

**TONBRIDGE & MALLING BOROUGH COUNCIL**

**STREET SCENE and ENVIRONMENT SERVICES ADVISORY BOARD**

**23 November 2021**

**Joint Report of the Director of Central Services & Deputy Chief Executive and  
Director of Street Scene, Leisure & Technical Services**

**Part 1- Public**

**Matters for Recommendation to Cabinet - Non-Key Decision (Decision may be taken  
by the Cabinet Member)**

**1 RIVER LAWN, TONBRIDGE**

**Summary**

**This report considers the possibility of the Council applying for Village Green status for River Lawn, Tonbridge and suggests the future rewilding of the site.**

**1.1 Introduction**

1.1.1 At the meeting of the Finance, Innovation & Property Advisory Board on 15<sup>th</sup> September 2021 the future of the River Lawn site was considered, and it was recommended to Cabinet that the proposed sale of the site not be progressed. This recommendation was subsequently agreed by Cabinet on 12<sup>th</sup> October 2021. At the meeting of the Board it was also discussed whether the site should be nominated by the Council for Village Green status, and it was agreed that a report on this issue, together with the future use of the site, be reported to this Advisory Board. A plan of the site is attached at **Annex 1**.

**1.2 Village Green Status**

1.2.1 Members may be aware that in March 2018 an application was made by the Barden Road Residents Association to Kent County Council to register the land as a Village Green.

1.2.2 A town or village green is an area of open space which by immemorial custom has been used by the inhabitants of the town, village or parish, for the purposes of playing lawful games and recreation. There is no legal distinction between town greens and village greens; the names merely refer to the geographical location of the green.

1.2.3 The core requirement common for applications to register new town and village greens under section 15 of the Commons Act 2006 is 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.

1.2.4 The application by the Barden Road Residents Association was rejected by KCC in January 2020 on the grounds on the basis that a ‘trigger event’ had occurred under the Commons Act 2006 as a result of land being identified for potential development in TMBC Core Strategy Policy CP23 and the Tonbridge Central Area Action Plan 2008. No further challenge was made to the decision of KCC by the Residents Association.

Voluntary registration as a village green

1.2.5 Under section 15(8) of the Commons Act 2006, the Borough Council (as the owner of the land) can apply voluntarily for the land to be registered as a town or village green. In such cases, the Council would not need to show that the land has been used by local inhabitants for lawful sports and pastimes for at least 20 years.

1.2.6 Any application by the Borough Council to voluntarily register the open space at River Lawn Road would be unaffected by the provisions relating to trigger and terminating events, which was the basis for the rejection of the previous application to the County Council by Keep River Lawn Green.

1.2.7 The implications of any such application are set out below.

1.2.8 Once registered, the land would be protected by long-standing legislation that effectively means that the land cannot be developed. For example, Section 12 of the Inclosure Act 1857 makes it a criminal offence to do any of the following

- undertake any act which interrupts the use or enjoyment of a green as a place of exercise and recreation
- wilfully cause injury or damage to any fence on a green;
- wilfully take any cattle or other animals onto a green without lawful authority;
- wilfully lay any manure, soil, ashes, rubbish or other material on a green; or
- undertake any act which causes injury to the green

1.2.9 Section 29 of the Commons Act 1876 deems it to be a public nuisance, and therefore an offence, to

- encroach on or inclose a green;
- erect any structure on, disturb, interfere with or occupy the soil of, a green unless this is done “with a view to the better enjoyment of such town or village green”.

1.2.10 The voluntary registration of the land as a village green would therefore strip the land of its development potential (set out in paragraph 1.7 below). It would also place a fetter on the Council’s ability to manage its asset in response to any change in circumstances in the future.

- 1.2.11 In respect of the rewilding proposals set out at paragraph 1.5 of this report, the above statutory provisions may mean that the Council could not seek to voluntarily register the land as a village green and undertake rewilding, as rewilding on a village green may be contrary to the restrictions contained in section 12 of the Inclosure Act (i.e. the rewilding would interrupt the use or enjoyment of the green as a place of exercise and recreation) and section 29 of the Commons Act (i.e. the rewilding would disturb, interfere with or occupy the soil of a green).
- 1.2.12 Defra have published non-statutory guidance on a number of issues relating to management and protection of greens, attached as **Annex 2**.

