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 Thursday 2nd December 2021.

Recommendation: I recommend that the County Council accepts the legal advice dated 9th June 2021 that no trigger event exists in relation to the application site, and proceeds to hold a Public Inquiry to consider the substantive issues of the case.

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 the Two Fields Action Group ("the applicant").

2. Under section 15 of the Commons Act 2006, any person(s) may apply to the County Council 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'.*

3. The piece of 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. A plan of the site is attached at **Appendix A** to this report.

Background

4. The application was considered at a meeting of the Regulation Committee Member Panel on 24th February 2021[1]. On the basis of legal advice received at the time, the recommendation was for the application to be rejected on the basis that the application site was affected by one of the 'trigger events' set out in Schedule 1A of the Commons Act 2006 (the effect of which would have been for the right to apply for Village Green status in respect of the application site to be disengaged).

5. However, having heard lengthy submissions from interested parties at the meeting, Members were not sufficiently satisfied that a 'trigger event' applied in

[1] A copy of the report considered by the Member Panel is available online at: https://democracy.kent.gov.uk/ieListDocuments.aspx?CId=182&MId=8764&Ver=4

relation to the application site and determined that the matter ought to be referred to a Public Inquiry for further consideration.

6. 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., advising 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.

7. The County Council 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 the available case law open to interpretation. It was suggested that the County Council ought to take further representations on the matter 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).

8. Since the Panel had not reached any decision either way on the matter, it was contended that the Pre-Action Protocol letter was premature (as there was not any 'decision' to challenge at this stage) and it was 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.

The 'trigger events' issue

9. The case turns upon whether the application site is affected by one or more of the 'trigger events' set out in Schedule 1A of the Commons Act 2006. Broadly speaking, if the application site is affected by a planning application or has been identified for development in a local or neighbourhood plan, the County Council is not able to consider an application to register the land in question as a Village Green.

10. In this case, it was submitted on behalf of two of the affected landowners that the application site was the subject of one of the trigger events specified in Schedule 1A of the Commons Act 2006, namely that (at paragraph 4 of Schedule 1A):

> "*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]*".

11. The Canterbury City Council's Local Plan (adopted in July 2017)[2] identifies the entirety of the application site as a 'Green Gap' under Policy OS6, 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.*

[2] A full copy of the Local Plan is available online at: https://www.canterbury.gov.uk/planning-and-building/local-planning-policies/

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".

12. The landowners' position is that the application site is therefore identified in the Local Plan for potential development.

13. The applicant's position is that the designation of 'Green Gap' is not one of the land being identified as suitable for development, but rather of its unsuitability and one where 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.

14. The original advice received from Counsel (upon which the previous Member Panel report was based) concluded 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 (the consequence of which would be for the application to be rejected by the County Council). However, Counsel also noted that that advice was based upon a particular interpretation of the policy in the light of the comments of the High Court in recent case law, and could potentially be open to different interpretation and application.

Further evaluation of the 'trigger events' issue

15. As is noted above, different Counsel ("the Inspector") was appointed to give the matter further consideration in light of the Member Panel's decision at the meeting of 24th February 2021. Further submissions were invited from all interested parties and the Inspector prepared a report setting out his conclusions and advice as to how the County Council should proceed. A copy of that report (dated 9th June 2021) is attached for information at **Appendix B**.

16. The Inspector's conclusions are guided by the only (current) judicial authority in this area, the Court of Appeal's judgement in the matter of Wiltshire Council v Cooper Strategic Estates Land Ltd. [2019] EWCA Civ 840[3] ("Cooper Estates"). In that case, it was 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. Thus, for a 'trigger event' to exist, it is not necessary for the land in question to be formally allocated for potential development, it merely needs to be 'identified' as such. However, the fact that the Local Plan encourages development is not sufficient and there must be a 'sufficient nexus' between the relevant plan and the application site.

17. The situation in Cooper Estates concerned a piece of land in the market town of Royal Wootton Bassett; the land in question was not allocated or specifically identified for development, but the relevant local plan document identified the

[3] A copy of the judgement is available online at: https://www.bailii.org/ew/cases/EWCA/Civ/2019/840.html

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 was considered in that case that the land was identified for potential development (the implication being that land within the defined settlement boundary was already considered developable land).

18. In reaching that decision, the Court did not '*rule 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*'[4]. In this regard, the Inspector 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*'[5].

