Neutral Citation Number: [2025] EWHC 1485 (Admin)

Case No: AC-2024-LON-003210

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th June 2025

Before :

MR JUSTICE EYRE

- -

Between :

TIWANA CONSTRUCTION LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**First Defendant**
- and -	
WEST SUFFOLK DISTRICT COUNCIL	**Second Defendant**

- -

- -

Andrew Parkinson (instructed by **Howes Percival LLP**) for the **Claimant**
Heather Sargent (instructed by **Government Legal Department**) for the **First Defendant**
The Second Defendant did not attend

Hearing date: 5th June 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 24th June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

Mr Justice Eyre:

1. On 20th August 2024 Sheila Holden ("the Inspector") refused the Claimant's appeal against the Second Defendant's refusal of planning permission for a proposed development of 10 self-build houses in Burwell ("the Decision"). The Claimant now seeks statutory review of the Inspector's decision on one ground pursuant to permission I gave on 3rd December 2024. The Claimant did not renew its application in respect of a second ground for which permission was refused.

2. The Second Defendant has taken no part in the proceedings and was not represented before me.

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

4. There were three elements to the ground on which permission was given. The first, that the Inspector had made a material error of fact, is no longer pursued. The remaining two elements challenge the rationality of the Decision and the adequacy of the reasons given by the Inspector.

5. The Claimant says that the provision of affordable housing by the Unilateral Undertaking was an obviously material consideration. It says that the Inspector's failure to take this into account as a factor in favour of the Claimant's appeal was irrational. The First Defendant says that there was no irrationality in circumstances where neither the Unilateral Undertaking nor a section 106 agreement had been put in evidence at the hearing of the appeal. The Inspector had agreed an extended period within which the Claimant could submit an executed section 106 agreement. However, that period had passed without the submission of such an agreement. Accordingly, the First Defendant says, the Inspector is not to be criticized for failing to take account of the Unilateral Undertaking, to which no earlier reference had been made.

6. The Claimant says that the Decision was deficient in that the Inspector did not give any reasons for her failure to take the Unilateral Undertaking into account. It says that it has been prejudiced by this failure. The First Defendant says that when the Decision Letter is read in context and with regard to the earlier exchanges, the reasons for the Decision are sufficiently clear and that in the circumstances of this case the failure to give any fuller explanation has not prejudiced the Claimant.

7. Although he maintained both lines of challenge it was the reasons challenge which was at the forefront of Mr Parkinson's submissions for the Claimant.

8. For the First Defendant, Miss Sargent submitted that even if the failure to take the Unilateral Undertaking into account were found to have been irrational, relief should be refused. This was because the court could, she said, be satisfied that, even if the provision of affordable housing had been taken into account as a factor in favour of the appeal, the ultimate outcome would still have been the same. Miss Sargent also submitted that relief should be refused if the court concluded that the Inspector had

failed to give sufficient reasons for her failure to take the Unilateral Undertaking and the provision of affordable housing into account. In this regard Miss Sargent's principal contention was that no substantial prejudice had been caused to the Claimant. She accepted that if any inadequacy in the reasons was found to have caused substantial prejudice to the Claimant the approach enunciated in *Simplex GE (Holdings) Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1041 would be unlikely to be applicable.

9. It follows that the issues to be considered are:

   i) Whether it was necessary for the Inspector to give reasons for her failure to take into account the proposal for affordable housing contained in the Unilateral Undertaking.

   ii) Whether the Inspector gave adequate reasons for that failure.

   iii) Whether the Claimant suffered substantial prejudice as a result of any inadequacy of those reasons.

   iv) Whether relief should nonetheless be refused if the reasons challenge is established.

   v) Whether the Inspector's failure to take the Unilateral Undertaking into account involved an irrational failure to have regard to an obviously material consideration.

   vi) If so whether relief should nonetheless be refused on the basis that taking the Unilateral Undertaking and the affordable housing into account would not have altered the outcome of the appeal.

The Factual Background.

10. The sources for establishing the history leading up to the Decision fall into two broad categories. The first consists of the documents and exchanges which were public (in the sense of being known to both the Claimant and the Inspector). Those were principally the material put forward at the hearing before the Inspector, the Decision Letter, and the exchanges between the Claimant and the Planning Inspectorate before the despatch of the Decision Letter. The second category consists of documents of which the Claimant was unaware until after the commencement of these proceedings or which came into being as a result of the proceedings. Those were a draft decision letter dated 9th August 2024; exchanges between the Inspector and her professional lead in the Planning Inspectorate; and the Inspector's witness statement.

11. The Claim was issued on 25th September 2024. I gave permission for ground 1 on 3rd December 2024. The First Defendant's Detailed Grounds of Defence were filed on 21st January 2025 when they were accompanied by the Inspector's witness statement of the same date to which the other previously unseen material was exhibited.

