

PARKS AND RECREATION (AND COVID-19)



St. John's Chambers Property Group looks at the 'right to roam' and to exercise outside the home in the light of the Covid-19 Coronavirus restrictions and regulations.

Please note that:

- (1) The restrictions are likely to vary over time; this note deals with the position as at 31 March 2020;
- (2) This note sets out our views as to the legal rights of individuals. The Government has also issued advice concerning individual behaviour and public health, which should be followed whenever possible. The police and local authorities are doing their best to help us at a very difficult time. Help them by complying with their requests and advice.
- (3) This note is meant to inform, but it is not intended to be relied upon, or to be used as a substitute for legal advice. If you require legal advice on the matters contained in this Note, please contact the clerks.

Recreation is an important aspect of the health of the public. The right to roam has been regarded by many as a public right since the mass trespasses of the 1920s, if not before. But in the present circumstances where there is a public health need for public association to be restricted to prevent the rapid spread of Covid-19, these two imperatives are, to an extent, in conflict. In many cases and for most people such a conflict will not arise, insofar as people accept the advice they are given by Government. But there may be circumstances where the rules, principles and advice do conflict.

General Prohibitions on Recreation

The basic rule in the UK is that what is not forbidden as unlawful is permitted; and restrictions on personal liberty are particularly carefully scrutinised.

Past public health emergencies have caused the restriction of public rights over land. During the foot and mouth epidemic of 2001, orders were made by the Government which prevented the use of footpaths in rural areas, so as to prevent the spread of the virus between livestock and other animals¹. The closure generated a dispute between Ramblers, who regarded it as excessive², and farmers, who thought a partial closure inadequate³.

The Present Restrictions

Neither the Government, nor local authorities nor the police had (prior to the present emergency) any general power to direct people not to carry out recreation, just as they had no power to direct the public to remain in their house on health grounds.

The Government has now enacted The Health Protection (Coronavirus Restrictions)((England) Regulations 2020 under the Public Health (Control of Diseases) Act 1984, which contains powers to restrict movement. The Regulations provide a three-stage process to controlling public activity.

First, it defines what you can do. Reg. 6 provides that people shall not be outside the place where they live without reasonable excuse, and then sets out a non-exclusive list of what amounts to a 'reasonable excuse'. 'The place where they live' is defined as 'the premises where they live together with any garden, yard, passage, stair, garage, outhouse or other appurtenance of such premises'⁴. It therefore includes a driveway, and any space within the curtilage of the dwelling. A reasonable excuse includes 'the need to... take exercise either alone or with other members of their household'⁴.

- 'Exercise' means just that. Walking, running and cycling are permitted, picnicking is not.

¹ See the Foot and Mouth Disease Order 1983, Art 35C.

² The Guardian 5 May 2001 'Ramblers angry as footpaths stay closed'.

³ The Guardian 19 July 2001 'Farmers fearful as footpaths reopen'. ⁴

Reg. 6(3)

⁴ Reg 6(2)(b)

- There is no limitation on how often a person may exercise or for how long.
- There is no restriction as to where exercise might take place. It is unclear from the Regulations whether driving to a place of intended exercise is permitted or not⁵. The exercise need not be 'reasonable' in type, quality, duration or location. It does not appear to be required that it be done as close to home as possible.

The **second** stage is direction, where authorised persons may direct people who they consider are contravening the requirements to go home, or may use reasonable force to take them home⁶. The authorised person does not have to hold this belief reasonably; he simply has to hold the belief, however wrong he may be.

The **third** stage is enforcement. Failure to comply with a direction, instruction or prohibition is an offence punishable by a fine on summary conviction⁷. There is a power to arrest a person on his failure to give a name⁹. There is also a power to issue fixed penalty notices for infringement by offenders aged 18 or over¹⁰.

The Regulations also prohibit 'gatherings' of more than two people in a public place⁸. It is a criminal offence to fail to comply with a lawful direction to remedy the breach of the regulations without reasonable excuse. The upshot is that as long as the public are in a public place⁹ for exercise, and not 'gathering' in a group, they will not be the subject of direction

⁵ If it is, then the police would have no power to stop people from doing so, however sensible their intervention.

⁶ Regs 8(3),(4).

⁷ Reg 9(4), which also extends to cases where the authorised person has reasonable grounds for doubting whether the name given is correct – see s.24(5)(a) Police and Criminal Evidence Act 1984. ⁹ Reg 9(7) ¹⁰ Reg 10.

