

IN THE MATTER OF THE COMMONS ACT 2006

AND IN THE MATTER OF THE COMMONS (REGISTRATION OF TOWN OR VILLAGE GREENS) (INTERIM ARRANGEMENTS) (ENGLAND) REGULATIONS 2007

AND IN THE MATTER OF LAND AT MOLESEY HURST EAST MOLESEY

**RESPONSE BY APPLICANT TO
STATEMENT OF OBJECTIONS TO THE APPLICATION ON BEHALF OF
ELMBRIDGE BOROUGH COUNCIL**

INTRODUCTION

1. This is the Statement of Objections within the meaning of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (the “2007 Regulations”) made by Elmbridge Borough Council (“EBC”) in relation to the application (the “Application”) made by Ms Jill Sanders (the “Applicant”) dated 7 October 2011 for the registration of the land known as Hurst Park, East Molesey, Surrey (“the Land”) as town or village green (“TVG”) under section 15 of the Commons Act 2006.
2. EBC is the registered proprietor of the Land and its title is registered under two separate title numbers. The freehold title is registered with title number SY702196, enclosed at Appendix 1 is a copy of the Land Registry’s Official Copy. The leasehold title is registered with title number SY422636 and enclosed at Appendix 2 is a copy of the Land Registry’s Official Copy. The freehold proprietor of the leasehold land is Surrey County Council and their title is registered with title number SY401232 and enclosed at Appendix 3 is a copy of the Land Registry’s Official Copy. Please see attached copy Lease dated 4 October 1972 and made between Surrey County Council and Esher Urban District Council who by devolution are now known as EBC. The Land is defined by the Applicant edged red on the plan attached to the Application. In this statement of objections, “the Land” is defined on the plan edged red attached to a copy of the Land Registry’s Official Copy Entry at Appendix 1 and Appendix 2.

SUMMARY OF EBC’S POSITION

3. The Applicant has failed to show that the land, or any part of it, should be registered under section 15(2) of the Commons Act 2006.

Response:

By virtue of the 135 evidence statements from long-term local users of Hurst Park, the case for registration of the land under the said section is clearly made.

End of response

4. EBC objects to the Land or any part of it being registered as a TVG. EBC’s grounds of objection are set out below.

REQUIREMENTS FOR THE REGISTRATION OF A TVG

5. The Application is made under section 15(2) of the Commons Act 2006 and it is a requirement of that section that the Applicant must show the following:-

- 5.1.1 That a significant number of the inhabitants of a qualifying area have indulged in recent activities on the entirety of the relevant site.
- 5.1.2 The activities in which the inhabitants have indulged may properly be described as lawful sports and pastimes.
- 5.1.3 The activities were such as at all times throughout the relevant 20 year period to bring home to the owners of the relevant site that a right to engage in lawful sports and pastimes “as of right” over the entire site was being asserted: R v Oxford County Council ex parte Sunningwell Parish Council [2001] AC335.
- 5.1.4 The activities have been indulged in “as of right”; that is without force; without stealth; and without permission: R (Beresford) v. Sunderland City Council [2003] UKHL 60, [20004] 1 AC 889
- 5.1.5 The activities have taken place over a period of not less than 20 years and continue to occur thereafter.

