Neutral Citation Number: [2022] EWHC 2593 (Admin)

Case No: CO/245/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2022

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

THE KING **on the application of** **BELLWAY HOMES LIMITED**	**Claimant**
- and -	
KENT COUNTY COUNCIL	**Defendant**
and	
DR ANTONIE van den BROEK	**Interested Party**

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- -

Douglas Edwards KC and Philip Petchey (instructed by **Winckworth Sherwood LLP**) for the **Claimant**
Tim Buley KC (instructed by **Invicta Law**) for the **Defendant**
Richard Honey KC and Michael Rhimes (appearing *pro bono* and instructed by **Kent Law Clinic**) for the **Interested Party**

Hearing dates: 14 and 15 July 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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The Hon. Mr Justice Holgate:

Introduction

1. The Commons Act 2006 ("the 2006 Act") provides a right to apply for the registration of a town or village green ("TVG") in relation to land which has been used as of right for "lawful sports and pastimes" for at least 20 years by a significant number of inhabitants of any locality, or neighbourhood within a locality. One effect of the statutory protection given to a TVG is that most forms of development are precluded. Because of concerns that the TVG registration system was being used to prevent development proposed or approved through the planning system, the Growth and Infrastructure Act 2013 ("the 2013 Act") amended the 2006 Act so as to disapply the right to apply to register land as a TVG if one of a number of "trigger events" takes place. One such event is where a development plan document identifies the land in question "for potential development". The central issue in this case is whether land included in a "Green Gap" to which Policy OS6 of the Canterbury District Local Plan ("CDLP") applies, is to be treated as having been identified by that plan for potential development.

2. On 8 November 2019 Lady Laws applied under s.15 of the 2006 Act to the registration authority, the defendant Kent County Council ("KCC"), to register land at Two Fields, Westbere, Kent as a TVG. The application was made on behalf of the Two Fields Action Group ("TFAG"). The western part of the application site is owned by the claimant, Bellway Homes Limited.

3. On 30 July 2020 the claimant sent a written submission to KCC that the adoption of the CDLP was a trigger event because Policy OS6 identified the application site for potential development. The owner of the eastern part of the site, Mr. S. Mahallati, made the same point in his written representations. TFAG made submissions to the contrary.

4. KCC took the advice of experienced junior counsel on this issue. On 20 November 2020 she advised that "Policy OS6… operates as a 'trigger event'" and so the application to register a TVG should not proceed. She also advised that Policy OS6 was open to a different interpretation and the matter was not clearcut.

5. On 24 February 2021 the Regulation Committee Member Panel of KCC resolved that the "trigger event" question be referred to a non-statutory public inquiry "to clarify all the issues".

6. KCC appointed experienced leading counsel, Mr David Forsdick KC, to hold the inquiry, but allowed him to adopt an "informal, written procedure" if he thought that appropriate. He was to report to the Panel solely on the "trigger event" issue. Mr. Forsdick decided that the matter could be dealt with by written representations from TFAG and interested parties.

7. In his report dated 9 June 2021 Mr. Forsdick advised that a trigger event had not occurred.

8. The Member Panel met again on 2 December 2021. KCC's Public Rights of Way and Access Manager stated in his report to members that Mr Forsdick's advice was sound and should be accepted. The Panel adopted that recommendation.

9. In their claim for judicial review the claimant asks for an order quashing KCC's decision on 2 December 2021 and:

> " a declaration that the right to make an application has ceased and that Kent County Council have no jurisdiction to entertain the application."

In other words, the claimant asks, that in the event of the court deciding that KCC erred in law, the court should determine the "trigger event" issue itself, and not send the matter back to KCC for redetermination. I did not understand Mr. Buley KC, who appeared for KCC, to take a different view.

10. The interested party, Dr van den Broek on behalf of TFAG, was represented by Mr. Honey KC and Mr. Rhimes. In their Detailed Grounds of Resistance they suggested that if the claim should succeed, a declaration would be unnecessary because the 2006 Act provides for the consequences of a trigger event. By implication they accept that the court is being asked to determine itself whether a trigger event has occurred.

11. I agree with the approach taken by the parties. Given that the occurrence of a trigger event disapplies the right of a citizen to apply for the registration of a TVG, I do not consider that a registration authority's decision on that issue is to be treated as a matter of judgment reviewable only on *Wednesbury* principles. The issue whether a development plan identifies land for potential development is a question of precedent or jurisdictional fact (De Smith's Judicial Review (8th edition) – paras. 4-055 to 4-056). As we shall see, that is the approach which was adopted without argument in the only authority dealing with this subject.

The Statutory Framework

12. Section 15 of the 2006 Act deals with the circumstances in which a person may apply to register land as a TVG. Subsections (1) and (2) provide:

> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where–
>
> (a) 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; and
>
> (b) they continue to do so at the time of the application."

Subsections (3) and (4) deal with alternative situations where the 20 year user requirement has been met but the use has thereafter ceased. The application to register must be made within either five years of cessation where that occurred before the

commencement of s.15, or within one year of cessation (for land in England) if that occurred after s.15 came into force.

13. Regulations made under s.24 set out the procedure by which an application made under s.15 is to be determined by the registration authority.

14. In January 2010 Mr. Adrian Penfold was commissioned by the Government to consider whether consents outside the planning system were delaying or discouraging investment in sustainable development. In his final report "Review of non-planning consents" published in July 2010 he considered that the issue of whether a TVG is to be registered should be raised at the same time as, and as part of, the planning process for addressing the "if decision", that is whether planning permission should be granted. At para 4.27 he said:

> "Where planning has dealt with an 'if' issue, the Review would argue that that issue should not be re-opened. Thus, where the possibility of TVG registration has been considered as part of planning, the Review would contend that granting planning permission should then provide protection from TVG registration for the duration of that permission. Such an approach would enable all the relevant issues to be weighed together, rather than the merits of TVG registration being considered in isolation, as is the case now."

15. As a result of the Review, the Department for Environment, Food and Rural Affairs ("DEFRA") issued a consultation document on changes to the TVG regime in July 2011. Paragraph 5.6.1. stated:

> "The greens registration system works entirely independently of the planning system. There is increasing concern that it is being used in some parts of the country as a mechanism to prevent development proposed and approved through the planning system."