⁸ Reg. 7. A 'gathering' is not defined, but it would seem to describe a grouping where people voluntarily come and stay together, probably for a common purpose or with a common interest. There does not need to be prior organisation; a gathering can be spontaneous. There are a number of exceptions; the most important is where all of the members of the 'gathering' are from the same household.

⁹ Reg. 5 closes certain types of premises, including 'Playgrounds, sports courts and outdoor gyms.' – Sched. 2 Part 2 para. 20.

under these regulations¹⁰. But they may still come into contact with other members of the public.

‘Social distancing’ is not a requirement under the Regulations, although it is government advice. Although the Government has asked the public to conduct ‘social distancing’, the only relevant restriction on outdoor exercise is the prohibition on ‘gatherings’ of more than two people not from the same household under Reg.7 of the 2020 Regulations. The consequence is that your household may hold an informal game of football in public, but your family (if from more than one household) may not.

Where can you go to Exercise?

Public Rights of Access for Exercise

Exercise here means any form of physical activity for our well-being. It includes informal pastimes such as rambling, dog walking and family play through informal games. In the context of the Covid-19 emergency, where households are being advised to remain at home save where exercising, the likely requirements for most will be somewhere to walk, run or cycle in the open air.

The Coronavirus Act 2020 contains powers for the Government to restrict access to designated types of events, gatherings or premises¹¹. As yet, no directions have been issued.

The main types of land available for recreation are: private land under which the public either has a right of access under the Countryside and Rights of Way Act 2000 (‘CROW’), or a right of way; municipal parks; common land; and town and village greens (TVGs).

One type of land which for many people is a great recreational resource is land held by the

¹⁰ See Lord Sumption’s essay in *The Times*, 26 March 2020 ‘There is a difference between the law and official instructions’.

¹¹ Section 52 Coronavirus Act 2020. Sch 2 Para. 20 of the 2020 Regulations closes ‘Playgrounds, sports courts and outdoor gyms’, but makes no reference to parks as such.

National Trust. Some National Trust land is open for access under CROW, but otherwise access to it is governed by the Trustees, who can restrict access as they wish, and they have presently closed their land to the public¹² The exceptions are:

- where that land has public rights of way crossing it; and
- where the land is common land. Not only will the commoners have rights of access, but the National Trust is under a statutory obligation to keep such land unenclosed, unbuilt on and for the recreation and enjoyment of the public¹⁶.

Private Land

There is no general legal right to enter and remain on private land even if normally open to the public free of charge: see *CIN Properties v Rawlins* (1995) 69 P & CR D36.

The public has a right of access to open country under CROW, unless it falls within the excluded categories as 'excepted land'. The extent of 'open country' is shown on a map held by Natural England. It can be accessed on the internet at www.openaccess.naturalengland.org.uk. The map does not show 'excepted land', which is described in a Schedule to CROW¹³. Most of the categories of excepted land are fairly obvious places the public would not be allowed to (or want to) go, but for present purposes the important ones are cultivated land; land used as a park or garden; and land used for the purposes of a golf course.

A landowner can exclude or restrict access land for up to 28 days in any year¹⁴. This power is not intended to allow wholesale curtailment of access to land on public health grounds, as it is hedged around with restrictions as to exclusions at the weekend, especially in summer.

In general, rights over access land are limited to access on foot for leisure purposes. Schedule 2 contains a list of things that cannot be done on the land. Most are sensible and obvious

¹² See: <https://www.nationaltrust.org.uk/press-release/the-national-trusts-lateststatement-on-coronavirus-covid-19> .

¹³ Schedule 1 CROW

¹⁴ Section 22 CROW

restrictions on anti-social behaviour, or behaviour inconsistent with the proper use of the land by the landowner. At the present time, the points to note are that you can take a dog but no other animal with you, and you cannot engage in organised games. What is an 'organised game' for these purposes is not altogether clear; a pre-arranged football game between distinct teams would be; an informal kick around having taken a ball there is probably not.

There are special restrictions on dogs. Between 1 March and 31 July they must be kept on a short lead, as they must be when in the vicinity of livestock. Dogs may be excluded for specific reasons, such as for grouse moor management and the (just passed) lambing season.

Rights of access to National Parks are governed by the National Parks and Access to Countryside Act 1949. Such land does not fall within CROW¹⁵. The restrictions on access to land are however similar to those under CROW.