GROUND OF OBJECTION

Burden on Applicant to show user

6. EBC disagree that the land has been available for lawful sports and pastimes continuously through out the 20 year period. The following parties are granted permission to use parts of the site to hold events on an annual basis:
 - East Molesey Methodist Church, Sadlers Ride – 24th April 2011
 - Towpath Trundle, Sadlers Ride – 15th May 2011 (**please see attached statement**)
 - The Stroke Association, Sadlers Ride – 22nd May 2011 (**please see attached photography**)
 - Hurst Park Resident Association, Sadlers Ride – 1st July 2011
 - Molesey Amateur Regatta, Hurst Park – 16th & 17th July 2011 and 18th February 2012
 - R.A Bond, Sadlers Ride – 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd August 2011
 - Hampton School Boat Club, Sadlers Ride – 3rd December 2011 & 4th February 2012 (**please see attached photography**)
7. EBC has granted additional permission for occupation to other groups and organisations as and when approached, the above list is limited to annual users.
8. EBC confirm that the occupation of part of the Land by the various occupants illustrates that it has not been possible for the applicant to continuously use the land for a 20 year period.
9. Lord Bingham made it clear in BERSFORD that all ingredients of the definition should be met before land is registered . He agreed with Pill LJ that it is not trivial matter for a landowner to have land registered as a village green. The burden is clearly on the applicant to prove all elements of the definition. The test has been set out by the House of Lords in R (on the application of Lewis) c Redcar and Cleveland Borough Council [2010] 2 WLR 653 as whether: “the user was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see R (Beresford) v Sunderland City Council [2004] 1 AC 889, paras 6 and 77), the owner will be taken to have acquiesced in it -.” Here if the applicant can show that it was as of right and not by right they must still show that the user was of such an amount and in such a manner as should be regarded as the assertion of a public right. The correct way to look at that is from the point of view of the reasonable landowner. In particular the applicant will have to show that there were no gaps in the use.

Response:

It is not true to assert that use of Hurst Park for charitable and public events excludes other users; on the contrary, it attracts many local people on to Hurst Park to participate in and enjoy those activities. The park is shared by all members of the public who wish to access it, for a particular activity on the day and for general recreation and leisure at any time. The council, in its conditions for hirers, stipulates: "Access to the Land for the general public must not be restricted in any way....". It also states in the management plan that "Hurst Park has an extensive and growing events and activities programme which does much to involve the community...." This would indicate that the council would wish the land to be available continuously. No evidence has been offered in support of the council's assertion that "it has not been possible for the applicant to continuously use the land" by virtue of lettings for events. We are able to obtain statements from charities who use Hurst Park for their events confirming that there is co-existence, and one such statement, from the organiser for many years of the annual Towpath Trundle, is attached. This submission further includes photography of events and activities at Hurst Park. If any member of the public has been lawfully excluded from any particular area, we would be prepared to exclude that particular area from the scope of this application.

End of response

By Right not "As of Right"

10. It is clear from the title documents referred to above and attached to this objection that the Land was acquired by EBC for the purposes of public open space. EBC has listed the entire site on their Open Spaces Register and with reference to the leasehold land it is a covenant within the Lease that the Land is to be held as a public open space; please refer to clause 3(k) of the 99year Lease dated 4 October 1972.
11. Further the registered leasehold title, SY422636 contains a restriction in the Proprietorship Register that there is to be no disposition of the land unless made in accordance with the Physical Training and Recreational Act 1937.
12. In addition to the way in which the property was acquired and the future restrictions placed on the EBC it is clear from the practical operation that EBC have granted and maintained the Land for the use and benefit of the public.
13. I refer to the Byelaws governing the land, see attached at Appendix 5. The Byelaws are clear evidence that EBC has granted the public the legal right to enter and use the Land. Also attached in this Appendix is photographic evidence of a sign positioned on the Land, clearly illustrating to the public that the Land is governed by the Byelaws and confirming to the public and users of the Land that they have the right to enter onto the Land and when using the Land they must comply with the Byelaws.
14. EBC has by way of further protecting the Land and ensuring the continued enjoyment of the public on the Land passed legislation governing the Land in the form of Dog Control Orders. Please see attached at Appendix 6 a copy of the Dog Control Order dated 24 May 2011 together with the relevant plans and photographs of the signs placed on the Land.
15. EBC has put in place a Management Plan. It is evident from this plan that the management of the land has been carried out with the interests of the public at the fore. It is clear that EBC has permitted the public to use the Land and the

Management Plan is evidence that it has encouraged the public to do so. Management Plan attached at Appendix 7.

