KENT COUNTY COUNCIL

REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Council Chamber, Sessions House, County Hall, Maidstone on Thursday, 2 December 2021.

PRESENT: Mr S C Manion (Chairman), Mrs S Hudson (Vice-Chairman), Mr M Baldock, Mr J M Ozog and Mrs L Parfitt-Reid

IN ATTENDANCE: Ms M McNeir (Public Rights Of Way and Commons Registration Officer), Mr G Rusling (Public Rights of Way & Access Service Manager), Ms S Bonser (Senior Solicitor. Invicta Law) and Mr A Tait (Democratic Services Officer)

UNRESTRICTED ITEMS

5. Application to register land known as Two Fields at Westbere as a new Town or Village Green
(Item 4)

(1) The Public Rights of Way and Commons Registration Officer introduced the report by saying that the County Council had received the application to register an area of land known as Two Fields at Westbere as a new Town or Village Green from the Two Fields Action Group. This application had been made under section 15 of the Commons Act 2006.

(2) The Public Rights of Way and Commons Registration Officer continued that the application had previously been considered at a meeting of the Regulation Committee Member Panel on 24th February 2021 when the recommendation, based on legal advice received at that time, had been to reject the application on the grounds that the application site was affected by one of the 'trigger events' set out in Schedule 1A of the Commons Act 2006. The Panel had, however, not been sufficiently satisfied that a "trigger event" had occurred and determined that the matter should be referred to a Public Inquiry for further consideration.

(3) Following the meeting, a Pre-Action Protocol letter was received from legal advisors acting on behalf of one of the affected landowners, Bellway Homes Ltd. This advised the County Council that it was their intention to make an application to the High Court for a Judicial Review of the Member Panel's decision on the basis that it was wrong in law because the application was affected by a "trigger event" prevented the County Council from considering the application further. Consequently, the County Council had sought a second opinion on the matter from Mr. David Forsdick QC. The advice received was that the issue in question was far from clear-cut and that the available case law was open to interpretation. He had suggested that the County Council ought to take further representations

on the issue of the alleged "trigger event" the and, following consultation with the relevant parties, this could be achieved by way of written submissions (as opposed to hearing oral representations in a Public Inquiry forum). It was then agreed that the County Council would proceed to further consider the issue of whether a "trigger event" existed prior to reaching a final verdict on this matter.

(4) The Public Rights of Way and Commons Registration Officer turned to consideration of the issues involved. She said that the case turned upon whether the application site was affected by one or more of the "trigger events" set out in Schedule 1A of the Commons Act 2006. For example, if the application site was affected by a planning application or had been identified for development in a local or neighbourhood plan, the County Council would not be able to consider an application to register the land in question as a Village Green.

(5) The Public Rights of Way and Commons Registration Officer said that in this case, two of the affected landowners had submitted that the application site was the subject of one of the trigger events specified in Schedule 1A as paragraph 4 of Schedule 1A stated that:-

"a development plan document which identifies the land for potential development is adopted under section 23(2) or (3) of the [Planning and Compulsory Purchase Act 2004]."

(6) The Public Rights of Way and Commons Registration Officer then quoted the relevant section of Canterbury City Council's Local Plan which identified the entirety of the application site as a "Green Gap" under Policy OS6, which stated that:

"Within the Green Gaps identified on the Proposals Map… development will be permitted where it does not:
(a) Significantly affect the open character of the Green Gap, or lead to coalescence between existing settlements;
(b) Result in new isolated and obtrusive development within the Green Gap.

Proposals for open sports and recreational uses will be permitted subject to there being no overriding conflict with other policies and the wider objectives of the Plan. Any related built development should satisfy criteria (a) and (b) above and be kept to a minimum necessary to supplement the open sports and recreation uses, and be sensitively located and of a high quality design".

(7) The Public Rights of Way and Commons Registration Officer said that the landowners' position was therefore that the application site was identified in the Local Plan for potential development.

(8) The Public Rights of Way and Commons Registration Officer then set out the applicant's position which was that the designation of "Green Gap" was not one of the land being identified as suitable for development, but rather that it designated its unsuitability, albeit that exceptions might be made for developments that would be compatible with continued recreational use and the retention of the land as an open space between settlements.

