Application to register land known as Two Fields at Westbere as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Wednesday 24th February 2021.

Recommendation: I recommend that the applicant be informed that the application to register the land known as Two Fields at Westbere as a Town or Village Green has not been accepted.

Local Member: Mr. A. Marsh Unrestricted item

Introduction

1. The County Council has received an application to register an area of land known as Two Fields at Westbere as a new Town or Village Green from Lady L. Laws on behalf of the Two Fields Action Group ("the applicant"). The application, made on 8th November 2019, was allocated the application number VGA681.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2014.

3. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Village Green where it can be shown that:

   'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years'

4. In addition to the above, the application must meet one of the following tests:

   • **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or

   • **Use of the land 'as of right' ended no more than one year prior to the date of application**[1], e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).

5. As a standard procedure set out in the 2014 Regulations, the County Council must publicise the application by way of a copy of the notice on the County Council's website and by placing copies of the notice on site to provide local people with the opportunity to comment on the application. Copies of that notice must also be served on any landowner(s) (where they can be reasonably identified) as well as the relevant local authorities. The publicity must state a period of at least six weeks during which objections and representations can be made.

[1] Reduced from two years to one year for applications made after 1st October 2013, due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013.

The application site

6. The land subject to this application ("the application site") is situated on the Westbere/Sturry parish boundary, south of Staines Hill and Westbere Lane, and consists of a large area of approximately 37 acres (15 hectares) comprising mixed woodland (some of which has been recently cleared) as well as more open areas of grassland and scrub. Access to the application site is via Public Footpath CB91 which, for the most part, runs alongside the railway line abutting the southern edge of the application site and connects Westbere Lane with Fairview Gardens.

7. The application site is shown on the plan at **Appendix A**, and an aerial photograph showing the site taken in 2009 (i.e. the middle of relevant twenty-year period) is attached at **Appendix B**.

The case

8. The application has been made on the grounds that the application site has become a Town or Village Green by virtue of the recreational use of the land by local residents for a period in excess of twenty years. It has been prompted by the clearance of part of the application site by one of the landowners in August 2019.

9. Included with the application was a statement of support from the applicant, photographs of the application site, detailed summaries of the evidence as well as 70 user evidence questionnaires. An additional 18 evidence questionnaires were submitted subsequently by the applicant in further support of the application.

10. The evidence questionnaires submitted in support of the application refer to the use of the application site for a wide range of activities, including walking, jogging, playing with children, foraging, bird watching and photography. Just over half of the evidence questionnaires refer to use the application site for a period in excess of twenty years, and the vast majority attest to use of the application site on a very regular (at least weekly) basis.

11. The application has been made under section 15(2) of the Commons Act – i.e. on the basis that use of the application site has continued 'as of right' until the date of the application – such that the relevant twenty-year period for the purposes of the application is November 1999 to November 2019. The applicant relies upon the parishes of Westbere and Sturry as the qualifying locality for the purposes of the application.

Landowners

12. The ownership of the application site is sub-divided into five strips of varying width that are registered with the Land Registry to four different landowners.

13. The western half (approximately) of the application site is registered to Bellway Homes Ltd. under title number TT60980. An objection to the application has been received from Winkworth Sherwood LLP on behalf of Bellway Homes Ltd. (further details below).

14. Adjacent to the land owned by Bellway Homes Ltd. is a narrow strip of land registered under Land Registry title number K779440 to Mr. S. Saadat. A further

adjoining narrow strip of land, registered under title number TT65696, is owned by Westbere Green Space Protection Ltd. Notice of the application has been served as required upon Mr. Saadat, but no response has been received. Westbere Green Space Protection Ltd. has, however, confirmed its support for the application.

15. The area of land, comprising approximately the eastern half of the application site is registered to Mr. S. Mahallati under title numbers K779400 and K786421. Mr. Mahallati is represented by Thompson, Snell and Passmore LLP, which has objected to the application on his behalf (further details below).