12. It was common ground that all this material was properly before me. The more significant question was the use to which it could be put. I have regard to the principles summarised in the judgment of the court in *R (United Trade Action Group Ltd) v Transport for London* [2021] EWCA Civ 1197, [2022] RTR 2 at [125]. It is appropriate

at this stage to have regard to all the material in order to establish what happened. The extent to which it can assist in determining the grounds of challenge is a different matter and I will consider that below.

13. The Claimant's application had been for outline planning permission for 10 self-build detached dwellings on land around Halfway House, a property about 400m from the edge of Burwell village. The application had been submitted on 24th January 2023 and was refused on 29th September 2023. The Second Defendant gave seven reasons for that refusal. Reasons 6 and 7 are relevant for current purposes and were:

> "6 Policy CS9 of the Forest Heath Core Strategy requires new development on sites of 10 dwellings or more or sites of more than 0.33 hectares to provide 30% affordable dwellings to meet local needs within the district. The application is not accompanied by a legal agreement to secure affordable housing as required by the policy and as such, the application conflicts with the provisions of CS9.
>
> 7 Policy CS13 of the Forest Heath Core Strategy requires new major development to contribute to appropriate infrastructure to meet site specific requirements and create sustainable communities. In this case, the contributions requested have not been secured by a legal agreement as necessary and specified in the policy and as such, the application fails to accord with CS13."

14. The Claimant appealed and the hearing before the Inspector was on 27th June 2024.

15. The Claimant had sent a draft section 106 agreement to the Planning Inspectorate on 21st June 2024. That made provision for 3 of the 10 dwellings to be affordable housing. However, it was advanced to address the Second Defendant's contention, as set out in the sixth reason for refusal, that the absence of affordable housing meant that the proposed development was contrary to the Development Plan. The Claimant did not accept that there was such inconsistency. The provision was made in that draft section 106 agreement only on the basis that it would take effect if the Inspector took a different view from the Claimant as to such inconsistency. So, if the Inspector agreed with the Claimant and found that there was no inconsistency and that the reason for refusal could not stand the provision for affordable housing would fall away.

16. There was discussion about affordable housing in the course of the appeal hearing. The discussion was addressed in the witness statement of the Claimant's planning consultant, Tim Waller, and in that of the Inspector. There are minor differences of emphasis between those accounts. The Inspector's statement was made on 21st January 2025 but in making that statement the Inspector was able to refer to her notes taken at the hearing. Mr Waller's statement was made in September 2024 but was made with the benefit of reference to his contemporaneous attendance note and the account which he had sent by email to the Claimant's solicitors the day after the hearing. The substance of what happened is clear. There had been discussion about whether compliance with the Development Plan required the Claimant to include affordable housing in the proposed development. The Inspector said that even if affordable housing was not needed to ensure consistency with the Development Plan and so not required to remove an adverse factor she would regard its provision as a positive factor which would go into the planning balance in favour of the appeal. In light of that suggestion the Claimant agreed that it would provide affordable housing. I will consider below the question of whether the Inspector stipulated that this provision be by way of a section 106 agreement. It is, however, clear that all involved expected that it would be provided by a section 106 agreement and consequently, the Inspector set out a timetable for the submission of such an agreement.

17. At the hearing the Inspector had said that the agreement should be provided by 2nd August 2024. On 8th July 2024 Mr Waller sent a revised list of conditions to the Planning Inspectorate case worker. On 10th July 2024 the caseworker, Hamish Walters, replied thanking Mr Waller for submitting the revised list by the agreed deadline and saying "the only further deadline agreed at the hearing was the completed s106 agreement by 2nd August".

18. On 30th July 2024 Mr Waller wrote again asking for an extension of the deadline by two weeks for the submission. Mr Waller said that the terms of a section 106 agreement had been agreed between the Claimant, the Second Defendant, and the County Council 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.

19. Mr Walters replied saying that the Inspector required confirmation from the Second Defendant that the wording of the draft section 106 agreement had been agreed. On receipt of that confirmation the Inspector would be prepared to extend time to 16th August but she had asked Mr Walters "to make it clear that [she] will not accept any agreement received after that date."

20. Confirmation from the Second Defendant was provided on 2nd August 2024.

21. On 9th August 2024 the Inspector prepared a draft decision letter. The following aspects of that document are of note.

22. First, it recorded that the appeal was dismissed.

23. At [9] the Inspector identified the main issues as being:

> "a) Whether the site is suitable for residential development having regard to the Council's spatial strategy;
>
> b) Whether the location would provide adequate access to local services and facilities for future residents;
>
> c) The effect of the proposal on the character and appearance of the countryside;
>
> d) Whether the development should contribute towards the provision of affordable housing and;
>
> e) If there is conflict with the development plan arising from any of the above, there are material considerations that indicate the decision should be other than in accordance with the development plan."