(9) The Public Rights of Way and Commons Registration Officer explained that the original advice received from Counsel (upon which the previous Member Panel report had been based) was that Policy OS6 *did* serve to identify "Green Gaps" as having the potential for development and therefore operated as a "trigger event" under Schedule 1A of the Commons Act 2006. Counsel had, however, also noted that her advice was based upon a particular interpretation of the policy in the light of the comments of the High Court in recent case law (known as the *Cooper Estates* case), and that this case law could potentially be open to different interpretation and application.

(10) Mr David Forsdick, QC was then appointed to act as the Inspector in order to give the matter further consideration as agreed by the February Member Panel in February 2021. He invited further submissions from all interested parties before preparing a report (which was appended to the papers) which set out his conclusions and advice as to how the County Council should proceed. His conclusions were guided by the Court of Appeal's judgement in the *Cooper Estates* Case. This case held that the word "identified" had the meaning to establish or recognise, that "potential development" was a very broad concept that was not to be equated with likelihood or probability, and that "identification" might be contrasted with "allocation" where a site was allocated for a particular use. Thus, for a "trigger event" to exist, it was not necessary for the land in question to be formally allocated for potential development, it merely needed to be 'identified' as such. However, the fact that the Local Plan encouraged development was not sufficient and there had to be a "sufficient nexus" between the relevant plan and the application site.

(**11) The Public Rights of Way and Commons Registration Officer's description of the Inspector's findings are set out in (12) to (17) below.**

(12) The situation in *Cooper Estates* concerned a piece of land in the market town of Royal Wootton Bassett in which the land in question was not allocated or specifically identified for development, but where the relevant local plan document identified the market towns in the area which had the potential for significant development and provided that, within the settlement boundary of those towns, there would be a "presumption in favour of sustainable development." Accordingly, it had been considered in that case that the land was identified for potential development because, by implication, the land within the defined settlement boundary was already considered developable land.

(13) In reaching that decision, the Court had not "ruled out the possibility that prima facie identification of the land for potential development by one policy could be contradicted by countervailing policies elsewhere in the plan." In this regard, the Inspector had considered that the fundamental starting point, in the current case, was to understand the Local Plan fully and as a whole because, although one policy read alone might appear to identify the land for development,

"that may be contradicted by other provisions of the Plan which show that the policy in fact adds a layer of constraint to other generally applicable policies."

(14) In reviewing the Local Plan, the Inspector had noted that its overarching objective (in addition to protecting existing open space) was to 'improve the distribution, accessibility, quality and connectivity of open space" and that the designation of "Green Gaps" served to retain separate identities of settlements by preventing their coalescence. He had noted that:

"The green gaps policy is thus designed to supplement the general policy (nationally) of restraints outside urban areas and in the countryside. It is explicitly designed to provide a more restrictive approach than in the countryside generally. The criteria for development in OS6 are thus additional to the criteria for such development in the countryside and more generally applicable policies…"

"Far from identifying the Land for potential development, it is thus clear from the supporting text that the green gaps were designed to supplement the policy of restraint in the more generally applicable countryside policies. They add a further factor into the assessment – namely the need for any otherwise acceptable development under those other policies to avoid coalescence."

(15) The Inspector had acknowledged that, taken alone, Policy OS6 would permit development within the green gaps if it satisfied the criteria and could be understood as identifying the land for some limited forms of potential development. However, in his view, looking at Policy OS6 in isolation was not the correct way of approaching the statutory question and, instead, it was necessary to understand the Policy in the context of the rest of the Local Plan to understand whether it identified the land for development.

(16) The application site (in common with all non-urban countryside areas within the district) was subject to multiple policies which constrained, but did not altogether prohibit, development. In this respect, the Inspector stated that:

"There is no identification of any specific area or land which will or may be developed as a result. It is to my mind impossible to construe policies of general application across the countryside (with criteria for possible certain forms of development) as "identifying" any given areas of land for potential development. Such policies do not identify any land for development – they identify a potential for certain forms of development to come forward in unidentified, unidentifiable and undetermined locations in the countryside if certain conditions are met."