Objections

16. Two objections have been received to the application on behalf of two of the affected landowners.

17. The objection from Winkworth Sherwood LLP (on behalf of Bellway Homes Ltd.) is made on the basis that:
    - The use of the application site has not been by a significant number of the inhabitants of a single locality, or neighbourhood within a locality;
    - Use of the application site has not been 'as of right' due to the erection of prohibitive notices erected on site in 2018 (replaced in September 2019);
    - The vast majority of the use relied upon consists of walking (which is considered equivalent to the use of a right of way) and not sufficient to establish use of the application site for lawful sports and pastimes; and
    - That use of the application site ceased to be 'as of right' more than one year prior to the submission of the application, such that the tests under sections 15(2) and 15(3) of the Commons Act 2006 are not met.

18. The objection from Thompson, Snell and Passmore LLP (on behalf of Mr. Mahallati) is made on the basis that:
    - A large proportion of the users have not provided evidence of use of the application site for the full twenty-year period;
    - One of the main uses of the application site is for walking and such use falls to be discounted on the basis that it is akin to a right of way usage rather than a general right to recreate;
    - Use was not by a sufficient number to give rise to a general appearance that the land was available for community use;
    - Use of the application site has been the subject of verbal challenges by the landowner, and in January 2020 fencing and prohibitive signage was erected; and
    - Local Plan policy OS6 constitutes a 'trigger event' such as to prevent the registration of the land as a Village Green.

19. The applicant's response to the objections is that (in summary):
    - There is no reason why a locality for this purpose is to be interpreted as a single locality and, in any event, it is only necessary for the applicant to demonstrate evidence of use from one of the localities in order for the application to be successful;
    - The user evidence questionnaires from the residents of Westbere alone represent a significant number of users (as a proportion of the total

population) from that locality, such that the 'significant number' test is met in that regard;

- The character of the site was radically altered by clearance and tree-felling works undertaken in 2019, such that the evidence of activities and access to other parts of the application site was destroyed, and although some parts of the application site are inaccessible during certain periods of the year, the vegetation dies back during other parts of the year;
- A sign was erected in late 2018 on the northern side of the application site but it was neither clear nor specific enough to challenge use, did not specify the land to which it related, and was so short-lived that it would not have come to most people's attention;
- A gate was erected on the northern boundary of the site in 2019 but it was understood to have been provided to prevent the unlawful occupation of the application site following its clearance and correspondence with the landowner at the time indicated that it was not the intention to restrict public (pedestrian) access to the site.

'Trigger events'

20. As noted at paragraph 3 above, the tests to be applied to the evidence when considering an application to register a new Town or Village Green are set out in section 15 of the Commons Act 2006 and require the applicant to be able to demonstrate that use of the application site has taken place 'as of right' for the purposes of 'lawful sports and pastimes' by the residents of 'a locality or a neighbourhood within a locality' for a period of a least twenty years, with such use continuing either to the date of the application or, failing that, ceasing no more than one year prior to the application being made.

21. However, before applying that test, the County Council must be satisfied that it is capable of considering the application for Town or Village Green status. The Growth and Infrastructure Act 2013 introduced a new provision requiring Commons Registration Authorities, on receipt of a Village Green application, to enquire of the relevant planning authorities as to whether the land subject to a Village Green application is affected by any prescribed planning-related events – known as 'trigger events' – which are set out in a new Schedule inserted into the Commons Act 2006 (Schedule 1A). The right to apply for the registration of a Town or Village Green is excluded if any 'trigger event' has occurred in relation to the land and becomes exercisable again only if a corresponding 'terminating event' has occurred in relation to that land.

22. In this case, following receipt of the Village Green application, the local planning authority advised that 'trigger events' had occurred in respect of the land, but that corresponding 'terminating events' had also occurred, such that the right to apply for Village Green status was not disengaged. The 'trigger events' referred to comprised four planning applications made during the late 1970s and the 1980s in respect of the application site, all of which had been refused and all means of challenge exhausted. Since there were no current 'trigger events' affecting the application, there was no reason for the County Council not to proceed with the determination of the application.

