AGENDA

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

Tuesday, 28th January, 2020, at 2.00 pm
Council Chamber, Sessions House, County Hall, Maidstone

Ask for: **Andrew Tait**
Telephone **03000 416749**

Tea/Coffee will be available 15 minutes before the meeting

Membership

Mr A H T Bowles (Chairman), Mr S C Manion (Vice-Chairman), Mr I S Chittenden, Mr J M Ozog and Mr R A Pascoe

UNRESTRICTED ITEMS

(During these items the meeting is likely to be open to the public)

1. Substitutes

2. Declarations of Interest by Members for items on the agenda

3. Village Green Application - VGA677 River Lawn, Tonbridge (Pages 1 - 52)

4. Other items which the Chairman decides are Urgent

EXEMPT ITEMS

(At the time of preparing the agenda there were no exempt items. During any such items which may arise the meeting is likely NOT to be open to the public)

Benjamin Watts
General Counsel

Monday, 20 January 2020

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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 section15C 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 it[1].

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 Court[i].

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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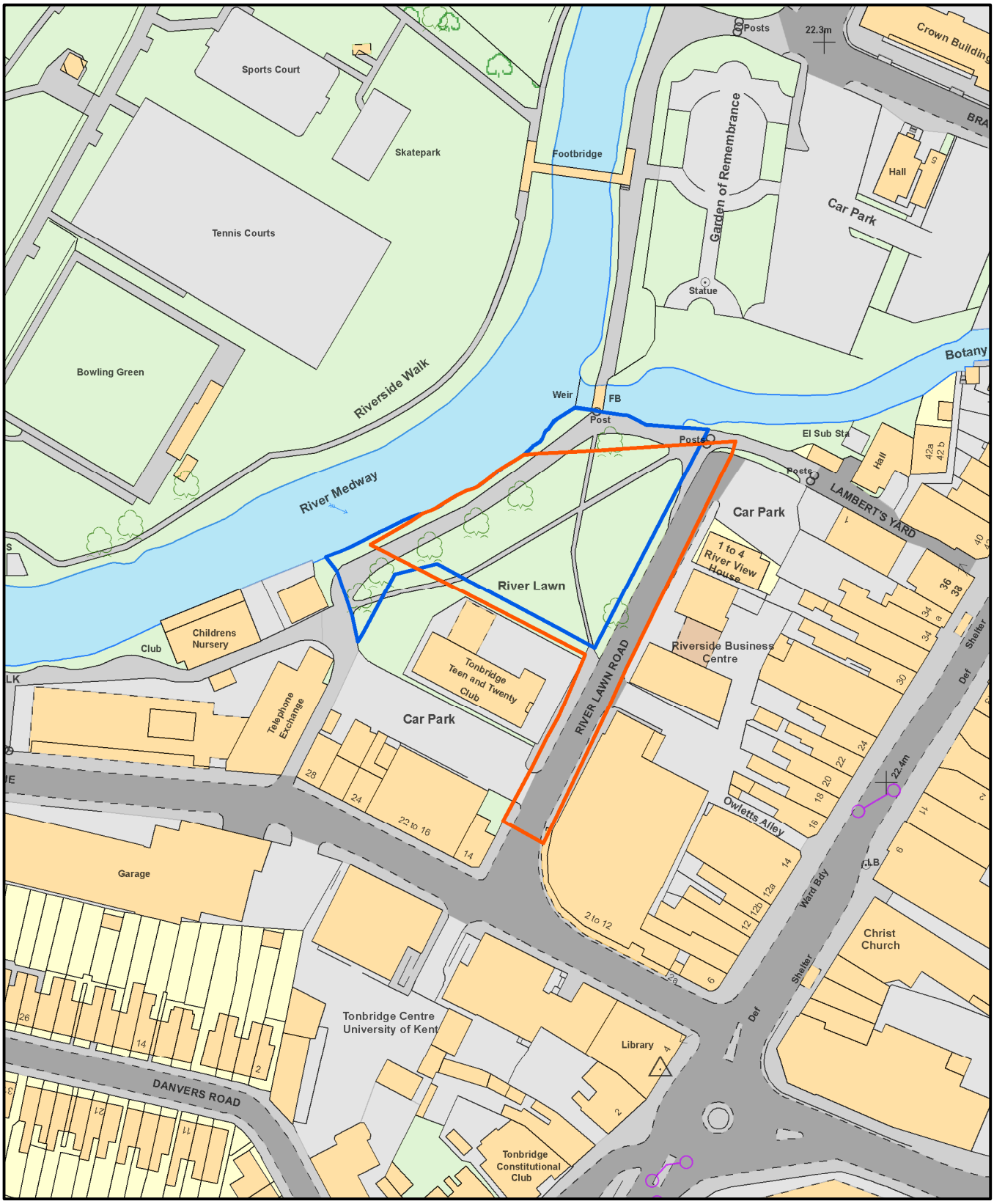
[i] Oxfordshire County Council v Oxford City Council 2006.



