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Case No: CO/1368/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2022

Before:

SIR ROSS CRANSTON
(Sitting as a High Court Judge)

- -

Between:

THE OPEN SPACES SOCIETY	**Claimant**
- and -	
SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Defendant**
- and -	
(1) RUBY HOMES (EAST ANGLIA) LTD **(2) BARKING TYE PARISH COUNCIL** **(3) MID SUFFOLK DISTRICT COUNCIL**	**Interested Parties**

- -

GEORGE LAURENCE KC and SIMON ADAMYK (instructed by **Richard Buxton Solicitors**) for the **Claimant**
NED WESTAWAY (instructed by **the Government Legal Department**) for the **Defendant**

Hearing date: 17 November 2022

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Approved Judgment

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date for hand-down is deemed to be 30 November 2022.

SIR ROSS CRANSTON:

INTRODUCTION

1. This is a challenge by way of judicial review to the decision of the defendant, the Secretary of State for Environment, Food and Rural Affairs, dated 18 January 2022, to grant consent under section 38 of the Commons Act 2006 ("the 2006 Act") for the construction of a short length of road at the north-eastern extremity of common land at Barking Tye, Suffolk. The common is constituted by a relatively narrow verge of land on both sides of the B1078 Barking Road at this point. The proposed road is to create access from the B1078 to the site of a new housing development and would be some 70m2 in size.

2. The claimant is The Open Spaces Society, a company limited by guarantee which was founded a century and a half ago to protect open spaces and public rights of way in the United Kingdom. In the judgment I will call it "the Society".

3. The Secretary of State has responsibility for the Government's policy in relation to the management and protection of common land. The Planning Inspectorate fulfils her functions in relation to common land casework in England. Planning inspectors or case workers are primarily appointed to determine applications for consent for works on registered common land under section 38(1) and for deregistration of registered common land under section 16(1) of the 2006 Act.

4. The Society contends that the inspector appointed in this case was wrong to grant consent in face of its submission to him that the burden of proof was on the applicant to demonstrate that there was a need for the proposed access road to be constructed on this common, and that the applicant had failed to discharge that burden, first, because the applicant had failed to show that there was no or no satisfactory alternative route off the common, and secondly, because it had failed to show that it there was no or no suitable replacement land which could reasonably have been provided in exchange for that to be used for the road.

5. There are three interested parties. The first, Ruby Homes (East Anglia) Ltd ("the developer"), was the applicant for permission to carry out works for the proposed access road on the common and also has an interest in the site of a proposed new housing development; the second, Barking Tye Parish Council, is the freehold owner of the common and has granted consent to the proposed access road; and the third, Mid Suffolk District Council, is the apparent vestee of the right and obligation to regulate this common under Part I of the Commons Act 1899. None of the interested parties has taken part in these proceedings.

BACKGROUND

6. The common at Barking Tye has been registered as a common for many years as Register Unit No. CL 23.

7. On 24 January 2018, outline planning permission for residential development (the construction of nine dwellings) was granted to the developer by Mid Suffolk District

Council. All matters of detail were reserved, save for the proposed access road which is the subject matter of these proceedings.

8. On 19 June 2021 the developer applied under section 38 of the 2006 Act for consent to construct a new permanent shared vehicular access way (including public utility services beneath) covering approximately 70m2 of common land at its north-eastern extremity in order to serve the proposed development site. The proposed access road would link the site with the nearby public highway, the B1078 Barking Road.

9. The Society objected to the application on 16 July 2021. It raised the question of why the proposed access road was needed. There was an "existing vehicular access with dropped kerb" almost immediately to the east of the proposed access, which was not on the common. The Parish Council had accepted an offer of £190,000 for an easement over the common, it said, and presumably the owner of the adjacent vehicular access might come to an agreement with the developer for a similar inducement. It added that the developer should justify its decision.

10. Even if need were shown, the Society continued, the developer had not proposed an exchange of land, even though it obviously could, either from the grassed space between the access road and the northern boundary of the development site, or from elsewhere. It might well cost the developer nothing. The proposed roadworks, it said, were incompatible with the core terms of the Secretary of State's policy guidance contained in *Common Land Consents Policy* of November 2015 ("the Policy"). They did not confer any wider public benefit. Nor were they temporary in duration or lacking in significant or lasting impact, and therefore they failed to satisfy the key test in the Policy.

