

... shall be and hereby dedicated to and for the use and recreation of the public as open and unenclosed space for ever.

3. By Article 7 (1) (b) of the Greater London Parks and Open Spaces Order 1967¹, Lambeth have power to provide in the common

... amusement fairs and entertainments including bands of music, concerts, dramatic performances, cinematograph exhibitions and pageants.

4. By Article 7 (1) (f) of the 1967 Order, Lambeth have power in the common to

... erect and maintain for or in connection with any purpose relating to the open space such buildings or structures as they consider necessary or desirable ...

5. By Article 12 (1) of the 1967 Order

In the exercise of powers conferred by articles 7 and 8 the local authority shall not, without the consent of the Minister (which consent the Minister may give in such cases as he thinks fit), erect, or permit to be erected any building or other structure.

6. The approach of the Secretary of State to the grant of consent is set out in Common Land Guidance Note 2d:

When deciding an application under Article 12 we will have regard to the criteria in section 39 of the 2006 Act:-

(a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);

(b) the interests of the neighbourhood;

(c) the public interest, which includes the public interest in nature conservation, the conservation of the landscape, the protection of public rights of access, and the protection of archaeological remains and features of historic interest;

(d) any other matter considered to be relevant.

The Friends of Clapham Common and The Clapham Society

7. The Friends of Clapham Common (hereinafter "the Friends") is an environmental charity with about 1000 members. It works with Lambeth to promote conservation and improve biodiversity across the Common. The Friends collaborate with and have the support of the Clapham Society. The Clapham Society has about 800 members. The aims of the Clapham Society are to i) improve the quality of life in Clapham and strengthen its identity and sense of community; ii) to promote excellence in new developments as well as conservation of the best features of the past; and iii) to enable Clapham to be a vibrant, exciting and safe place to live, with job opportunities and good shopping and leisure amenities.

¹ The Order forms the Schedule to the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967.

The application

8. On 23 April 2021, Lambeth applied to the Planning Inspectorate for consent to erect structures on the Common.
9. Those identified were:
 - a standard 3.4m high solid Steelshield type fence, 1,050m in length, enclosing an area of 81,100 square metres;
 - a mainstage;
 - big top style tents;
 - toilets;
 - welfare facilities.
10. The works are to facilitate the following events:
 - *Yam Carnival* on Saturday, 28 August 2021 (capacity 39,999) between 11 30 and 22 30.
An Afrobeat music festival celebrating black music, food and culture
 - *RTRN II Dance* on Sunday, 29 August 2021 (capacity 39,999) between 11 30 and 22 30
A celebration of rave dance featuring Chase and status
 - *ALT + LCN* on Monday 30 August 2021 (capacity 39,999) between 12 noon and 22 00
An alternative Hip Hop and Rock Festival².
11. The application explained that the works would be needed for a maximum of 25 days from 16 August 2021 to 9 September 2021.
12. The application was advertised in accordance with the Works on Common Land etc (Procedure) (England) Regulations 2007³. It attracted over 470 objections from local people and local groups, including detailed submissions from the Friends and the Clapham Society.
13. The Planning Inspectorate has invited the comments of Lambeth on the objections. It has not to date made any decision as to how the application is to be determined (i.e. by way of written representations or following a public inquiry). However by an email dated 6 August 2021 [REDACTED] of the DEFRA Casework Team (Common Land) confirmed that the application would not be determined before 16 August 2021⁴.

The consequence of the fact that the application will not be determined before 16 August 2021

² There is the possibility of a fourth event on Friday 27 August 2021 but this is unlikely to happen.

³ SI 2007 No 2588.

⁴ The reason why the application has taken so long is not known. It is perhaps because there have been several hundred objections and the Planning Inspectorate must address each of the concerns raised in those objections as part of the due process of law under the Commons legislation. The Friends is not privy to communications between Lambeth and the Planning Inspectorate.

14. The consequence of the fact that the application will not be determined before 16 August 2021 is that Lambeth will not have consent as at 16 August 2021 when it plans to start work. The consequence of this is that Lambeth will have no *power* to erect the structures. It will be acting *ultra vires*. Further the erection of such structures will prevent access to the Common by the public for its recreation contrary to the scheme under the Metropolitan Commons Act 1866.

Lambeth's response to the fact that the application will not be determined before 16 August 2021

15. The Friends and the Clapham Society asked Lambeth what it would do if the application was not determined before 16 August 2021.
16. On 9 August 2021, [REDACTED] assistant Director Neighbourhoods (Environment and Streetscene) responded on behalf of Lambeth. Lambeth accepts that the Planning Inspectorate has confirmed that it will not be able to determine the application before the event[s] are scheduled to take place.
17. Lambeth makes the following points, namely that:
 - (i) Lambeth have engaged in the process of obtaining consent in good faith. However it has no control over the process or the length of time it takes the Planning Inspectorate to decide on an application;
 - (ii) There is no reason to cancel the event[s] and Lambeth will not take steps to do so: *The Council has recently published its decision report recommending that the event is given permission and our current position is that we will not be taking steps to cancel the event or otherwise stop it from happening.*
 - (iii) Lambeth wishes to receive retrospective consent;
 - (iv) The event[s] are in the interests of the neighbourhood in accordance with the Secretary of State's guidance for the grant of consent;
 - (v) The event[s] will generate a substantial revenue receipt for Lambeth;
 - (vi) The Inspectorate require a level of detail that is not available far enough in advance of the erection of the structures to enable an application to be made that will be granted in time for the event for which the structures are required.

Our client's position as regards Lambeth's Response

18. None of the six matters raised provides a justification for Lambeth to proceed without the consent of the Secretary of State. Our client addresses each point as follows:
 - (i) *Lambeth have engaged in the process of obtaining consent in good faith. However it has no control over the process or the length of time it takes the Planning Inspectorate to decide on an application.*
19. The fact that Lambeth **applied** for consent in good faith does not mean that it can proceed without consent if, for whatever reason, that consent does not exist at the time that it wants to erect the structures.