19. In reviewing the Local Plan, the Inspector noted[6] that its overarching objective (in addition to protecting existing open space) is to 'improve the distribution, accessibility, quality and connectivity of open space' and that the designation of 'Green Gaps' serves to retain separate identities of settlements by preventing their coalescence. He notes[7]:

> *"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…*
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> *…*
>
> *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."*

20. The Inspector 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[8], looking at Policy OS6 in isolation is not the correct way of approaching the statutory question and, instead, it is necessary to understand the Policy in the context of the rest of the Local Plan to understand whether it identifies the land for development.

21. The application site (in common with all non-urban countryside areas within the district) is subject to multiple policies which constrain, but do not altogether prohibit, development. In this respect, the Inspector states[9]:

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[4] See paragraphs 46 and 55 of the judgement
[5] See paragraph 16 of the Inspector's report
[6] See paragraph 28 of the Inspector's report
[7] See paragraphs 30 and 32 of the Inspector's report
[8] See paragraphs 35 and 36 of the Inspector's report
[9] See paragraphs 38, 39 and 40 of the Inspector's report

"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."

22. With that in mind, and when reading Policy OS6 in the context of the rest of the Local Plan, the Inspector found that[10] *"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 noted[11] that although Policy OS6 is, of itself, expressly permissive of development (subject to limitations), when read in the context of the rest of the Plan, its effect is to impose additional constraints on all forms of development within the Green Gaps.

23. The Inspector therefore concluded as follows[12]:

"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".

[10] See paragraph 43 of the Inspector's report
[11] See paragraph 46 of the Inspector's report
[12] See paragraph 56 of the Inspector's report

Subsequent correspondence

24. On receipt, the Inspector's report was forwarded to all interested parties for their information and further comment.

25. Whilst accepting that the issues raised in this matter concern 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. It is submitted that Policy OS6 identifies the land for development and, contrary to the Inspector's views, there are no countervailing policies in the Canterbury Local Plan to directly contradict that identification. It is further submitted that there is 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 therefore the Inspector's approach is 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.

26. The applicant welcomed the Inspector's findings and supported the reasoning set out by the Inspector. The applicant's view is that the Local Plan contains a number of policies that restrict development in the area, and Policy OS6 is in substance a restrictive policy comprising constraints (in terms of extend and kind) on any development coming forward on the application site. It is submitted that the circumstances in this case are 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).

27. The comments received have been forwarded to the Inspector who has confirmed that they do not change his conclusions or advice to the County Council.

Conclusion

28. The County Council has received conflicting legal advice on this matter: the earlier advice 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), whilst the latter advice has concluded that, on a wider interpretation of the plan as a whole, the Policy cannot be seen as specifically identifying the application site for development. A decision is now required, one way or another, to enable the matter to be progressed.

29. It is important to note that the County Council is not legally bound by either legal advice received and must ultimately reach its own decision in relation to this matter.

30. At the previous Panel meeting, it would appear that Members were not fully satisfied by the approach adopted within the original legal advice of viewing the Policy in isolation; hence the decision to seek further clarification. The latest advice (reached entirely independently and uninfluenced by Members' earlier decision) takes 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 identifies the land for potential development.

31. In the Officers' views, there is merit in this broader approach to the matter. In Cooper Estates, Lord Justice Lewison acknowledged that the phrase that the Court was being called upon to interpret was 'imprecise' and noted that each side had been able to point to potential difficulties if the other side was right. For that reason, he considered it[13] "*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"*.

32. As noted above, 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 1000+ new homes needed in Royal Wootton Bassett during the currency of the plan. That position is clearly in contrast to the current case where the land has 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; accordingly, 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.

33. Moreover, viewing the matter, as the Court in Cooper Estates did, from the perspective of the underlying policy in relation to 'trigger events', it is clear that if a 'Green Gap' is 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 cannot have been Parliament's intention in enacting Schedule 1A of the Commons Act 2006. Indeed, the original purpose of Schedule 1A was to prevent section 15 of the Commons Act 2006 being used to frustrate planned or intended development, but it cannot have been envisaged as a mechanism to curb the potential for Village Green applications to be made altogether.

34. Whilst the matter is not clear cut, and the relevant law not settled, it is considered on balance that the latest advice is sound and offers a strong basis upon which to reach a considered decision in this matter.

Procedure

35. Members will need to determine the 'trigger event' issue either way. If the recommendation is accepted (i.e. that no 'trigger event' exists) then the matter will be referred to a Public Inquiry to consider the more substantive factual issues of

[13] at paragraphs 47 and 48

the case. As was noted in the previous Member Panel report, there are conflicts within the evidence that require further examination and the Courts have held that a Public Inquiry is an appropriate forum for these issues to be given more detailed consideration.

36. If Members do not agree with the recommendation - and instead determine that the application site is affected by a 'trigger event' - then the Village Green application will be rejected and no further action taken by the County Council.