11. Natural England also objected to granting consent for the proposed access road. While it was relatively small and located at the northern extremity of the common, Natural England said in its letter of the 16 July 2021 that it was unable to see how the proposals would maintain or improve the common or were sympathetic to its continued use as common land. It also made the point that the works would take place at the northern extremity of the common and given the location they would expect that this would effectively form the boundary of the common in this area and potentially lead to a greater loss than the 70m2. Natural England suggested that a section 16 application to deregister the land covered by the area to be surfaced along with the area of common immediately to the northeast of the proposed route would be more appropriate. An alternative area of common land of equal value could then be provided.

12. The developer (through its agent) responded. As to the suggestion that replacement land should be offered, it said that the area affected was only 70m2 and there was no need to offer replacement land where deregistration was sought in respect of such a small area. It added that it was not realistic to ask for alternatives to be considered at this stage because it was the scheme for which planning permission had been granted and in respect of which the road safety implications had been assessed. Access was not a reserved matter on the outline planning permission it had been granted.

13. The Society responded on 21 September 2021, inter alia, that the developer should have considered the requirements of the section 38 process before embarking on the application for planning permission.

14. The Secretary of State appointed an inspector, Mr Edward Cousins, to decide the developer's section 38 application. Mr Cousins is a highly experienced inspector and an author of *Gadsden and Cousins on Commons and Greens*, 3rd edition, 2020.

THE INSPECTOR'S DECISION

15. The inspector issued his decision granting section 38 consent on 18 January 2022, COM/3277618. At the outset of the decision, he indicated that he had made a site visit.

16. After setting out the statutory requirements in sections 38 and 39 of the 2006 Act, the inspector said that he must also have regard to the Policy. However, he added, every application was considered on its merits and a determination would depart from the Policy only if it appeared appropriate to do so: DL7.

17. The inspector then outlined the application before turning to the objections which Natural England and the Society had raised. He said that both had submitted that a proposal of this nature should more appropriately be the subject of an application made under section 16 of the 2006 Act, a process by which the affected land would be de-registered as common land with a corresponding area being designated as common land as a replacement. No such application had been made, he said, so that the current application had to be considered on its merits in accordance with the relevant criteria set out in section 39 of the 2006 Act: DL17. The inspector then considered each of the four factors in section 39(1) to which regard must be had in determining a section 38 application.

18. As regards the first, section 39(1)(a), the *interests of those occupying, or having rights in relation to, the common*, he concluded that public access to the application land would still be available after the works have been carried out, albeit that the area would have a hard surface to accommodate traffic. Public access to the common would not be restricted in any significant way, indeed would be improved owing to the lack of any existing pavement between the B1078 Barking Road and the common: DL21. The proposal would not adversely affect the interests of those occupying or having rights in relation to the common: DL22.

19. Turning to the second, section 39(1)(b), the *interests of the neighbourhood*, the inspector noted the absence of a statutory definition of "neighbourhood". He then paraphrased paragraph 3.2 of the Policy: DL23. In this case, he observed at DL24, the proposed works would have the effect of replacing a relatively small area of grassland on the common adjoining the public highway and lying adjacent to the existing unmetalled path to farmland to the rear, with a paved or tarmacadamed carriageway constructed in order to access the proposed new housing development. The impact of the proposed works on the interests of the neighbourhood would therefore appear to be the visual effect of the replacement of a small area of grassland with paved surface: DL25.

20. The inspector then expressed his view that the works proposed were clearly not intended to be temporary and would inevitably have a lasting impact on a small peripheral area of the common. However, "the question whether this impact should be regarded as significant and whether it will be outweighed by some wider public benefit must also be considered": DL26.

21. The inspector observed at DL27 that the main reason the application had been made was to enable an access road to the proposed development, for which planning permission had been granted. The inspector also referred to the passage in paragraph 5.9 of the Policy, that in some circumstances a paved vehicular way may be the only practical means of achieving access to land adjacent to the common, adding: "This would appear to be the situation in this case": DL27.