#### Charging for use of a village green

- 1.2.13 Inhabitants of the locality within which a green is situated have the right to use that green for lawful sports and pastimes. By definition any right can be exercised free of charge. Therefore, although the owner of a green may ask a local inhabitant to pay a donation for their use of a green, that person would be under no obligation to pay. This principle would apply equally to a request for a contribution to maintain a green as it would to a request for a payment to enter an organised event such as a fête or sports match which was being held on the green. A local inhabitant cannot be required to pay a fee to exercise a right.
- 1.2.14 Commercial activities can be carried out provided that they do not unduly interfere with the public's rights, it is therefore possible to have "dual use" greens – this could include a situation where tables and chairs are temporarily placed on a small area of the green. That temporary use might not "unduly interfere" with the rights of the public to use the remainder of the green to exercise their rights. For example in the recent Supreme Court case of TW Logistics v Essex County Council [2021], the court there considered that temporary storage of materials by TW did not unduly interfere with the public's rights over an area of hardstanding. The commercial use was not incompatible with the registration as a green and TW's continuing commercial activities would not constitute an offence under the Commons Act 1876.

#### Release from registration

- 1.2.15 In considering whether to pursue voluntary registration of the land, Members will no doubt wish to understand the ability of the Council to remove that registration in the future.
- 1.2.16 Under section 16 of the Commons Act 2006 an owner of a green may apply to the Secretary of State for land to be released from registration. If successful, such an application would result in the land no longer being subject to protection as a green.
- 1.2.17 If the application relates to the release of land with an area of more than 200 square metres, the application must include a proposal to register an alternative site as common land or a town or village green (*section 16(2), CA 2006*). The

alternative site would be registered in exchange for the release of the original land. If the release land is smaller than 200 square metres, a proposal for replacement land may be included, but there is no absolute requirement. However, it is the policy of the Secretary of State to avoid the net loss of town and village greens. Therefore the Secretary of State generally expects that land will be offered in exchange even where the release land is less than 200 square metres.

- 1.2.18 A proposed exchange under section 16 will be considered by the Secretary of State and will not be approved automatically. The Secretary of State will wish to take into account the impact of the exchange having regard (amongst other things) to the public interest.
- 1.2.19 When deciding whether to grant the release, the Secretary of State is required to consider:
- The interests of those who have rights over the land (particularly rights of common) and anyone who occupies the land.
  - The interests of the neighbourhood.
  - The public interest, including:
    - nature conservation;
    - conservation of the landscape;
    - the protection of public rights of access to any area of land; and
    - the protection of archaeological remains and features of historic interest
  - Any other relevant matters
  - If an application to release land with an area of up to 200 square metres does not include an exchange proposal, the extent to which the absence of a proposal is detrimental to the interests of the public, the neighbourhood and those with rights over the original land.
- 1.2.20 Members will therefore note that the release of village green status is difficult to achieve, and at the very least would require the release of an equivalent area of land for designation as a village green.

#### Local Green Space designation

- 1.2.21 An alternative to the Village Green process is to consider designating the area as a Local Green Space (LGS) through the preparation of the Local Plan.
- 1.2.22 The National Planning Policy Framework (NPPF) describes LGS as a designation for use in Local Plans or Neighbourhood Plans. These plans can identify on a map ('designate') green areas for special protection. LGS may be designated where those spaces are demonstrably special to the local community.
- 1.2.23 Designating any LGS will need to be consistent with local planning for sustainable development in the area. In particular, plans must identify sufficient land in

suitable locations to meet identified development needs and the LGS designation should not be used in a way that undermines this aim of plan making.

- 1.2.24 Designation would give the land protection consistent with that in respect of Green Belt, but otherwise there are no new restrictions or obligations on landowners.
- 1.2.25 Management of land designated as LGS will remain the responsibility of its owner. If the features that make a green area special and locally significant are to be conserved, how it will be managed in the future is likely to be an important consideration. Local communities can consider how, with the landowner's agreement, they might be able to get involved, perhaps in partnership with interested organisations that can provide advice or resources.
- 1.2.26 The proposed rewilding set out in paragraph 1.5 has the potential to enhance the status of the land for the purposes of designation as a local green space. In assessing whether a space is 'demonstrably special to a local community' under the National Planning Policy Framework, the Council (as Local Planning Authority) may take into account the richness of its wildlife.
- 1.2.27 Designation as LGS is at the discretion of the Local Planning Authority through the Local Plan process, whereas a Village Green Application is determined by the County Council. Changing Village Green status can be difficult to achieve as noted at para 1.2.20. LGS enjoys a similar status and protection against inappropriate development as Green Belt and similarly both designations can be revisited and amended when the Local Plan is reviewed. Therefore, while both Village Green status and LGS protect the open spaces to which they apply, the latter is a more flexible tool for the Council to consider.