Financial implications

37. The determination of Village Green applications is a quasi-judicial function of the County Council and, accordingly, any financial implications can have no bearing whatsoever on the Member Panel's decision. However, Members should be aware that, whatever decision is reached, there is a likelihood that it will be the subject of an application to the High Court for Judicial Review, which carries significant legal costs.

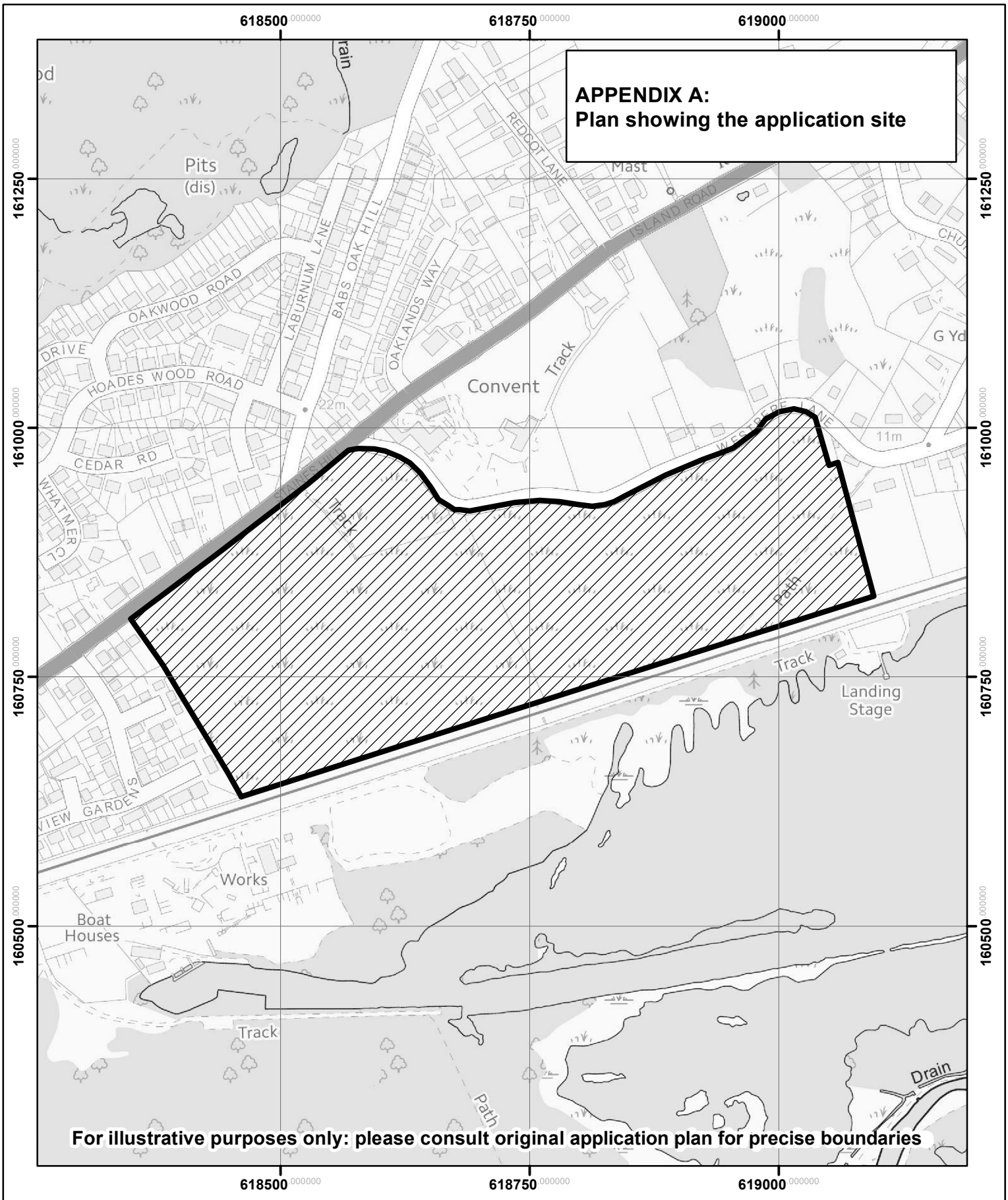
Recommendation

38. I recommend that the County Council accepts the legal advice dated 9th June 2021 that no trigger event exists in relation to the application site, and proceeds to hold a Public Inquiry to consider the substantive issues of the case.

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 – Copy of the Inspector's report dated 9th June 2021.



