Commons registration application rejected by Surrey County Council
A report of the meeting

Our application to have the whole of Hurst Park put on the Commons register to afford it the greatest protection possible against change and development was rejected at the Surrey's planning and regulatory committee on Tuesday 18 November.

We had interesting debate raised by some councillors, and our own division member, Cllr Ernest Mallett, spoke to the meeting about the level of support in the community for conserving for Hurst Park - information missing from the brief report before the meeting.

However, there were interesting points from the meeting. Surrey's solicitor laid out the legal aspects of the regulations. There was no question that the application we made was rightful - there was strong evidence in statements submitted by 134 local people, all of them users of the park for 20 years or more. The solicitor stressed the 'by right' and 'as of right' argument, and it is upon this that decisions on making new commons now seem to solely rest.

According to the solicitor, if the use has been 'as of right', this would mean a significant number of inhabitants of the neighbourhood acting as if they had the right to use the land for pastime and leisure. It is this that must be proved against the balance of probabilities. In our case, according to the solicitor's advice, this balance indicated everyone used the land 'by right', because it was dedicated to public recreation with byelaws, management, etc. This balance of probabilities changed with a legal decision relating to the Barkas case, given in July, and it was why the council held on to our application for so long - submitted in November 2011.

The fact that Hurst Park is **not** held under the Public Open Spaces Act of 1906 should have had a bearing on this arcane legal argument, but it was one of the omissions and we were not able to speak.

Cllr Mallett however was permitted three minutes to speak on our behalf and made the following points:

- Supporters were concerned that the extent of the local public view should be before the committee.
- Molesey Hurst (the traditional name for Hurst Park) had an important history, including the earliest mention as lammas land with common rights for grazing; in C18 it was a centre for cricket, prize fighting, archery, horse riding, duelling, and much else.
- It was unfenced and used by the public as common land for centuries. Later, illegally or otherwise, it was enclosed as a race course from the late 1800s until the 1960s. Suffragettes had burned down the Stand in the 1930s.
- Part of the land had been built on by Wates, some was left as open space. Later this was added to with further house building, making in all 70-80 acres.

Cllr Mallett continued: "It is clear that the area has a history of public use, going back several centuries. The Friends are concerned that the Thames Riverside may fall to development in the passage of time, which is why they submitted the application.

“We have really only the royal parks and Barnes Wetlands as open space now along the riverside into London. The land may also fall to gravel extraction - it can qualify, although it is on the list as a low priority for this use. It might have been used for navigation purposes in 1808, when it was shown as Land Held in Common.”

Cllr Mallett emphasised the extent of public support for our application. “This is shown only as modest support in the agenda,” he said. “There has been a massive interest in this locally and I think the notice referred to in the report was not for public comment. There are also further statements given.

“The Friends are concerned that local people’s views and use of their open space are fully recognised by the committee. They consider that this land was used as common land from the 1700s and more recently, and they consider the statements show this use of the land over the period of 20 years and more. They submit that commons registration should be granted for Molesey Hurst.”

To a question from the Chairman (Cllr Keith Taylor) on whether the solicitor had taken all the history into account, Mrs Mortimer replied that she ‘didn’t know that, but it is not relevant’. The council had looked at what was to be approved under Section 15 of the 2006 Commons Registration Act. Although there was a significant number of inhabitants, and the evidence showed use of the land for leisure and pastimes over the past 20 years, it was not proven that inhabitants had been doing it as of right.

One councillor admitted he had done more reading on this application than on other items on the agenda because it was very interesting. He asked how land that was owned publically, as in this case, affected the position. Cllr Ian Beardsmore pointed out that the land in the Barkas case had been land given by the developer. This was materially different from land at Molesey Hurst which was not land held by a developer but was land that had a certain status in history. Had it ever been sold and sold back, or subsequently declared by the local authority as used for recreation? He admitted he was confused.

“This Barkas ruling seems to be heralded as a turning point but perhaps only under specific circumstances,” Cllr Beardsmore continued.

Mrs Mortimer explained that the Barkas ruling had followed on from many other cases so it was not a new legal point. The land was held by the borough council under the Public Open Spaces Act 1906.

At this point, if the Friends had been allowed to have a speaker of our own, we would have been able to tell the meeting that the land is owned by Surrey, managed by Elmbridge and, according to the Elmbridge solicitor who was directly asked the question, it is ***not*** *held under the Public Open Spaces Act.*

Cllr Beardsmore criticised the report to the meeting as sparse for so complex an issue; he had received a more thorough report by email (from the Friends).

“It strikes me, looking at this and more generally, that if you have common land as of right and the local authority acquires it under any sort of statute, by implication you seem to extinguish the access and replace it with ‘by right’ simply with any bye law or anything else. I can’t find any evidence for this, but it is an implication. It strikes me as a dangerous route if

this is the case. In terms of Barkas, it seems to be irrelevant and a red herring, as of right and by right, because the difference here is that residents did not obtain a right over the piece of land. It is different in that residents have had as of right over this for literally centuries. Elmbridge effectively extinguished existing rights . Were the common rights 'as of right' extinguished when the land became Elmbridge's? This case sits with us; we have to make a decision. I can't see anything that says clearly 'as of right' did not exist on some or all of the land previously, so I can't see anything that says in black and white that those rights have been extinguished.

"Can we prove Elmbridge extinguishing existing rights, otherwise I think we have to grant this case as there is no evidence?"

Mrs Mortimer replied that the application was being made under the 2006 Act and what the council was looking at was the last 20 years immediately preceding the application, nothing before that was relevant to the committee. During that time it had been held by the borough council under the Open Spaces Act of 1906. The report was succinct.

The county's Commons Registration Officer, Helen Gilbert, added that to get to this point, there were process that could have included a public inquiry, but these were costly to residents and so the matter had been dealt with by written representations.

Councillors asked whether, therefore, they could only focus on the 20 year period. Mrs Mortimer explained that every application was different. Officers had always known this case was contentious, but that she was confident in the advice she had given members. She agreed that land held under the Public Open Spaces Act was easier to remove from public recreation use than if it were held under the Commons Register, where it would be forever. As Public Open Space it was not so secure, but this affected the right to use the land 'by right'.

Cllr Beardsmore pointed out that there were other differences - the Barkas ruling had related to the 1985 Housing Act which referred to recreation ground as part of a housing development; the Open Spaces Act referred to something different. It was not so simple. To this, Ms Mortimer repeated that the Barkas case had followed on from a series of cases and the council had waited on this Supreme Court ruling before bringing the matter to the committee. The facts were not exactly the same, they never were, and under the Barkas case it was the 1985 Housing Act, whereas this was the Open Spaces Act. The key point was that users had the right and were not accessing the land as if they had a right.

Several councillors continued to express doubts, saying it seemed they were being told they had no option but to reject the application and accept the officers' advice.

The matter was put to the vote and in a show of hands the majority chose to reject the application, with four against.