22. The inspector then addressed the existing tarmacadamed area and unmetalled path leading from the side of public highway to the fields beyond (which the Society had described as an "existing vehicular access with dropped kerb" almost immediately to the east of the proposed access and as a possible alternative access to the housing development). It seemed, said the inspector, that part of it lay over the northern extremity of the common itself: DL28. The inspector rejected the suggestion of the Society that this could be utilised as an alternative means of access to the housing development in these terms:

> "First, that pathway does not lie within the ownership of the Parish Council but falls within the ownership of an unknown third party. Secondly, planning permission has been granted for the current proposal which includes the utilisation of the application site in order to access the proposed development. Thirdly, this proposition is speculative and lacks any supporting factual basis": DL29.

23. Overall, he found that the proposed works would not, on balance, have any significant adverse effect on the interests of the neighbourhood and that any impact would be outweighed by the benefits of enabling the housing development to take place for which planning permission had been granted: DL30.

24. Turning to the third factor at section 39(1)(c), *public interest*, the inspector observed that the works would not overall harm nature conservation interests to any significant extent (DL34); that as regards landscape conservation the extent of the land affected would be minimal (DL35); and that public access to the proposed access road would remain as part of the common (DL36).

25. Finally, the inspector considered *other relevant* matters, section 39(1)(d). He referred to the important national policy of maintaining an adequate supply of land for new housing, and the planning consent given for the development of the nine dwellings: DL38. He added:

> "40. Further, bearing in mind that there is no requirement to offer replacement land in respect of such a small area of

> common land, and the statement made in paragraph 3.2 of the Consents Policy [i.e., the Policy] is for guidance only, in my judgment such an application would have been inappropriate and unnecessary in the circumstances where there is not [a] legal duty on the part of the applicant so to do. In any event, I find that there is a clear public benefit in granting the application. Although, there will be a lasting impact, such impact will be minimal bearing in mind that the application site will still form part of CL23, the extent of which will not be diminished."

26. At DL39 the inspector observed that the Parish Council would receive £195,000 as consideration for granting its consent, which would be utilized for the benefit of the Parish.

27. The inspector reiterated that in his view there was no practical alternative means of achieving access to the development site, for which planning permission had been granted: DL42.

28. In his conclusions, the inspector summed up that, on the basis of the submissions and from his observations on site, the works proposed would (1) have minimal effect on the interests of persons having rights in relation to the land and no substantive adverse effect in terms of the overall availability of common land capable of being grazed; (2) not be detrimental to the interests of the neighbourhood; and (3) not cause significant harm to historical, archaeological, landscape or nature conservation interests or, in practical terms, to public access: DL43.

LEGISLATIVE FRAMEWORK

29. Section 38 of the 2006 Act prohibits certain works being carried out on common land without consent. It continues and extends the restriction, now repealed, previously contained in section 194(1) of the Law of Property Act 1925. The relevant part of section 38 provides as follows in relation to any land registered as common land.

> "(1) A person may not, except with the consent of the appropriate national authority, carry out any restricted works on land to which this section applies.
>
> (2) In subsection (1) 'restricted works' are–
>
> (a) works which have the effect of preventing or impeding access to or over any land to which this section applies;
>
> (b) works for the resurfacing of land.
>
> (3) The reference to works in subsection (2)(a) includes in particular–
>
> (a) the erection of fencing;

> (b) the construction of buildings and other structures; (c) the digging of ditches and trenches and the building of embankments.
>
> (4) For the purposes of subsection (2)(b) works are for the resurfacing of land if they consist of the laying of concrete, tarmacadam, coated roadstone or similar material on the land (but not if they consist only of the repair of an existing surface of the land made of such material)."

30. Section 39 makes certain provisions for the determination of an application for consent under section 38. Sections 39(1) and (2) provide as follows:

> "(1) In determining an application for consent under subsection (1) of section 38 in relation to works on land to which that section applies, the appropriate national authority shall have regard to–
>
> (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;
>
> (d) any other matter considered to be relevant.
>
> (2) The reference in subsection (1)(c) to the public interest includes the public interest in–
>
> (a) nature conservation;
>
> (b) the conservation of the landscape;
>
> (c) the protection of public rights of access to any area of land; and
>
> (d) the protection of archaeological remains and features of historic interest."

