

SOUTHAMPTON COMMON: THE LEGAL REGIME

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ABSTRACT

A brief outline of the history of Southampton Common and a survey of relevant legislation forms the framework for a discussion of contemporary problems arising from conflicts of public interest and of different conceptions of amenity. The current legal position is explained and recommendations are made for the reform of the law to meet modern needs.

THE LEGAL FRAMEWORK

Southampton Common, now about 350 acres, belongs to the City of Southampton under a grant of 1228 (Thomson 1979, 1–49). The Common has been reduced by enclosure and encroachment, notably the sites of the Cowherds inn and Southampton Zoo, which are now no longer part of the Common. Land was also taken in the nineteenth-century for a cemetery and reservoirs (now disused). From 1228 until at least 1925, communal rights, especially to pasture animals, were exercised on the Common by the burgesses, but no such rights were registered under the Commons Registration Act 1965 and all are therefore extinguished. With the decline of the Common's original function in the nineteenth century, Southampton corporation obtained statutory authority to prevent commercial development and, on public health grounds, to preserve the Common as an open space for public recreation.

The Southampton Marsh Act of 1844 stated that the Common should be public land in perpetuity to be preserved as an open space for the public advantage of the inhabitants of Southampton (7 & 8 Vic c54 ss116–7). The Southampton Marsh and Markets Act 1865 provided that the Common be devoted and kept exclusively as a park, garden, pleasure ground, play ground, and other open space for the general and public advantage of the

inhabitants of Southampton and persons resorting thereto. It has to be equipped with such statues, fountains, seats, and other ornaments and conveniences for public use and not more than five lodges on the Common as the corporation from time to time think fit. No other structures or buildings were authorised and no parts of the Common may be taken or used for any other purpose (28 & 29 Vic c162 s72). Under the Southampton Corporation Act 1910, the Common became a park or pleasure ground under the public health acts, which together authorised the provision of places for public recreation, prescribed powers regarding open spaces, and authorised limited closure, the making and enforcing of byelaws. It reiterated that 'Nothing contained in this Act or in the Public Health Acts shall authorise the erection of buildings on the Common or in the Parks . . .' (10 Edw VII & 1 Geo V c99; 38 & 39 Vic c55 s164; 53 & 54 Vic c59 ss44–45; Public Health Act 1961 s53(3); 39 & 40 Vic c56; 62 & 63 Vic c30 s10). Public access for air and exercise was required by the Law of Property Act 1925, which also forbade the erection of any building or fence or the construction of any work whereby access to the Common is prevented or impeded (15 Geo V c20 ss 193–94). Finally, the Southampton Corporation Act 1931 prohibited vehicles on the Common except on the roads there listed: The Avenue, Cemetery Road, Highfield Avenue, Oak Mount Avenue, Winn Road, Westwood Road, Highfield Road, Northlands Road, and the road from the Avenue to the tramway depot. This section was repealed in 1971 (21 & 22 Geo V c99).

CONTINUING CONTEMPORARY PROBLEMS

Southampton City Council manages the

Common as trustee under the terms of the legislation. It may make byelaws compatible with the statutes, but cannot act in contravention of the law, which it has a legal responsibility to enforce. In practice the Common has often been used in ways that are strictly illegal and should not have been allowed. Heavy use causes damage to the surface and animal and plant life. Adjoining landowners try to encroach upon public land and byelaws are unenforced. There is pressure to widen roads, provide car parking, and improve public transport. Some of these other needs, for example for car-parking, have been presented as necessary for public recreation, but conflict with the terms of the statutes. Indeed, the concept of a park and ideas of recreation have changed substantially since the passage of the relevant statutes. There are conflicting demands between pedestrians and cyclists, between those wanting fairs, shows, or circuses and those with diametrically opposed wishes. There are commercial concerns anxious to exploit organised leisure activities on the Common. Groups and societies have developed to try to persuade the City Council to permit the Common to be put to new uses and are opposed by others averse to change. Through inaction or at its own initiative, the City Council has permitted some innovations, such as the legal Southampton Show, which entails the closure of part of the Common to the general public. Most changes, even those of doubtful legality, have provoked only criticisms, but others have resulted in litigation. The resultant judgements and indeed legislation has, however, only clarified certain issues in a piecemeal way, leaving the main issues and the current legal position unclear.