### 1.3 Public Rights of Way

- 1.3.1 In the previous report to the Finance, Innovation and Property Advisory Board, Members were advised of the current situation in relation to the application to register paths crossing the land as public rights of way. For the assistance of Members the updated position is set out below.
- 1.3.2 On 24 November 2017 an application was made to Kent County Council ('KCC') to register certain paths which cross River Lawn as public rights of way ('PROW'). Currently the paths are tarmacked and are used both as footpath and as a cycle path which link with the River Walk along the side of the River Medway and onwards. A plan detailing the paths in question is attached as **Annex 3**.
- 1.3.3 The Borough Council wrote to KCC in August 2018 to register its objection to the proposed PROW. 2 legal points were raised at that time by way of objection:-
1. That River Lawn and all paths over it have been used by the public for many years with TMBC's consent and permission and under TMBC's control at all times and as such they have not been used as of right as required to support the application. The ways have not been enjoyed as of right and without

interruption for 20 years so the presumption that the paths are dedicated as a highway has not arisen.

2. In addition, the land and the footpaths have been closed on various occasions during the necessary twenty-year period. So even if any presumption had been raised, this would then have been broken and the necessary period of 20 years of continuous use is not demonstrated.
- 1.3.4 Notwithstanding the objections of the Borough Council at the time, KCC proceeded to modify the definitive map in November 2020 by the addition of 3 new Public Rights of Way:-
- a) from River Lawn Road to Buley's Weir Bridge
  - b) from Weir View Scout Hut to Lambert's Yard
  - c) from Lambert's Yard to the Buley's Weir Bridge
- 1.3.5 In December 2020 the Borough Council submitted a formal objection to the Order modifying the definitive map (attached as **Annex 4**). The submission of a formal objection means that KCC is not able to confirm the Order (unless the objection were to be withdrawn). The matter must instead be submitted to the Secretary of State for the Environment, Food and Rural Affairs for determination. It is expected that this would be heard by the Planning Inspectorate by way of local inquiry, as the representation has been made by another local authority. If this is the route the Inspectorate follow, then the Inspectorate advises that it will normally take up to 45 weeks from the start date for the decision to be issued. The start date may itself be up to 10 weeks after the date KCC submit all the necessary paperwork to the Inspectorate, so realistically we might potentially be looking at 55 weeks or more from submission of the paperwork to the Inspectorate before we get a decision.
- 1.3.6 On 26 August 2021 Kent County Council wrote to the Borough Council to confirm that the necessary paperwork had been submitted to the Inspectorate. They further indicated that the Inspectorate had a large backlog of cases and had advised the County Council that they may not hear anything else about this case until 2022. In all likelihood this will mean that a decision on the application may not be issued until 2023, possibly even later.
- 1.3.7 Members are asked to note that the inclusion of the proposed PROWs on the definitive map would not preclude a future application to extinguish or divert the public rights of way under the Highways Act 1980 or the Town & Country Planning Act 1990. All of these applications are subject to a number of statutory tests e.g. in the case of an application to extinguish a PROW under the Highways Act 1980, the determining authority would need to be satisfied that it was expedient to extinguish the PROW on the ground that it is not needed for public use. Consequently, there can be no guarantee that any such application(s) would be successful, nor how long they would take.

- 1.3.8 Members are asked to note that any decision as to whether to maintain the objection to the PROW Order is separate to the assessment of whether the Borough Council should seek to voluntarily register the land as a village green. These decisions are not co-dependent.

#### **1.4 Asset of Community Value**

- 1.4.1 The land is currently included on the Borough Council's register of Assets of Community Value (ACV), following an application in August 2017. The land will remain on the register until August 2022, although a further application could then be made to secure its inclusion for a further 5 year period.
- 1.4.2 When an owner of land or a building listed as an ACV wishes to dispose of it, the community is given the opportunity to develop a bid and raise capital to buy the land. This means that an owner of land listed as an ACV is restricted from disposing of their land until a certain period of time has passed (a "moratorium period"), during which only bids from community groups can be accepted (however there is ultimately no obligation to sell to any community group).