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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 B:
Copy of the Inspector's report

APPLICATION TO REGISTER TWO FIELDS, SOUTH OF STAINES HILL AND WESTBERE LANE, WESTBERE AS A VILLAGE GREEN

DISPUTE AS TO WHETHER THERE IS A TRIGGER EVENT UNDER S.15C OF THE COMMONS ACT 2006

REPORT OF THE EXAMINING INSPECTOR

1. Section 15C of the Commons Act 2006 disapplies the right to apply to register land as a town or village green ("TVG") if a trigger event specified in the first column of the Table in schedule 1A (all inserted by Growth and Infrastructure Act 2013 – "the 2013 Changes") occurs. The triggers cover a wide range of matters concerned with the development of land including the making of an application for planning permission, the publication of a draft of a development plan or neighbourhood plan which identifies the land for potential development or (the relevant provision here) the adoption of "a development plan document which identifies the land for potential development".

2. I have been instructed by the registration authority – Kent County Council ("KCC") - to hold a non-statutory inquiry into whether such a trigger event has occurred in respect of land known as Two Fields, South of Staines Hill and Westbere Lane, Westbere, near Canterbury ("the Land") and to provide a non-binding report to it on my conclusions on that single issue. This is that Report.

3. The Land is about 15 hectares and currently comprises mixed woodland (some of which has been recently cleared) as well as more open areas of grassland and scrub. It appears to have been in that broad state for a number of years. It presents as open fields/countryside on (very broadly) the edge of the villages of Westbere and Sturry.

4. The application for registration was made on behalf of the Two Fields Action Group ("TFAG"). Westbere Green Space Protection Limited own a small strip through the site and support the application. Objections to registration have been received from

Winkworth Sherwood on behalf Bellway Homes Limited ("Bellway") which owns much of the western half of the Land and who engaged in pre-application discussions for the development of much of the Land in 2017 and Thompson Snell and Passmore LLP on behalf of Mr S Mahallati (acting through Mr Mavaddat) who owns much of the eastern half of the Land. I have also received submissions from Mr Ashley Clarke which I have taken into account.

Procedure for my consideration of the issue

5. I consulted all those interested on the procedure to be adopted and gave reasons for my decision that no hearing sessions were required. In response to informal directions I set out, there were then two stages of written representations with each party seeing the representations of the other parties[1]. I specifically invited the parties to comment on the interpretation of the development plan as a whole so as to understand how OS6 fit into that overall framework. I am very grateful for the detailed and clear submissions and the supporting material which I have received - although I have felt it necessary to delve deeper into the overall structure of the development plan than those submissions have. No issues of fairness of the process have been raised and I am satisfied that all parties have had full opportunity to set out their position to me including on the proper understanding of the Plan as a whole.

6. I make particular reference in this Report to certain representations. The fact I have not referred to all representations does not detract from the fact that I have considered them all. I choose particular representations because they may embody the point made by others. References to Bellway's submissions of 4th May 2021 are given as "B1/[para no]"; to Bellway's Submissions of 13th May 2021 as "B2/[para no]"; to TFAG's submissions of 6th May 2021 as "[T1/para no]" and to its submissions of 13th May as "[T2/para no]".

[1] It has not been possible to contact one of the parties but everything appropriate has been done to attempt to bring these proceedings to his attention going beyond the statutory requirements on the application itself and it is therefore appropriate to proceed.

The Legal Framework

7. As explained in *Wiltshire Council v. Cooper Estates Strategic Land Ltd* [2019] EWCA Civ 840 (approving the decision of the High Court) in the light of concerns about TVG applications sterilizing land for development proposed and approved through the planning system without taking into account planning considerations, the Penfold Report of 2010 recommended that where the acceptability of development had been addressed through the planning process, TVG registration should not be possible – hence the later formulation of the trigger events. The statutory purpose extends to land identified for potential development – axiomatically it does not extend to all land or to land which is not identified for potential development.

8. Allied to the DEFRA proposals which followed was a proposal to introduce a Local Green Space planning designation which would have the same effect and confer the same protection as green belt.

9. Under s.15C and schedule 1A, the key relevant question is whether the land is "identified for potential development" in the Canterbury District Local Plan July 2017 ("the Plan").

10. As to the word "identified": see *Cooper* @ [36-37]. Plan policies may be "more or less specific and still be relevant in terms of the statutory mischief even if they are not specific to the land itself but are sufficiently directed to an area or circumstances…" (*Cooper* - High Court @ [32]). There it was said that the identification can be through allocation, preferred areas for development, reserved areas or opportunity areas (although I do not treat that list as exhaustive). However, the fact the development plan encourages (or I would add is permissive of) a particular form of development is not enough – the High Court stated that there must be "a sufficient nexus between the plan and the land". It appears to follow that a general policy applicable across the Council's area which is permissive of development in certain defined circumstances is not, in itself, sufficient because there will be insufficient nexus with the land in question. Thus, the mere fact that here there are general policies permitting

agricultural dwellings, agricultural buildings, rural exception sites or rural businesses subject to certain criteria is unlikely to be sufficient alone to provide the necessary nexus.