During both World Wars, under the Defence of the Realm legislation, the Common was used for military purposes and huts, camps, air raid shelters, and a decontamination centre were erected. All should have been removed after the War and nearly all have been, albeit sometimes belatedly. There still remain the air raid shelter to the north-west of the subway and the former decontamination centre at the

south end near Cemetery and Northlands roads, which has served as a nursery school and is now an environmental studies centre. The only buildings permitted under the 1865 Act are lodges, Holly Lodge at Bellemoor gate being now the sole survivor. Buildings erected under emergency legislation should have been demolished when the emergency ended. They cannot legally be left there and converted to another use, however socially useful or convenient for the enjoyment of the Common. The only possible justification is a provision in the 1875 Public Health Act, which permits 'any urban authority' to 'improve and maintain land for the purpose of being used as public walks or pleasure grounds by any person whatsoever', which has been held to justify a caretaker's bungalow (*Attorney-General v Poole Corporation*, 1936, 1938; *Attorney-General v Sunderland Corporation*, 1876). The caretaker works on the pleasure ground and improves and maintains it, whereas the study centre does not enable the Common to be improved in any way. Furthermore the Common is governed by its own law, which is specifically and intentionally restrictive as far as buildings are concerned: it is not just any old pleasure park. If a building cannot be erected anew for any of these laudable purposes, then a building erected for some other purpose, such as war, cannot be adapted and used for such laudable purposes.

The City Council is under an implied legal duty to look after the Common properly. Yet the Council and its lessees and licensees, for whom the Council is responsible, constantly damage or allow to be damaged the surface of the Common and fail to restore it properly. Wet weather, heavy lorries, extended use, inadequate or incompetent restoration, and insufficient time-lapse before renewed use all combine to cause permanent damage in many places, such as deep ruts and bare patches. It is a breach of statutory duty for the Council to cause or to allow this to happen. Contracts with lessees and licensees could and should provide for cancellation by the Council, when wet weather has made the surface very soft, for permitted 'maximum' use to prevent serious

damage, and for restoration by lessees and licensees to a specified minimum level within a specified maximum time with penalties for default secured by advance deposit. As at Mayflower Park (Samuels 1984), the 'before and after' problem causes argument: precisely how much time before and after is an exhibitor or show organiser allowed for erecting and removing his tents? The worst offender is the Council itself. For obvious commercial reasons tent-hire contractors and exhibitors minimise the time their equipment remains on the Common, whereas the Council has installed former tramway poles carrying high tension electricity from June until August inclusive.

The byelaws are not generally known to the public. Although they are exhibited on the Common and simple specific warnings are posted near the lake, the language is not readily intelligible to the ordinary person and the boards are so inadequately protected that the byelaws are often illegible or virtually illegible. As the byelaws are not enforced – no prosecution is known ever to have been brought for a byelaw offence on the Common – there are frequent infringements.

The use of metal detectors is permitted, even though they lead to damage to the surface in contravention of clause 9 prohibiting the removal, cutting or displacement of soil or turf, and although the owners keep finds from public land and incompetently disturb archaeological sites. Under clause 6 vehicles may not be used on the Common. Except at authorised and controlled entry points, access around the perimeter is physically prevented in part by earth banks, in part by metal 'shin rails', now dilapidated, and partly by 'dragons teeth', stout wooden posts spaced at appropriate intervals. As long as gaps remain and until the protection is continuous, complete and closed, trespassing vehicles can still get on the Common, especially during public events. In the absence of leisure camping sites in the city, so do cars, dormobiles, caravans and tents. All the land near and around the Zoo (closed 1985) is part of the Common, yet employees and visitors to the Zoo repeatedly parked there and no action against them was

taken by the Council. Quite correctly, however, the Council has erected posts at the registered boundary of the Common to prevent vehicles illegally crossing it to no. 5 Highfield Road, a house with no other vehicular access (SOC, counsel's opinion, 1981).

No byelaws exist regarding animals on the Common, but 'walking a bear' or 'walking an elephant' is probably illegal as incompatible with and interfering with the ordinary enjoyment of the Common by the public. Captive animals ought not to be allowed on the Common, except for direct passage in locked vehicles to and from the Zoo or to any lawful circus held on the Common. All keepers of dangerous wild animals must be licensed under the Dangerous Wild Animals Act 1976. Indeed, it would not be unjust or oppressive to ban dogs from going on certain areas, such as ornamental gardens, enclosed parts or children's playgrounds, where good and obvious reasons for prohibition can be shown (*Burnley v England*, 1979). At present owners must keep dogs under proper control and are thus prevented from causing annoyance to any person and from worrying or disturbing any animal or water-fowl, but nevertheless dogs are not prohibited from entering the cemetery or ornamental lakes and thus driving away ducks and geese (SOC, byelaw 11).