"If such policies were sufficient to satisfy the statutory test, it would mean that the Plan here constituted a trigger event for apparently the whole of the Council's area because all the Council's area is subject to policies which are permissive of some forms of development in some circumstances (even the local green spaces). Across the country, any countryside restraint policy which was permissive of some development in some circumstances… would disapply the 2006 Act for all that countryside. I cannot read the statute, its underlying logic or Cooper [Estates] as requiring that result…

Fundamentally, I do not regard the fact that policies may be permissive of some development in some circumstances as sufficient to mean they "identify" any specific land for potential development."

(17) With that in mind, and when reading Policy OS6 in the context of the rest of the Local Plan, the Inspector had found that:

"it is clear that it: (1) applies an added layer of constraint; and/or (2) highlights an extra factor for consideration when proposals for development in the countryside and in a green gap come forward."

In reaching that view, the Inspector had noted that although Policy OS6 was, of itself, expressly permissive of development (subject to limitations), when read in the context of the rest of the Plan, its effect was to impose additional constraints on all forms of development within the Green Gaps. The Inspector had therefore concluded

"that the Plan properly construed as a whole does not "identify" the Land for potential development… The land is in the countryside, all of which is outwith the focus of the spatial strategy and is an area of restraint. Being part of the countryside, it is subject to a number of generally applicable policies which are restrictive of development but which allow certain forms of development in certain circumstances and subject to certain criteria. Those wider policies cannot be properly understood as "identifying" land for potential development. OS6 is a specific policy which adds an extra layer of constraint in the green gaps – cutting down on the limited potential for development in the countryside generally under the generally applicable policies. I therefore cannot read it as identifying the land for potential development.".

(18) The Public Rights of Way and Commons Registration Officer then said that the Inspector's report had been forwarded to all interested parties for their information and further comment.

(19) The Public Rights of Way and Commons Registration Officer said that, whilst accepting that the issues raised in this matter concerned difficult, important and untested points of law, Bellway Homes Ltd considered that the Inspector had nonetheless reached the wrong conclusion in relation to the existence of a "trigger event" in respect of the application site. They submitted that Policy OS6 identified the land for development and, contrary to the Inspector's views, there were no countervailing policies in the Canterbury Local Plan to directly contradict that identification. They further submitted that there was no reference in Schedule 1A of the Commons Act 2006 to any requirement to consider the totality of the context, or to construe the Local Plan as a whole, and that therefore the Inspector's approach was to effectively re-write the "trigger event" in question. Moreover, the rationale of introducing Schedule 1A was to ensure that land was protected via the planning system rather than via registration of land as a Village Green.

(20) The Public Rights of Way and Commons Registration Officer then said that the applicant had welcomed the Inspector's findings and supported the reasoning set out by the Inspector. The applicant's view was that the Local Plan contained a number of policies restricting development in the area, and that Policy OS6 was in substance a restrictive policy comprising constraints (in terms of extend and

kind) on any development coming forward on the application site. They submitted that the circumstances in this case were plainly different to that in *Cooper Estates* (where there was a presumption in favour of sustainable development within a defined settlement boundary) and that to find in favour of a "trigger event" in the current case would be wholly inconsistent with the statutory purpose for which Schedule 1A was brought into force (because to do so would effectively render section 15 of the Commons Act 2006 redundant in the majority of cases).

(21) The Public Rights of Way and Commons Registration Officer said that the comments received have been forwarded to the Inspector who had confirmed that they did not change his conclusions or advice to the County Council.

(22) The Public Rights of Way and Commons Registration Officer moved on to explain her conclusions. She noted that the County Council had received conflicting legal advice on this matter. The earlier advice had indicated that on a strict reading of the Policy wording it appeared that the site had been identified for potential development (because the Policy specifically provided for development to take place). The latter advice has concluded that, on a wider interpretation of the plan as a whole, the Policy could not be seen as specifically identifying the application site for development.

(23) The Public Rights of Way and Commons Registration Officer explained that the County Council was not legally bound by either legal advice received and had to reach its own decision in relation to this matter.

(24) The Public Rights of Way and Commons Registration Officer continued that the latest advice had been reached entirely independently and been uninfluenced by the Panel's earlier decision. It had taken a wholly different approach of viewing the Policy in the wider context of the rest of the Local Plan and considering the document as a whole to determine whether it identified the land for potential development.

