



MITCHAM GREENS PROTECTION

Reviewing the legality of Merton Council's damage to Cranmer Green & Three Kings Piece

February 2017

Summary

Merton Council contractors undertook major engineering operations on the registered Town Greens of Three Kings Piece and Cranmer Green during June 2016. These included extensive tarmacking, erection of bus stops, creation of road crossings and the introduction of kerbs. This replaced the open grassland and green road verges that are a characteristic feature of the area.

Mitcham Cricket Green Community & Heritage raised concerns with Merton Council about its actions on 10 June 2016.

Merton Council has justified its actions on three main grounds:

1. The Council has powers to undertake the works under the Highways Act 1980
2. The works are necessary to meet obligations under the Equality Act 2010 to make the bus stops accessible
3. The registered town greens in Merton are not regulated by the various Commons Acts as these Acts apply to metropolitan commons rather than town greens.

Our summary response to each of these three grounds is below:

1. The general powers granted by the Highways Act 1980 do not override any constraints on the use of the powers under other legislation. There is a well-established legal principle that where there is a conflict between two statutory regimes, a general provision does not derogate from a special one (*generalia specialibus non derogant*).
2. The importance of the Equality Act 2010 is not in question but the requirements do not mean there is a general override of the requirements of other legislation protecting town greens and metropolitan commons.
3. We believe Mitcham's greens are protected - the *Trap Grounds* case clearly decided that s.12 of Inclosure Act 1857 and s.29 of Commons Act 1876 apply to all registered town or village greens.

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Additionally, we have confirmed that the power of appropriation for road widening under s.6(2) of the Mitcham Urban District Council Act 1923 has been repealed and that no other powers exist for the local authority to act without the consent of the Secretary of State.

It is, therefore, our understanding that Cranmer Green and Three Kings Piece are protected by s.12, Inclosure Act 1857 and s.29, Commons Act 1876. These create an offence for any works that have been undertaken without authorisation.

s.12 of the Inclosure Act 1857 states:

"If any person wilfully cause any injury or damage to any fence of any such town or village green ... wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes or rubbish or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green ... or to the interruption of the use or enjoyment thereof as a place for exercise and recreation ..."

that person shall be guilty of an offence

s.29 of the Commons Act 1876 states:

"an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance ..."

We have been provided with advice by the Open Spaces Society in reaching this conclusion.

We therefore ask Merton Council to review the legal position relating to its actions on Three Kings Piece and Cranmer Green and to confirm (a) whether it has received any authorisation for the works and (b) what authorisation it would require for any future actions involving the loss or development of any part of the registered town greens in Mitcham. If no authorisation has been received then we ask it to either seek such authorisation as is needed or to undo the works and return both Cranmer Green and Three Kings Piece to their former condition.

Background

Three Kings Piece and Cranmer Green are located in Mitcham Cricket Green Conservation Area and are two of the five registered Town Greens in Mitcham. They were both subject to major works by Merton Council contractors involving tarmacking of green space, replacement of soft edges with kerbs and the construction of bus stops in June 2016 (images below). These actions prompted widespread concern about both their immediate impact and the future protection of the greens.

As a result we have reviewed the legal position with regard to the Mitcham Greens and received extensive expert advice from the Open Spaces Society. Founded in 1865 The Open Spaces Society is the acknowledged national expert on common land and town and village greens. The legal framework is complex and we have summarised our understanding of the situation below.

As well as addressing the legality of these works in particular, our intention is to ensure there is a shared understanding of the legal protection afforded Mitcham's greens in general and of the necessary procedures which should be followed in relation to any future works by the local authority or any other party.

Merton Council view

The Head of futureMerton states in email correspondence (15 July 2016) that:

"The council, in its role as the Highway & Traffic Authority has the right to undertake any works on the public highway and any land that falls under its jurisdiction. Such highway improvement works are not subject to any mandatory consultation. Ward Councillors were consulted, with no objections received. Given that the bus stop works do not require a Traffic Management Order, a statutory consultation is not required. We did publish public notices for the zebra crossing on Commonside West at Three Kings Piece."