23. However, following advertisement of the application, the issue of a possible (and different) 'trigger event' in relation to the application site was raised by the

objectors. It is suggested that the identification of the entirety of the application site as a 'Green Gap' within Canterbury City Council's Local Plan (adopted in July 2017) means that a 'trigger event' has taken place in accordance with paragraph 4 of Schedule 1A of the Commons Act 2006. That paragraph provides specifically that a 'trigger event' takes place where "*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]*".

24. In support of this proposition, reliance is placed upon the recent Court of Appeal decision in Wiltshire Council v Cooper Estates Strategic Land Ltd. [2019] EWCA Civ 840 in which it was suggested that the words 'potential' and 'development' are not to be narrowly construed; thus, the 'trigger event' requires only for the land to be identified as having the potential for development, and not for the land to be specifically allocated for development.

25. The applicant's response is that the designation of the land as a 'Green Gap' in the Local Plan is not a designation of the land as being suitable for development, but rather of it being unsuitable for development. In the case of a 'Green Gap' an exception might be made for developments that were compatible with its continued use for recreational purposes and its maintenance as an open space between settlements, but it would be perverse to assume that Parliament intended such a designation to prevent the land in question being afforded the further protection of Village Green status (i.e. to continue being used for the same purposes as the 'Green Gap' designation is intended to allow).

26. It is further suggested that the Cooper Estates case can be distinguished because that decision was reached on the basis that Village Green registration in that case would frustrate the broad objectives of the relevant development plan, from which it was clear that new housing would be required. In the current case, it is clear that the intention of the 'Green Gap' is to preserve the land as open space between settlements.

Legal Advice

27. In light of the dispute on the applicability (or otherwise) of a possible 'trigger event' in relation to the application site, advice on this matter has been sought from Counsel.

28. Counsel's advice, which is attached at **Appendix C**, is that the identification of the application site as a 'Green Gap' in the Canterbury City Council Local Plan operates as a 'trigger event' for the purposes of Schedule 1A of the Commons Act 2006, such that it is not possible for the County Council to consider the Village Green application.

29. In reaching that advice, Counsel paid close attention to Policy OS6 in the Local Plan, relating to 'Green Gaps', which states:

    "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".

She further noted that the objective of the policy was to retain separate identities of existing settlements and was considered to supplement national policies seeking to restrain built development outside urban areas and address the concern that gradual coalescence between existing built up areas harms the character of the open countryside.

30. The leading authority on the interpretation of paragraph 4 of Schedule 1A of the Commons Act 2006 is the Cooper Estates case, in which the Court of Appeal held that 'identified' has its ordinary English meaning to establish or recognise, that 'potential development' is a very broad concept that is not to be equated with likelihood or probability, and that 'identification' may be contrasted with 'allocation' where a site is allocated for a particular use.

31. Applying the principles of the Cooper Estates case to the current application, Counsel advised (at paragraphs 18 to 20, and 23, of her advice) that:

"The existence of constraints affecting the land is not a reason for ruling out the area from being identified for potential development. The question comes down to the consequences of the land being within a Green Gap, looking at the plan as a whole, and bearing in mind the policy underlying the change in the law, which 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.

I accept the point that the effect of the 'green gap' designation is essentially restrictive in that development will only be permitted where it does not affect the open character of the gap or lead to coalescence or result in isolated and obtrusive development. Furthermore, the policy is said to supplement national policies restraining built development in the countryside. It seems unlikely there that any significant built development would be in compliance with this policy.

However, the very fact that such a policy exists appears to acknowledge that the area is under development pressure (see supporting text). It therefore could be said that the policy is identifying the land for 'potential development' and seeking to regulate that development in order to preserve the open character of the Green Gap. Proposals for open sports and recreational uses would be in compliance with the policy (provided they met other policies in the plan). Where these involve a material change of use of land, they would also fall within the meaning of 'development'. It could therefore further be argued that the policy is identifying the land for potential sports and recreational development as well as for more general forms of built development (subject to the restrictions imposed).

