against the background of the statutory purpose which is whether or not to protect a piece of recreational land *with identified development potential* through the planning system or the TVG registration system. The CCTV planning application does not give the TVG land any identified development potential since the development is outside its boundaries. The statutory mischief of TVG registration inhibiting development is simply not served by finding that there is a trigger event when in fact no development at all is proposed in relation to the land.

22. There is no reason why 'in relation to the land' should mean the same thing in the planning and TVG contexts. I accept that it is up to the applicant for planning permission where they choose to draw the red line (which may be tight around a development or very wide) and this has very little – if any – consequences in terms of an application for operational development. If the red line is determinative to prevent the right to apply to register land as a TVG, then it takes on a much more fundamental significance than is envisaged in the planning legislation.

23. In my view, there is nothing unworkable about interpreting 'in relation to the land' for the purposes of the trigger event as meaning that the *development* that is subject to the planning application must be connected (or be 'in relation to') the TVG land itself. That is the only way the words can be read naturally in accordance with the statutory purpose / mischief.

24. However, as with the issue of interpretation of the development plan, there are strong arguments for the alternative interpretation, as the Applicant's representative himself acknowledges. Therefore, although I am bound to advise the registration authority and reach a view, there is a risk to the registration authority of a successful Court challenge whichever interpretation is adopted.

Procedure

25. In light of the uncertainty and difficult questions the registration authority are being asked to address, I have considered whether it might be possible to seek a declaration from the High Court as to the answers, rather than make a decision which is liable to be subject to legal challenge. I note that declarations on a number of questions regarding TVG legislation were sought in the Oxfordshire County Council v Oxford City Council case which reached the House of Lords ([2006] UKHL 25). However, Lady Hale expressed concern that declarations had been sought in [92], stating: "I do not wish to be over-critical of the county council's disinclination to come to a decision on Miss Robinson's application until all the legal issues which seemed to them to arise had been judicially resolved, but I do wonder whether all the ten paragraphs of declaratory relief sought in this case can be brought within the legitimate boundaries of the courts' jurisdiction to grant such relief."

26. I doubt that a Court would entertain an application for declarations on the questions in this case. The registration authority is bound, in my view, to reach a decision on whether these trigger events apply. There is a risk of legal challenge whatever decision is reached and, regrettably, that is inevitable and something the registration authority simply has to be prepared for.

27. Please do let me know if anything in this advice requires further clarification or if I can be of any other assistance.

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10 October 2019