16. In para. 5.6.3 DEFRA proposed that:

> "This proposal would exclude any land proposed for development through a planning application, or for which there were an extant planning permission in place, from being included in an application to register the land as a green. It would also exclude land proposed or designated for development …… in a neighbourhood or local plan, which had been adopted or published for consultation."

In para. 5.6.9. the Department stated:

> "Nor could an application to register a green be made in relation to any land designated for development …… in a local plan which had been adopted by the local planning authority, or which was in a draft local plan which had been published for consultation. The same principles would apply to land

> designated for development …… in a neighbourhood plan envisaged by the Localism Bill, either at consultation stage or after formal adoption."

17. These proposals took into account the statutory requirements for consultation with the local community when a local plan, or other development plan document, is being prepared (para. 5.6.5).

18. The suggested changes to the TVG regime also took into account the Department's proposals in section 1.2 of the document to protect recreational space through the planning system. This was to involve the designation of Local Green Spaces in the preparation and adoption of local plans under the National Planning Policy Framework ("NPPF"), which was then under consultation.

19. Paragraphs 76 to 78 of the NPPF published in March 2012 stated:

> "76. Local communities through local and neighbourhood plans should be able to identify for special protection green areas of particular importance to them. By designating land as Local Green Space local communities will be able to rule out new development other than in very special circumstances. Identifying land as Local Green Space should therefore be consistent with the local planning of sustainable development and complement investment in sufficient homes, jobs and other essential services. Local Green Spaces should only be designated when a plan is prepared or reviewed, and be capable of enduring beyond the end of the plan period.
>
> 77. The Local Green Space designation will not be appropriate for most green areas or open space. The designation should only be used:
>
> - where the green space is in reasonably close proximity to the community it serves;
>
> - where the green area is demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and
>
> - where the green area concerned is local in character and is not an extensive tract of land
>
> 78. Local policy for managing development within a Local Green Space should be consistent with policy for Green Belts."

Thus, Local Green Spaces have a high level of protection.

20. Although the description in the NPPF of a Local Green Space has some similarities with the definition of a TVG, the functional criteria are more restrictive. On the other hand, there is no requirement for 20 years' user as of right.

21. In November 2012 DEFRA published its response to the consultation. The Government remained fully committed to the protection of registered greens and to allow for new greens to be registered. But it was concerned about "the substantial rise in applications for green status in recent years and that some can delay development that is needed and wanted by the wider community." The Government decided that the 2006 Act should be altered by preventing applications to register a TVG on land where, for example, a planning permission has been granted and remains extant, or an application has been made and remains undetermined, or an adopted or draft local plan or neighbourhood plan identifies that land "for potential development." That last phrase was broader than that proposed in DEFRA's consultation document, "land designated for development".

22. Section 16(1) and (2) of the 2013 Act inserted a new s.15C and Schedule 1A into the 2006 Act.

23. Section 15C(1) and (2) of the 2006 Act provide:

> "(1) The right under section 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").
>
> (2) Where the right under section 15(1) has ceased to apply because of the occurrence of a trigger event, it becomes exercisable again only if an event specified in the corresponding entry in the second column of the Table set out in the relevant Schedule occurs in relation to the land ("a terminating event")."

The "relevant Schedule" for England is sched. 1A (see s.15C(9)).

24. Schedule 1A contains 16 different types of trigger event. For each trigger event, the schedule also specifies a terminating event. Where a trigger event is subsequently followed by a relevant terminating event, the right to apply to register a TVG becomes exercisable again. The parties agree that in such cases the right to apply to register is suspended between those two dates. Paragraph 82 of the Explanatory Notes to the 2013 Act states that the disapplication of the right to apply for registration "does not affect the accrual of any period of use as of right or prevent any such user ceasing to be as of right".

25. This case is concerned with para. 4 of sched. 1A:

> "4. A development plan document which identifies the land for potential development is adopted under section 23(2) or (3) of the 2004 Act."

Schedule 1A also specifies the "terminating event" for that case, namely where the plan is revoked or where "a policy contained in the document which relates to the development of the land in question is superseded by another policy by virtue of s.38(5) of the Planning and Compulsory Purchase Act 2004 (i.e. conflict with a policy in a subsequent development plan).

26. Schedule 1A also sets out other trigger events, such as a *draft* development plan document published for consultation which identifies "the land for potential development" and the first publication of an application for planning permission in relation to land. If permission is granted, the right to apply to register a TVG continues to be disapplied unless and until the period within which the development must be begun (see ss.91-92 of the Town and County Planning Act 1990) expires without the development having started. On the other hand, if that development is begun within that period then the disapplication of s.15(1) continues indefinitely.

The *Cooper* case

27. There appears to be only one authority on the meaning and application of the "trigger event" in which a development plan identifies land for potential development, *R (Cooper Estates Strategic Land Limited) v Wiltshire Council* [2019] PTSR 1980. There, the application to register land as a TVG related to a site within the settlement boundary of a market town, Royal Wootton Bassett. The Wiltshire Core Strategy required the provision of at least 42,000 new homes over the plan period and 178 hectares of new employment land. The spatial strategy distributed new development according to a settlement hierarchy. The market towns were identified as having the potential for significant new residential and employment development, thereby helping to promote viable, sustainable communities (Core Policy 1).

28. Core Policy 19 of the Strategy stated that 1,070 additional homes were required for Royal Wootton Bassett. Core Policy 2 contained a presumption in favour of sustainable development on land within the town's settlement boundary. In addition, the Strategy specifically allocated a number of sites for development. Although the application site had not been so allocated, it was accepted that those site-specific allocations would not suffice to meet the needs which the Strategy required to be provided for. By contrast, outside the settlement boundary the Strategy stated that development would not normally be permitted.

29. Mr. David Elvin QC (sitting as a deputy High Court Judge) decided that the Wiltshire Core Strategy had identified the application site for potential development. He quashed the local authority's decision to register the land as a TVG and ordered that the entry of that land in the register of town or village greens be deleted ([2018] EWHC 1704 (Admin)). In other words, the court decided for itself the issue of whether s.15(1) had been disapplied by s.15C. The Court of Appeal upheld the decision of the High Court. No issue was raised about the relief which had been granted.