In subsequent email correspondence (4 November 2016) we were informed that Merton Council believes it acted legitimately under powers granted by the Highways Act 1980:

"Under the Highway Act 1980 Part V Improvement of Highways section 66 Footways and guard-rails etc. for publicly maintainable highways, part (1) It is the duty of a highway authority to provide in or by the side of a highway maintainable at the public expense by them which consists of or comprises a made-up carriageway, a proper and sufficient footway as part of the highway in any case where they consider the provision of a footway as necessary or desirable for the safety or accommodation of pedestrians; and they may light any footway provided by them under this subsection"

Merton Council also believes the changes are consistent with its responsibilities under the Equality Act 2010 and Department for Transport guidance that:

"councils are required to "take reasonable steps to change practices, policies and procedures which make it impossible or unreasonably difficult for disabled people to use a service" and that "These requirements apply to facilities and services in the pedestrian environment".

Further Merton Council asserts:

"The registered town greens in Merton are not regulated by the various Commons Acts as these acts apply to metropolitan commons rather than town greens.

Therefore I'm advised that the following commons acts are not relevant.

- *Metropolitan Commons Act 1866-1898*
- *Commons Acts 1876, 1899, 2006*
- *Inclosure Act 1857"*

and that:

"....the footpaths are not considered to adversely affect the use of the greens for their intended use (open space and recreation) as they remain open spaces and as mentioned previously, there are other local precedents."

A [Freedom of Information request](#) has confirmed that ward councillors were informed of the proposals on 1 April rather than consulted and offered no response.

Enquiries through Public Questions to Merton Council Cabinet Members as to whether the Mitcham Greens are controlled by a Scheme of Regulation under the Metropolitan Commons Act 1886-1898 or Commons Act 1899 have confirmed that the Council *"does not hold this information"*.

Legal background

Mitcham's Greens were originally established under the Scheme made under the Metropolitan Commons Acts 1866 to 1878 and confirmed by the Metropolitan Commons (Mitcham) Supplemental Act 1891 which placed their regulation and management in the hands of Mitcham Common's conservators. The Conservators are enjoined not to do anything which would "*vary or alter the natural features or aspect of the Commons, or interfere with free access to every part thereof*". They have certain powers to drain, raise, level or fence the Common for the purposes of the Metropolitan Commons Act 1866 but not to lay roads or paths.

These responsibilities and powers were transferred from the Conservators to the local authority by s.5 of the Mitcham Urban District Council Act 1923. As well as transferring powers this provision deemed the town greens to be "*public pleasure grounds*" under the Public Health Acts and conferred powers to appropriate parts of the Mitcham Greens for road widening.

The provisions for appropriation of the Mitcham Greens are set out in Section 6 of the 1923 Act:

Appropriation of Mitcham Greens.

6.—(1) Subject to the provisions of subsection (2) of this section the Mitcham Greens (as vested in the Council under the section of this Act whereof the marginal note is "Vesting of Mitcham Greens in Council") shall be deemed to be public pleasure grounds within the meaning of the Public Health Acts and the provisions of those Acts and of this Act shall apply accordingly.

(2) The Council may by resolution appropriate or dedicate any part or parts of the Mitcham Greens (as so vested in the Council as aforesaid) for the purpose of the construction of new streets or highways or the widening or improvement of existing streets or highways.

(3) Provided that the Council shall at all times preserve the turf shrubs trees plants and grass on the lands numbered on the deposited plans 4 10 14 16 and 17 in the parish and urban district of Mitcham (which lands are known respectively as Cranmer Green and the Lower or Cricket Green) and may on such lands plant trees and shrubs for shelter or ornamental purposes but the Council shall not at any time on such lands do any act or thing that would or might alter the nature surface or aspect of such lands or except as in this section hereinafter provided place build or erect any building or structure thereon.

(4) Notwithstanding anything in the last preceding subsection provided the Council may upon the lands coloured green on the signed plan erect place or build public lavatories and conveniences.

