

REPORT

To: the COMMONS REGISTRATION AUTHORITY
SURREY COUNTY COUNCIL

APPLICATION 1864 - FOR THE REGISTRATION
of LAND as a TOWN or VILLAGE GREEN

LAND at MOLESEY HURST, EAST MOLESEY

1. BACKGROUND

On 31 October 2011, an application (the Application) was received by the Commons Registration Authority (CRA) from Jill Sanders (the Applicant) under section 15 (2) of the Commons Act 2006 that land at Molesey Hurst, East Molesey was a village green, (the Land). The Land is shown on maps submitted with the Application.

Section 15 (2) says:

- (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.

The onus is upon the Applicant to prove on the balance of probabilities, that all the requirements of section 15 (2) have been met before the CRA can register the Land as a village green.

Applicant:

*We would ask that Members take a far longer view of Moulsey Hurst and Meadows. Records show from 1807-09, when parliament enacted compulsory purchase orders for the purpose of building canals to improve navigation, that the close-mown area of Hurst Park was **historically land held in common**, used for informal recreation and events such as Hampton Races and for grazing of animals as lammas lands. The area downstream, now occupied by Hurst Meadows, was at that time divided into pasture and fields, and in ownership and occupation for agricultural purposes.*

The entire area between Hurst Road and the Thames was enclosed in 1890 for Hurst Park Racecourse - possibly illegally as it included land held in common. Maps and records show Hampton Ferry in operation throughout, and the towpath

kept open for navigation along the Surrey bank. For 70 years the racecourse operated until it closed in the 1960s and the Hurst Park Residential Estate was built. This came with a gain for local people with the return of some of the original riverside land of Moulsey Hurst. Since the 1960s, this area has been freely open to use for informal recreation and for local events - very much a return to the situation that existed in the early C19th and before (apart from the grazing rights). After a long interruption, people resumed the use of this land as of right.

The area of the Meadows became used when it fell into disuse - that is, people walked on it, crossed it to reach the river and had general access to it even though it was in poor condition. Nevertheless, there are statements in the bundle to say the land was enjoyed, with wild plants and birdsong. In time this land too was better cared for, partly as a result of more house-building on parts of it bringing a planning gain. The land was seeded with wild grasses and flowers and copses were planted for the improvement of the environment and the enjoyment of all who might wish to access it. We congratulate Elmbridge Council for this far-sighted decision, funded via the local authority and paid for by local people through their local taxes. Much of this access has always been informal, and the transformation of derelict ground to ecologically rich land occurred because the area was being increasingly accessed, as it was not used for anything else.

This history tells us that people have always used open areas at Hurst Park as of right, and some of it in this way since time immemorial.

Members should also be reminded of the value local people put on this land. Following a proposal to establish a cricket pitch and outfield on the wild meadows area, the council held a local consultation where 98% of people (more than 600) objected to loss of the meadows and of access to the land.

2. THE APPLICATION

The Application is supported by one hundred and thirty-three (133) statements from residents, although it is not clear if twenty-one (21) of those statements are from residents living within the purported locality, or neighbourhood within the locality. All the statements evidence use for lawful sports and pastimes of over twenty years.

Applicant:

This number of statements could have been far more, but the community decided to limit the period to collect them to a relatively short length of time. Hurst Park, taken as a whole, is an 80 acre area openly accessible to the public. It is next to the river and has diverse characteristics which include: areas suitable for picnicking and for informal family sports; areas that include beaches; the Thames Path; areas rich in wildlife that have been designated a Site of Nature Conservation Interest, making them of local importance and value for study; an

area of rare Thames-side meadow that is regularly flooded, making it of particular interest to those examining the ecology and environment; an area for children to play. A senior parks officer has said he regards Hurst Park as a Country Park - a good description. As a result of its several and specific attractions, Hurst Park is visited by a community somewhat wider than those living immediately close by. This especially applies with access to the Thames Path as a national trail and public right of way. This is indeed open to the public as of right. However, the statements are from residents who pay local council tax in Surrey and, mainly, Elmbridge.