As transport authority, the Council has constructed a bus stop and tarmac surface on the Common at Highfield Road. This is illegal because it encroaches on the Common and was constructed mainly for residents using the bus service and not users of the Common. Tentative Council proposals for a bus standing and station on the Common in the angle of the Avenue and Winn Roads are also illegal. Most seriously, road surveyors and engineers, some councillors and others wish to widen The Avenue, that section of the A33 trunk road running through the Common. The A33 is the responsibility of the Department of Transport. Hampshire County Council, the local highway authority, has granted an agency to Southampton City Council. Although marked out in places for two lanes in each direction,

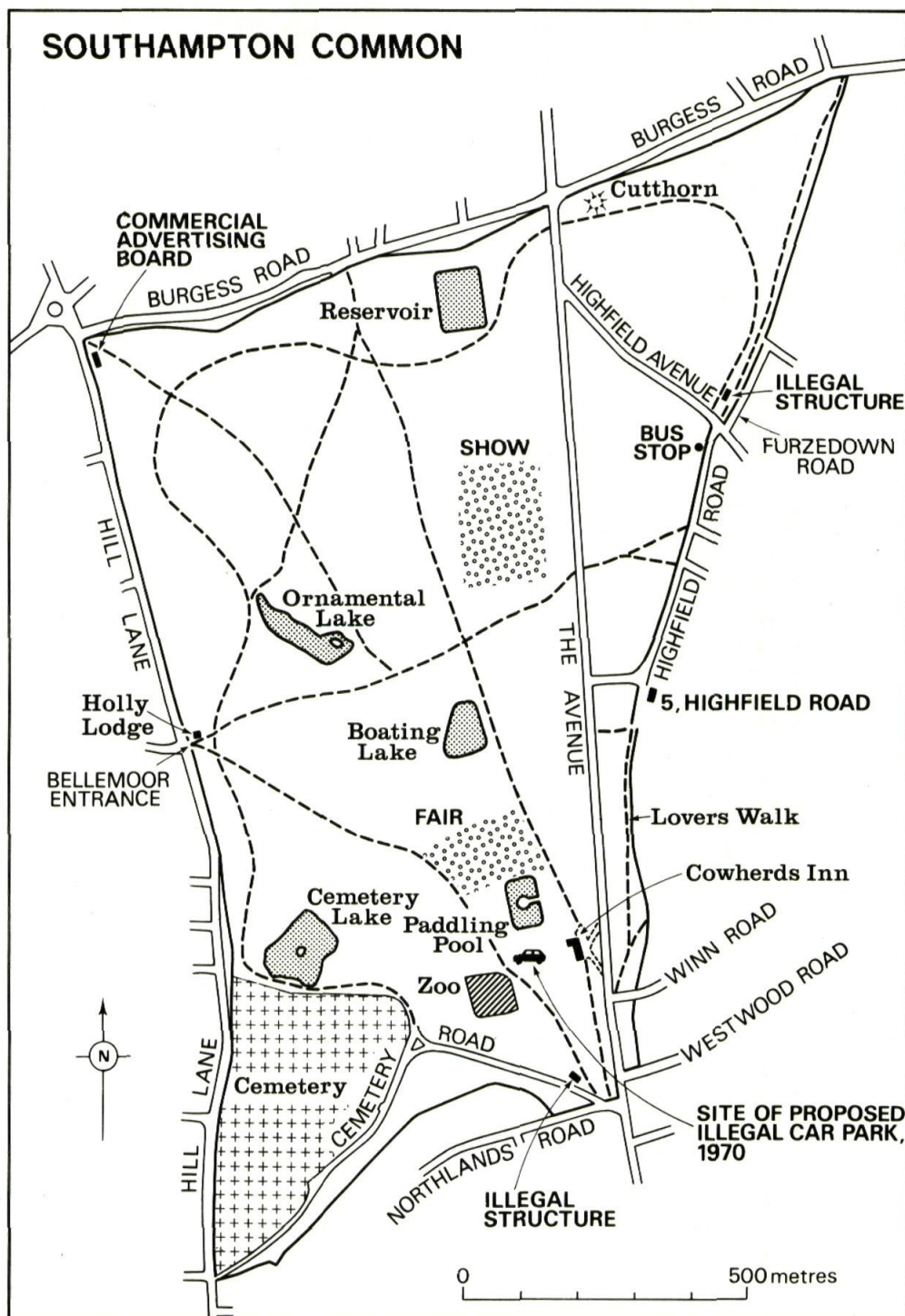


Fig 1. Southampton Common: since this drawing was submitted, a new illegal structure has appeared on the corner south of Burgess Road and west of The Avenue; the illegal structure on Furzedown Road has been removed; and the Zoo has closed.