30. Lewison LJ gave the leading judgment. He accepted at [36]-[37] the explanation of what is meant by "identifies" given by Lindblom J (as he then was) in *West Kensington Estate Tenants and Residents Association v Hammersmith and Fulham London Borough Council* [2013] EWHC 2834 (Admin) at [54] – [55], albeit in a different context. The development plan itself must achieve the identification of a defined area for potential development. "Identify" means to establish the identity of, or to establish what a given thing is, or to recognise.

31. "Potential" is a very broad concept. It is not qualified. It is not to be equated with likelihood or probability ([37]). It can include, but need not be, a site-specific allocation for a particular development ([38] and [42]).

32. The site of an application to register under s.15(1) may form part of a larger area identified for potential development, but that land must be "specifically identified" by the development plan. Such identification may be achieved in a number of ways. The land may be shown by a line on a map in the plan. It may be identified by a verbal description of an area, or be described by reference to prescribed criteria. In *Cooper* the land was sufficiently identified for potential development by being located within the town's settlement boundary in the Strategy, read together with the relevant Core Policies ([40]).

33. The mere fact that land is shown as being included within a settlement boundary is insufficient to suspend the right to apply to register a TVG. That depends upon the *consequences as set out in the development plan* of the land being included within that area. The important question was whether that plan identified the land "for potential development" ([41]).

34. Lewison LJ rejected the local authority's contention that the identification of all land within the settlement boundary of a town was too wide to be capable of falling within para. 4 of sched. 1A to the 2006 Act ([43]) for four reasons:

    (i) The object of the legislative and policy changes was that where a development plan identifies land for potential development, protection for what would otherwise be registrable as a TVG would be governed by the planning process (see also [47]);

    (ii) The fact that land is identified for potential development does not lead to the consequence that it will be developed. Within the planning system the land in question could be designated in an emerging development plan as a Local Green Space and thus protected by a policy akin to green belt;

    (iii) The 2006 Act requires the court to look at the development plan document to see what it provides. For example, it may contain policies which except the land from identification for potential development (e.g. sites of special scientific interest or school playing fields);

    (iv) The settlement boundary may be reviewed by a revision of the development plan itself or by means of a neighbourhood plan.

35. Point (iii) in [34] above is important. It is an expression of what Lewison LJ had already said in his judgment at [41] (see [33] above) and underlines the importance of considering the development plan as a whole, or, at least, all relevant policies.

36. In *Cooper* the Strategy did identify the application site for potential development because ([45] and [48]):

    (i) Core Policy 1 identified settlements where sustainable development *will* take place, which included Royal Wootton Bassett:

    (ii) Core Policy 2 provided a presumption in favour of sustainable development inside that town's settlement boundary;

(iii) The explanatory text of the Strategy stated that Core Policy 2 defined where development would be most sustainable and how those settlements *will* develop;

(iv) The Strategy identified development needs for the town to be met within its boundary, but stated that it was unnecessary to make specific allocations in the early stages of the plan;

(v) To allow registration of a TVG within *that* settlement boundary would frustrate the broad objectives of the Strategy;

(vi) "In circumstances like the present" Parliament had decided that a TVG should not be registered, but instead the question of development should be left to the planning system.

37. In relation to land inside the settlement boundary which is also subject to policies protecting open space or conservation values, Lewison LJ stated at [46] that a registration authority is not required to decide whether planning permission would be granted before deciding whether to entertain an application to register a TVG. The 2006 Act refers to the identification of "land for potential development", not "land for development". Although it is possible that the *prima facie* identification of land for potential development by one policy could be contradicted by countervailing policies elsewhere in the plan, that was not so in *Cooper's* case.

38. Floyd LJ agreed with Lewison LJ. He rejected the local authority's argument that the deputy judge had been wrong, in effect, to treat all land falling within the settlement boundary as being identified for potential development (see [52] – [54]). The judge had not done so. He had allowed for the possibility that there might be specific cases inside the settlement boundary "where the plan constraints do bear directly on the land and might on the facts preclude potential development" (e.g. listed buildings and conservation areas), but that was not so in the case of the application site. Accordingly, the judge had not treated inclusion within the settlement boundary as conclusive of the question whether the right to apply to register a TVG was excluded for any site falling withing that boundary.

39. Henderson LJ agreed with both judgments.

The Inspector's report

40. At paras. 7 to 18 of his report the Inspector directed himself on the principles laid down in *Cooper* and on how they were applied by the Court of Appeal in that case. He correctly identified the circumstances which led the court to decide that the land in question had been identified by the Strategy for potential development. It lay within the settlement boundary of a town where significant development was required to be delivered. There was no policy in the Strategy excluding the site from the presumption in favour of development or protecting it from development (para. 17).

41. The Inspector stated that he had invited submissions on the whole of the CDLP, to see whether that plan, read as a whole, identified the land for potential development. Even so, the submissions had tended to focus on Policy OS6, and had not placed that policy

in the context of the plan's spatial strategy or the general countryside policies applicable to all non-urban land, including the application site (para.19).

42. He considered that the CDLP followed a sequential approach, such that development should be concentrated in the urban centres of the District, with limited new development in rural settlements proportionate to their scale and position in the settlement hierarchy. Westbere was at the bottom of the hierarchy, a hamlet. The application site was not located in any settlement (paras. 20 to 24).

43. Policy HD3 allows for the provision of affordable housing to meet local needs on "rural exception sites" outside the built confines of villages. Policy HD4 allows for new dwellings in the countryside in limited circumstances. Both policies contain criteria which must be satisfied before such development may be approved. They are general policies covering the whole of the CDLP's countryside area. They do not provide a nexus with any specific area of land. They did not identify the application site, nor any other land, for potential development (para. 25).

44. The Inspector concluded that the Plan's policies did not identify the site for employment development. But new agricultural buildings, development for rural business, tourist caravan sites and rural tourist accommodation could be permitted, subject to various criteria. Once again, these were general policies covering the whole of the non-urban, or countryside, area and did not provide a sufficient nexus with any particular area of land (para. 26).

45. The objective of the CDLP is to improve the distribution and connectivity of open space and to protect existing open space. Policy OS1 identified two Local Green Spaces, which did not include the application site (para. 28).

46. The CDLP supports national planning objectives to restrain built development outside urban areas and in the countryside. The identification of Green Gaps supplements that general policy of restraint by providing a more restrictive approach. The object is to retain the separate identities of settlements by preventing coalescence between them. The Gaps have been identified at "pinch points" where there is a particular risk of coalescence. The risk relates not only to isolated residential development but also to other minor development related to activities such as agriculture, recreation and the keeping of horses (paras. 29 to 33).

