COMMONS REGISTRATION ACT 1965

Reference No. 259/D/19-20

In the Matter of Hogsmill Open Space,
Kingston upon Thames
Greater London.

DECISION

These disputes relate to the registration at Entry No. 1 in the Land section of Register Unit No. VG 63 in the Register of Town or Village Greens maintained by the Greater London Council and are occasioned by Objection No. 88 made by British Railways Southern Region and noted in the Register on 25 May 1972 and Objection No. 97 made by the Town Clerk of the Royal Borough of Kingston upon Thames and noted in the Register on 25 July 1972.

I held a hearing for the purpose of inquiring into the dispute at Watergate House, London WC2 on 13 and 14 July 1976. The hearing was attended by Mr D. W. G. Barnett, the applicant for the registration, and by Mr Terence Etherton, of Counsel, on behalf of the Council of the Royal Borough of Kingston upon Thames and Mr Keith Topley, of Counsel, on behalf of the British Railways Board.

The land comprised in the Register Unit is an area of open land on either side of the Hogsmill River. The part to the west of the river was in the former Urban District of Surbiton and the part to the east was in the former Urban District of the Maldens and Coombe. Both Councils acquired parts of the land from several previous owners from 1934 onwards, all of which parts became vested in the Council of the Royal Borough by the operation of the London Government Act 1963. A small part was purchased by the Southern Railway Company in 1935 and has become vested in the British Railways Board by a chain of enactments. Parts of the railway land were later sold to the former Surbiton Corporation and the County Council.

Since their acquisition by the former Urban District Councils parts of the land in question have been used for varying periods as allotments, and at the present time some are still so used. Another part is at present used by the Surbiton District Scouts' Association under a lease granted in 1968. Mr Barnett stated that he did not wish to support the registration in so far as it related to the parts at present used for allotments. The remainder has been left open. The former Urban District Council and the present Royal Borough Council have kept the land in order, mowing it once a week and cleaning out the river regularly, and have made byelaws for its regulation under sections 12 and 15 of the Open Spaces Act 1906.

When opening his case, Mr Barnett stated that he did not contend that the land in question fell within the first limb of the definition of "town or village green" in section 22(1) of the Commons Registration Act 1965, but that he hoped to prove that it was land on which the inhabitants of a locality had a customary right to indulge in lawful sports and pastimes or on which the inhabitants of such locality had indulged in such sports and pastimes as of right for not less than twenty years.

Since a customary right must have existed from before the time of legal memory, i.e. the year 1189, the known history of the land shows that it cannot be subject to any such rights. Its eastern and western boundaries were not defined until the estates of which it formed parts were laid out for development in the 1930's and the area

had no separate identity until the Royal Borough was constituted under the Act of 1963. Mr Barnett's registration must, therefore, stand or fall by a consideration of the question whether the inhabitants of a locality have indulged in lawful sports and pastimes on the land as of right for not less than twenty years.

The land the subject of the reference, together with the land to the east and the west, has been extensively used for sports and pastimes, including football, cricket, and rounders, since the early part of the present century and possibly earlier. When the land to the east and the west was developed by the erection of houses in the late 1930's the area available for these activities was reduced, and for many years they have been confined within the boundaries created by the development.

Part of the eastern boundary consists of the rear fences of the gardens of the houses fronting onto Manor Drive North. Mr Barnett called a number of witnesses now or formerly resident in Manor Drive North, who stated that they and their children had used the land in question for sports and pastimes. It is not surprising that the inhabitants of Manor Drive North have made considerable use of the land, for when the building plots on the western side of that road were laid out space for an entrance to the land at the rear was left between Nos. 46 and 48 and the site of the entrance was conveyed by the developers, Gleeson Development Company Ltd, to the Urban District Council of The Maldens and Coombe on 25 September 1934.

Most of Mr Barnett's witnesses spoke of the position since the land to the east and the west was developed, but two of them, Mrs M. C. Andrews and Mr F. E. J. Swindon, remembered the area before the surrounding development took place. Mrs Andrews's recollection going back to 1928 and Mr Swindon's to 1916. The residents in Manor Drive North have continued to use the land at the rear of their houses in the same way in which it was used before their houses were built, but the building of houses so near to the land has no doubt intensified the use made of it.

Mr Barnett contended that the relevant locality to be considered is that consisting of the former Urban Districts of Surbiton and The Maldens and Coombe. In my view, there is no evidence which links the use of this land with the inhabitants of that locality. The evidence of recent user is linked to a much more limited locality, namely Manor Drive North. Mrs Andrews said that the people who used the land were from the Malden area, but when Mr Swindon was a child he lived in Wimbledon and travelled from there to play on the undeveloped land in this neighbourhood. The impression left on my mind by the evidence is that anybody who wished to do so has used this land for sports and pastimes, those living in the neighbourhood naturally being in the majority. That neighbourhood is, however, incapable of identification with any defined locality, such as a manor or parish or urban district.

None of the witnesses called by Mr Barnett claimed to have any special right to use this land, and Mr Swindon stated that when he came to this land as a child he had just the same right as any other person and that he did not claim any special right because he now lives in New Malden. The fact that the use of parts of the land for allotments and by the Scouts did not give way to any complaint from anybody that his rights were thereby infringed indicates that there were no rights to be infringed.

In my view, the use of this land disclosed by the evidence has been by members of the public and it is nothing to the point that some of them have lived in houses in the vicinity. So far as the use of this land is concerned, there is nothing in the evidence to differentiate them from members of the general public.

For these reasons I refuse to confirm the registration.

Both Mr Etherton and Mr Topley asked that, if their clients were successful, I should order Mr Barnett to pay their costs. Mr Barnett has no proprietary interest in this matter. In applying for the registration, he regarded himself as safeguarding the interests of his neighbours, who encouraged him to do so. He conducted his case with propriety and moderation and did nothing to increase the costs incurred by the Objectors. I have therefore come to the conclusion that this is not a case for an award of costs.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of the decision is sent to him, require me to state a case for the decision of the High Court.

Dated this 30th day of July 1976.

Chief Commons Commissioner