

**Application Decision**

Site visit made on 8 December 2021

**by Edward Cousins BA, BL, LLM, Barrister**

**An Inspector appointed of State for Environment, Food and Rural Affairs**

**Decision date: 18 January 2022**

**Application Ref: COM/3277618**

**Barking Tye Common**

***Register Unit No.: CL 23***

***Registration Authority: Suffolk County Council***

* The application, dated 18 June 2021, is made under Section 38 of the Commons Act 2006 for consent to carry out restricted works on common land.
* The application is made on behalf of Ruby Homes (East Anglia) Ltd.
* The works comprise the construction of a new permanent shared vehicular access (including public utility services beneath) covering approximately 70m2 of land to serve a proposed development site for nine dwellings.

**Summary of Decision: The application is granted.**

**Preliminary matters**

1. I made an unaccompanied Site Visit to the land referred to in the application on 8 December 2021.
2. Outline planning permission for residential development (erection of nine dwellings, with garages), was granted by Mid Suffolk District Council on 24 January 2018 (Application Reference: 4933/16). All matters were reserved, save for the access route the subject matter of this application.
3. Rights of access to CL23 are governed by a scheme of regulation made under the Commons Act 1899 (‘the Scheme’). By virtue of section (15(2) of the Countryside and Rights of Way Act 2000 rights of access to the common extend to members of the public in general.

 **Main Issues**

1. In general terms Section 38 of the Commons Act 2006 (‘the 2006 Act’) prohibits the carrying out of certain restricted works on common land without the appropriate consent. Restricted works are defined as including the re-surfacing of land which may consist of ‘the laying of concrete, tarmacadam, coated roadstone or similar material on the land’.
2. In determining this application for such works made under Section 38, Section 39 of the 2006 Act requires that I have regard to the following:
	1. the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it).
	2. the interests of the neighbourhood.
	3. the public interest; and
	4. any other matter considered to be relevant.
3. Section 39(2) of the 2006 Act provides that the public interest 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.
4. I must also have regard to Defra’s Common Land Consents Policy produced in November 2015 which has been published for the guidance of both the Planning Inspectorate and for applicants. However, every application is considered on its merits and a determination will depart from the policy only if it appears appropriate to do so.

**The application**

1. The parcel of common land over which the new access is proposed to be constructed forms a small part of a narrow verge of common land approximately 70m2 in size contained within Unit CL23 (‘the Verge’). The Verge lies adjacent to the B1078 Barking Road at its north-eastern extremity.
2. The application is made on behalf of Ruby Homes (East Anglia) Ltd (‘Ruby Homes’). It proposes the construction of a new permanent shared vehicular road (including public services below) across the Verge lying adjacent to and abutting an existing unmetalled path. The purpose of the application is to provide access the proposed development site from the public highway in accordance with the planning permission and the plans attached thereto.
3. Permission for the construction of the new access route over the application site has also been granted by Barking Tye Parish Council (‘the Parish Council’), who are the freehold owners of the whole of the various parcels of land comprising CL23.
4. A public notice was published in the East Anglian Daily Times on 17 June 2021 giving brief details of the proposal. Owing to Covid restrictions the application and accompanying documents were not publicly displayed but were available from Last and Tricker Partnership, agents for Ruby Homes, for the statutory 28-day consultation period until 19July 2021. Consultation letters were sent to interested parties as required, including the Barking Tye Parish Council (as owners of the common land), the Commons Registration Authority, Natural England (‘NE’), Historic England (‘HE’), the Open Spaces Society (‘OSS’), SCCAS, and the five registered owners of rights of common held over CL23.

**Representations and objections**

1. There was no response from any of the owners of registered rights of common over CL23.
2. Three responses were submitted in answer to the notice of the application.
3. HE confirmed that it had no objection to the proposal.
4. Both NE and the OSS have registered objections to the proposal on similar grounds.
5. Both organisations point to aspects of the Secretary of State’s Common Land Consents Policy which indicates 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 (released) as common land with a corresponding area being designated as common as a replacement. As a consequence, it is submitted that the works proposed should not have been the subject of an application under Section 38 of the 2006 Act, but instead should have been the subject of an application under Section 16 of that Act.
6. That approach would have required an area of replacement land to be offered in exchange for common land lost by reason the works. However, no such application was made. Accordingly, the current application must be considered on its merits in accordance with the relevant criteria set out in Section 39 of the 2006 Act.

**Reasons**

***The interests of those occupying, or having rights in relation to, the common***

1. The Parish Council as owners of the common land were consulted about the application but have made no comment.
2. The Rights Section of the Commons Register notes a number of rights attached to local properties recorded over the whole of the land comprised in the Register Unit CL23, including the Verge. These include the rights to graze horses, donkeys, geese, and cattle and sheep. However, there is no evidence as to whether and to what extent these rights are currently exercised. In this context it seems unlikely that, in any event, animals could be safely kept on the application site or any other part of the Verge, given its unenclosed nature and its proximity to busy traffic on the B1078 Barking Road – there is no pavement between the Verge and the highway.
3. There have been no objections submitted from any of the registered rights holders. Thus, no adverse effects of the proposal on the holders of such rights to graze have been highlighted.
4. Further, I consider that public access to the Verge will not be restricted in any significant way by reason of the proposed works. Any exclusion of the public from the application site will only be of a temporary nature, and agreement should be reached with any interested parties as to the timing of the exclusion and an alternative temporary access be provided, if it is considered necessary or appropriate. I find that public access to the application land would still be available after the works have been carried out, albeit that the area will thereafter have a hard surface to accommodate traffic. Indeed, in my judgment access to the Verge will be improved owing to the lack of any existing pavement between the Verge and the B1078 Barking Road.
5. Accordingly, I conclude that the proposal would have no substantive adverse effect in terms of the overall availability of common land capable of being grazed in other parts of CL23 and will not adversely affect the interests of those occupying or having rights in relation to CL23.