Key

- Planning application boundary
- Village Green application boundary

Application Site: River Lawn Village Green

Produced by the KCC Public Rights of Way and Access Service

Please note: this map extract is not a legal record of the alignment or existence of a public right of way. No measurements should be taken from it.

N

1:1,250

0 Metres 50 100

0 Yards 50 100

Created by:	NB	Issue Date:	17/10/2019
Checked by:	GR	Reference:	VG/RiverLawn

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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.

ANNABEL GRAHAM PAUL

Francis Taylor Building
Inner Temple
EC4Y 7BY

24 January 2019

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

THIRD OPINION

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.

ANNABEL GRAHAM PAUL

Francis Taylor Building
Inner Temple
EC4Y 7BY

19 March 2019

Re River Lawn Village Green Application at Tonbridge

ADVICE

1 INTRODUCTION & SUMMARY

1.1 I am instructed by Tonbridge and Malling Borough Council to write a further advice to assist Kent in their determination of the trigger event issue. In particular at paragraph 26 of the helpful third opinion of Annabel Graham Paul she invited further assistance on the meaning of the expression "an application for planning permission in relation to the land"

1.2 In summary my advice is that this expression must in the context of a planning application be taken to be the land contained by the red line plan because that is the only obligatory definition of the land to which a planning application relates. To go for any other definition would be to create uncertainly because there would be no definition on a plan as to which land the planning application related apart from that. The definition of a red line plan assists with this construction because it uses the same verb relates as in the Commons Act 2006

2 THE THIRD OPINION

2.1 In her third opinion Annabel Graham Paul advises that so far as the planning application is concerned there was no terminating event. The evidence about the trigger event is accepted and she sought further

representations on the precise interpretation of the provision in the trigger event and in particular what the provision "an application for planning permission in relation to the land" means as to the physical extent of the planning application.

2.2 The relevant trigger event is provided in schedule 1A of the Commons Act 2006.

> *1. An application for planning permission [, or permission in principle,] in relation to the land which would be determined under section 70 of the 1990 Act is first publicised in accordance with requirements imposed by a development order by virtue of section 65(1) of that Act.*

3 ANALYSIS

3.1 It is in my view clear that when the history of the requirements of the red line plan are looked at that this provision must mean that it is the red line area of the planning application is the relevant area to use.

3.2 At the time of the planning application in this case which was granted on 13 September 2004 the rules for planning applications were The Town and Country Planning (Applications) Regulations 1988. That provided at Regulation 3 the following.

> *3.—(1) Subject to the following provisions of this regulation, an application for planning permission shall—*
> *(a)be made on a form provided by the local planning authority;*
> *(b)include the particulars specified in the form and be accompanied by a plan which identifies the* ***land to which it relates***[1] *and any other plans and drawings and information necessary to describe the development which is the subject of the application; and*
> *(c)except where the authority indicate that a lesser number is required, be accompanied by 3 copies of the form and the plans and drawings submitted with it.*

[1] My emphasis

3.3 That basic formulation has also been followed through in rules as they have continued. The 1995 GDPO 4E came into force on April 6 2008 and provided that an application must be accompanied by:

*A plan which identifies the **land to which the application relates***[2].

3.4 The 2010 Town and Country Planning (Development Management Procedure) England Order had the same formulation at Article 6 (1) (i). As does the Town and Country Planning (Development Management Procedure) England Order 2015 at article 7 (1) (i)

3.5 Thus there is a mandatory requirement in publicising a planning application to show the land to which the application relates on what is traditionally known as the red line plan. It is that plan which the consultation will be on and people will be able to inspect that plan. Thus when using the very similar expression in this the Commons Act 2006 the only way of determining the land which the planning application relates is by looking at the red line plan.

3.6 Thus in a planning application the definition of the land to which the application relates must be that within the red line plan which the notice given to neighbours and the site notice under GDPO says can be inspected. The intention of Parliament must be that the trigger event excludes the red line area of the planning application which is the only obligatory definition of the land to which it relates. To go for any other definition would be to create uncertainty because there would be no definition on a plan as to what was covered by the planning application.

3.7 This is also entirely consistent with the Defra guidance on Sections 15A to 15C of December 2016 which at paragraph 96 envisages that there can be a portion of land that is caught by trigger events. In order for this to be done for a planning application there would need to be a

[2] My emphasis

definition of the land which the planning application relates and this can only sensibly be the red line area. There is not a mandatory requirement to define any other area in the consultation documents.

Richard Ground QC

2 May 2019

Cornerstone Barristers
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London WC1R 5JH.

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.

CAIN ORMONDROYD
FRANCIS TAYLOR BUILDING
2 JULY 2019

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