31. Under section 16(1) of the 2006 Act, the owner of any land registered as common land may apply to the Secretary of State for the land ("release land") to be de-registered as common land. Where the land to be deregistered exceeds 200m2 the applicant must propose suitable replacement land: s.16(2). That proposal is that replacement land be registered as common land in its place: s.16(3). In the determination of an application under section 16(1), section 16(6) provides that the factors to which regard shall be had are the same as those in section 39(1), namely, (a) the interests of those occupying or having rights in relation to the common, (b) the interests of the neighbourhood, (c) the public interest, and (d) other relevant matters.

32. Even where the land to be deregistered is not more than 200m2 the application may still propose suitable replacement land: s.16(4). Section 16(7) provides that in a case where the release land is not more than 200m2 and the application does not include a proposal under subsection (3), an inspector must have particular regard under subsection (6) to the extent to which the absence of such a proposal is prejudicial to the interests specified in paragraphs (a) to (c) of that subsection.

COMMON LAND CONSENTS POLICY

33. The Secretary of State's policy in relation to the determination of common land casework is contained in the document to which reference has already been made, her *Common Land Consents Policy*, the latest version of which was published in November 2015.

34. The Policy explains in the introduction that planning inspectors seek to adhere to the policy in determining applications under sections 16(1) and 38(1) of the 2006 Act. It adds: "However, every application must be considered on its merits, and a determination may depart from the policy if it appears appropriate to do so. In such cases, the Inspectorate will explain why it has decided not to follow the policy": para. 1.3.

35. Paragraph 1.4 goes on to explain that some provisions in the Policy may apply only to applications for deregistration and exchange under section 16(1), or consent to works under section 38(1), and this will often be apparent from the context.

36. Part 2 of the Policy is headed: "Why is common land important?" and explains that about 3% of the land area of England is common land of which 88% carries one or more national statutory designations — National Park, Area of Outstanding Natural Beauty, Site of Special Scientific Interest (SSSI) or scheduled ancient monument. It adds that the Secretary of State wishes to see common land delivering a range of benefits, including recreational benefits; the enjoyment of the landscape by visitors and tourists; the public right to walk on all commons and horse or cycle ride on many; providing open space for surrounding communities; and their use for a wide range of organised activities.

37. The policy objectives are set out in part 3. The 2006 Act, along with earlier legislation on common land, it states, enables the government to safeguard commons for current and future generations to use and enjoy; ensure that the special qualities of common land, including its open and unenclosed nature, are properly protected; and improve the contribution of common land to enhancing biodiversity and conserving wildlife: [3.1]. Paragraph 3.2 says:

> "3.2 To help us achieve our objectives, the consent process administered by the Planning Inspectorate seeks to achieve the following outcomes:
>
> • our stock of common land and greens is not diminished so that any deregistration of registered land is balanced by the registration of other land of at least equal benefit;
>
> • any use of common land or green is consistent with its status (as common land or green), so 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."

38. Part 4 of the Policy addresses the assessment of an application. Paragraph 4.1 records that sections 16(6) and 39(1) set out the criteria to which the Secretary of State must have regard when assessing an application under these provisions.

39. Paragraph 4.3 is headed "What are the alternatives?" and reads:

> "4.3 The Secretary of State will wish to know what alternatives have been considered to the application proposal. For example, if an application proposes the erection of temporary fencing to prevent livestock from wandering on to a road passing across a common and causing accidents, the Secretary of State may want to know whether the applicant has explored the option of asking for a temporary speed limit to be introduced on the appropriate stretch of road to mitigate the risks of an accident whilst preserving the open nature of the land, or for warning signs to be introduced (e.g. warnings of cattle on road) or traffic calming applied, that would have the effect of slowing down traffic. If these options were considered and rejected, the Secretary of State may seek an explanation."

40. Part 5 of the Policy is entitled "Other considerations".

41. The first aspect of part 5, paragraphs 5.1-5.3, is concerned with applications to deregister land under section 16(1) of the 2006 Act. Paragraph 5.3 is headed "Cases where no replacement land is offered" and reads in part:

> "5.3…In general, the Secretary of State will grant consent where no replacement land is offered only in exceptional circumstances. Such circumstances are most likely where a wider public interest is being served by the deregistration which may mitigate the prejudice caused by the loss of the release land…[A]n application for deregistration where no replacement land is offered is most unlikely to be granted if no compelling public interest is served by the deregistration."