47. At para. 35 the Inspector said that, taken by itself, Policy OS6 could be understood as permitting development in Green Gaps meeting certain criteria and as identifying land in those Gaps for some limited forms of development. But in accordance with *Cooper* and general principle, it was incorrect to look at Policy OS6 in isolation in order to answer the statutory question, whether the CDLP identified the application site for potential development. It was necessary to consider the Plan as a whole (para. 36).

48. The features in *Cooper* which led to the land in that case being treated as identified for potential development were absent here (para. 37)

49. The application site, like all land in non-urban or countryside areas, was subject to multiple policies which constrain development. To the extent that they allow some types of development subject to compliance with certain criteria, they do so by way of general application to the whole of that broad area of the District. They do not identify

areas of land for potential development. They simply allow for development to come forward in unidentified locations anywhere within those extensive parts of the District if certain conditions are met. If such policies were to be treated as identifying land for potential development, the result would be that the adoption of the Plan would have operated as a trigger event for all land in the countryside, if not the whole of the District (paras. 38 to 44).

50. The analysis in relation to Policy OS6 was not materially different. Notwithstanding its permissive language, the policy simply adds an additional layer of constraint to the general countryside protection policies and further criteria for determining whether development may be permitted in unidentified locations (para. 42 to 45).

51. The Inspector concluded that the adoption of the local plan does not identify the application site for potential development and so no trigger event had occurred in relation to that land (paras. 56 – 60). KCC accepted that advice.

Local Plan Policies

52. The claimant's case is focused on Policy OS6. It does not rely upon other policies in the CDLP. Nor does the claimant criticise the Inspector's analysis of those other policies. Instead, the claimant simply criticises his approach to Policy OS6. However, as the Inspector rightly said, it is necessary to consider the CDLP as a whole, or at least those policies of significance for answering the question whether the Plan identifies the land the subject of the TVG application, or some larger area of which it forms a part, "for potential development".

53. In accordance with established planning practice, the Plan takes a positive approach to sustainable development. This needs to be borne in mind when considering the language used in the drafting of policies such as OS6. Policy SP1 states:

> "**Policy SP1 Sustainable Development**
>
> When considering development proposals the Council will take a positive approach that reflects the presumption in favour of sustainable development contained in the National Planning Policy Framework.
>
> Planning applications that accord with the policies in this Local Plan (and, where relevant, with policies in Neighbourhood Plans) will be approved, unless material considerations indicate otherwise.
>
> Where there are no policies relevant to the application or relevant policies are out of date at the time of making the decision then the Council will grant permission unless material considerations indicate otherwise, taking into account whether:
>
> - Any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the National Planning Policy framework taken as a whole; or

- Specific policies in that framework indicate that development should be restricted;"

54. Policy SP2 sets out the main development needs for the whole of the plan period and allocates 11 large areas of land, strategic sites, for meeting most of those needs. Additional development will be judged against the District settlement hierarchy. Canterbury District does not have a substantial number of larger villages, rather many small scale settlements. New development in rural settlements will be limited, and proportionate to their scale and position in the hierarchy. Westbere is a hamlet in the lowest tier of the hierarchy (paras. 1.47 to 1.50).

55. Policy SP4 sets out the strategic approach to the location of development. The urban areas of Canterbury, Herne Bay and Whitstable will be "the principal focus for development, with a particular focus at Canterbury…". In hamlets such as Westbere "development will be permitted which specifically meets an identified local need" and then:

> "In the open countryside, development will be permitted if required for agriculture and forestry purposes (see Policy EMP 13)".

56. Chapter 2 of the Plan contains policies for residential development. Policy HD1 allocates some additional sites for housing, in addition to the strategic allocations.

57. Policy HD3 deals with the provision of affordable on "rural exception sites", that is sites in the countryside which are not identified in the CDLP:

> "**Policy HD3 Rural Exception Sites**
>
> The City Council will permit affordable housing to meet local needs on rural exception sites that is, unallocated land outside the boundary of the urban areas and/or built confines of villages, subject to the following criteria:
>
> a. The applicant and the parish council or local community in conjunction with the City Council, must demonstrate the existence of a local need which cannot be accommodated in any other way, i.e. no other sites are available within the village;
>
> b. The development must be of a scale not in excess of the identified local need;
>
> c. The City Council must be satisfied that the long term occupancy of the dwellings can be controlled to ensure that the housing will continue to be available for a local need at an affordable price and this will be defined by a legal agreement. Proposals to construct dwellings offering a discounted initial purchase price only will not be acceptable. The City Council will seek to control occupancy through agreements as appropriate to meet local needs;
>
> d. The development must be capable of proper management by a registered provider, village trust, parish council or a similar organisation;

e. There is no conflict with environmental protection polices;

f. Any site must be well related to the village and existing facilities; and

g. Market housing will be acceptable as an element of the scheme to enable the financial viability of the scheme or to meet an identified local market need. A financial viability statement will need to be submitted with any application and may be validated by an independent assessor at the expense of the applicant. The market housing element will amount to no more than 30% of the scheme. Any permitted market housing must be comparable in scale and design to the affordable housing element. Starter homes will not be permitted on rural exception sites."

58. Policy HD4 defines the restrictive circumstances in which an isolated dwelling in the countryside may be permitted, for example to meet a need to provide accommodation for an agricultural worker:

"**Policy HD4 New Dwellings in the Countryside**

Planning permission for new dwellings in the countryside will only be granted in the following circumstances:

a. For Rural Workers Dwellings where:

- There is an essential need for a rural worker to live permanently at or near their place of work in the countryside, for example, to meet the needs of agriculture or forestry. In such circumstances the City Council will require the applicant to produce an independent report demonstrating the need for the dwelling and the financial viability of the business.

- Existing dwellings serving or closely connected with the holding do not provide sufficient accommodation for essential rural workers.

Where a need is proven, the City Council will normally require the new agricultural dwelling to be sited in association with existing groups of farm buildings; or

b. For the re-use of heritage assets where:

The proposed development would represent the optimal viable use of a heritage asset or would be appropriate enabling development to secure the future of heritage assets; or

c. For the re-use of existing buildings where:

The development would re-use redundant or disused buildings and lead to an enhancement to the immediate

setting; or

d. For a new dwelling where:

The design of the development is of an exceptional quality or innovative nature."

