

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.

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.

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.
- 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.
- 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.

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, 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”.

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