42. The second aspect of part 5 concerns "Works on commons under section 38", and is dealt with in paragraphs 5.7-5.16.

43. Paragraph 5.7 states that commons "should be maintained or improved as a result of the works being proposed on them". The paragraph adds that consent under section 38 is a gateway, enabling the construction of works which are sympathetic to the continuing use and enjoyment of common land, but which reinforces controls on development which are inappropriate or harmful.

44. Paragraph 5.9 deals specifically with the construction or improvement of a vehicular way across a common. It states that consent will be required under section 38 if the works involve the laying of concrete, tarmacadam, coated roadstone or similar

material (other than for the purposes of repair of the same material.) The paragraph continues:

> "5.9…Such an application may be consistent with the continuing use of the land as common land, even where the vehicular way is entirely for private benefit, because the construction will not in itself prevent public access, or access for commoners' animals. However, by its very nature, paving will have an impact on the enjoyment of the common, by reducing the area available for recreation and grazing, by causing harm to habitat, perhaps by affecting drainage, and by introducing an urbanising feature into what will normally be an essentially open and natural setting. The Secretary of State takes the view that, in some circumstances, a paved vehicular way may be the only practical means of achieving access to land adjacent to the common."

45. In paragraph 5.10, the Secretary of State notes that the alternative of deregistration of the land covered by a vehicular way, and the substitution of replacement land elsewhere, may be undesirable in that the release land ceases to be subject to statutory protection, may cause fragmentation of the common, and may cease to be available to the community. The paragraph adds that the issues will vary according to the circumstances and no general rule can be formulated.

46. Paragraphs 5.14-5.16 fall under the sub-heading "Works with an underlying public benefit" and deal with works which do not benefit the common but nevertheless have a potential underlying public benefit, "for example works for the generation of sustainable energy, or at a more local scale, the laying out of a cycle path to improve sustainable travel opportunities, or the installation of statutory undertakers' apparatus": [5.14].

47. Paragraph 5.15 deals with infrastructure projects, mentioning energy generation in particular, and states that the Secretary of State's expectation is that applications for such infrastructure projects on common land are more likely to be successful under section 16(1), so that an exchange of land is proposed, adding that an application for consent to such works under section 38(1) will rarely be granted unless there are convincing reasons why an application under section 16(1) cannot or ought not to be pursued.

48. Paragraph 5.16 has the title, "Improvements to public services", referring to the conferral of some wider benefit on the local community, such as minor works undertaken by a statutory undertaker (e.g., a water utility). The paragraph then states that "our expectation is that applications for such purposes on common land are more likely to be successful under section 16(1), so that an exchange of land is proposed and can be considered on its merits". However, consent under section 38 may be appropriate where the physical presence of the works "would be so slight as to cause negligible impact on the land in question (such as a control booth or manhole), and the proposals ensure the full restoration of the land affected and confer a public benefit".

49. Both paragraphs 5.15 and 5.16 have at their conclusion the phrase, in parenthesis: "See also the Secretary of State's policy in relation to vehicular ways across common land in paragraph 5.9 above."

INTERPRETATION OF THE POLICY

50. In public law a policy must generally be followed unless there are good grounds for not doing so: e.g., *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [29]-[31]. This does not mean that a policy must be slavishly followed: *R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport* [2022] EWHC 960 (Admin), [111]. In this case the Policy itself states at paragraph 1.3 that a determination may depart from its provisions if it appears appropriate, and that any application of it must be considered on its merits.

51. There is the well-accepted difference between the interpretation of policy and its application. The interpretation of policy is a matter of law; the application of policy can only be challenged on rationality grounds: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13. As Holgate J pointed out in *Trustees of the Barker Mill Estates v Test Valley Borough Council* [2016] EWHC 3028 (Admin), to raise a genuine case of misinterpretation of policy a party must identify (i) the policy wording said to have been misinterpreted; (ii) the interpretation of that language adopted by the decision-maker; and (iii) how that interpretation departs from the correct interpretation of the policy wording in question: [84].