16. I further attach various photographs of various signs (Appendix 8) at various locations across the land, the welcoming signs and information signs would not have been placed on the land by EBC if it were not permitting the public the right to access to Land and use the land, such permission is sufficient evidence of a licence as referred to in *Regina v. City of Sunderland (Respondents) ex parte Beresford (FC)* (Appellant) in where Lord Bingham held "It is also plain that "as of right" does not require that the inhabitants should believe themselves to have a legal right: the House so held in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 354, 356. It is clear law, as summarised in the last-mentioned decision, that for prescription purposes under the Prescription Act 1832, the Rights of Way Act 1932 and the 1965 Act "as of right" means *nec vi, nec clam, nec precario*, that is, "not by force, nor stealth, nor the licence of the owner": see pp 350, 351, 353-354. In this case there was no question of force or stealth. So the only question is whether the inhabitants' user was by the licence of the owner." Similarly for the reasons set and evidence referred to above the use of the Land was by the licence of EBC.

Response:

Officers of the Council have informed me that Hurst Park is not held under the Open Spaces Act 1906 or similar. Interestingly - and this is worth comment in the context of local community involvement - the photograph of the sign explaining fishing and bird feeding areas is an aspect of the management of Hurst Park that was the result of work by local people. In the early 1990s records were carefully logged of any water birds found with injuries caused by fishing lines and tackle. Wounds and fatalities had become increasingly commonplace; local bird rescuers collected data that persuaded the authorities to separate anglers and bird feeders, with the result that incidents dropped by 60% in one season. A low level of incidents to birds continues to this day. There is a long term management plan for the various landscapes of the park, which will be supported by the Friends Group that emerged from the campaign to safeguard Hurst Park.

TVG Registration will permit continuation of the use of Hurst Park as it has always been used, as described in the 135 statements made by local users. The importance of protecting this right is illustrated in the council's transfer of public open space at Graburn Way out of local authority ownership; this loss of public open space for exclusive use by Molesey Boat Club provides a context for this application. We have precedents where two parcels of land were disposed of to the boat club despite strong local opposition; we have also had a proposal to lease five acres of land for at least 30 years to East Molesey Cricket Club, again, fiercely opposed by local people. Users of Hurst Park therefore find that the council can remove rights of access from the general public so that they no longer have any rights to the land. In the case of the boat club, public open space has been fenced off and there is an application to build over some of this former public open space. Local users of Hurst Park justifiably fear that their rights are not secure.

In summary, none of the formal documents states that the land was acquired under the Open Spaces legislation. Only such a formal statement would create a statutory trust for enjoyment of the land by the general

public. Bye-laws and a management plan are simply tools for the management of the land and, in the absence of a statutory trust, do not negate use being “as of right”.

End of response

GENERALLY

19. EBC reserves the right to add or to expand upon the above grounds of objection as may be appropriate.

CONCLUSIONS

20. For reasons set out in this Statement of Objections, it is submitted that the Registration Authority may deal with the matter summarily and without a local inquiry.

Response:

With the weight of evidence from the 135 statements, a local enquiry is unlikely to be required; the applicant has made a strong case proving local use of Hurst Park for recreation and leisure over a period of at least 20 years.

End of response

21. In the circumstances, it is submitted that:
- (i) The application in respect of the Land should be dismissed and the Registration Authority should not register those parts of the Land as a TVG. It is readily apparent from the surrounding circumstances that the Application in respect of the Land was brought in an endeavour to prevent the neighbouring Cricket Club having permitted access to use the Land as an outfield on which to play cricket. The registration Authority will appreciate that if the Land is registered as a Town and Village Green the cricket club will have the same rights as the rest of the public to use the land for lawful sports and as cricket is a lawful sport they will be able to use the land for this purpose.

