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COMMONS REGISTRATION ACT 1965

Reference No. 216/D/43

In the Matter of Martins Green, Brickendon Liberty, Hertfordshire

DECISION

This dispute relates to the registration at Entry No. 1 in the Land Section of Register Unit No. VG 43 in the Register of Town or Village Greens maintained by the Hertfordshire County Council and is occasioned by the conflicting registration at Entry No. 1 in the Land Section of Register Unit No. CL 87 in the Register of Common Land maintained by the Council.

I held a hearing for the purpose of inquiring into the dispute at Hertford on 26 October 1982, when I decided to refuse to confirm the conflicting registration. This, however, did not concluded the matter, since it was still my duty to inquire into the matter of the registration the subject of this reference, and I therefore reopened the hearing at Hertford on 6 May 1983, when the Hertfordshire County Council was represented by Mr L F Dowler, Solicitor.

The whole of the land comprised in the Register Unit is one of the several strips of land and common or waste land described in the Second Schedule to the Broxborne and Hoddesdon Open Spaces and Recreation Grounds Act 1890 (53 & 54 Vict.,c. xlvii) and coloured green on the map referred to in Section 2 of the Act. It is provided by Section 14 of the Act that such land shall at all times be free and open to the public to the same extent as if the same formed portions of a public highway subject to certain rights of Horace James Smith Bosanquet and Cecilia Jane Wentworth Smith Bosanquet or their successors in title and subject also to any existing rights of way and other rights or easements of any other person.

Mr Dowler submitted that this land fell within the first limb of the definition of "town or village green" in Section 22(1) of the Commons Registration Act 1965 or in the alternative within the third limb of that definition.

To fall within the first limb of the definition land must have been allotted by or under an Act for the exercise or recreation of the inhabitants of a locality. If one compares the wording of this limb of the definition with that of Section 14 of the local Act, one finds that there is no allotment of the green land, that there is no mention of exercise or recreation, and that there is no mention of the inhabitants of any locality. Instead the beneficiaries are the public and the land is to be free and open to the public to the same extent as if it formed portions of a public highway. While it is true that walking is a form of exercise and some people regard it as a recreation, any element of exercise or recreation is merely incidental to the use of a highway for the purposes of legitimate travel.

However, Mr Dowler argued that it would not be right to consider Section 14 of the local Act in isolation and that light is thrown on its meaning by the preamble to the Act. The part of the preamble on which Mr Dowler relied recites that certain questions had arisen as to rights of way through the land coloured red, yellow, green and blue on the map referred to in Section 2 and Mr and Mrs Smith Bosanquet to avoid litigation and in the public interest had offered to promote a Bill in Parliament to provide open spaces and recreation grounds for the parishes of Broxborne and Hoddesdon and to dedicate to the public two new

footways and to declare and define the rights of way through the land and to settle any doubts which might have arisen in reference thereto. This, so Mr Dowler argued, shows that the purpose of the Act was to allot land for the exercise or recreation of the inhabitants of the locality composed of the parishes of Broxborne and Hoddesdon.

If one compares the recital upon which Mr Dowler relied with the enacting part of the Act, one finds that in Sections 7 and 8 provision is made for the vesting in trustees appointed under the Act of the land coloured yellow on the map for its use for all time by the inhabitants of the parishes of Broxborne and Hoddesdon and by such other persons as the trustees may from time to time think fit as open spaces and recreation grounds. Effect is also given to the other parts of the recital by Section 20, which provides for the dedication to the public of two new footways, and by Section 21, which declares and defines certain public rights of way. There is, however, nothing in Section 14 which can be linked with anything in this recital. On the other hand, there is another recital stating that Mr and Mrs Smith Bosanquet were further desirous in the public interest to surrender such rights as they might have to enclose the strips of land and common or waste land described in the Second Schedule to the Act. This is the green land which is the subject of Section 14.

In my view it would not be right to construe Section 14 by reference to the recital on which Mr Dowler relied. In so far as there may be any ambiguity in the wording of Section 14, that ambiguity should be resolved by reference to the second recital, to which effect is given by that Section. The provisions of the Act which give effect to the words relating to open spaces and recreation grounds on which Mr Dowler relied are Sections 7 and 8. The difference between the land the subject of Sections 7 and 8 on the one hand and the land the subject of Section 14 on the other is emphasised by Section 17, which empowers the trustees to make byelaws (1) for the regulation of the use and enjoyment of the lands vested in them under the Act and for the maintenance and protection thereof as open spaces and recreation grounds, and (2) for the purpose of enabling them to carry into execution the powers and duties conferred and imposed on them by the Act with reference to the green lands. I have therefore come to the conclusion that even if there were any ambiguity in the wording of Section 14, no guidance to its construction can be found in the recital on which Mr Dowler relied. In my view Section 14 confers no right to use the green land for the purposes of exercise or recreation on the inhabitants of Broxborne and Hoddesdon. Their rights in the green land are those which they have as members of the public as if it formed portions of a public highway.

Mr Dowler advanced an alternative argument that the green land falls within the third limb of the definition of "town or village green" in Section 22(1) of the Act of 1965 as being land on which the inhabitants of the locality have indulged in lawful sports and pastimes as of right for not less than twenty years.

Unlike Mr Dowler's first argument, this argument depends upon facts, and in order to support it he relied on the evidence of Mr P A Hickman, one of the trustees appointed under the Act of 1890, who is now aged 66 and has known the green land all his life. He said that the land has been used by members of the public for picnics. Before the last war cricket and other ball games were played there, but ways have changed, and now people leave their cars on the green land and go for walks. There is also some use of the land by horse riders. There has never been any objection to this by the landowners. While some of the people come

from Broxborne and Hoddesdon, a number are day trippers from London.

I am not satisfied on this evidence that this land falls within the third limb of the definition of "town or village green". Mr Hickman very fairly described the people who came onto the land as "the public", and it is impossible to say that inhabitants of the locality who come there are exercising any rights peculiar to themselves. Furthermore, with the exception of the cricket and other ball games, which ceased more than twenty years ago, the use which the public has made of the land cannot properly be described as indulging in sports and pastimes. The activities which Mr Hickman described can be regarded as being consistent with the throwing open of the land to the public to the same extent as if it formed portions of a public highway under Section 14 of the Act of 1890. While it is true that the right of the public in highways is to use them for legitimate travel, as Lord Esher M.R. said in Harrison v. Duke of Rutland, (1893) 1Q.B.142, at p. 146, "things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such". Thus, a person who stops his car for a rest for a reasonable time does not become a trespasser on the highway: see Randall v. Tarrant, (1955) 1W.L.R. 225. The matters dealt with by Mr Hickman in his evidence are in no way inconsistent with the use of the green land authorised by Section 14 of the Act of 1890.

For these reasons I am not satisfied that the land comprised in the Register Unit falls within the definition of "town or village green" in Section 22(1) of the Commons Registration Act 1965, and I therefore refuse to confirm the registration.

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 16th day of May 1983

Chief Commons Commissioner