(25) The Public Rights of Way and Commons Registration Officer said that in her view, there was merit in the broader approach to the matter given by the Inspector. Lord Justice Lewison had acknowledged in the *Cooper Estates* case that the phrase that the Court was being called upon to interpret was "imprecise" and had also noted that each side had been able to point to potential difficulties if the other side was right. For that reason, he had considered it:

"imperative, in my judgement, to interpret it in accordance with the policy underlying the change in the law. That policy, as I understand it, 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 as a TVG [Town or Village Green]… [in this case] to allow a registration of a TVG within the settlement boundary would, in my judgement, frustrate the broad objectives of the plan. That is precisely the reason why Parliament decided that, in circumstances like the present, a TVG should not be registered; but, instead, the question of development should be left to the planning system".

(26) The Public Rights of Way and Commons Registration Officer continued by saying that the factual circumstances in Cooper Estates were that the land in question fell within a defined settlement boundary for which there was a positive presumption in favour of development within the Local Plan in order to achieve the over 1,000 new homes needed in Royal Wootton Bassett during the currency of the Plan. This position was clearly in contrast to the current case where the land had been identified as a "Green Gap" for the specific purpose of retaining the open character of the land and preventing coalescence between the settlements of Westbere and Sturry. Registration of the application site as a Village Green in this case (if that were ultimately to happen) would not frustrate the broader objectives of the Canterbury City Council Local Plan.

(27) The Public Rights of Way and Commons Registration Officer added that when viewing the matter, from the perspective of the underlying policy in relation to "trigger events" (as had happened in the *Cooper Estates* case) it was clear that if a "Green Gap" was considered to identify land for potential development then that interpretation would effectively sterilise almost all land in the City Council's area (and indeed nationally) against any potential application under section 15 of the Commons Act 2006. This could not have been Parliament's intention in enacting Schedule 1A of the Commons Act 2006. Indeed, the original purpose of Schedule 1A had been to prevent section 15 of the Commons Act 2006 being used to frustrate planned or intended development. It could not have been envisaged as a mechanism to curb the potential for Village Green applications to be made altogether.

(28) Whilst acknowledging that the matter was not clear cut and that the relevant law not settled, the Public Rights of Way and Commons Registration Officer considered on balance that the advice received from the Inspector was sound and that it offered a strong basis upon which to reach a considered decision in this matter. She recommended accordingly.

(29) The Public Rights of Way and Commons Registration Officer then gave the procedural advice that the Panel had to determine the "trigger event" issue alone at this stage. If the Panel accepted her advice that no trigger event existed, then the application would be to a Public Inquiry to consider the more substantive factual issues of the case. If the Panel did not agree with the recommendation - and instead determined that the application site was affected by a "trigger event" - then the Village Green application would be rejected , with no further action being taken by the County Council.

(30) The Public Rights of Way and Commons Registration Officer concluded by saying that determination of Village Green applications was a quasi-judicial function of the County Council and that any financial implications could have no bearing whatsoever on the Panel's decision. She added that, whatever decision was reached, there was a likelihood that it would be subject of an application to the High Court for Judicial Review.

(31) In response to questions from Mr Baldock, the Public Rights of Way and Commons Registration Officer said that the *Cooper Estates* case judgement had been made by the Court of Appeal and had not been referred to the Supreme Court. In the event that the Panel decided that there had been no "trigger event",

it would be prudent in this case to delay arrangements for the Public Inquiry to enable the landowners to consider whether to challenge the Panel's decision in the courts. Any application for Judicial Review would need to be made no later than three months from the date of the decision.

(32) Dr Antonie G van den Broek addressed the Panel on behalf of the applicants. He said that they agreed with the Inspector's conclusions as Policy OS6 of the Canterbury Local Plan had the effect of adding an extra restraint to the development of the land in question. He considered it significant that Canterbury CC had indicated to Bellway Homes that an application for them to develop was likely to be rejected. In addition, Parliament had clearly not intended that an application such as this would be automatically rejected when it had passed Schedule 1A of the Commons Act 2006 into Law. When reaching its decision, the Panel should consider whether to agree with the first advice to simply look at Policy O56 in isolation or the second advice which had examined the Plan in its totality and offered a further two rounds of consultation after setting out a draft opinion. He believed that the Law was clearly on the side of the applicants in this instance.

(33) The Clerk to the Committee said that Eleanor Andrews from Winckworth Sherwood LLP had written on behalf of the landowners, Bellway Homes to request that correspondence be read out to the meeting. This is set out below:

Letter of 30 November 2021

"Dear Sirs.