- (ii) *There is no reason to cancel the event[s] and Lambeth will not take steps to do so:*
The Council has recently published its decision report recommending that the event is given permission and our current position is that we will not be taking steps to cancel the event or otherwise stop it from happening.

20. The absence of consent is obviously a reason for cancelling the event. It is unclear if the decision of the Director for Environment and Streetscene (in consultation with the Cabinet Member for Culture and Equalities) to authorise the event has been given. Our client has recently found on-line an undated, unsigned document entitled "Officer Delegated Decision Report 16 August 2021." It seems to be recent and seems to post-date the application for consent under Article 12. As such it is defective because it fails to draw to the attention of the Director the fact that such consent will not issue in time for the event and to consider the implications of this. It does not so much as mention the need for consent under Article 12. This is extraordinary.

(iii) *Lambeth wishes to receive retrospective consent.*

21. Article 12 evidently envisages that advice will be obtained prospectively. There is a ban on erecting structures without the consent of the Minister; if that ban is not complied with, there is, on the face of it, nothing that can be done about it. Other statutory provisions make express provision for retrospective applications – see e.g. section 73A of the Town and Country Planning Act 1990. Although it might be convenient to imply a power into Article 12 in respect of certain circumstances, there is no necessity to do so. Note that the Epsom Commons case referred to is a decision on section 38 of the Commons Act 2006 where the power of the Secretary of State to grant consent retrospectively was not in issue. It was not a decision of the Court nor of an Inspector but of an officer employed by the Planning Inspectorate who did not have any legal qualifications. There is no case decided by the Court holding that the Secretary of State has power to grant consent retrospectively.
22. Further, even if the Secretary of State does have power to grant consent retrospectively, on the face of it, the effect of such consent would be to authorise any structure from the date of its authorisation; the Secretary of State does not have the power to rewrite history. Accordingly (on this basis) a structure erected on 16 August 2021 and authorised (say) on 1 March 2022 will not be lawful with effect from 16 August 2021; but from 1 March 2022. Of course in the present case, the relevant structures would, in any event, not be in place after 9 September 2021. It would be highly artificial to say that a structure which was in place between 16 August 2021 and 9 September 2021 and did not in fact enjoy any consent during the period of its existence became lawful by virtue of a consent given (say) on 1 March 2022.
23. Moreover, although retrospective consent **may** issue, there can be no certainty that it **will** issue.
24. However whether there is or is not power to grant retrospective consent and, if there is, how such a retrospective consent operates are not central issues as to the question of

whether as at 16 August 2021 there will be consent for the structures. It is not in dispute that there will not. In these circumstances Lambeth will have no power as at 16 August 2021 to interfere with the rights of access of the public.

25. In these circumstances it is appropriate for an injunction to issue to vindicate the rights of the public and, in particular, those living in and around the Common and who use the Common on a regular basis. The course of action proposed by Lambeth renders nugatory the process put in place by Parliament for determining whether consent should or should not be granted.

(iv) The event[s] are in the interests of the neighbourhood in accordance with the Secretary of State's guidance for the grant of consent;

26. The exercise of determining whether works are or are not in the interests of the neighbourhood is one for the Secretary of State and not for anyone else; still less for the determination of the party who proposes to carry out the works and is seeking consent for them.

(v) The event[s] will generate a substantial revenue receipt for Lambeth;

27. As articulated, this is irrelevant both because the issue is the absence of the consent of the Secretary of State and also because it is not possible to "buy" the consent of the Secretary of State by reference to extraneous money benefits. Parliament evidently vested the Common in Lambeth not for the benefit of the council tax payers of Lambeth but for everyone. The Secretary of State may consider that money received by way of licence fees in respect of events staged on the Common may be relevant to an assessment of benefit to the neighbourhood if applied to the maintenance and improvement of the Common itself; but not if applied to fund unrelated projects in Lambeth (and not for the general benefit).

(vi) The Inspectorate require a level of detail that is not available far enough in advance of the erection of the structures to enable an application to be made that will be granted in time for the event for which the structures are required.

28. It may be that the current application has led to the identification of practical issues which may require to be addressed by both Lambeth and the Planning Inspectorate. However practical issues do not entitle Lambeth to ignore the requirement of the Order that the consent of the Secretary of State be obtained before structures are erected on the Common.

Entitlement to an injunction

29. In the circumstances set out above, our client is entitled to an injunction restraining Lambeth from erecting structures on the Common as proposed.

30. It is clear that Lambeth are mistaken in their belief that "*As a public body, Lambeth needs to balance the objections received against the wider public interest and financial*

issues.” Our client’s position is that this is not a question for the Council to decide but for the Secretary of State to decide. To re-iterate, given that Parliament has legislated for that decision to rest with the Secretary of State, Lambeth will be in breach of the law if it allows these events to go ahead without the consent of the Secretary of State for the Environment.

31. Finally, our client notes that Lambeth has suggested that officers from Lambeth meet with the Friends of Clapham Common to discuss the issues. The Friends value their relationship with Lambeth and look forward to continuing to work with Lambeth in promoting conservation and improving biodiversity on the Common. The Friends of Clapham Common trust that because Lambeth also values this relationship, the Council will follow due process and the rule of law.
32. **We look forward to receiving your undertaking that Lambeth will not proceed with erecting structures on the Common on 16 August 2021, in the absence of consent from the Secretary of State. Please respond by email to Susan Ring by 5pm on Friday 13 August.**

Yours faithfully,

Harrison Grant

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c.c. PINS ref COM/3273667



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