Case Name: *The Open Spaces Society v Secretary of State for Environment, Food and Rural Affairs* [2022] EWHC 3044 (Admin) (30 November 2022)

Full case: Click Here

Commentary:
This case concerned a challenge by the Open Space Society ("the Society") in respect of a Planning Inspector's decision to allow the construction of a short length of road at the north-eastern edge of common land at Barking Tye in Suffolk under Section 38 of the Commons Act 2006 (the "Commons Act"). The proposed new road was designed to provide access to a residential development that had been granted outline planning permission by the Mid-Suffolk District Council with all matters reserved except for access. The access road covered approximately 70 m2 of common land.

The hearing focussed on whether the Inspector had misdirected himself in his interpretation of the Common Lands Consents Policy last published in November 2015 ("the Policy") and, in particular, the role of alternatives in the assessments under S.38 of the Commons Act. The judge re-iterated the principles set out by Mr Justice Holgate in Trustees of the Barker Mill Estates v Test Valley Borough Council [2016] which states that 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. The Judge found that the proper interpretation of the Policy in respect of alternatives was that an application for consent under Section 38 of the Commons Act, whether or not they intend to make an application under Section 16 (which allows for commons land to be de-registered as commons land and suitable replacement land nominated where the de-regulated land will be over 200 m2), must properly explore alternatives and this may include a replacement alternative.

In the planning appeal the subject of these proceedings the applicant had written to the Inspector saying that it was not realistic to ask for alternatives to be considered since planning consent for the development, including access had already been granted. The Judge held that this does not exempt an applicant from the need to obtain other consents to works, such as the consents under the Commons Act. Nevertheless, there were in fact two alternatives to the proposed scheme before the Inspector that had been put forward by the Society and Natural England in their objections and these were so obviously material that the Inspector had to take both of them into account in his decision-making process. But, as the Inspector did not require the applicant to address the alternatives properly and explain how they were not available or appropriate, the basis on which he considered the two alternatives proposed by the objectors was "less than adequate" (para.75).

However, the Judge ultimately found that the Inspector had not committed public law

error as there were sufficient reasons in his decision to explain why he had departed from the Policy in the special circumstances of the case which meant that the applicant did not need to explore the alternatives as would ordinarily be required.

Case summary prepared by Juliet Munn