11. The Court of Appeal adopted Lindblom J's analysis in *West Kensington Estate Tenants v. Hammersmith and Fulham LBC* - that to be identified for potential development the principle of development in a particular defined area will have to be have been established [36]. In *Cooper* the relevant land was within the settlement boundary of Royal Wootton Bassett ("RWB") and had therefore been "identified" [39]. Contrary to the submissions of TFAG which I have received, I consider a key issue in respect of the Land is whether the "identifies" it for potential development. This is a different question from the core issue addressed in *Cooper.*

12. As to "potential" that is a "very broad concept" [*Cooper* @ [38]) and "falls a very long way short of "suitable for" [55]. It does not require "likelihood or probability" and does not equate to an allocation [38].

13. The "development" does not have to be for housing – the term is very wide and there is no limit on it in the statute [55].

14. In *Cooper,* the land was not "allocated" nor specifically identified under any policy for development. However, the development plan's approach was based on a settlement strategy which sought to focus development in the most sustainable settlements and the Core Strategy thus set out "the way in which these settlements *will* develop in the future". Key to the logic was the fixing of settlement boundaries. Thus, Core Policy 1 ("CP1") identified the Market Towns which had the potential for significant development and Core Policy 2 ("CP2") provided that within the limits of development of the Market Towns "there is a presumption in favour of sustainable development" - in RWB that meant to deliver the necessary 1455 homes. It was clear that the strategic allocations alone would not meet the need hence the framework of CP1 and CP2. Outside the defined limits of development, development was not permitted (subject to other general policies – as here). I note that in *Cooper* the existence of the boundary

was the essential starting point. It was not suggested that other generally permissive policies outside that boundary could have been sufficient to meet the statutory words.

15. Even then, the fact that the land was within the settlement boundary was not enough to constitute a trigger event – the focus had to be on the consequences, as set out in the development plan document, of the land being within a settlement boundary. On the facts there, the development plan policies properly understood did identify the land for potential development [45].

16. However, the Court of Appeal did not "rule out the possibility that *prime facie* identification of the land for potential development by one policy could be contradicted by countervailing policies elsewhere in the plan" [46 and 55] and the judge below had noted that there may be specific cases within the settlement boundary where constraints in the plan do bear directly on the land and might on the facts preclude development [65] - hence the need to understand the development plan fully and as a whole. Consistent with the reasoning of the Court of Appeal, where one policy read alone would appear to identify the land for potential 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. As I will show, I think that is the position here.

17. The Court of Appeal recognised that the phrase "identified for potential development" was imprecise [47] and thus focused on the policy of the 2013 Changes – namely that whether or not to protect a piece of recreational land with identified development potential should be determined through the planning and not the TVG system. Again, it is telling that the focus is on land with "identified development potential" not any land subject to generally applicable policies which are more or less permissive of development in particular circumstances for the short reason that such policies do not "identify" land for potential development.

18. It is important to understand the conclusion in *Cooper* in its context – a context the judge and the Court of Appeal were at pains to focus on. There the site was within the

settlement boundary and significant development was to be delivered within that boundary. There was no policy excluding the site from the presumption in favour of sustainable development or protecting the site from development. It was the totality of that context which meant that the adoption of the core strategy constituted a trigger event. Whether or not it would be identified for actual development later in the process was not the correct question – absent any countervailing policy it was identified for *potential* development.

The Development Plan in respect of the Land.

19. In the light of *Cooper,* I invited representations on the totality of the development plan as applicable to the Land. I regard that as the fundamental starting point. In understanding the development plan, it is axiomatic that one does not read one policy in isolation from the whole – thus the question here is whether the Plan as a whole "identifies the land for potential development" applying the *Cooper* approach. Despite my invitation, the submissions have tended to focus on OS6. Even where the submissions have looked at the Plan more widely they have not highlighted the overall spatial strategy or the generally applicable "countryside" policies which apply to all "non-urban" land including the Land nor have they sought to place OS6 in that overall framework. I consider the totality of the policy framework which applies to the Land.

20. Like *Cooper,* the Plan here makes some strategic allocations for housing and other uses and adopts a settlement hierarchy which will guide most remaining development to the urban centres (para 1.48) with limited new development in the rural settlements proportionate to their scale and position in the hierarchy. "Outside the urban areas, housing provision is restrained" [2.48] but "some villages may have the potential for some limited minor housing development or infill development, consistent with the scale of the village".