52. Three main issues arose in the course of the hearing about the interpretation of the Policy: (i) the relationship between section 16(1) and section 38(1) applications; (ii) the role of alternatives in the assessment of applications; and (iii) the basis for granting consent to applications for works on common land, in particular vehicular ways.

(i) *Relationship sections 16(1) and 38(1)*

53. As concerns, firstly, the relationship between a section 16(1) application for the deregistration and exchange of common land on the one hand, and one for consent under section 38(1) to carry out restricted works on common land on the other, the Policy at paragraph 1.3 makes clear that although it applies to both there are provisions in the Policy which apply to one and not the other. That is the case with paragraphs 5.1-5.3, concerned with section 16(1) applications, and paragraphs 5.7-5.16, applicable to section 38(1) applications. Consequently, I accept Mr Westaway's submission that there is generally no assistance is to be gained from paragraphs 5.1-5.3 in considering a section 38(1) application.

(ii) *Alternatives*

54. As regards secondly, the role of alternatives in the assessment of an application, Mr Laurence KC submitted that the combination of paragraph 4.3 of the Policy and section 39(1)(d) of the 2006 Act meant that an applicant was required to undertake "a robust exploration of potential alternatives", invoking the language of the inspector, Helen O'Connor, in the *Dunsfold Common Case*, Decision COM/3272496, [35].

55. For the Secretary of State, Mr Westaway contended that paragraph 4.3 is in deliberately general and advisory terms, and he directed attention to the language "may want to know" in the example in the paragraph of an application to erect fencing. In his submission the paragraph simply provides inspectors with guidance that they should bear in mind as part of their overall assessment what alternatives have been considered, and that "may" involve greater exploration or explanation, depending on the circumstances in an individual case.

56. In my view the opening sentence of paragraph 4.3 could not be clearer: "The Secretary of State will wish to know what alternatives have been considered to the application proposal." The discretionary language in the paragraph in relation to the fencing example does not detract from the emphatic language in that opening sentence. Therefore 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. The intensity of how alternatives are explored will depend on the circumstances. These may demand a robust exploration of alternatives. In some cases, however, an inspector may depart from the Policy and decide that an applicant need not consider alternatives or explain why specific alternatives have been rejected. Consistently with principle, if an inspector takes this course, she should set out why she has departed from the paragraph 4.3 requirement for applicants for consent under the 2006 Act to do this.

57. The issue arises as to what alternatives an applicant should explore. In the context of works on common land, Mr Laurence contended by reference to paragraph 5.15 of the Policy that an applicant for section 38(1) consent had to adduce convincing reasons why a section 16(1) application could not be pursued. That paragraph relates to infrastructure projects for sustainable energy generation, and Mr Westaway is undoubtedly correct that the proposed access road in this case is not an infrastructure project, although such infrastructure projects will ordinarily require access roads. Hence there is the cross-reference in paragraph 5.15 to paragraph 5.9.

58. Apart from paragraph 5.15, however, and in line with paragraph 4.3, an applicant may need to consider a section 16(1) application as an alternative in the circumstances of a particular section 38(1) application and explain (if that is the position) why it is impossible or undesirable. The point is strengthened by paragraph 5.10. It recognises the alternative of the deregistration of common land, and the substitution of replacement land elsewhere, in the context of a section 38 application for works relating to vehicular ways, albeit that that paragraph 5.10 is directed at situations where a section 16(1) application may be undesirable.

59. Accordingly, an applicant for consent under section 38 of the 2006, whether or not it chooses to make a concurrent application under section 16, must properly explore potential alternatives and this may include a replacement alternative. The rejection of potential alternatives must be properly explained.

(iii) ***Works on common land***

60. Thirdly, as regards the consent process for works on common land, paragraph 3.2 provides that inspectors will seek to achieve the outcome that such works take place

only where

(i) they maintain or improve the condition of the common *or*

(ii) they confer some wider public benefit *and* are *either*

(a) temporary in duration *or*

(b) have no significant or lasting impact (emphasis added).