59. Chapter 3 of the Plan contains policies for economic development and employment. Policy EMP1 sets out employment land allocations.

60. Policy EMP13 deals with new agricultural buildings:

"**Policy EMP13 New Agricultural Buildings**

The City Council will permit proposals for new agricultural buildings, structures or development subject to the following criteria:

a) It has been demonstrated to the satisfaction of the Council, by means of a supporting statement, that there is an economic need for the development;

b) The proposal avoids harm to its physical setting by its siting, scale, design, materials and external colours;

c) Where existing buildings are of architectural or historic importance any extensions should respect their existing design and use of materials; and

d) There is no detrimental impact on landscape interests, protected species, sites or features of nature conservation interest, Area of Outstanding Natural Beauty or on sites of archaeological or historical importance.

Where appropriate, new landscaping should be provided to further reduce the visual impact of the new building and this should reflect the character of the surrounding area."

61. Policy EMP14 deals with development for other rural businesses:

"**Policy EMP14 Other Rural Businesses**

The City Council will grant planning permission for the conversion of existing rural buildings, and well-designed new buildings and premises, that support the development and expansion of rural business in suitable locations in the rural areas, as follows:

a) Preferably, in or on the edges of existing settlements;

b) Conversions of existing buildings for business or tourism uses, including accommodation;

> c) Particular care should be exercised in the design of buildings and premises, where permitted within the Kent Downs Area of Outstanding Natural Beauty, or where it involves the conversion of an historic building;
>
> d) Access and parking provisions are acceptable and the use does not significantly increase traffic to the detriment of the area or highway safety;
>
> e) There is no detrimental impact on landscape interests, protected species, sites or features of nature conservation interest or on sites of architectural or historic importance, or their settings where appropriate; and
>
> f) There is no detrimental impact on residential amenity.
>
> The City Council will support proposals that would not result in the loss of existing business premises that provide essential services to the rural areas."

62. Chapter 6 of the Plan deals with tourism and the visitor economy, Caravan tourist sites are addressed in Policy TV4:

> "**Policy TV4 Touring and Static Caravan Tourist Sites**
>
> The Council will grant planning permission for new touring and static caravan tourist sites within the District or the refurbishment and expansion of existing sites provided that the proposals meet the aims of the relevant flooding, design and landscape and biodiversity policies.
>
> In respect of proposals for new sites, the Council will require a legal agreement or similar mechanism to ensure the site remains in tourism use.
>
> The Council will not permit the loss of existing sites unless it can be demonstrated that the use of the site does not make any positive contribution to the local economy."

63. Chapter 10 of the Plan deals with landscape and biodiversity. Much of the southern part of the District lies within the Kent Downs Area of Outstanding Natural Beauty ("AONB") (para. 10.2), in relation to which Policy LB1 provides:

> "**Policy LB1 Kent Downs Area of Outstanding Natural Beauty**
>
> High priority will be given to conservation and enhancement of natural beauty in the Kent Downs Area of Outstanding Natural Beauty (AONB) and planning decisions should have regard to its setting. Major developments and proposals which conflict

> with the objective to conserve and enhance the AONB, or that endanger tranquillity, will not be permitted except in exceptional circumstances where it is demonstrated to be in the public interest, the need is shown and any detrimental effect is moderated or mitigated.
>
> In considering proposals for development within the AONB, the emphasis should be on proposals that are sustainably and appropriately located and designed to enhance the character of the AONB. The City Council will grant proposals which support the economy and social well being of the AONB and its communities, including affordable housing schemes, provided that they do not conflict with the aim of conserving and enhancing natural beauty by addressing location, scale, form, high quality design, materials and mitigation and have regard to the advice set out in the Kent Downs AONB Management Plan, and its supporting guidance.
>
> Proposals will be encouraged where they facilitate the delivery of the statutory Kent Downs AONB Management Plan and are desirable for the understanding and enjoyment of the area."

64. Chapter 11 of the Plan deals with open space. Policy OS6 sets out the policy for Green Gaps. Paragraphs 11.42 to 11.48 contain the explanatory text relating to that policy. In *R (Cherkley Campaign Limited) v Mole Valley District Council* [2014] EWHC Civ 567 the Court of Appeal held that such explanatory text is relevant to the interpretation of the policy to which it relates, but it does not form part of the policy, or have the force of policy, nor can it trump the policy itself ([16]). Here, the claimant accepts that the explanatory material for Policy OS6 is consistent with that policy and may be used in its interpretation.

65. Paragraph 11.48 states that there are eight Green Gaps delineated on the Proposals Map. Three lie between Canterbury and nearby villages. One separates Herne Bay and Whitstable. Three separate Sturry, the largest settlement in the rural hierarchy and a rural service centre, from small settlements, including the hamlet with which we are concerned, Westbere.

66. Paragraphs 11.42 and 11.43 explain that the objective of OS6 is to protect the separate identities of the relevant settlements by preventing coalescence, supplementing other policies which restrain built development outside urban areas and in the countryside:

> "11.42 The objective of the green gap policy is to retain separate identities of existing settlements, by preventing their coalescence through development.
>
> 11.43 There are national objectives that restrain built development outside the urban areas and in the countryside which is supported by the Council. The allocation of green gaps on the proposals map (see also Insets 1, 3 and 5) *supplements these*." (emphasis added)

67. Paragraph 11.44 states that gradual coalescence between existing built-up areas "not only harms the character of the open countryside, but is having an adverse impact on the setting and special character of villages."

68. Paragraphs 11.45 and 11.47 explain the problems:

> " 11.45 The green gaps have been specifically identified between built up areas, such as villages or urban areas, which are gradually expanding, particularly along the road frontages. *The designations have been limited to 'pinch points', where settlements, often due to linear expansion, are at a particular risk of coalescence*.
>
> 11.47 *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." (emphasis added)

69. Paragraph 11.46 states that the Green Gaps are "critical" to the objective of retaining separate identities of settlements. Many of them have come under development pressure, including proposals for isolated development. Existing development constraint policies remain the most important means of countryside restraint, but the Green Gap "designation draws attention to specific areas where *inappropriately located new development* could lead to coalescence between settlements" (emphasis added).

70. It is in the context of this explanatory material that Policy OS6 provides:

> "**Policy OS6 Green Gaps**
>
> 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."