21. Westbere is at the bottom of the hierarchy – a hamlet. The adjoining Sturry is a rural service centre at the top of the rural settlement hierarchy. There are deliberately no settlement boundaries (para 1.52) for either.

22. Policy SP4 embodies the settlement hierarchy strategy – as one goes down the hierarchy the scale of potential development at the settlement reduces. At the hamlets, development is limited to developments which specifically meet an identified local need. There are no relevant housing allocations in the area south of Sturry or around Westbere.

23. The parties are correct not to contend that the Land is within either settlement or subject to the policies applicable to the settlement hierarchy.

24. There is no question of this site being identified for potential general housing development under the Plan.

25. HD3 is permissive of provision of affordable housing to meet local needs on rural exception sites outside the built confines of villages subject to certain criteria and HD4 allows for new dwellings in the countryside in limited circumstances. None of these provisions identify the Land for potential development in the *Cooper* sense (namely establishing the principle of the development in a particular defined area) or, in my view, provide sufficient nexus between the policy and any specific area of land. They are general policies covering the whole of the Council's (non-urban or countryside) area. For reasons which will become clear below, it is relevant that each of those policies has various criteria which must be satisfied before the specific type of development described would be acceptable.

26. Under the employment and tourism chapters there is no question of this site being identified for potential general employment or tourist development but new agricultural buildings [EMP13], development for rural business [EMP14], tourist caravan sites [TV4] and rural tourist accommodation [TV8] could be permitted (and EMP12 allows for the loss of the best and most versatile farmland where necessary to meet a housing, business or community need if there is no alternative site). None of these provisions identify the Land for potential development in the *Cooper* sense or, in my view, provide sufficient nexus between the policy and any particular area of

land. They are general policies covering the whole of the Council's (non-urban) area. Each of the policies are subject to various criteria.

27. The Conservation Area policy [HE6] is restrictive of development and does not identify the Land for potential development in the *Cooper* sense.

Open Space

28. The overarching objective of the Plan is to "improve the distribution, accessibility, quality and connectivity of open space (para 11.5) to be achieved through the green infrastructure study (para 11.9) and protecting existing open spaces. Two areas of "local green space" (under NPPF99 were identified in OS1 – the Land was not.

29. Green gaps serve a specific function (distinct from that of the other Open Space policies) of retaining separate identities of settlements by preventing their coalescence [para 11.42]. "There are national objectives that restrain built development outside urban areas and in the countryside which is [sic] supported by the Council. The allocation of green gaps on the proposals map… supplements these" (para 11.43).

30. The green gaps policy is thus designed to supplement the general policy of restraint 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 in the more generally applicable policies referred to above.

31. The green gaps have been "specifically identified" at "pinch points" between built up areas [11.45] where settlements are at particular risk of coalescence. In this sense they have clearly been "identified". But the question is why and for what? Those areas are considered "critical" to retaining the separate identity of settlements [11.46].

> ***"Existing development constrain policies remain the most important means of countryside restraint and this will remain unchanged outside the urban***

areas. It is therefore important that there is not a perceived tiering of countryside protection. This designation draws attention to specific areas where inappropriately located new development could lead to coalescence between settlements."

"***This need not be as a result of further isolated residential development, but other minor development related to activities such as agriculture, recreation and the keeping of horses. Proposals for development within the green gaps will be considered with particular regard to siting, design and external appearance." [11.47]***

32. 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. That supporting text cannot override the express terms of the policy itself but I consider that the two are consistent.

33. The policy states as follows:

"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 or obstructive 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 a minimum necessary to supplement the open sports and recreation uses, and be sensitively located and of a high quality design".

The Statutory Question

34. Given all that – does the Plan "identify the land for potential development" applying the *Cooper* approach?

35. *Taken alone*, OS6: (1) would permit development in the green gaps if it satisfied the criteria; and (2) could be understood as identifying the land (the green gaps) for some limited forms of potential development.

36. However, in accordance with general principle and with the approach of the Court of Appeal in *Cooper,* I do not think that looking at OS6 in isolation is the correct way of approaching the statutory question. It is necessary to understand OS6 in the context of the rest of the Plan and to construe the Plan as a whole to understand whether it identifies the Land for potential development.

The Spatial Strategy

37. The development plan has a spatial strategy which directs development to strategic allocations, the urban areas and, to a limited degree, to the villages under the settlement hierarchy. In contrast to *Cooper*, the Land here is outside all of those areas. This is thus the converse of the *Cooper* situation. There the fact that the site was within the broad areas to which development was directed by the Plan ("*will* take place"; *"will* develop" – *Cooper* @ [45] - emphasis in original) was sufficient to identify it and - despite any site specific constraints - to satisfy the "potential" test. It was the settlement boundary which created sufficient nexus between the plan and the site. That key factor is missing here.

