Case Name: Tiwana Construction Ltd v Secretary of State for Housing, Communities And Local Government & Anor [2025] EWHC 1485 (Admin) (24 June 2025)

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Commentary: This case was a successful statutory challenge of the decision of an inspector (the "Inspector") dated 20 August 2024 (the "Inspector's Decision") to refuse the appeal made by Tiwana Construction Limited (the "Claimant") against the decision of West Suffolk District Council (the "Council") to refuse the Claimant's application for outline planning permission for 10 self-build detached dwellings (the "Application") (the "Council's Decision").

Following the end of the appeal hearing, but prior to the Inspector's Decision, the Claimant submitted two draft section 106 agreements and an executed unilateral undertaking ("the Unilateral Undertaking") to the Inspector, which made provision for the inclusion of 3 affordable housing units as part of the 10 dwellings for which permission was sought. In the Inspector's Decision the Inspector did not take account of the draft section 106 agreements or of the Unilateral Undertaking.

The challenge was brought on one ground with two elements, namely that the Inspector's Decision irrationally failed to take into account the "obviously material consideration" of the provision of affordable housing and that the Inspector's Decision was inadequate as it failed to give reasons for the failure to take the Unilateral Undertaking into account.

The Claimant's challenge succeeded on both elements of the ground with the Court finding that there was a failure to provide the reasons in relation to a matter of importance and that the failure caused substantial prejudice to the Claimant. In respect of the failure to take into account a material consideration, the Court was not satisfied that the decision would have been the same with the high degree of likelihood necessary to satisfy the Simplex test and relief was therefore granted and the decision was quashed.

Facts

The Council's Forest Heath Core Strategy requires provision of 30% affordable dwellings by new development on sites of 10 dwellings or more, however the Application was not accompanied by a legal agreement securing such affordable dwellings and so was considered by the Council to conflict with local policy.

The Claimant submitted a draft s106 agreement securing the necessary affordable dwellings, if the Inspector agreed with the Council that the Application was in conflict with the development plan, to PINS around a week before the start of the hearing. Following discussion during the hearing, the Inspector considered that even if affordable housing was not required in order for the Application to accord with the

development plan, its provision would be considered a positive factor in determination of the appeal. On that basis, the Claimant agreed to provide affordable dwellings in line with the policy.

The Inspector required the s106 agreement to be provided by 2 August 2024. On 8 July 2024, the Claimant's planning consultant sent a revised list of conditions to the PINS case worker and on 10 July 2024 the case worker confirmed "the only further deadline agreed at the hearing was the completed s106 agreement by 2nd August". On 30 July 2024, the Claimant's planning consultant wrote to PINS asking for an extension of the deadline by two weeks for the submission. He said that the terms of a section 106 agreement had been agreed but that the approval of the Claimant's chargee was awaited and that time for execution would be needed after the final agreement by the chargee. The Inspector indicated that she would be prepared to extend time to 16 August 2024 provided confirmation from the Council that the wording of the draft section 106 agreement had been agreed was provided and was clear that no agreement would be accepted after that date. The Council confirmed agreement to the draft s106 agreement on 2 August 2024. The Inspector prepared her draft decision letter on 9 August 2024, which attached moderate weight to the provision of affordable dwellings but ultimately dismissed the appeal due to "the very significant cumulative harms arising the site's location, lack of genuine transport choices and its adverse effects on the countryside". On 13 August 2024 the Claimant's planning consultant requested an additional two-week extension to allow time for the Claimant's funder to approve and execute a slightly amended s106 agreement, however this request was refused.

On 16 August 2024 the Claimant's planning consultant provided the Unilateral Undertaking to PINS, together with an advice note from its solicitors supporting an additional extension of time, or alternatively, confirming that the Inspector could rely on the Unilateral Undertaking together with the imposition of a Grampian condition to ensure the necessary interests in land were bound or could simply impose a Grampian condition on its own.

On 19 August 2024 the Claimant's planning consultant confirmed to PINS that the Claimant's lender had confirmed approval of the s106 agreement and the second requested extension would be sufficient to obtain executions by all necessary parties, however on 20 August 2024 the Inspector issued the Inspector's Decision, dismissing the appeal but not listing affordable housing as an issue, following advice from her professional lead. Affordable housing was not identified within the planning balance in the Inspector's Decision.

In her witness statement dated 21 January 2025, submitted with the detailed grounds of defence filed by the Secretary of State for Housing, Communities and Local Government (the "SoS"), the Inspector confirmed that she did not consider the Unilateral Undertaking as it was confirmed that it contained the same obligations as the s106 agreement she had already considered and found to be flawed, and she had considered affordable housing to be a determinative issue in the appeal.

Judgment

In respect of the reasons element of the ground of challenge, Mr Justice Eyre considered that "the effect which the provision of affordable housing had on the planning balance was clearly a matter of importance" given that it had been one of the original reasons for refusal of the Application and the SoS had stated that failure to provide affordable dwellings was contrary to the development plan. It was clear that the extension of time granted was for the purpose of the provision of affordable housing through the legal agreement, and PINS's inspector training manual provided that it was good practice to accept such legal agreement, even if after an agreed deadline. In any event, the Unilateral Undertaking was provided by the agreed deadline, and the fact that it was a unilateral undertaking and not an agreement made little difference. Mr Justice Eyre went on to state that "[t]he Inspector made a deliberate decision not to take account of the Unilateral Undertaking or of the provision of affordable housing made in it. It was necessary for the reason for that decision to be articulated in the [Inspector's Decision]. The articulation of the reasons could have been short, but reasons needed to be given".

In respect of adequacy, Mr Justice Eyre considered that the Inspector's Decision together with the email correspondence between PINS and the Claimant on 20 August 2024 "did not provide an adequate explanation of the reasons for the Inspector's decision not to take the Unilateral Undertaking into account". He went on to confirm that the Inspector's witness statement, which significantly post-dated the Inspector's Decision, could not "operate to enhance the adequacy or otherwise of the reasons given in the [Inspector's Decision]", that the [Inspector's Decision] had to be read objectively and "the Inspector's view as to what she meant to say cannot be used as an aid to interpretation". He considered that the case worker's statement that the Inspector would "make her decision accordingly" did not make clear that she would not take account of the Unilateral Undertaking in her decision. The Judge rejected the SoS's submission that the Inspector's Decision was to be read as saying that even if the Claimant had provided affordable housing the planning balance would still have been against the appeal and that the Inspector had not addressed the issue for that reason.

Mr Justice Eyre considered that the Claimant did suffer "real and substantial prejudice" as a result of its ability to assess the lawfulness and rationality of the Inspector's Decision, as well as its ability to understand whether any different proposal would be acceptable, being impaired.

In respect of the additional element of the ground of challenge relating to the alleged failure to take into account an obviously material consideration, the Judge considered that the Unilateral Undertaking was "substantial professionally-drawn document which had been executed and which was accompanied by reasoned legal submissions". The Inspector had herself highlighted the role to be played by affordable housing, and had confirmed that its provision would be a positive factor in the planning balance, identifying it as an issue she had considered in her first draft decision. The Inspector's course of action failed to follow the good practice set out in PINS's inspector training

manual in respect of accepting planning obligations submitted to PINS. The Inspector herself confirmed that she did not consider the Unilateral Undertaking as she was advised that it secured the same obligations as the s106 agreement and in doing so she irrationally failed to have regard to an obviously material consideration.

Conclusion

For the reasons set out above, the Claimant's challenge succeeded.

Case summary prepared by Sophie Bell