I would trust that the Members have read the statements, which give a clear idea of how Hurst Park is used and valued, sometimes over three generations of a family.

3. THE OBJECTION

The Application was duly advertised on 8 December 2011 and objection (the Objection) was received from Elmbridge Borough Council (the Objector) on 27 January 2012.

One letter of support was received from a resident. The Countryside service of Surrey County Council and the Molesey Boat Club wrote that they had no objection.

The Objector's Objection is summarised as follows: -

3.1 The Land is owned in two parts – one part is owned freehold by the Objector whilst the other part is owned leasehold by the Objector. The freehold owner of the leasehold part is owned by Surrey County Council from whom no response, as landowner, has been received.

3.2 The Objector disagrees that the Land has been available for lawful sports and pastimes throughout the twenty year period as seven different parties have been granted permission to use parts of the Land to hold events on an annual basis.

Applicant:

*Events held on this land are open to all, and enjoyed by all, which is one of the main reasons for holding them here. I have lived overlooking Hurst Park since 1991 and at no time has anyone been barred from the park. However, there were a few years when the organisers of the Molesey Regatta unlawfully obstructed the towpath and a small area of ground for their tents and finish. They even charged people to enter an 'enclosure'. This was not rightfully permissible without due process; the practice ceased with our application, when it was recognised as unlawful to stop up the Thames Path, a public right of way, and land adjacent. There were always objections to this practice as it required users of the Thames Path to make a dog-leg away from the river. **As the practice was not lawful, it cannot be deemed to have been 'granted permission', and this was the sole event that briefly appropriated land from the public. The Molesey Regatta now***

makes a virtue of being open to all in the community to attend, and the towpath remains unobstructed throughout the two-day event.

3.3 The Objector acquired the freehold for the purposes of public open space. It has listed the Land on its Open Spaces Register with reference to the covenant in its Lease of the remainder of the Land that the leasehold part is also to be held as a public open space.

Applicant:

Land listed on the Open Spaces Register is not the same as land held under the Open Spaces Act. We know that two tranches of public land here have been transferred to the ownership of Molesey Boat Club, with no consultation other than that which normally takes place under the terms of a regular planning application for change of use (from public to private). There was no special consultation with local people over the loss of this land, as one would expect from a local authority holding land under the POS Act. Even so, there were many objections and heartfelt dismay to transferring the land to private ownership, but they did not influence the decision to do so. This tells us that Hurst Park is always at risk of becoming something other than public open space, and it is one of the main thrusts of our argument to ensure better protection for it.

We would also like to remind Members that a proposal by the cricket club in July 2011, supported at the time by senior council officers and locally elected members, would have privatised at least five acres of Hurst Park. It is important for Members to remember that had this proposal gone ahead - and it was only local people objecting that prevented it - the land would have been leased for a period of 40 years to the club as a pitch and outfield, with rights given to the club to exclude members of the public, perhaps erect buildings and otherwise appropriate the area for their own purposes. Moreover, this proposal was for five acres at the heart of the Thames meadow, with the greatest ecological and community value. People were alarmed and astonished that such a proposal could have the backing of local members and council officers after more than 20 years' open access to the land as of right.

3.4 There are Byelaws and Dog Control Orders which govern the use of the land. There are signs on the land and the Objector has a Management Plan dated December 2008. The Management Plan deals with the provision of benches, bins, lights and seats, recreational use (walking, angling, sailing, rowing, sports, cycling, dog walking, sitting) and access amongst other things.

Applicant:

Elmbridge has other commons and village greens that it manages very much the same way. The local community has an active interest in the arrangements through the Friends of Hurst Park and other local organisations. They would wish to see greater enforcement of some aspects, such as litter and dog excrement. Local people care about the management of Hurst Park and this interest will continue.

4. RESPONSE

The Applicant responded on 18 March 2012 to the grounds of the Objection. As a result of this, it became clear that the main point was whether or not the sports and pastimes on the Land had been indulged in “as of right” – without force, stealth or permission (Beresford, 2003).

The Applicant claimed that Hurst Park was not held under the Open Spaces Act 1906. Further, one of the signs and a long term management plan, for the various landscapes of the Park, came about as a result of work by local people.