A summary of the claimant's submissions

71. Mr Edwards KC, who together with Mr Petchey appeared on behalf of the claimant, said that the claimant's case focuses on the interpretation and effect of Policy OS6. That is the only policy in the CDLP upon which the claimant relies as identifying the application site for potential development, so that the adoption of that Plan constituted a trigger event disapplying s.15(1) of the 2006 Act. The claimant did not suggest that any other policies of the Plan, whether taken in isolation or in combination, had that effect.

72. The claimant submitted that it is necessary to interpret para. 4 of sched. 1A to the 2006 Act in accordance with the policy underlying the change in the law brought about by the 2013 Act. The objective is to prevent the possibility of an application to register a TVG impeding planning processes in relation to land identified in a draft or adopted development plan for potential development. Mr. Edwards submitted that the formulation by the interested party, that it is necessary for the plan to establish the principle or acceptability of development, involves putting an impermissible gloss on the legislation and does not accord with the statutory objective. I say straight away that I accept that particular submission.

73. Relying upon *Cooper*, Mr. Edwards went on to submit that:

    (i) Identification of land for potential development is to be understood in the sense used in the *West Kensington* case (see [30] above);

    (ii) The CDLP need not allocate the land in question for development;

    (iii) The CDLP need only identify the land for "potential development", not development;

    (iv) "Potential" is a very broad concept, so that there is no requirement to show that development on the land is likely or probable;

    (v) Policies imposing constraints on development may not negate "potential";

    (vi) The land in question may form part of a wider area identified by the CDLP for potential development.

74. However, Mr Edwards rightly accepted that there must be a sufficient nexus between the development plan and the land in question, so that policies which are simply positive in nature, or which generally encourage certain types of development or in certain circumstances, do not themselves identify any land for potential development so as to qualify as a trigger event. The plan must identify the land for potential development which would be inhibited by an application for registration of a TVG (see the High Court in *Cooper* at [32]-[33]).

75. Mr. Edwards said that Policy OS6 is permissive or positive in relation to development which satisfies the criteria in that policy. It uses the words "will be permitted." Policy OS6 identifies land for potential development, because it is permissive in relation to development meeting those criteria on land located in a Green Gap. The application

site lies within a Green Gap and so the Plan identifies that land for potential development, that is development meeting the criteria in OS6. The restrictive intent of that policy does not detract from the fact that it identifies land for potential development compliant with its criteria. In that sense "the City Council has chosen to control development by positively identifying Green Gaps for a specified but limited category of potential development." That is sufficient for the purposes of para. 4 of sched. 1A to the 2006 Act (skeleton paras. 21-22).

76. Although the statutory test is whether the development plan taken as a whole identifies the relevant land for potential development, there are no "countervailing policies" which are to a different effect, or which in some way negate the express language of Policy OS6 (referring to *Cooper* in the Court of Appeal at [46]). For that reason, the CLDP, taken as a whole, does identify the application site for potential development (skeleton para. 23).

77. Mr Edwards submitted that the analysis is no different if Policy OS6 is regarded as being negative in substance. The development plan seeks to limit many forms of development in the Green Gaps, but not all development. A generally restrictive policy approach is nonetheless consistent with the CDLP identifying land for potential development. Policy OS6 stands in contrast to, for example, Green Belt policy, the overall effect of which is that land it not to be developed subject to certain exceptions. Unlike OS6, Green Belt policy does not contain a positive statement that certain forms of development "will be permitted" (paras. 24 and 33 of skeleton).

78. Mr. Edwards accepted that the present case is very different from *Cooper*. There the site lay inside the settlement boundary of a town where substantial additional development needed to be provided, there was a presumption in favour of sustainable development and there was no other policy in the development plan precluding development on the site. But, he submitted, it is not necessary that the land should benefit from a policy presumption in favour of development in order to be able to conclude that the plan identifies that land for potential development.

79. Instead, Mr Edwards submitted that it suffices that the policies of the plan, read as a whole, identify land where some development is encouraged. By contrast, where the overall effect of the plan's policies is neutral or negative in relation to development on the relevant land, the test in para. 4 of sched. 1A to the 2006 Act would not be satisfied. But he emphasised that where a policy positively encourages development on the land, the mere existence of policy constraints does not prevent that test from being satisfied, unless they are sufficiently strong to negate any potential for development resulting from the positive features of that policy.

80. Mr. Edwards submitted that in the present case the constraints in Policy OS6 do not negate the positive effect of the words "will be permitted" as identifying land in Green Gaps for potential development. But he accepts that on his approach, many policies commonly included in draft and adopted development plans would satisfy the test for a trigger event in paras. 3, 4, 5 and 6 of sched. 1A to the 2006 Act.

Discussion

81. Although the claimant has said that this case is about the interpretation of Policy OS6, the real question is wider, namely whether that policy, or rather the development plan,

on a proper interpretation, falls within the ambit of para.4 of sched.1A to the 2006 Act. This involves the application of the legislation, properly understood, to the relevant policies.

82. The principles for interpreting planning policy have been established in the higher courts. They are familiar and do not need to be revisited here. The main references were brought together and the principles summarised in *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] PTSR 1709 at [101] – [104] and *Rectory Homes Limited v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 143 at [43] – [45].

83. I refer, in particular, to the judgment of Lindblom LJ in *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] PTSR 1714 where he said this at [22]:

> "….. The interpretation of development plan policy, however, is ultimately a matter of law for the court. The court does not approach that task with the same linguistic rigour as it applies to the construction of a statute or contract. It must seek to discern from the language used in formulating the plan *the sensible meaning of the policies in question, in their full context, and thus their true effect. The context includes the objectives to which the policies are directed, other relevant policies in the plan, and the relevant supporting text.* The court will always keep in mind that the creation of development plan policy by a local planning authority is not an end in itself, but a means to the end of *coherent and reasonably predictable decision-making, in the public interest*: see the judgment of Lord Reed JSC in *Tesco Stores Ltd v Dundee City Council [2012] PTSR 983*, paras 18–19; the judgment of Lord Gill in the *Hopkins Homes case [2017] PTSR 623* , paras 72–73; the judgment of Richards LJ in *Islington London Borough Council v Secretary of State for Communities and Local Government [2014] EWCA Civ 378* at [17] and [24]; and the judgment of Richards LJ in *R (Cherkley Campaign Ltd) v Mole Valley District Council [2014] EWCA Civ 567* at [16] and [21]." (emphasis added)

84. Here the claimant relies solely upon Policy OS6 as identifying the application site for potential development. It does not rely upon any other policy in the CDLP. In particular, it does not rely upon any other policy which, subject to satisfying given criteria, permits certain types of development in the countryside such as affordable housing (HD3), isolated dwellings (HD4), new agricultural buildings (EMP13), rural business development (EMP14), or caravan tourist sites (TV4).