Much of the 1923 Act, including ss.5 and 6, was repealed by Pt.I of Sch.4 to the Local Government - The Local Law (South West London Boroughs) Order 1965 (SI 1965/532) but this does not reverse certain things done by the 1923 Act: this is the effect of [s.16](#) of the Interpretation Act 1978. So the repeal of s.5 of the 1923 Act does not abrogate the vesting of the Mitcham Greens in the then council, or the abolition of the powers of management of the Conservators over the Mitcham Greens, and the repeal of s.6. (including the power for the local council to appropriate land for highways purposes) does not affect s.6(1), which deems the Mitcham greens to be '*public pleasure grounds*' and applies the Public Health Acts. This interpretation is confirmed by the provisions in art.44(1)(I) of, and Pt.II of Sch.5 to, the London Government Order 1965 (SI [1965/654](#)),

to amend [Sch.5](#) to the London Authorities (Property etc.) Order 1964 (SI [1964/1464](#)) by the inclusion of reference to the 1923 Act. The effect of those provisions is to confirm that Mitcham Greens are held by the council under s.164 of the Public Health Act 1875. The key provisions were continued under Section 87 of the London Government Act 1963. They were not affected by the Local Government Act 1972.

By way of background it is important to understand that Sch.5 to the 1964 Order updates the various powers under which recreational grounds were held in Victorian legislation (much of which pre-dated national legislation conferring powers for similar purposes). These recreational grounds were often, pre-1964, still being held under local Act powers, which may have imposed awkward or outdated constraints, particularly as the authorities to which these Acts referred were being abolished by London government reform. The effect of arts.32 and 33 of, and Sch.5 to, the 1964 Order, was to appropriate the land so as to be held under national legislation. When the 1964 Order was made, it did not include Mitcham Greens or the 1923 Act, but this was addressed by Pt.II of Sch.5 to the 1965 London Order which extended Sch.5 to the 1964 Order to now include reference to the 1923 Act and appropriate the Mitcham Greens to be held by the London Borough of Merton under [s.164](#) of the Public Health Act 1875. This remains extant.

Since then, the Mitcham Greens have been registered as town or village greens under the Commons Registration Act 1965. This confers significant protection as once registered the Victorian protective statutes (s.12 of Inclosure Act 1857 and s.29 of Commons Act 1876) apply to all greens (see [House of Lords judgement on Trap Grounds case](#)). These protections are consistent with the continued powers in the 1923 Act (remembering that s.6 conferring powers for the local council to appropriate land for highways purposes was repealed by the Local Government - The Local Law (South West London Boroughs) Order 1965 and the original powers of the Conservators did not include laying roads or paths).

We also note the Metropolitan Commons Acts 1866 to 1898 extend to "*land subject at the passing of this Act to any right of common, and any land subject to be inclosed under the provisions of the Inclosure Act 1845*" within the former metropolitan area (see ss.3 and 4). This means that those Acts apply to the Mitcham Greens, because they were very likely subject to rights of common in 1866 and they are certainly within the metropolitan area. Under s.5, the Secretary of State may not "*entertain an application for the inclosure of a metropolitan common which is under the control and management of a London borough council, or any part thereof*". So, unless the council has existing authority to inclose the Merton greens, it cannot apply to the Secretary of State for authority under s.38 of the Commons Act 2006, because the Secretary of State's power is excluded by s.5 of the 1866 Act. Inclosure almost certainly includes paving over the green.

Merton Council has also referred to various other enactments which it considers 'support' its action — the Greater London Parks and Open Spaces Order 1967, the Surrey Act 1958, the Surrey Act 1985, and the London Local Authority Act 1990 "*which enables the provisions of the Surrey Act 1985 to apply to the London Authorities that were once in Surrey*". We note Sch.4 to the [1990 Act](#) revived s.33 of the 1958 Act in its application to metropolitan commons in Merton and this allows works only where they are consented by the Secretary of State. We are unaware of any such consent being provided. Thus Merton Council has behaved inconsistently. It has specific powers to inclose common land for road schemes, it has inclosed common land for a "road scheme", it has not availed itself of the powers, and now it says that it doesn't need to employ the powers.

We therefore conclude that the works which have been undertaken are unauthorised and in breach of the legislation unless Merton Council can identify specific powers to the contrary or the appropriate authorisation.



Damage to Three Kings Piece



Damage to Cranmer Green