The Avenue is really too narrow. The construction of a dual carriageway would involve substantial tree felling and loss of land from the Common. For some years the City Council has been clearing the trees between Northlands Road and Stag Gates and northwards to the Cowherds. Dutch elm disease enabled many trees in The Avenue to be felled in the 1970s. At the initiative, and through the generosity, of the City of Southampton Society, replanting took place at the western side of the southern end of The Avenue and also further north, but although the Council insisted that the trees be set back from the road because there were underground cables there, it was suspected that it was to facilitate, or to prevent impediment to, the eventual widening of The Avenue (SPPS papers).

The definition of public recreation in the relevant legislation does not permit a bandstand, which would be illegal. A Council proposal in 1981 to seek express statutory power was not pursued. The byelaws do, however, permit cycling on certain paths. Anxious to facilitate cycling to and from work and school, especially to areas like Lordshill north-west of the Common, the Council proposed a network of cycle tracks. The proposals require widening existing paths, constructing new ones, and amending the byelaws. While enjoying some support from the public and amenity societies, the increase in cycling would to some extent conflict with pedestrians and change the character of the Common.

Proposals (1985) to amend the byelaws in order to create a shared pedestrian and cycle facility in Lovers Walk, removing trees, shrubs and bushes, and widening the tarmac surface of the path have met with considerable opposition.

Commercial pressures on the Common are becoming increasingly strong. At the principal entry points to the Common – the north-west and south-east corners and Holly Lodge – commercial advertising poster boards have been erected. They advertise nothing whatsoever to do with the Common, are obtrusive and are often in dilapidated condi-

tion. They are not the ornaments and conveniences for public use permitted under the 1865 Act and do not in any way promote or enhance the enjoyment of the Common. It may be argued that the Council, if they think it necessary or expedient, may advertise their own (sic) entertainments to be held anywhere, under the Local Government Act 1972, but it is very doubtful whether this general power can be used to derogate from specific prohibitions and limitations in respect of specific land such as the Common (SPPS counsel's opinion 1976).

The law does not however appear to prohibit a measure of commercial activity being carried on under the 'closure' provisions, but it is submitted nevertheless that there will come a point at which the commercial element becomes so obtrusive and so predominant as to constitute a breach of the law wholly incompatible with public enjoyment of the Common. The Southampton show and funfair, for example, now include stalls selling things as at a market and in 1982 and 1983 the Southampton Show included a motor show.

CONFLICT

Such problems, actual and potential, are commonplace. Litigation has occurred in cases of 'saturation use', where conflicts of interest have become acute between commerce and amenity or between different forms of amenity, between the Show and the peaceful enjoyment of the natural environment.

In contravention of the law, the Council proposed in 1969 to build car parks on the Common adjoining the Cowherds inn. This was opposed by the amenity societies, namely the Southampton Civic Trust (now the City of Southampton Society), the Friends of Old Southampton, and the Southampton Commons and Parks Protection Society. Feelings ran high, public meetings were packed, but the Council persisted. The case went to the High Court, where the judge found for the societies and against the Council on three principal grounds:

(1) A car park, especially when used as such,

would impede air and exercise and was therefore illegal.

(2) The proposed car parks would be a road, the only access to a building, and therefore fell within the prohibition of roads under the 1931 act.

(3) The statutory powers vested in the Council were subject to the test: Is the proposed exercise of the power properly and reasonably necessary to enable the public to enjoy the land as an open space?

As the purpose of the car parks was to serve the Cowherds, the Zoo, and the Dell football ground, none part of the Common, and the City generally, the judge found that the proposal was not reasonably necessary to enable the public to enjoy the open space or for the Common to be used as public walks or leisure grounds. Furthermore, the proposal was in breach of the byelaws and the Council had no power to allow large sections of the public to ignore the byelaws (*Attorney General v City of Southampton*, 1970; *Samuels*, 1970).

Because of the court case and this time in consultation with the three local amenity societies, the Council promoted the Southampton Corporation Act 1971. This authorised the construction of fences, mounds or ditches to prevent vehicles driving on to the Common. The clause of the 1931 act permitting parking in specific roads was revoked, but parking of vehicles was permitted for the use of people resorting to the Common alongside Cemetery Road, such parking not to extend more than 72 feet from the centre of the road. The act also authorised closure for a maximum of 21 consecutive days, a maximum of 60 days, and a maximum of 50 acres in the course of a year (*Southampton Corporation (Southampton Common) Act 1971*). Difficulty has arisen over the interpretation of these powers so far as 'before' and 'after' is concerned, that is erection and dismantling. The Council has permitted extensive time before and after, effectively preventing or impeding public use and enjoyment of the land affected. The amenity societies consider this to be excessive or improper. All agree that a reasonable time is to be implied before and after, but it is difficult to

apply the term 'reasonable' to any given set of facts.