General Countryside Policies

38. The Land, as for all non-urban and countryside areas in the Council's areas, is subject to multiple policies (addressed above) which constrain, but do not prohibit all, development. So far as material, each such policy applies across all of the countryside/non-urban areas. 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.

39. 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 (and I cannot think of any district with countryside which does not have such a generally applicable policy) would disapply the 2006 Act for all that countryside. I cannot read the statute, its underlying logic or *Cooper* as requiring that result. Further, it is difficult to see how a development plan could be worded so as to prevent any potential for some development anywhere in the countryside – compare *Cooper* @ [43]. There will always (almost by definition) be policies which are permissive of some sorts of development in some circumstances (even green belt policies).

40. 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.

41. Indeed, read together with the spatial strategy they clearly do not do so – the land identified as suitable for development comprises the allocations, the urban areas and the villages. The countryside is the converse of this – no land in it is identified for potential development but a policy of restraint is applied subject to certain possible, non-location specific exceptions.

OS6

42. OS6 has to be understood in the context of the rest of the Plan including the spatial strategy and the countryside policies referred to above.

43. When so read, it is clear that it: (1) applies an *added* layer of constraint; and/or (2) highlights an extra factor for consideration where proposals for development in the countryside *and* in a green gap come forward. This is what the supporting text says it does and that is how I read it in its wider context. The settlement strategy and all the other general policies referred to above continue to apply. If they do not identify the land for development (as I conclude they do not) it is difficult to see how a further policy which adds an extra layer of constraint does so.

Does the Plan Identify the Land for potential development?

44. When considering the Land the overall framework is thus:
    a. a spatial strategy which directs development to other areas (as in *Cooper)*;
    b. a general approach of constraint elsewhere with no land or areas identified for potential development in the *Cooper* [36] sense – the principle of development in a given area is not established;
    c. a number of general countryside policies which do not identify specific land (or land with specific characteristics) to which they apply and which do not therefore establish the principle of development in a particular, defined area; and
    d. an extra layer of policy being applied to the Land which, despite being positively worded, serves to impose extra constraints or requirements on development which could otherwise be permissible under those general countryside policies.

45. On the latter point, take a rural exception application in the general countryside. If it satisfies the requirements of HD3 it will have policy support. However, if the site is also in a green gap under OS6, satisfying HD3 will not be sufficient – it will also need to satisfy the requirements of OS6. I do not regard this as other policies "trumping" OS6 [B1/33] – it is simply about construing the Plan as a whole to see whether taken as a whole the policy framework identifies the green gaps for potential development.

46. I note, of course, that OS6 is expressly permissive of development where it does not have certain impacts. However, when read in the context of the rest of the Plan its effect is to impose extra constraints or requirements for all forms of built development.

The Ambit of OS6

47. I do not agree that the policy covers only development for open sports and recreation uses (and ancillary built form). The second paragraph addresses a specific sub-set of development under the first paragraph and is not exhaustive as to the nature of "development" which may be permitted under the first paragraph. I think that conclusion follows from the words used alone and there is no ambiguity but the supporting text in para 11.47 makes that position abundantly clear. I therefore reject the second "in the alternative" substantive submission of TFAG – that the only development to which OS6 is consistent with TVG uses. Development here under OS6 and the Plan generally could go wider than just for sports and recreation uses and could thus be inconsistent with a TVG (whatever the precise limits of development in a TVG). I therefore do not consider it necessary to examine those precise limits.

Are the Green Gaps identified for Sports Uses?

48. Conversely, I do not accept that the second paragraph of OS6 is necessarily inconsistent with TVG status. TVG status would thus not therefore necessarily contradict or "cut across" the second paragraph of OS6 in contrast to *Cooper*.

49. In any event and more importantly, I note that the Open Space chapter of the Plan makes specific allocations for playing fields [OS3 - OS5]; protects existing playing fields [OS2] and open space [OS9] and requires that the major allocations provide for major additional open space (para 11.6 and OS11 and 12). Those areas are "identified" for potential sports uses. There is no suggestion of a need for further formal sports provision in the green gaps under OS6.