…

It is therefore my view that Policy OS6 does identify the land within the 'green gaps' for potential development. The likelihood of such development

being permitted in accordance with the policy will, of course, depend on whether the development applied for significantly affects the open character of the gap or leads to coalescence of settlements or not (or otherwise results in new isolated and obtrusive development). It is clear that the development plan envisages the development pressures on these 'green gap' areas being managed through the planning system. Whilst TVG registration may be in accordance with the restrictive nature of the protection for the green gap, that is not always necessarily going to be the case. For example, TVG registration would prevent sympathetic sports buildings and structures being erected on the land or, by way of another example, a utilities mast being erected which would not affect the open character of the gap. The Courts have emphasized the wide scope of the meaning of 'potential' development. In light of this, I consider that a Court would be more likely than not to conclude that Policy OS6 functions as a 'trigger event' in this case".

Applicant's comments

32. In light of Counsel's advice, the applicant has been afforded an opportunity to comment further upon the 'trigger events' issue.

33. The applicant strongly contests Counsel's advice and considers that the Cooper Estates case is plainly and necessarily distinguishable from the current case, and cannot apply to it. The situation in Cooper Estates was that the development envisaged was incompatible with the use of the land in question as a Village Green, which is not the case with the current application site where the designation of the land as a 'Green Gap' is mutually supportive of the Village Green application.

34. The applicant's position is that it is perverse to construe the designation of the land as a 'Green Gap' as identifying the land for development, when the purpose of that policy is in fact the prevent the coalescence of settlements through development. Common sense dictates that the intention of Schedule 1A of the Commons Act 2006 must be to prevent Village Green applications from contradicting and superseding planning applications that have already been made, and not to render impossible the submission of an application under section 15 of the Commons Act 2006 wherever there is a Local Plan in place (which arguably, in effect, abolishes the right of individuals to assert any recreational rights that may have been acquired). The applicant's submission is that it cannot have been Parliament's intention for this to happen, and there must be some land within a local planning authority's area where Village Green applications are still possible (being those areas where the granting of a Village Green application would be compatible with the relevant Local Plan policies).

35. The applicant's comments have been referred back to Counsel for review and, whilst accepting that the matter is not clear-cut and open to interpretation, Counsel has nonetheless confirmed that her original advice remains unchanged.

Conclusion

36. In this case, the issue before the Panel is whether the application site is affected by one of the 'trigger events' set out in Schedule 1A of the Commons Act 2006; if

it is, then the application as a whole falls to be rejected without further consideration.

37. There is no dispute between the parties that Canterbury City Council's Local Plan is a development plan document adopted under the Planning and Compulsory Purchase Act 2004; nor is there any dispute that the entirety of the application site is identified within that plan as a 'Green Gap' under policy OS6.

38. The question is, therefore, whether it can be said that the application site is identified for potential development under that policy. In this regard, 'development' need not be, for example, a large-scale housing estate, but the term would apply equally to (as an example) the development of football pitches or a sports hall on the land. It is clear from the wording of Policy OS6 (at paragraph 29 above) that the policy is not intended to be totally prohibitive in nature but, on the contrary, seeks to regulate the kind of development taking place within the identified 'Green Gaps'. In that regard, it can be said that the policy specifically provides for development – albeit of a restricted nature – to take place within areas identified in the Local Plan as 'Green Gaps'.

39. As noted above, Counsel's advice on this matter is that the 'trigger event' specified in paragraph 4 of Schedule 1A to the Commons Act 2006 is engaged by reference to the identification of the application site as a 'Green Gap' within the Local Plan. Having carefully considered that advice, and revisited all of the submissions made by the parties, it would appear that there are good grounds for concluding that the application site has been identified for potential development, such that the County Council is not able to consider the Village Green application.

40. For the sake of completeness, in the event that the Panel is not minded to approve the recommendation set out below, then it is asked to refer the matter to a Public Inquiry for further consideration on the basis that there is a significant conflict of evidence between the applicant and the objectors. However, such a course should only be considered where the Panel is satisfied that no 'trigger events' apply in respect of the application.