Thank you for your email dated 8 November 2021 informing us of the Regulation Committee Member Panel meeting and your further email of 23 November 2021 enclosing a copy of the agenda papers.

We can confirm, on behalf of Bellway Homes Limited, that its position remains as per the letter dated 5 July 2021 a copy of which is attached.

Bellway Homes Limited does not require slot to make representations and instead asks that the 5 July 2021 letter is provided in the pack to members and is read aloud to the members at the meeting.

If you require anything further please do not hesitate to contact us.

Yours faithfully "

Letter of 5 July 2021

"Dear Sirs

Further to your email dated 16 June 2021 we do wish to make further short submissions in relation to the Report of the Examining Inspector dated 9 June 2021 as follows:

1. We agree with the Inspector that the issues in relation to the existence of a trigger event in this case raise difficult, important and untested points of law. However, as we explain, briefly, below, he has reached the wrong conclusion.

2. As set out at paragraph 16 of his Report, in Cooper the Court of Appeal did not rule out the possibility that the prima facie identification of the land for potential development by one policy could be contradicted by countervailing policies elsewhere in the plan. Thus in that case it was necessary to examine the Wiltshire Core Strategy to see whether there were any countervailing policies which contradicted the identification of the land for potential development by CP1 and CP2. There were none.

3. Similarly, we say, in the present case OS6 identifies the land for potential development and there are no countervailing policies which contradict that identification; in particular, neither HD3 nor OS8 are such policies.

4. Although the Inspector expressly says that he is applying the same approach as applied in Cooper, in fact he is doing something different. His starting point is with policy HD3. He says that this does not identify land for potential development. He then goes on to say that OS6 supplements the policy of restraint and that reading OS6 in the light of HD3, it does not identify land for potential development. Similarly, he says that OS8 does not identify land for potential development. He then goes on to say that OS6 adds further, stricter criteria requirements for development and that reading OS6 in the light of OS8, it does not identify land for potential development.

5. The Inspector is correct to say that neither HD3 nor OS8 identify land for potential development. But this does not mean that they are countervailing policies which contradict the identification of land for potential development by OS6. They are not. Thus although we agree with the Inspector that the factual circumstances of the present case are different in some respects from those of Cooper, in a key respect they are the same: there is in both cases a policy which identifies land for potential development and in both cases there are no countervailing policies. The Inspector, on the other hand, in effect rewrites schedule 1A to hold that a trigger event has not occurred despite the fact that the land is identified for potential development, holding that looking at the totality of the context8 the land is not identified. Reference to the totality of the context or construing the plan as a whole does not entitle the decision-maker to set aside the plain words of the Act in their application to the words in the development plan. The Inspector was correct to be drawn to the argument that the permissive nature of OS6 was decisive in favour of the objectors. Moreover a conclusion based on such an argument is consistent with the rationale of the amendment to the Commons Act 2006 by the Growth and Infrastructure Act 2013, whereby this particular piece of open space is protected through the planning system and not the TVG system.

For these reasons we have advised our client that if the Registration Authority were to adopt the reasoning set out in the Inspector's Report, and determine that

no trigger event has occurred, then that decision would be liable to challenge by way of judicial review.

Our client's position in this regard is expressly reserved.

Yours faithfully"

(34) The Panel moved on to consider its decision. Mr Baldock said that in his view, the landowners had misunderstood the purpose of a Local Plan. A Local Plan set out the planning considerations for determining future planning applications. Each application had to be considered on its merits, so the Plan could not rule out any development whatsoever. It was only possible to apply general policies when the Plan was being developed. The Green Gap Policy acted in this way. He could not understand how any other interpretation of the Local Plan could be held and moved the recommendations in the report.

(35) Mr Ozog seconded the motion, saying that he was in full agreement with the argument made by Mr Baldock.

(36) Mrs Parfitt-Reid said and Mrs Hudson concurred that Local Plans had to be looked at in the round rather than taking each policy in isolation.

(37) On being put to the vote, the motion proposed by Mr Baldock and seconded by Mr Ozog was agreed unanimously.

(38) RESOLVED that the legal advice dated 9 June 2021 be accepted to the effect that no trigger event exists in relation to the application site and that a Public Inquiry be held to consider the substantive issues of the case.