#### **1.5 Future Use**

- 1.5.1 At the aforementioned meeting of the Finance, Innovation & Property Advisory Board the option of rewilding the River Lawn area was highlighted within the report. The Council has recently undertaken a trial on the introduction of a reduced cutting frequency on an area of public open space in Darenth Avenue, Tonbridge. The trial saw the frequency of cuts at the site reduced from 15 (as is currently the frequency at River Lawn) down to two cuts, one in March and one in September, with the second being a cut and collect. The trial was undertaken in liaison with the Medway Valley Countryside Partnership (MVCP) who undertook wildlife monitoring of the site through the summer period and brought forward recommended actions for the trial area. The monitoring concluded that the change in cutting regime had a positive impact on species diversity and adopting and maintaining this cutting frequency and collection method would improve this position further in the future. The outcome of the trial was reported to the recent meeting of the Communities and Housing Advisory Board where Members recommended to Cabinet that the approach taken in the Darenth Avenue trial be applied to the future management of other sites that may be brought forward, including River Lawn. MVCP has undertaken a site visit to River Lawn and it has been confirmed the approach taken in the Darenth Avenue trial could be applied to River Lawn, commencing in March 2022. Whilst this will see a reduced cutting frequency at River Lawn to increase biodiversity, a 1m cut edge will be maintained along the path edges. In addition, there is the opportunity to plant a further tree in the quarter closest to the weir and this will replace a tree felled some years ago. It is proposed that the tree be a "Heavy Standard" to improve its immediate environmental credentials and resist any future vandalism.
- 1.5.2 The River Lawn site is included in the 'Tonbridge Riverside Route' that is currently being assessed by consultants to ensure a cohesive overall design approach is

taken to delivery of phases of the route, supported by s106 contributions, which for this area include a contribution from the development of the medical centre facility adjacent to River Lawn. The design work has commenced, with initial design concepts and high-level costs due before the end of 2021 for discussion with Members. Consultants are aware of the rewilding proposals and are currently considering how the aim of increasing biodiversity at this location can best be integrated with the aim of improving the riverside path including lighting.

## **1.6 Legal Implications**

1.6.1 As set out above.

## **1.7 Climate change impacts**

1.7.1 The proposed rewilding would have the potential to increase biodiversity in the area by significantly reducing the existing cutting frequency. This would contribute to the delivery of the targets set out in the Council's adopted Climate Change Strategy.

## **1.8 Financial and Value for Money Considerations**

1.8.1 Voluntary registration of the land as a village green would be likely to prevent future development and would therefore deprive the land of much of its value. It may also set a precedent in respect of other areas of open space within the Borough.

1.8.2 In accounting terms, the land at River Lawn is held in our accounts at a nil value. This is in accordance with RICS guidance, as the land is not subject to any planning permission.

1.8.3 A marketing appraisal of the site was undertaken by Hartnell Taylor Cook in July 2020, although this wasn't a red book (RICS) valuation. The appraisal was as follows:-

- the appraisal for Retirement Living and a café showed a positive Residual Land Price of approximately £1,825,000 exclusive of VAT.
- the appraisal for private residential, some Social & Affordable housing and a café showed a positive Residual Land Price of approximately £620,000 exclusive of VAT.

1.8.4 Members are asked to note that the appraisal is likely to have changed since July 2020, so the above figures are for guidance purposes only.

1.8.5 Voluntary registration would also mean that the Council would continue to be responsible for maintenance of the area, effectively in perpetuity.

1.8.6 In respect of the objection to the PROW Order, the Borough Council would incur further costs should it seek to defend the objection at a local inquiry.

## 1.9 Risk Assessment

1.9.1 The risks of pursuing voluntary registration of the land as a village green, and those relating to the application to register public rights of way are set out within the body of this report.

## 1.10 Equality Impact Assessment

1.10.1 The decisions recommended through this paper have a remote or low relevance to the substance of the Equality Act. There is no perceived impact on end users.

## 1.11 Policy Considerations

1.11.1 Asset Management

1.11.2 Climate change

## 1.12 Recommendations

1.12.1 It is **RECOMMENDED** to Cabinet that-

- The area of land at River Lawn Road Tonbridge (shown at **Annex 1**) be considered for designation in the Local Plan as a Local Green Space;
- The proposal to rewild the land in partnership with the Medway Valley Countryside Partnership as outlined in the report be progressed.

1.12.2 Members are asked to consider whether the Borough Council maintains its objections to the PROW Order.

The Director of Street Scene, Leisure & Technical Services confirms that the proposals contained in the recommendation(s), if approved, will fall within the Council's Budget and Policy Framework.

Background papers:

Nil

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