50. OS8 contains a criteria based policy for sports and recreation provision in the countryside (including associated buildings) which is permissive subject to those

criteria being met. It is a generally applicable policy across the countryside – it does not identify relevant land in the *Cooper* sense. Any sports provision in the countryside would have to satisfy it. Any sports provision in the green gaps would also have to satisfy OS6. The second paragraph of OS6 serves to add further criteria or requirements before sports development in the green gaps would be acceptable. In particular it is more restrictive than OS8 by restricting further the scale and impacts of any buildings. Adopting the same analysis as for more general development, I do not read the Plan with OS6 as being permissive of sports development – it adds further stricter, criteria requirements to the generally applicable OS8 criteria in the Green Gaps.

Non-Identification as a Green Gap

51. It is correct that the local green spaces have been introduced to protect areas of particular importance to local communities – giving them protection akin to green belts. The Land has not been so identified even though it could have been. I have considered whether the existence of NPPF99 impacts on the analysis above and have concluded it does not. Local green spaces are a route in the planning system to protect valued green spaces even if they are not TVGs. The fact a site has not been identified as a local green space does not tell one anything as to whether the Land is identified for potential development.

Further Matters

52. I do not think it is necessary to refer to Hansard to properly understand the statutory language. However, the purpose of the legislation though is clear from the words used and that is consistent with the Hansard extracts with which I have been provided.

53. I note that the wording of OS6 was changed during its evolution. The word "only" was deliberately omitted. I have taken that into account in my conclusions but it does not affect the basic point that OS6 imposes extra hurdles to development over and above those generally applicable in equivalent but non-green gap locations. It is also relevant that the inspector considered OS6 as adopted to be consistent with the aim of national policy of identifying land where development is "inappropriate."

54. I accept of course that:

    a. the fact criteria are imposed does not mean land is not identified for "potential development" [B1/8];
    b. OS6 is expressed as permissive [B1/6] and taken alone could be interpreted as identifying the green gaps for development [B2/6];
    c. OS6 has to be interpreted in the context of the plan as a whole [B1/9 and 33];
    d. The trigger events are to be construed in accordance with the policy underpinning the 2013 Changes: [B1/11];
    e. Whether to protect land *with identified development* potential is for the planning system: B1/16; and
    f. Registration as a TVG would prevent development which might be permissible under the Plan including OS6: B1/18 – although I note that that is not the statutory question and would not prevent formal sports use. Further, that consequence will always arise where there are generally applicable policies being permissive of certain forms of development in certain situations and a TVG application - it is not a reason for concluding that the Land is identified for potential development.

55. However, none of these points, to my mind, get to the heart of the issue or undermine my conclusions on it.

Conclusion

56. I therefore conclude that the Plan properly construed as a whole does not "identify" the Land for potential development. I do not agree that "there is nothing in the [Plan] that… could found a conclusion that the development plan does not identify the application site for potential development [B1/10]. 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 of 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.

57. If the Plan as a whole was construed as identifying the land for potential development, the effect would be stark. The ability to register any land as a TVG where it was covered by any policy permissive of some development in some circumstances would be removed. That is all (or almost all) land. The effect of the 2013 Changes would render the words "identify for potential development" so wide as to cover all (or almost all) land and would thus emasculate the power to register far beyond the mischief at which the 2013 Changes were aimed.

58. I have considered the previous Advices received by KCC but do not agree with them. They do not consider the Plan as a whole and focus just on OS6. That is not the correct approach in my view.

59. I was initially drawn to the argument that the permissive nature of OS6 was decisive in favour of the objectors but having considered the whole Plan, the reasoning in *Cooper* in detail and the representations received, I am driven inexorably to the opposite (and clear) conclusion.

60. I therefore conclude that there is no trigger event.

Other Arguments

61. In reaching this conclusion I have not accepted the arguments of either party. In particular I have not accepted the approach to interpretation of the TFAG for which I find no support in the case law. I cannot construe OS6 alone in the way TFAG contend for – and taken alone I consider that on its correct interpretation it would favour the objectors. I have explained above why it is necessary to go wider than OS6 to understand the full planning policy framework which applies to the Land.

Next Step

62. The issue here raises difficult, important and untested points and the factual circumstances are markedly different in some key respects from those in *Cooper* (see below). There is a clear risk of challenge to any decision KCC makes on the trigger question. However, the conclusion I have reached is not a marginal one.

63. The approach I have adopted in this Report is different to that urged upon me by either party. It follows that the objectors to registration have not had an opportunity to comment on the approach I have adopted although I did, at the outset, expressly invite representations on the interpretation of the Plan as a whole. Neither party took me up on that invitation by assessing how OS6 fitted into the overall policy framework. I consider that approach to be essential.

64. KCC may consider it appropriate to provide the parties with one last opportunity to comment on this Report before making its decision.

David Forsdick QC

Landmark Chambers

9th June 2021