61. The Policy returns to (i) in paragraph 5.7, reiterating that commons should be maintained or improved as a result of the works being proposed on them. As to (ii), a wider public benefit of itself does not justify granting consent for works on common land. On its face the paragraph does not permit a wider public benefit to be weighed against permanent (lasting) works to diminish their adverse impacts. Works having a permanent impact must confer a wider public benefit and that impact must not be significant. Depending on the circumstance works, albeit small, may have a significant impact. I accept Mr Laurence's submission that if a replacement alternative is available, that can retain a wider public benefit such as a housing development but without having any net adverse effect on a common. As he submits, the alternative is plainly to be preferred to a proposal under which the impact of the proposed works is both lasting and has some (albeit perhaps small) residual adverse effect.

62. Paragraphs 5.14-16 give examples of works with an underlying public benefit. Although not mentioned, works contributing to the supply of housing could confer a wider public benefit, although as Mr Laurence suggested that may turn on the nature of the housing (affordable/social housing versus expensive executive housing).

63. The upshot is that permanent works on a common which require section 38 consent are to be avoided if possible unless their effect is to maintain or improve the condition of the common (paragraphs 3.2, 5.7). It is difficult to conceive of how a paved vehicular way across a common to serve an adjoining development (or otherwise) will maintain or improve the common. That underlines the need for applicants to explore and explain suitable alternatives.

64. Specifically with respect to consent for the construction (or improvement) of a paved vehicular way across common land, there are three additional points to note, contained primarily in paragraph 5.9: (a) it may be consistent with the continuing use of the land as common land, even where the vehicular way is entirely for private benefit, because the construction does not prevent public access; (b) a paved road across an open common will inevitably have an adverse impact on the enjoyment of the common by introducing "an urbanising feature into what will normally be an essentially open and natural setting"; and (c) in some circumstances a paved vehicular way may be the only practical means of access to adjacent land.

65. To my mind point (a) lacks substantial purchase since it simply acknowledges that if a consent application under section 38(1) is not coupled with an application to exchange or deregister under section 16(1), the land to be paved over will remain common land and, depending on design, will enable continued public access because people can walk over it.

66. Point (b) spells out how, a propos the earlier analysis, a new road across a common neither maintains nor improves it, since by its very nature it impacts on the

enjoyment of the common by introducing an urbanising feature. I accept Mr Laurence's submission that also to be taken into account are the adverse impact on the visual amenity provided by the greenery of the common, and the fact that the inevitable presence of traffic on a new road across a common will impede the passage of walkers and riders across the common and mean that people will need to watch out more carefully and keep children, dogs or horses under closer control than otherwise, thereby adversely affecting their enjoyment of the common: see *Eaton v Kurton* (1967) XVII/6 CSJ 175 (Cheltenham County Court), referred to in *Gadsden and Cousins on Commons and Greens*, 3rd ed., para. 10-49.

67. To my mind point (c) states the obvious, in that it underlines the Policy requirement in relation to vehicular ways that an applicant for section 38 approval should explore alternatives. In relation to point (c) Mr Laurence submitted that it introduced an "only practical means" test which created a high threshold of exceptional circumstances to the grant of consent. In other words, an applicant had to demonstrate not only that it had considered alternatives for a vehicular way but that the vehicular way was needed. That submission I did not find persuasive.

ANALYSIS OF SOCIETY'S CASE

68. The major plank of Mr Laurence's submissions was that the inspector had been wrong to reject the Society's case that the developer ought to have investigated and properly considered one or other of two separate alternatives to the use of the section 38 procedure, firstly, what he termed the "off common alternative" (there was no need for the proposed access road to be constructed on the common because it could be physically situated elsewhere); and secondly, what he characterised as the "replacement alternative" (suitable replacement land should be provided in exchange for that to be used for the proposed access road, enabling it to be deregistered under section 16 of the 2006 Act). Mr Laurence submitted that the inspector had wrongly assumed that the Society had the burden of persuading him that the alternatives should be utilised.

69. For the reasons given earlier, my view is that the Policy requires an applicant to consider alternatives to any application it proposes. It is for the applicant to produce evidence sufficient to persuade an inspector that alternatives have been properly considered and rejected. With a section 38(1) application these might include Mr Laurence's off common and replacement alternatives.

