Open Spaces Society

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Barking Tye common

Full name

The Open Spaces Society v *Secretary of State for Environment, Food and Rural Affairs*

Neutral citation no

[2002] EWHC 3044 (Admin).

Link to judgment

www.bailii.org/ew/cases/EWHC/Admin/2022/3044.html

Summary

The Open Spaces Society challenged in the high court the decision of an inspector to allow an application for works on common land, claiming that he had not followed government policy and should have required the applicant to explain why it could not adopt an alternative less harmful solution. The claim was dismissed but the judge gave some valuable policy guidance.

Background

The society challenged the decision of an inspector, appointed by the environment secretary, to grant consent under section 38 of the Commons Act 2006 ('the 2006 act') for works on common land at Barking Tye, two miles west of Needham Market in mid-Suffolk.

The works comprised a shared vehicular access covering 70 square metres of common land at its north-east end. This was to serve a proposed development site of nine dwellings (for which planning permission had been given) immediately adjoining the common. The access road would link the site with the nearby B1078 Barking Road.

In opposing the application, the society had questioned why the access road was needed, since there was an existing vehicular access with dropped kerb almost immediately to the east of the proposed access, and this was not on the common. The parish council, as landowner, had accepted an offer of £190,000 for an easement over the common and, presumably, the owner of the adjacent vehicular access might come to an agreement with the developer for a similar inducement. The society considered that the developer, Ruby Homes (East Anglia) Ltd should justify its decision.

Even if need were shown, the society said, the developer should have proposed an exchange of land, to add to the common land in compensation for what was used for the access road. The proposed roadworks were incompatible with the secretary of state's *Common Land Consents Policy* (November 2015) since they did not confer any wider public benefit, a requirement for applications under section 38.

Natural England also objected on the grounds that the works did not maintain or improve the common and were not sympathetic to its continued use as common land. Natural England suggested that an application under section 16 of the 2006 act, to deregister the land affected, with provision of alternative land of equal value, would be more appropriate.

After further correspondence, the inspector, Edward Cousins (barrister), granted the application on 18 January 2022. The society challenged the decision by judicial review in the high court.

Discussion

Sir Ross Cranston, sitting as a high court judge, issued his judgment on 30 November 2022.

He considered the 2015 policy and stated [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. … 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.'

Sir Ross went on to say ([58] and [59]) that '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. … Accordingly, an applicant for consent under section 38 of the 2006 [act], 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.'

He next considered the matter of wider public benefit, which, contrary to the objectors' view, the inspector had held was provided by the housing development, and the money to be paid to the parish council for local use. The judge said of paragraph 5.7 of the policy [61]: '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.' He concluded [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 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.'

He went on to analyse the society's case, saying [69]: '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.' He referred to the two alternatives presented by the society and said that the inspector had to take both into account.

Reading thus far, one would have thought the society would win the appeal. However, when the judge came to analyse the way in which the inspector reached his conclusion, he did not find that the inspector had committed a public-law error (although he felt that the inspector's basis for considering the two alternatives raised by the objectors 'was less than adequate').

He considered that [76]: '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.' The inspector had concluded [77]: 'that the proposal would not adversely affect' the various relevant interests, nor would it '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.' He therefore dismissed the appeal.

Comment

Although the judge dismissed the appeal on the particular facts of the case, he accepted many of the society's arguments. He provided important clarification on the principles to be taken into account when considering an application under section 38, which will be invaluable to the society in responding to future applications.

Thanks

The society is grateful to its legal team, George Laurence KC and Simon Adamyk of New Square Chambers, and Matthew McFeeley of Richard Buxton, Solicitors.