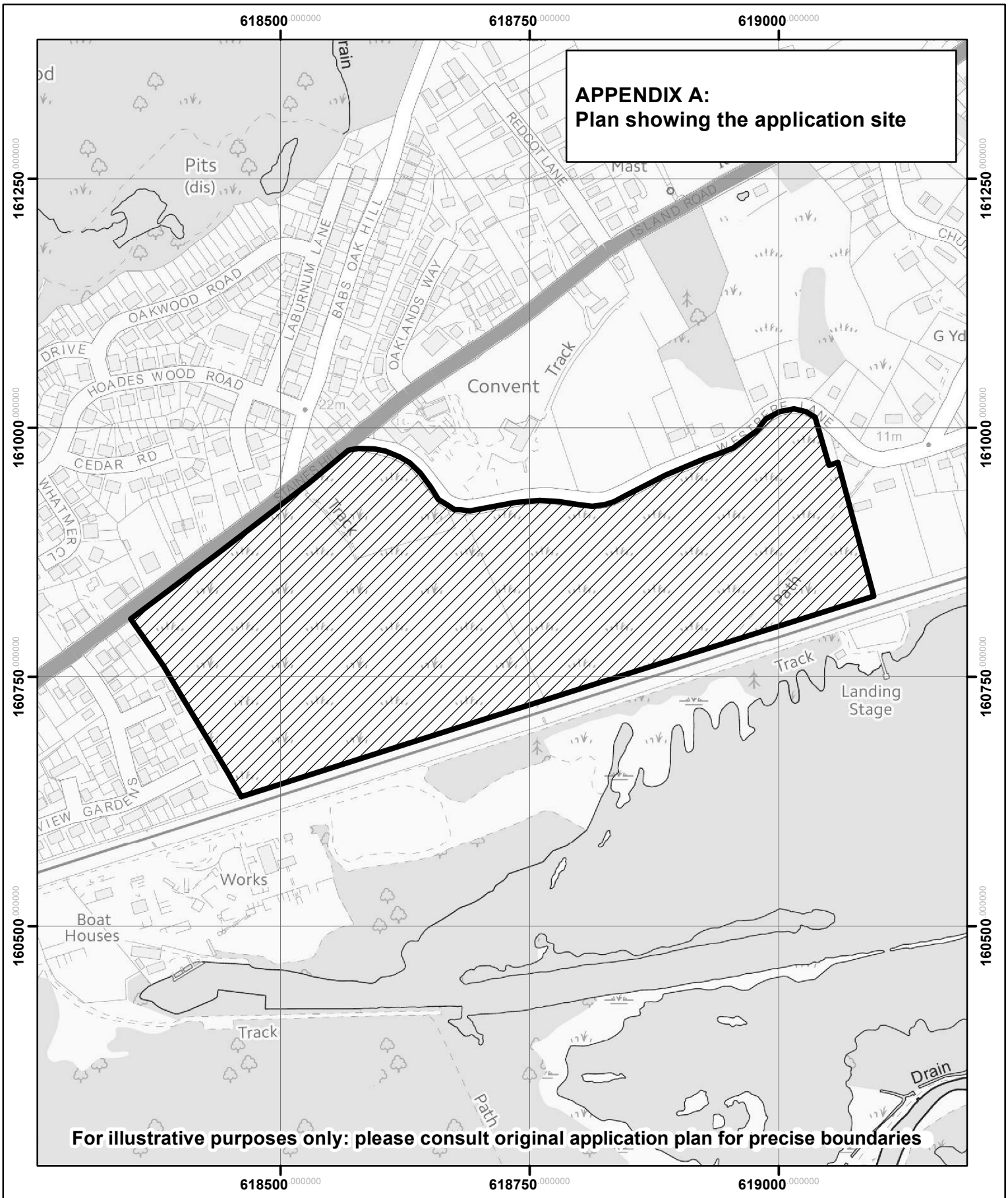
Recommendation

41. I recommend that the applicant be informed that the application to register the land known as Two Fields at Westbere as a Town or Village Green has not been accepted.