70. In this case the applicant in its response dated 31 August 2021 said that it was not realistic to ask for alternatives to be considered at that stage because outline planning permission has been granted for the housing development, including access. As Mr Laurence submitted, if correct that would mean that an applicant could sidestep the consent regime of the 2006 Act by the simple expedient of applying for planning permission for the works first. Planning consent and consent under section 38 are conceptually and legally separate, and independent of each other, highlighted by the statutory provision that consent given for works under section 38(1) constitutes consent for the purposes of section 38(1) only: s.38(9). That planning consent has been given does not exempt an applicant from the need to obtain any other consent to works, such as the consent of the landowner or consent under the 2006 Act.

71. There were two alternatives before the inspector in this case. In its objection of 16 July 2021, the Society suggested that access to the development could follow the existing vehicular access with dropped kerb immediately to the east of the proposed access, and if that were not possible suggested an exchange of land for the application site from the grassed space between the access road and the northern boundary of the development site or from elsewhere. In their objection Natural England suggested a section 16 application to deregister the land covered by the access road and the area of the common immediately to its northeast and their replacement by common land of equal value elsewhere.

72. In light of these suggestions, and against the background of section 39(1)(d) of the 2006 Act and the Policy, these alternatives were so obviously material that the inspector had to take both into account. First, as for the unmetalled track leading from the B1078 Barking Road, the inspector rejected this at DL29. The first reason for this was its ownership, which he said lay with an unknown third party. To say that its ownership was unknown is not equivalent to it being unknowable. I have already commented on the second reason, that planning permission for the development and its access had already been granted. The third reason was that the proposal lacked any supporting basis. That, however, was because, contrary to paragraph 4.3 of the Policy, the applicant had not explored alternatives.

73. As to the alternative of a section 16(1) application the inspector said at DL40, correctly, that there was no legal obligation to make such an application. However, he went on to say that in his judgment it was inappropriate and unnecessary. One reason was that there no need to offer replacement land with such a small area, less than 200m2. While strictly true, I accept Mr Adamyk's submission that this glosses over the steer in section 16(7) of the 2006 Act, that an application for deregistration of land, even if not more than 200m2, will be strengthened by a proposal for replacement land. There are also the provisions of paragraph 5.3 of the Policy (which was not mentioned by the inspector), especially its suggestion that where no replacement land is offered deregistration is unlikely to be granted in the absence of a compelling public interest.

74. Another reason the inspector gave was that the new road will have only minimal impact, bearing in mind that it will still be common land. To my mind there is still the inevitable adverse impact on the enjoyment of the common by introducing "an urbanising feature" and the need for those using the common to avoid traffic. Natural England also made the point that given its location the works could potentially sterilise a greater area of the common than the 70m2. However, this was a matter for the inspector's judgment, and it was not irrational for him to reach this conclusion about its impact. The application site is at the extreme north-eastern end of the common, and as Natural England noted access by those wishing to use the common and recreation occurred predominately on the main area of common which is located some 600m to the south. It is trite law that matters of planning judgment can only be challenged on grounds of irrationality: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [19].

75. Ordinarily, the inspector would for the reasons explained earlier have required the applicant to address these alternatives properly and explain, if it were the case, how

they were not available or appropriate. He did not require the applicant to do this. The consequence was that, when he considered the two alternatives which the objectors had raised, the basis for doing so was less than adequate. The issue is whether his approach constitutes public law error.

76. Addressing that issue must begin with Lord Carnwath's dictum that "the courts should respect the expertise of the specialist planning inspectors and start at least from the presumption that they will have understood the policy framework correctly": *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [25]. With that as background it seems to me that there are sufficient reasons in the inspector's decision leading to his departure from the Policy in what he regarded as the specific circumstances of this case. His overall planning judgment was that the application related to a proposal to construct a new access road over "a small part of narrow verge of common land" at the north-eastern extremity of the common and that its impact would be minimal.

77. Moreover, in working through the factors set out in section 39(1)(a)-(c) of the 2006 Act, it will be recalled that the inspector concluded that the proposal would not adversely affect the interests of those occupying or having rights in relation to the common, it would not have any significant adverse effect on the interests of the neighbourhood, and it would not cause significant harm to the public interest in conservation, landscape and public access. In light of all these findings it was open to him to depart from the Policy in the special circumstances of this case, which meant that the applicant did not need to explore the alternatives as would ordinarily be required. The inspector concluded that there was no good reason for withholding section 38(1) consent and that decision stands.

CONCLUSION

78. For the reasons given I dismiss the claim.