Response

It is a mistake to suggest that the application is an endeavour to prevent the Cricket Club having permitted access to use the land. As stated above, New Green status does not preclude the playing of cricket; indeed, cricket is frequently played on town and village greens throughout the land; it is a traditional recreational/leisure activity entirely in keeping with this application. The objection to the cricket club proposal related to the wildlife-rich area. The TVG application has the objective of preventing any leasing off or other disposal of areas of public open space to any organisation, for in that event we find it is no longer public or open. In the case of the boat club these were small parcels of land, now lost to public access; in the case of the cricket club proposal it would be something in the region of five acres of land leased out to the club for a period of 30 years or more for year round use by the club and other sporting organisations. The registration as TVG will also counter any proposal to take forward plans to extract minerals from Hurst Meadows, listed Category 2 Potential Mineral Zone on Surrey County Council’s Minerals Plan.

End of response

- (ii) EBC suggests that by registering this vast parcel of land as a TVG the maintenance and management may be hindered significantly to the detriment of the public. EBC have taken special care and effort to ensure that any additions to

the land have been done so with the best interests of the public and that any future additions such as children's play equipment or suitable picnicking facilities may be prevented if the Land is registered as a TVG and whilst this it is impossible to predict the future needs of the neighbourhood it is entirely possible that in future further facilities may be required to maximise the site for the public's enjoyment.

Response

No criticism of Elmbridge BC's management of Hurst Park is implied in this application. Local people use this public open space and love it because it is very well managed. They wish only to protect it and their access to it. Local people, as a result of this campaign, have formed a Friends of Hurst Park group to work more closely with Elmbridge Council and to become more involved in the management of Hurst Park. This is warmly welcomed by the council's Parks Department. Low level fencing on village greens for children's playgrounds is acceptable. The general rule under s29 of the Commons Act 1876 is that fencing and enclosure are not permitted when this is done "otherwise than with a view to the better enjoyment of the green". Therefore facilities to assist in the enjoyment of recreation (eg children's playgrounds, cricket nets, etc.) are not in breach of the section. With additional protection there will be no objection to the continuing management of the land to the standard that it is now.

Commons Registration will safeguard the future of the park, which would be at risk if areas of land were leased off or otherwise disposed of to other organisations, as has occurred with public open land locally and which was proposed with a 30 year lease to the cricket club. Thirty years is a long time and the consequences of such tenure cannot be foreseen. Local planning authorities can sell-off the public land we collectively own and are only required to publicise these disposals by placing a small advertisement in a local newspaper. Local users of those public open spaces may not be informed and therefore in no position to object should they so wish. There is currently no centralised resource of freely available information regarding the disposal, sale and privatisation of public open space. Within the past ten years, local people have objected to the council about loss of public open space and their objections have been disregarded. We do not wish to be in a position where we foresee having to fight this same battle against loss of public open space again and again, with uncertain prospect of success taking into account the precedents; hence this application.

End of response

- (iii) If, contrary to the above submissions, it is considered that the Application cannot be dismissed outright, the Registration Authority is requested to hold a local inquiry so that the claimed exercise of lawful sports and pastimes can be tested.

Response

I trust, by virtue of the overwhelming evidence in the statements from local users and these subsequent rebuttals of the council's objections, no local inquiry will be necessary. There is no doubt that Hurst Park is at all times, 24/7, open to the public for the exercise of lawful recreation, leisure, sports and past-times, and has been for at least 20 years. It is greatly used and enjoyed. Public funds must be better spent.

The Commons Act 2006 states:

Registration of greens

(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.

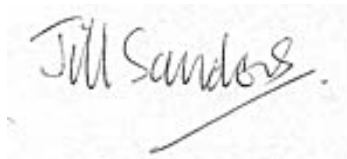
AND

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied—

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land “as of right”.

End of response

Signed

A handwritten signature in black ink that reads "Jill Sanders." The signature is written in a cursive style and is underlined with a single horizontal stroke.

.....
Jill Sanders
Applicant

Dated
18th March 2012

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