Accountable Officer:
Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

APPENDIX A – Plan showing application site
APPENDIX B – Photographs of the application site
APPENDIX C – Copy of Counsel's advice dated 20th November 2020


APPENDIX A:
Plan showing the application site
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11m
CEDAR RD
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VIEW GARDENS
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Landing Stage
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Boat Houses
Track
Path
Drain
For illustrative purposes only: please consult original application plan for precise boundaries
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Scale 1:5000
Land subject to Village Green application,
known as Two Fields,
in the parish of Westbere (nr. Canterbury)
Kent County Council
kent.gov.uk

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Land subject to Village Green application, known as Two Fields, in the parish of Westbere (nr. Canterbury)

Kent County Council
kent.gov.uk

APPENDIX C:
Copy of legal advice

Land known as Two Fields, south of Stanes Road and Westbere Lane, near Canterbury

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ADVICE

Introduction

1. I am asked to advise Kent County Council ('the registration authority') in respect of whether a trigger event has occurred which would prevent the registration of the above land known as 'Two Fields' as a town or village green (pursuant to application VGA 681) and, more generally, as to whether there are any other reasons for the application not to proceed to full consideration.

Factual Background

2. The application was made on 8 November 2019 by Two Fields Action Group Sturry and Westbere under s. 15(2) of the Commons Act 2006. It is alleged that the fields (which comprise five parcels of land with different owners and two further strips of land with unclear ownership) have been used by a significant number of the inhabitants of the parishes of Westbere and Sturry as of right for a period of 20 years ending on the date of the application.

3. Objections to the application were received on behalf of owners of two parts of the land: Bellway Homes Ltd. and Mr Jamshid Mavaddat. Bellway Homes did not initially raise an argument concerning a potential trigger event. However, this was raised by Mr Mavaddat in his objection of 9 March 2020 and subsequently seconded by Bellway Homes by way of further submissions on 30 July 2020. The Applicant responded on the trigger event point as well as the other points of objection raised by Bellway Homes and Mr Mavaddat.

Trigger Event:

4. In relation to the potential trigger event, the following is a summary of the arguments.

5. The whole of the land forms part of a number of sites which are identified as 'Green Gaps' in Canterbury City Council's Local Plan on the Proposals Map. Although I am not clear exactly which 'Green Gap' is relevant to this piece of land (as listed in para 11.48 of the Local Plan), the fact that it is so allocated is not disputed by the Applicant. Policy OS6 ('Green Gaps') thus applies to the land. It states as follows:

> Within the Green Gaps identified on the Proposals Map (see also Insets 1,3 and 5) 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.

6. The supporting text to the policy makes clear that "The objective of the green gap policy is to retain separate identifies of existing settlements, by preventing their coalescence through development" (para 11.42). The policy is considered to supplement national policies restraining built development outside the urban areas and in the countryside and address the concern that gradual coalescence between existing built up areas (as a result of some development which has occurred historically outside urban areas) harms the character of the open countryside and is having an adverse impact on the setting and special character of villages (paras 11.43 and 11.44). It is said that the areas selected as 'Green Gaps' have been specifically chosen as being of particular risk of coalescence and are considered critical to the objective of retaining separate identities of settlements, and many of them have come under development pressure in the past and may again in the future. It is noted that

there remain exiting development constraint policies which are the most important means of countryside restraint and this will remain unchanged (paras 11.45 and 11.46).

7. Mr Mavaddat argues in his submissions that, whilst it is accepted that the policy itself "seeks to restrict development", it does allow for certain types of development i.e. proposals for open sports and recreational uses and related built development. It is said to be a permissive policy (with exclusions) rather than a completely restrictive policy, which does not rule out the potential for development on the land. Bellway Homes further point to the words of the policy, that development "will be permitted" and argue that the Green Gap policy provides expressly that land designated as a green gap is suitable for potential development.

8. They also point to the fact that a small section in the north eastern part of the Bellway Land sits within the Conservation Area. The Conservation Area policy (Policy HE6) does not preclude development or imply that any development would be unsuitable in these areas, it simply imposes conditions that any proposed development would need to satisfy to be appropriate.

9. Bellway refer to the Court of Appeal authority of Wiltshire Council v Cooper Estates Strategic Land Ltd [2019] PTSR 1980 in which the Court found that the fact that the land in that case lay within the settlement boundary of a market town was sufficient to create the presumption that the land had potential for development. The words "potential" and "development" are not to be narrowly construed.

