

**APPLICATION BY THE LONDON BOROUGH OF LAMBETH TO ERECT  
TEMPORARY EVENT FENCING AND STRUCTURES ON CLAPHAM COMMON  
PURSUANT TO ARTICLE 12 OF THE MINISTRY OF HOUSING  
AND LOCAL GOVERNMENT PROVISIONAL ORDER CONFIRMATION  
(GREATER LONDON PARKS AND OPEN SPACES) ACT 1967  
APPLICATION REF: COM/3312935**

**OPENING SUBMISSIONS ON BEHALF OF THE FRIENDS OF CLAPHAM  
COMMON**

**Introduction**

1. The Friends of Clapham Common (“the Friends”) are an active environmental group of approximately 600 members who work to protect and improve Clapham Common (“the Common”). It also works in partnership with the Clapham Common Management Advisory Committee. It was established for the benefit of the inhabitants of southwest London by providing, or assisting in the provision, of facilities for recreation and leisure time with the object of improving the conditions of life for the inhabitants of the area, including by the preservation, promotion, support, assistance and improvement of the Common.
2. The Friends object to the Council’s application made under 12 of the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967 (“the 1967 Act).
3. In so doing, the Friends recognise that ,as a matter of principle, the holding of entertainment events falls within the scope of article 5 of the 1967 Act, as does, in principle the erection of structures and means of enclosure to facilitate this. However, the scale and consequences of what is proposed now by the London Borough of Lambeth (“the Council”), and its duration, is such that material harm is cause to the Common, to the use of the Common and to those who use it pursuant to their statutory rights to do so. The proposed structures and enclosure, and the use of the Common which these facilitate, cause harm to the various interests identified in legislation and to the principal policy objectives which the Secretary of State has confirmed to be engaged. As will be made clear in evidence and through the

examination of witnesses, the balance here, the Friends submit, is clearly and decisively, against this application.

4. Opening submissions are not the place for a full rehearsal of the Friends' case. However, and to assist, in these submissions we will address briefly the considerations set out in section 39 of the Commons Act 2006 ("the 2006 Act") and more generally in the Secretary of State's policy and in so doing give an overview of the Friends' case in respect of them.
5. In terms of approach, and for the avoidance of any doubt, where an application is made pursuant to article 12 of the 1967 Act, the Secretary of State's Common Lands Consent Policy ("the Policy"), and indeed Common Land Guidance Sheet 2d, make clear that regard should be had to the considerations set out in s.39 of the Commons Act 2006<sup>1</sup>. This, no doubt, will be common ground between all those who appear at this inquiry.
6. Before we address the statutory and policy consideration, we deal with a preliminary but, we say, a critical point. It concerns the statutory limitation on the area which the Council is entitled to set apart or enclose for the purposes of the event that the structures to which this application is directed is intended to deliver. That limitation is one acre or, as is more relevant here, not more than 10% of the "open space".
7. Article 6 of the 1967 Act defines "open space" as including "any public park, heath, common, recreation ground, pleasure ground, garden, walk, ornamental enclosure or disused burial ground under the control and management of a local authority". The open space here, therefore, is principally at least Clapham Common.
8. Article 7(1) of the 1967 Act gives rise to two essential questions. Those are, firstly, the total extent of the open space and, secondly, the part proposed to be enclosed for the Event.
9. The Inspector is, we submit, required to resolve both questions. In short, this is because the Inspector is being asked to give consent for structures which will secure the enclosure of open space for the purposes of an entertainment event. As such, the Inspector must be satisfied that the structures will not give rise to area being set aside or enclosed which exceeds the limitation provided for in article 7. Otherwise, the Inspector would be giving consent for something which is unlawful. As such, the extent of the areas proposed to be set aside and/or enclosed is a matter of primary jurisdictional fact which needs to be resolved at through inquiry.

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<sup>1</sup> As agreed at the CMC, see COM 3312935 Inspector's Requirements for the Inquiry 31 March 2023, [9-10].

10. For completeness, we submit, given this, that the matter cannot, as a matter of law, be resolved by way of a condition.<sup>2</sup> Notably, the Council does not, thus far at least, invite the Inspector to approach the matter in this way.
11. The burden of demonstrating that the requirements of article 7(1) are satisfied falls squarely upon the Council. The Friends do not consider that the Council has discharged that burden.
12. The Council is not able to produce a map or other evidence which shows the extent of land registered as common land through the registration process required by the Commons Registration Act 1965. Of course, where land was common land was not so registered, it ceases to be such (s.1 Commons Registration Act 1965). As such, the commons register is critical in terms of the extent of common land at Clapham Common.
13. In terms of the extent of the Common, the Council bases its case on an 1877 Map produced by Inclosure Commissioners and seeks to extrapolate an area of common land from this. As an approach, this is fundamentally flawed and unreliable, we submit. Moreover, as an approach, the Council itself, rightly, seems to acknowledge its significant limitations.
14. The Friends consider that the deficiency in the Council's assessment is remedied by the Secretary of State's records, derived as they are from the commons register, which confirms that the extent of Clapham Common (in total) is 78.17 hectares. The Council has provided no sensible or persuasive reason for inviting this Inspector, who acts in the place of the Secretary of State, to reject the DEFRA data. If this is not correct, then the Inspector, of course, has Mr Crosby's assessment, which leads to the same conclusions in terms of the Article 7 limitation.
15. On that basis, the Friends will demonstrate, in its evidence, that the proposed area to be enclosed, as the Council puts it, of 78,998 (or 78,995) sq.m is in excess of both one acre, and of 10% of the area, of the Common. This application ought, therefore, to be rejected on that basis.
16. For completeness, given the Council's evidence, we will seek further clarification of the precise extent of open space to be set aside as well as that which is to be enclosed for the purposes of the proposed event.
17. We turn now to the statutory and policy tests.