Public Rights of Way

Public rights of way are not limited to rights of passage; they may be used for public recreation and exercise as part of a journey from one place to another¹⁶.

Public rights of way run along highways, which vary from formal roads to informal worn paths. There are three types of highway: a carriageway, footpaths and bridleways.

- Carriageways generally permit use with vehicles, on foot¹⁷ and with and by animals; cycling on the pavement is an offence¹⁸.

¹⁵ Section 15(1)(c) CROWA 2000

¹⁶ *DPP v Jones* [1990] 2 AC 240 suggests that the purpose need not be that of passage from A to B. We think that mere recreation falls within the public right to use a highway, as long as the manner of the use is akin to passage. Playing a game of football on the highway would probably amount to a criminal offence of obstruction of the highway.

¹⁷ 'Jaywalking', crossing the road without care or otherwise than at a crossing, is not an offence under English highway law; nor is walking or running along a road (except a motorway or one where passage by foot is forbidden).

¹⁸ Under section 72 Highways Act 1835.

- Footpaths permit public use on foot only. Users can take dogs with them, and usual accompaniments, such as prams¹⁹. A bicycle could not be ridden, but it could be pushed.
- Bridleways permit use on foot, by bicycle or by and with animals – typically horses. The official plan of footpaths and bridleways is held by the local Highway Authority as its ‘definitive map’ under the Wildlife and Countryside Act 1981.

Municipal Parks

Municipal parks are held by local authorities under a duty to allow the public access to them²⁰. Some open spaces are regulated by special Acts of Parliament, but most are governed by the provisions of the Open Spaces Act 1906. A local authority has no general power to close any public park or pleasure ground²¹, but can regulate the usage of the parks by byelaws. The decision of some local authorities to close parks on the grounds of contravention of social distancing advice by the public, on occasion in conjunction with advice from the police is controversial²² (as it is argued that the effect is to concentrate those who take exercise into smaller available space), and unclear as to the power relied upon to take this step.

The statutory power to make byelaws is often provided for the better management and preservation of the park. Such a provision would not allow for closure on public health grounds. Byelaws have to be reasonable to be effective, and restrictions on the presence of dogs in public parks have been considered reasonable²³. Byelaws should be visible to the public.

¹⁹ See *R v Mathias* (1861) 2 F & F 570 NP.

²⁰ See sections 9, 10 Open Spaces Act 1906; *R v North Yorkshire CC (oao Barkas)* [2014] 1 All ER 178

²¹ See *A-G v Loughborough Local Board* (1881) The Times 31 May. *Friends of Finsbury Park v Haringey BC* [2017] EWCA Civ 1831 at [17].

²² See <https://www.hackneycitizen.co.uk/2020/03/26/coronavirus-victoria-park-warningsdisplacement-effect/>

²³ See *Burnley BC v England* (1978) 77 LGR 227

Common Land

‘Common land’ is land over which some people have a ‘right of common’, such as a right to graze cattle or take turf, and it is now registered as common land under the Commons Act 2006. If common land is classed as ‘open land’ under CROW it will bear the rights that apply to that. If not, the public will be able to enjoy ‘rights of air and exercise’ on it, on foot or on horseback if it is, broadly speaking, a metropolitan and not a rural common²⁴. Use of such land may be controlled by byelaws²⁵.

Town and Village Greens

Town and Village Greens are places that are registered as available for local recreation for the inhabitants of a local neighbourhood, although in practice they are available for general public use. Despite the name, they need not relate only to towns or villages, and they need not be green – beaches, woods and even tarmac’d areas have been registered. They are recorded in the Register of Town and Village Green held by the Commons Registration Authority for the area²⁶. Any form of recreation is permissible, subject to a principle of neighbourly ‘give and take’. Some Town and Village Greens are subject to byelaws restricting the use that can be made of them

Conclusion

If the nation is going to be kept at home for three months or more, the need for it to exercise, both for our collective physical and mental health becomes all the more important. The public should act sensibly, and follow guidance, directions and advice; local authorities should ensure that sufficient facilities are available for proper recreation to take place, and should publicise those facilities and locations, and any restrictions that apply to them.

If you require legal advice on the topics contained in this Note, please contact the clerks to the Property team at St. John’s Chambers, who will assist you in finding the right barrister to

²⁴ Section 193 Law of Property Act 1925.

²⁵ Section 193(1)(a) Law of Property Act 1925

²⁶ Under the Commons Act 2006. Unless and until the TVG is registered, no public rights of recreation exist.

advise on your concern.

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