85. Instead, rather strangely, the claimant has selected a policy the object of which is to protect specified Green Gaps which are vulnerable to coalescence through gradual expansion of existing settlements, linear development, isolated development and even minor development related to agriculture, recreation and the keeping of horses. This is not promising territory for identifying land for potential development.

86. In *Cooper* the Court of Appeal emphasised that the statutory test is whether land is identified for "potential development" not "development". "Potential" means "possible as opposed to actual; having or showing the capacity to develop into something in the future" (Oxford English Dictionary). But although "potential" has a broad meaning, we are not here dealing with artificial possibilities. The policy underlying section 15C of the 2006 Act is that a conflict between the recreational use of land and its potential for development should be resolved through the planning system and not, in effect, pre-empted by an application and decision to register a TVG. But Parliament can only have intended to deal with conflicts on issues of this nature which are real. In other words, a realistic, rather than a theoretical, approach should be taken to whether a development plan identifies an area of land for potential development. That must be so, given that the effect of s.15C is to exclude the right to apply to have a TVG registered for the benefit of the inhabitants of a locality or neighbourhood.

87. This is made clear by the language Parliament has chosen to use. The development plan itself must "identify" the land in question "for" potential development. It is common ground that in the light of *Cooper*, "identify" has the meaning set out in [30] above. Here, the word "for" means "with the object or purpose of" (Oxford English Dictionary). Similarly, planning policy should be interpreted in the light of its objectives (see *Canterbury* in [83] above). So an essential question is whether it is the meaning and purpose of the development plan (or according to the claimant's case Policy OS6) to identify the relevant land for potential development.

88. The policies identified by Lewison LJ in *Cooper* did not pose any real difficulty. They created a presumption in favour of the development of the relevant area in order to meet development needs of the town, without their being any suggestion of the application site being subject to policy constraints or countervailing policies.

89. The present case is very different. The land lies outside a settlement boundary and there is no presumption in favour of any development. The CDLP does not suggest that there is any need for development in any of the Green Gaps. The object of Policy OS6 is to protect gaps, described as "pinch points", which are at risk of coalescence, even from some minor forms of development such as might often be found in the countryside. Not surprisingly, the development control criteria in OS6 make it clear that generally a proposal could only be compliant with that policy if it would not significantly affect the open character of the Green Gap, or lead to coalescence between existing settlements, or result in new, isolated and obtrusive development in the Gap. The whole thrust of these criteria is to protect the function of a Green Gap as a defence against coalescence, including *gradual* coalescence, that is to say coalescence resulting from development over time on more than one site. Although the development of an individual site may not be harmful in itself, its contribution to gradual coalescence may be, taking into account development which has already occurred as well as that which might otherwise come forward in future. On any view Policy OS6 imposes a relatively strict form of development control. It certainly does not amount to any positive encouragement of development.

90. The only language in the first part of Policy OS6 which Mr. Edwards claimed to have a positive effect are the words "will be permitted." But those words are only engaged where the criteria referred to in [89] above are satisfied. Policy OS6 applies to each and every part of all of the eight Green Gaps. The policy does not assume or imply,

let alone identify, that each and every part of those areas has any potential for development. How could it sensibly do that? For example, land may be located in part of a Green Gap which is particularly sensitive to the effects of development on coalescence and other parts of that Gap.

91. Mr. Edwards rightly accepted that where the issue of whether a development plan identifies a particular area of land for potential development cannot be answered without applying the criteria of a policy to a notional proposal, then the test in para. 4 of sched. 1A to the 2006 Act would not be satisfied. The plan would not establish the necessary nexus with any particular area of land. As *Cooper* held, the legislation is not to be applied by imagining how a hypothetical planning application or proposal would be likely to be determined.

92. Mr. Edwards attempted to confine the extent of his concession to development control criteria which are external to, or not to do with, the land in question. By way of example, he pointed to the requirements in Policy HD3 of the CDLP that there be a need for affordable housing in the locality, the scale of the development must not exceed what is necessary to meet that need and the housing must be controlled so that it continues to be available for that purpose. I am not persuaded that those criteria are external to the land being considered under s.15C of the 2006 Act. The policy makes it clear that the need must relate to the village in question and the site must be the only available site to meet that need.

93. But, irrespective of whether HD3 is a good example of the type of policy to which Mr Edwards refers, I do not think that the distinction he seeks to make is sound. Take, for example, Policy EMP14. It identifies an area of land, namely the rural areas of the District lying outside settlements. No one could sensibly suggest that each and every site within that area is identified for potential development. Whether any particular site could be so identified depends upon the outcome of applying the criteria in the policy to that site assessing, for example, impacts on landscape, ecological interests and residential amenity. The same is true of other policies for the rural area, such as EMP 13, HD4 (b to d) and TV4.

94. Of course, some policies apply to a smaller area than the whole of the rural land within a district. At the other end of the spectrum a policy may provide for an allocation of a specific site in the countryside for a particular development or purpose. There, it may generally be said that the plan identifies the land for potential development, even if that site-specific policy requires a number of criteria to be satisfied before any planning permission may be granted.

95. Care is needed when dealing with policies which apply to defined areas within the countryside larger than a site allocation. Policy LB1 imposes a familiar form of development control for an AONB. The policy states that "major development" will *not* be permitted unless certain criteria are satisfied or, in exceptional circumstances, where there is a need for the development which should be met in the public interest. That is plainly a restrictive policy both as a matter of language and substance. It does not identify the whole or any part of the AONB for potential development. Like Green Belt policy, that part of policy LB1 would not qualify as a "trigger event".

96. But policy LB1 goes on to deal with lesser forms of development in the AONB:

> "The City Council will grant proposals which support the economy and social well-being of the AONB and its communities, including affordable housing schemes, provided that they do not conflict with the aim of conserving and enhancing natural beauty [in the AONB]….."