***The interests of persons having rights in relation to, or occupying, the Common (and in particular persons exercising rights of common over it)***

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<sup>2</sup> As was done in respect of an application concerning Streatham Common - COM/3311223 Application Decision, 8 June 2023.

18. The public have rights to use the common for the taking of air and exercise (s.193 LPA 1925). That is the primary right here. The proposed structures will exclude the public and in particular inhabitants of the neighbourhood from a well-used and important part of Clapham Common for 19 days during the summer of 2024, coinciding with the August bank holiday and the school holidays. As well as a result of physical exclusion, the effect of that for which consent is sought will adversely affect other parts of the Common through noise (including during setting up, dismantling and sound testing), traffic, anti-social behaviour, and the presence of a vast number of persons entering the Common to access and leave the event. There will be a clear adverse effect on those with a right to use the Common and in particular those who can be expected to most frequently and intensively use and enjoy that right, namely those who live closest to the Common. Many of these are socially deprived and, absent any private amenity space, use the Common, including the so-called events field, for recreational purposes. The legislation and the Secretary of State's policy is directed in the main to enabling the safeguarding of the Common and ensuring that the special qualities of common land, including its open and unenclosed nature, are properly protected.<sup>3</sup> This application will not further those objectives.

### **The interests of the neighbourhood**

19. The outcome intended by the proposed works, i.e., the Event, will not add something which will positively benefit the neighbourhood and the use by the inhabitants of the neighbourhood of the Common<sup>4</sup>. Further, local people will clearly be prevented from using the Common in the way that they are used to for the duration of the period of proposed enclosure<sup>5</sup>.
20. The Common is of great important to the communities which surround the Common. The adverse effects of the Event in the form of physical exclusion at a peak period, noise, anti-social behaviour and access to public transport will also negatively impact on the wider neighbourhood.
21. Further, the Friends will show in evidence that far from what is claimed by the Council, the Event will have a negative impact on local businesses. The Friends disagree that there will

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<sup>3</sup> See the Secretary of State's Common Lands Consent Policy as quoted by the High Court in *Open Spaces Society v Secretary of State for Environment, Food and Rural Affairs* [2022] EWHC 3044 (Admin), [36]-[37].

<sup>4</sup> Secretary of State's Common Lands Consent Policy, [4.4]

<sup>5</sup> Secretary of State's Common Lands Consent Policy, [4.4]

a financial benefit for the neighbourhood. Further, any benefits, if they existed, are clearly not outweighed by the negative impacts of the Event.

**The public interest**

22. Section 39(2) of the 2006 Act makes clear that this element includes the public interest in nature conservation, the conservation of the landscape, the protection of public rights of access to any area of land and the protection of archaeological remains and features of historic interest. Added to this will be the public interest in recreational use of the Common (see Common land guidance sheet 2d).
23. For the reasons we have already identified, the public interest in continued public recreation on the Common will be adversely affected by the proposal. This is not mitigated by any benefit through the holding of an as of yet unspecified event by Festival Republic.
24. Further, it has not been demonstrated that the proposed works will not negatively impact nature conservation in respect of land which is a Borough Grade 2 Site of Importance for Nature Conservation. The Friends consider that the Event will, therefore, have a negative effect on nature conservation.
25. Moreover, the Council has not demonstrated that despite the impacts of the previous events held on the Common on the soil and grass of the Common, restoration will be possible after the Event. There will therefore, we say, be an adverse effect on the landscape value of the Common.
26. Of course, the common land consent process is expected to deliver outcomes which include ensuring that “any use of common land is consistent with its status” such that “works take place on common land only where they maintain or improve the condition of the common or where they confer some wider public benefit and are either temporary in duration or have no significant or lasting impact”.<sup>6</sup>
27. We say that the works do not maintain or improve the Common; they do precisely the opposite. Moreover, they do not offer any wider public benefit of the form envisaged by the Secretary of State’s policy (see paras.5.14-5.15) nor is what is relied upon by the Council (such as it is) sufficient to outweigh the harm caused. The works do not facilitate the use of this Common in a way that is consistent with its purpose as a recreational resource for the public and in particular for local residents.

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<sup>6</sup> Secretary of State’s Common Lands Consent Policy, [3.2].

### **Other relevant matters**

28. Additionally, the Council has failed meaningfully to consider, or to explore, alternatives to what is proposed. The Secretary of State has made clear that she expects to know what alternatives have been considered to the application proposal.<sup>7</sup> The High Court has held clear that “under the Policy applicants for consents must adduce evidence of the alternatives they have considered and, if they have rejected them, they should generally offer a proper explanation as to why they have done so”.<sup>8</sup> That has not been done here in any meaningful way.

### **Conclusion**

29. The Friends’ objections are reflected in the strength of local feeling against this application proposal expressed in the many third-party representations. Those concerned are relevant and well founded. Neither this application, nor the proposed Event, represents a positive proposal for the Common. Further, there are clear conflicts with the Policy and there are no reasons why it would be appropriate to depart from the Policy.<sup>9</sup>

30. In the light of all the foregoing, the Inspector will, in due course, be respectfully requested to conclude that consent should not be granted and to dismiss the Council’s application.

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13 June 2023

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<sup>7</sup> Secretary of State’s Common Lands Consent Policy, [4.3].

<sup>8</sup> *Open Spaces Society v Secretary of State for Environment, Food and Rural Affairs* [2022] EWHC 3044 (Admin), [56].

<sup>9</sup> Secretary of State’s Common Lands Consent Policy, [1.3].