In 1981, barely ten years later, in consideration of the continuing legal problems and growing commercial and other pressures, the Council proposed far-reaching legal changes:

(1) Extended powers of closure:

- (i) Closure days to be extended from 60 to 90;
- (ii) Consecutive days to be extended from 21 to 30;
- (ii) The maximum area to be closed to be extended from 50 to 210 acres.

(2) A new roadway to the Zoo.

(3) The provision of leisure facilities, such as bandstands, tea-rooms and a children's railway.

(4) Power physically to remove illegally parked vehicles.

(5) Legal duty of disclosure by the registered keeper of a vehicle (the owner) on the Common of the identity of the driver.

There were strong and widespread objections to the first three proposals, especially regarding extended closure. Virtually all the open space would be closed virtually all summer. There would be more serious soil impacting and damage to the ecology, which would not have time to recover. There would be more commercial activities, particularly as the Show usually loses money. It was claimed that existing use was already at saturation level and that the public want the Common left as far as possible in its natural state. It was suggested that automatic barriers on existing roads would suffice for the Zoo and that individual proposals for leisure facilities, such as bandstands, should be considered on their merits rather than made subject to blanket authorisation. There proved to be no public demand for the proposals, which were entirely officer inspired, and they were dropped for the moment (SPPS papers; SCC counsel's opinion, 1981).

The proposals for more effective power to control illegal parking were sound and unobjectionable. If any vehicle is left without

authority on the Common, the Council may remove it for safe custody and may recover from the person responsible the expenses reasonably incurred. Similarly the owner of any unlawfully parked vehicle commits an offence if he fails to disclose the identity of the driver on being required to do so (Hampshire Act 1983 ss58-9).

In 1984 the Council agreed to allow Mission Solent to hold an evangelical crusade on the Common for eight days and for the participants, expected to be many thousands, to be accommodated in a big tent. While recognizing Mission Solent to be a respectable and worthwhile body, the three amenity societies were concerned by the noise and the damage to the grass caused by numerous people, vehicles and attendant activities. They also feared that a precedent would be set for more controversial and less generally acceptable events on the Common, such as political rallies and boy scouts jamborees. Hoglands Park has been used for such events and there are other suitable sites in city. An injunction was sought and was heard in the chancery division of the royal courts of justice on 3 May 1984. The case turned on section 3(1) of the 1971 act, which provides that the Council for such time or times as they think fit may close to the public or restrict public access to any part of the Common for the purpose of 'fairs, shows, circuses, or other functions of like nature'. Mr Justice Harman found that this clause authorised frivolous events rather than a serious and purposeful crusade, that it permitted 'something designed to entertain and not to improve or convert the heathen population of Southampton to the words of Our Lord'. The injunction was granted (*Attorney-General v Southampton Corporation*, 1984) and the mission took place elsewhere in Southampton.

In summer 1985 the Council erected a structure on the Common just south-west of the junction of the Avenue and Burgess Road, intending to display a sign proclaiming the city to be a nuclear free zone. This is illegal because it is an unauthorised structure, contrary to the statutes and byelaws, unrelated

to and inconsistent with the proper use of the Common, and not reasonably necessary to enable the public to enjoy the land as a public open space. See the decision of the judges in the court cases.

REFORM

All the relevant law is now contained in the Hampshire Act 1983, but few know what the law is or where it is to be found. The preserved law is old-fashioned in language, style and content, often unsuitable for contemporary problems, silent or unclear. The law and byelaws are inaccessible and difficult to understand. Out of ignorance, indifference or wilfulness, many people break the letter and spirit of the law. The Council, supposedly a trustee, shows a tragically indifferent and even hostile attitude to its statutory obligations. It breaks the law, permits others to do so, and does not prosecute offenders.

It is desirable that a new modern statute should set out the relevant law in modern form and thus comprehensively and positively establish an effective legal regime for the Common. But useful though a restatement of existing law would be, the basic need is for a fundamental and wide-ranging review of all the problems, involving the whole community. Guidelines for the management and future development of the Common are needed. There should be a strategy, a policy, and effective standing consultative machinery involving as many interests as possible. The more successfully the end result accommodates the many conflicting demands and the more consent it secures, the more likely it is to be observed. The establishment of a warden with full powers and staff for the Common would enable a start to be made in upholding and enforcing the law.

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