***The interests of the neighbourhood***

There is definition of the concept of ‘neighbourhood’ within the terms of the 2006 Act. However, in general terms works should only be permitted on common land if 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 (see the Common Land Consents Policy, paragraph 3.2).

1. In this case, the proposed works will have the effect of replacing a relatively small area of grassland on the Verge 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 development.
2. 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.
3. In my view, the works proposed are clearly not intended to be temporary and will inevitably have a lasting impact on a small peripheral area of the common. However, the question of whether this impact should be regarded as significant and whether it will be outweighed by some wider public benefit must also be considered.
4. The main reason this application has been made is to enable an access road to be constructed which will allow the proposed development to take place on land to the rear of the Verge comprising part of CL23. Planning permission has been granted for this proposal. Specific guidance on works relating to vehicular ways across common land accepts that in some circumstances a paved vehicular way may be the only practical means of achieving access to land adjacent to the common (see the Common Land Consents Policy, paragraph 5.9). This would appear to be the situation in this case.
5. On site it is to be noted that there is a tarmacadamed area to the southwest of the neighbouring property (Ashford). This currently serves the unmetalled path from the highway to fields lying to the southeast behind the relevant part of CL23. However, part of this shared area also appears to lie over the northern extremity of CL23 itself. It is also to be noted that there is a length of partially inserted dropped kerb lying at the side of the B1078 Barking Road at this point.
6. I reject the suggestion made by the OSS that the existing unmetalled path leading from the side of public highway instead could be utlilised as an alternative, for three reasons. 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.
7. Overall, I find that on balance the proposed works will not have any significant adverse effect on the interests of the neighbourhood and that any impact will be outweighed by the benefits they will bring by enabling the housing development to take place for which planning permission has been granted.
8. I therefore reject the assertion made by the OSS that there is an absence of need.

**The Public Interest**

***Nature Conservation***

1. In summary, NE acknowledges that whilst the area of land that is the subject matter of the proposal is relatively small and located at the northern end of the common. It is stated that NE is unable to see how the proposals would maintain or improve the common or are sympathetic to its continued use as common land.
2. Whilst it could be said that there could be an overall loss of natural habitat resulting from the proposed works, as the area in question forms part of the roadside Verge the quality and extent of the grassland affected, and its location, are such that the weight I attach to this loss is minimal when considered within the context of the common comprising CL23 as a whole. There is no evidence that any material harm will be caused to nature conservation. Further, although as small part of the area will have a hardened surface, it will still remain part of the common. No evidence has been adduced that supports the suggestion made that there will be a greater loss than 70m2
3. In summary, I am satisfied that the works will not overall harm nature conservation interests to any significant extent.

***Landscape conservation***

35. The application site is not subject to any statutory designations for landscape. It lies to the side of a public highway. Natural England has confirmed it does not envisage any negative impact in this regard. I therefore disagree with the assertion promoted by the OSS that the proposed works will ‘encroach on significant elements of the rustic features of the Common’. In reality, the extent of the land affected will be minimal.

***Public rights of access***

1. Apart from a short period whilst construction of the new roadway to serve the proposed development is in progress, the application site will remain publicly accessible as part of the Verge adjoining the public highway, albeit that it will have a tarmacadamed surface. However, it will continue remain as part of the common land lying within CL23. No public rights of way would appear to be affected by the proposal.

***Archaeological remains and features of historic interest***

1. There is no evidence to suggest that any archaeological remains or features of historic interest would be affected by the proposed works and there are no submissions to the contrary. Historic England has made no objection to the proposal. I am therefore satisfied that there is no evidence before me to indicate that the works will harm any such interests.

**Other relevant matters**

1. The maintenance of an adequate supply of land for new housing is an important national policy. The proposed works will enable the construction of nine dwellings in accordance with the outline planning consent granted by Mid Suffolk District Council. The access route has been approved by Mid Suffolk District Council.
2. In this context, as noted above, the common land comprising CL23 is owned by the Parish Council. As I understand it, the Parish Council and Ruby Homes have agreed that the access route to the proposed development will lie over the application site, the consideration for which the Parish Council will receive £195,000. This sum will be utilised for the benefit of the Parish.
3. 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 is for guidance only, in my judgment such an application would have been inappropriate and unnecessary in the circumstances where there is not 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.
4. I also note that section 38 of the 2006 Act states that works on common land which require consent under that section include *‘*works for the resurfacing of land’, and further states that “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)’*.* This wording would appear to me to cover the sort of works currently applied for and to suggest that the inclusion of paved highways is not necessarily inimical to the status of common land.
5. Finally, I consider that there is no practical alternative means of achieving access to the development site, for which planning permission has been granted.

**Conclusions**

1. On the basis of the submissions, and from my observations on site, I conclude that the works proposed would
2. have minimal effect on the interests of persons having rights in relation to the land and will no substantive adverse effect in terms of the overall availability of common land capable of being grazed.
3. not be detrimental to the interests of the neighbourhood; and
4. not cause significant harm to historical, archaeological, landscape or nature conservation interests or, in practical terms, to public access.

**Formal Decision**

1. Consent is granted under Section 38 of the Commons Act 2006 for the works sought by the application dated 18 June 2021 and the plans submitted with it.

Edward Cousins

**Inspector**