10. The Applicant has responded (via Elizabeth Laws, the Secretary of the Group) and has argued that the designation of the land as a 'Green Gap' is in substance a designation of the land as "unsuitable for development". The exception for outdoor recreation would, broadly speaking, be compatible with continued use of the land for purposes which correspond to use of the land for lawful sports and pastimes, and its maintenance as an open space between settlements. The decision in Cooper Estates was reached on the basis that registration would "frustrate the broad objectives of

the development plan, from which it was clear that the planning authority had envisaged that new housing within the settlement boundary would be needed." The opposite is true of the green gap designation, from which it is clear that the planning authority, in its local plan, had envisaged that the land should be preserved as an open space between two settlements.

Other Points of Objection

11. The other points of objection to the application may be summarised as follows:

    (i) Failure to prove a significant number of users of the land for the full 20 year period, Allied to this, allegations that some of the use is referable to public rights of way use and should be discounted;

    (ii) Reliance on two localities – the parishes of Westbere and Sturry – which is not permissible in the context of the statute;

    (iii) Failure to provide that the number of users is significant in the context of the population of the localities;

    (iv) Alleged signage erected by Bellway in October 2018 stating: "This land is Private Property. The routes are not public rights of way. Any access is granted only by permission of the landowner." Identical replacement signs are alleged to have been placed on the land in September 2019. Both sets of signs were removed by persons unknown. Mr Mavaddat also argues that he erected post and wire mesh fencing on the land in January 2020; however, this was after the TVG application was made.

Trigger Event: Relevant Legal Principles

12. Section 15C(1) of the Commons Act 2006 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"). The relevant part of the Schedule 1A is para 4 which provides: "A development plan document which identifies the land for potential

development is adopted under section 23(2) or (3) of the 2004 Act." There can be no dispute that Canterbury City Council's Local Plan is a development plan document adopted under the 2004 Act.

13. The Cooper Estates case is the leading authority on the interpretation of para 4. The Court of Appeal upheld the reasoning of Elvin J in the High Court and thus the High Court judgment is informative as well.

14. Elvin J held as follows:

(i) 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.

(ii) It is necessary to show a connection between the plan, the policies, and the land in question.

(iii) Allocation would be the paradigm example but identification could be through preferred areas for development, opportunity areas, reserved areas etc.

(iv) 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.

(v) 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).

(vi) 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.

15. 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).

16. The Court of Appeal (Lewison LJ giving the leading judgment) upheld that reasoning and added the following:

(1) It is not a requirement of the trigger event that only the land in question is identified. It may be part of a larger area.

(2) 'Identified' has its ordinary English meaning to establish the identity of; establish who or what a given person or thing is; recognize.

(3) 'Potential development' is a very broad concept, is not qualified, and is not to be equated with likelihood or probability. It does not mean that the land will be developed and goes beyond allocation or something of essentially the same nature.

(4) Identification may be contrasted with "allocation" where a site is allocated for a *particular* use or development.

(5) 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.

(6) It is imperative to interpret the trigger event in accordance with the policy underlying the change in the law. That 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.

(7) In that case, identification of a presumption in favour of sustainable development in respect of the land clearly identified the land as having potential for development.

(8) There may be sites within a settlement boundary where the plan constraints bear directly on the land and might on the facts preclude potential development, but this was not such a case.

Application of Cooper Estate to Policy OS

17. It is clear in this case that there is a connection between the plan, the policies and the land in question since it is expressly allocated as a 'green gap' (it does not matter that it is part of a wider parcel of land so allocated). The first stage in establishing a trigger event is therefore met.

18. The question then arises is whether the allocation is one for "potential development" or not. The existence of constraints affecting the land is not a reason for ruling out the area from being identified for potential development. The question comes down to the consequences of the land being within a Green Gap, looking at the plan as a whole, and bearing in mind the policy underlying the change in the law, which 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.

19. I accept the point that the effect of the 'green gap' designation is essentially restrictive in that development will only be permitted where it does not affect the open character of the gap or lead to coalescence or result in isolated and obtrusive development.