However, the Applicant did not dispute the existence of the Objector’s Management Plan, nor the existence of Byelaws and Dog Control Orders.

The question became as to whether or not the inhabitants used the Land with the permission of the Objector, the Landowner, “by right” rather than as if they had the right, “as of right”.

5. EVIDENCE

On 6 June 2012, the Objector supplied documents relating to their freehold ownership of part of the Land (the Freehold Land).

As to the Freehold Land held by the Objector, it was transferred to the Objector by a developer pursuant to an agreement dated 23 September 1993 under s106 of the Town and Country Planning Act 1990 whereby the developer undertook to re-grade and lay out the Freehold Land as a public open space. The Objector undertook not to use or permit the Park, or any part of it to be used other than as an open space for the enjoyment of the public under the Open Spaces Act 1906.

On 5 July 2012, the Objector supplied copy correspondence relating to their leasehold ownership of part of the Land (the Leasehold Land).

As to the Leasehold Land held by the Objector, it is clear from correspondence from Surrey County Council in 1971 and from a minute of 8 September 1970 of the Open Spaces Committee of Esher Urban District Council (the Objector’s predecessor council) that the Leasehold Land was to be used solely as public open space. A Scheme of Management was required by Surrey County Council (the freehold owner) and further, Surrey County Council endeavoured to obtain loans from both the Ministry of Housing and Local Government and the Greater London Council in order to lay out the Leasehold Land as open space.

The Objector has also supplied photographs of Byelaws, Dog Control Orders and toilet facilities.

I find the evidence insurmountable that the Land was and is held by the Objector for the purposes of public recreation, whether or not it is formally registered under the Open Spaces legislation.

6. AS OF RIGHT

The Applicant argued that “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 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. (Applicant’s Response, 18 March 2012).

There is no case law to support the view taken by the Applicant.

On the contrary the case of *Barkas*, which was decided in the Supreme Court this summer, (*this judgment comes following our application*) held that where land has been lawfully allocated to the purpose of public recreation, the public can be said to have a right to go on to such land. Therefore, the inhabitants had express permission to go on to the Land.

7. RECOMMENDATION

I therefore find that the sports and pastimes on the Land have been indulged in with the permission of the Objector, “**by right**” and not “as of right”.

Applicant:

*As we understand this arcane argument, the back-stop for authorities opposing commons registration, it boils down to: **effectively, 'by right' means you can do it only with someone's permission**; 'as of right' means you can do it without needing anyone's permission. Local people have used this land for over 20 years as of right, and historically some of it was used more than 200 years ago in this way, but this right is always at risk as there is insufficient protection for the land - hence this application. Members must bear in mind that the council has disposed of areas of Hurst Park before, and has showed itself minded to dispose of much more (see points above) to the dismay of local people who have always believed they have access to the land as of right. Members must agree that regardless of 'by right' or 'as of right', these actions tell us we might expect to have no rights at all to use this land; they can be removed at any time by the local authority.*

The 133 park users' opinions, representing the view very much shared by all those who use and love the area, make it clear they wish to secure Hurst Park for everybody forever - and for this to be certain we require the area to be registered under the Commons Registration Act so we may enshrine our use as of right.

We would expect our locally elected members to consider carefully the importance of the points we make and to question these recommendations. If they so do with an open mind, it is clear that they should support the people's application for Commons Registration of Hurst Park so that we may secure this

lovely area for public to enjoy into the future, as we've had it in the past, as of right.

I have not taken a view on any of the other requirements of Section 15(2) of the Commons Act 2006, as I have not considered them in depth. However as, in my opinion the Application fails on one part of section 15(2), it fails completely.

I therefore recommend that the Applicant's Application be **REJECTED**. The Land at Molesey Hurst, East Molesey, the subject of the Application, is not available for registration as a green.

Joanna Mortimer
Principal Solicitor
Legal and Democratic Services
Surrey County Council
(Legal ref: JM/53736)

14 July 2014

*Jill Sanders, applicant
Garrick's Ait
2 September 2014*