If the claimant's case on the main body of Policy OS6 were to be treated as correct, then it would follow that this part of Policy LB1 is sufficient to identify for potential development *all* land in the AONB falling within the defendant's district, so that no application to register a TVG could be made in any part of that wide area. I do not think that could be correct.

97. In my judgment, it is impossible to say that this part of Policy LB1 identifies any land within the AONB for potential development. The question whether any such land is so identified would depend upon applying the criteria in the policy to development of the land the subject of an application to register a TVG (or possibly to a wider area). Policy LB1 does not answer that question affirmatively or provide encouragement. Where development does not satisfy those criteria, the policy is plainly restrictive or negative (see *Monkhill Limited v Secretary of State for Housing Communities and Local Government* [2021] PTSR 1432). Even where development meets those criteria, the protective or restrictive constraints which the policy imposes are simply overcome. This part of LB1 does not identify any land in the AONB for potential development.

98. The last part of Policy LB1 encourages proposals that facilitate the delivery of the Management Plan for the AONB and the understanding and enjoyment of the area. The mere fact that that policy is positive towards development of this type does not suffice for the purposes of para. 4 of sched. 1A to the 2006 Act. This passage does not identify either the whole of the AONB or any particular part of it for potential development. It is another example of a policy which simply falls to be applied to a proposal which comes forward on a site not identified for that purpose by the development plan.

99. Similarly, I reach the firm conclusion that Policy OS6 does not identify land for potential development. Whether Policy OS6 should be treated as positive or as encouraging development in Green Gaps depends upon taking a realistic, sensible approach to the substance of the policy and its objectives. The policy is concerned to protect land which has been specifically selected for inclusion in a Green Gap because of its vulnerability to coalescence through development, even minor development associated with rural and recreational activities. It does not seek to identify all land within the Green Gaps, or any part of that land, for potential development.

100. I agree with the Inspector that Policy OS6 is similar to other policies applicable in rural areas of the District (such as SP2, SP4, HD3, HD4, EMP13, EMP14 and TV4) which, in essence, provide criteria applicable generally throughout the relevant area for assessing the acceptability or otherwise of proposals which come forward. They do not themselves identify land for potential development. There is no relevant nexus between those policies and any specific land. I also agree with the Inspector that Policy OS6 adds an additional layer of restraint to general countryside protection policies, that restraint being dedicated to the prevention of coalescence or gradual coalescence within each of the Green Gaps. To say that Policy OS6 identifies

particular areas of land for potential development is, with respect, to turn the policy on its head. I would add that comparison with Policy LB1 on the AONB ([96]-[97] above) demonstrates that the claimant's argument cannot be correct.

101. The fact that Policy OS6 states that "development will be permitted" where the relevant criteria are not breached does not alter the above analysis. Such words are commonly found in development plan policies. They do not alter the substance of Policy OS6, or indeed Policy LB1. The practice of expressing development management policies in positive language of that nature has existed for many years. The parties agreed that paras. 9.5 and 9.6 of the "Good Plan Making Guide" published by the Planning Advisory Service of the Local Government Association in September 2014 accurately summarised the position:

> "9.5 It can take some time to prepare a full set of policies to which there is broad consensus. In particular, work closely with development management officers to ensure the policies are fit for purpose, in particular check their wording supports plan objectives (*see NPPF paragraphs 16 and 57, for example, which require that plans and policies are positive in tone*).
>
> 9.6 *Avoid negative "thou shalt not" type development control policies and embrace a "yes, unless" approach to drafting policies*. The policies should be aimed at promoting the strategy that the authority is seeking to implement. *Negative policies reinforce the reactive development control mind-set rather than the positive development management approach suitable for a genuinely plan-led planning system.*" (emphasis added)

This is reflected in, for example, Policy SP1 of the CDLP (see [53] above).

102. Following that practice in his report in June 2017 on the statutory Examination of the CDLP, the Inspector, Mr Michael Moore, said this at para. 49:

> "The Framework indicates that plans should be positively prepared, with local planning authorities positively seeking opportunities to meet the development needs of their areas. Development which is sustainable should be approved without delay. *Many of the individual LP policies are expressed in a restrictive way indicating that development should not take place unless various criteria are met. A more positive wording for these for consistency with the support for sustainable development in the Framework is necessary ….* " (emphasis added)

He then identified the similar modifications that needed to be made to a number of policies of the draft CDLP, including Policies HD3, EMP 4 and OS6. Thus, the draft version of Policy OS6, which had said that "development will only be permitted where it does not …", was altered to read "development will be permitted where it does not …". Two things are plain. First, that change did not turn Policy OS6, read fairly, as a whole and in context, into a policy which, as a matter of substance,

identifies potential development within a Green Gap. That "more positive" tone does not change the restrictive purpose of the policy Second, and in any event, it did not result in Policy OS6 identifying the whole or any part of a Green Gap as land for potential development. The claimant attaches a significance to the words "will be permitted" which they cannot possibly bear, certainly for the purposes of para. 4 of sched. 1A to the 2006 Act.

103. The claimant also relies upon the last paragraph of Policy OS6 which states *inter alia* that proposals for open sports and recreational uses will be permitted subject to there being no overriding conflict with other policies of the CDLP and its wider objectives. But once again, the claimant's argument proves too much. If correct, it would apply to all of the land within the eight Green Gaps and would result in all of that land being treated as identified for potential development. Such a conclusion would be all the more unreasonable given that the main body of the policy does not have that effect. This part of the claimant's argument merely relies upon the treatment in Policy OS6 of one very specific type of land use. But it could not sensibly be said that the CDLP identifies the whole of each Green Gap for that potential development, nor that there is a relevant nexus between this part of Policy OS6 and any particular area of land.

104. The very last sentence of Policy OS6 refers to built development ancillary to open sports and recreational uses. But such development must comply with criteria (a) and (b) of the policy and so this sentence does not carry the claimant's argument any further.

105. I conclude that, properly understood in the context of its accompanying explanatory text, Policy OS6, whether read as part of the CDLP as a whole or in isolation, does not identify land in the Green Gaps for potential development.

Conclusion

106. Accordingly, the claim for judicial review is dismissed. The defendant is entitled to a declaration to the effect that the application site does not fall within para. 4 of sched. 1A to the 2006 Act and the defendant has jurisdiction to determine the application to register a town or village green. I invite the parties to agree a suitable form of order for the court's approval.