Furthermore, the policy is said to supplement national policies restraining built development in the countryside. It seems unlikely there that any significant built development would be in compliance with this policy.

20. However, the very fact that such a policy exists appears to acknowledge that the area is under development pressure (see supporting text). It therefore could be said that the policy is identifying the land for 'potential development' and seeking to regulate that development in order to preserve the open character of the Green Gap. Proposals for open sports and recreational uses would be in compliance with the policy (provided they met other policies in the plan). Where these involve a material change of use of land, they would also fall within the meaning of 'development'. It could therefore further be argued that the policy is identifying the land for potential sports and recreational development as well as for more general forms of built development (subject to the restrictions imposed).

21. The High Court and Court of Appeal in Cooper Estates were concerned that TVG registration of the land in question would frustrate the broad objectives of the development plan which had envisaged that new housing within the settlement boundary would be needed. I agree with the Applicant that the same concern is not relevant here. TVG registration of Two Fields would not frustrate the objective of the 'Green Gap' policy to prevent the loss of openness of the gap and coalescence of settlements.

22. Having said that, Lewison LJ made the point that the policy underlying the change in the law and the introduction of 'trigger events' was concerned with whether protection of a particular piece of land identified with development potential should be achieved (or not) through the TVG registration process or through the planning system. It seems to me that the purpose of identifying the land as a 'Green Gap' in the development plan was to ensure that regulation of potential development of it comes about through the planning system.

23. It is therefore my view that Policy OS6 does identify the land within the 'green gaps' for potential development. The likelihood of such development being permitted in accordance with the policy will, of course, depend on whether the development applied for significantly affects the open character of the gap or leads to coalescence of settlements or not (or otherwise results in new isolated and obtrusive development). It is clear that the development plan envisages the development pressures on these 'green gap' areas being managed through the planning system. Whilst TVG registration *may* be in accordance with the restrictive nature of the protection for the green gap, that is not always necessarily going to be the case. For example, TVG registration would prevent sympathetic sports buildings and structures being erected on the land or, by way of another example, a utilities mast being erected which would not affect the open character of the gap. The Courts have emphasized the wide scope of the meaning of 'potential' development. In light of this, I consider that a Court would be more likely than not to conclude that Policy OS6 functions as a 'trigger event' in this case.

Other Points of Objection

24. Given my views on the trigger event, it is not strictly necessary to consider whether there are any other 'knock out blows' to the application. However, for completeness, my views are as follows.

25. I would be reluctant to reach any conclusion about use of the land and whether it is by a significant number of local inhabitants and the extent to which it is footpath use, without hearing evidence. In addition, there seems to be a real dispute of evidence in the written submissions about the signage – where it was located and whether it was actually referable to the footpaths rather than the land as a whole. Thus, again, I would not want to reach a conclusion on the effect of alleged signage without hearing evidence.

26. The localities point is not so dependent on evidence. I am not aware of any authority permitting an applicant to rely on two localities (as opposed to the two

neighbourhoods in Leeds). The statute refers to a single locality in s. 15. However, in the interests of fairness, I consider that – were the registration authority to disagree with my advice on the trigger event and proceed to determine the application – this point should proceed to fuller consideration (and, indeed, whether an amendment could allow two neighbourhoods instead, which has been mooted by the Applicant).

Conclusion

27. In conclusion, my view is that Policy OS6 of the Canterbury City Council Local Plan operates as a 'trigger event' under para 4 of Schedule 1A of the Commons Act 2006. Accordingly, it is not possible to determine an application to register Two Fields as a TVG.

28. I acknowledge, however, that my conclusion stems from a particular interpretation of the policy in light of the comments of the High Court and Court of Appeal in Cooper Estates and it is potentially open to different interpretation and application.

29. If the registration authority disagrees with my conclusion and decides to proceed to determine the application, I consider that the evidence should be tested by means of a public inquiry. There is no 'knock out' blow to cause the application to fail conclusively at this stage.

30. If any questions arise as a consequence of this advice, or if I can be of further assistance, those Instructing should not hesitate to contact me in the usual way.

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20 November 2020