24. At [31] – [36] the Inspector addressed affordable housing saying, at [35] and [36]:

> **"**35 As a consequence of the discussion at the Hearing, the appellant agreed to provide 3 of the 10 plots at a discount of 20%. The completed Section 106 agreement includes appropriate eligibility criteria, clauses to ensure that initial occupants use the houses as their principal residence for a minimum of 3 years and that subsequent disposal of any of the properties would be at 20% below the market value at the time of sale. These provisions would be the basis for securing the DMS in perpetuity. However, if the marketing strategy is not successful in finding prospective purchasers for the DMS plots, the affordable homes would not be delivered and no other mechanism for contributing towards affordable housing need, such as a commuted sum, has been offered.
>
> 36 Nevertheless, I conclude that, subject to 3 eligible persons coming forward, the proposal would comply with Policy CS9 of the Core Strategy."

25. At [46] – [49] the Inspector addressed the planning obligation explaining, *inter alia,* that a failure to deliver the affordable housing would mean that there was conflict with the Development Plan.

26. The Inspector then turned to the planning balance saying, at [53]:

> "On the other hand, the delivery of 10 self-build serviced plots would contribute to the unmet demand for such plots across the district. It would assist the Council in meeting its duty to grant permissions in support of those individuals and groups who wish to build their own home. However, with no substantive evidence of interest from registrants in this particular sight, this is a benefit which attracts only significant weight in the planning balance. The provision of 3 DMS plots would accord with the development plan's requirement to provide affordable housing. Even though not all of them might be taken up, and the scheme would not address the requirements of those in greatest housing need, provision of DMS housing would be a benefit of moderate weight."

27. The Inspector concluded thus, at [54]:

> "Taking all these matters into consideration I conclude that the benefits associated with the proposal would not outweigh the very significant cumulative harms arising the site's location, lack of genuine transport choices and its adverse effects on the countryside."

28. On 13th August 2024 the Claimant's planning consultants wrote again to Mr Walters. They explained that there had been modest amendment to the earlier draft section 106 agreement and that it remained necessary for the chargee to obtain the approval of its funder. The consultants sought a "final extension of time" for a further two weeks from 16th August 2024.

29. On 15th August 2024 Mr Walters replied saying:

> "The inspector has rejected this extension request.
>
> In my email of the 2nd August I made it very clear that the inspector was not willing to accept any agreement after the extended deadline of the 16th August.
>
> The inspector will only accept an agreement which is executed if received on or before 16th August."

30. On 16th August 2024 the Claimant's planning consultants sent the Unilateral Undertaking to the Inspector together with an Advice Note from its solicitors. In the accompanying email they said:

> "Many thanks for the e-mail below and confirmation from the Inspector that the extension of time has not been agreed at this stage.
>
> This has, quite understandably, caused the Appellant significant concern. The s106 Agreement is in an agreed form and is circulating for signature. The delay in securing final signatures is completely outside of the Appellant's control, in that we are awaiting execution from the lender. This is expected any day now. All parties and their solicitors have approved the draft.
>
> As the Inspector has refused a further extension, the Appellant has – given the urgency here and for the assistance of the Inspector in determining this appeal and to assist consideration – prepared and completed a Unilateral Undertaking. The Appellant has also sought independent legal advice which is attached to either help satisfy the Inspector that a final extension of time is reasonable here, or alternatively that the Inspector may positively determine the appeal through reliance on the Unilateral Undertaking, in combination with a proposed Grampian condition to ensure that all relevant interests are

> bound into the terms of the planning obligation, in consideration that the lender has not executed at this stage. The Appellant appreciates the Inspector's patience thus far in agreeing extensions of time and these have been very much appreciated. It is unfortunate that in light of the holiday period and final amendments required to the s.106 following the holiday season, that whilst the draft is agreed, the agreement needs to be executed by the remaining parties and completed – and that this is likely to take a few more days.
>
> The Appellant sincerely hopes that the Inspector, in the circumstances, would allow one further extension of time to allow the agreed section 106 to be signed, completed and submitted, or alternatively is comfortable, as per the legal advice note, that he UU, in conjunction with the imposition of a Grampian condition, would ensure the necessary planning obligations are secured."

31. The Unilateral Undertaking made provision for 3 of the 10 proposed dwellings to be sold at below market value as affordable housing. It also provided for a sum equivalent to 20% of the open market value of a plot or dwelling to be payable to the Second Defendant as the "affordable housing contribution" in the event that an affordable housing plot was sold at more than the discounted market value. The Advice Note contained detailed submissions. In short, the primary submission was that the Inspector should reconsider her refusal to extend time and should grant an extension to enable an executed section 106 agreement to be provided. The Advice Note then set two options. The first was acceptance of the Unilateral Undertaking coupled with the imposition of a *Grampian* condition. The second was the imposition of a *Grampian* condition alone. The Advice Note submitted that the Inspector should adopt one of those options if she chose to maintain her refusal of an extension of time.

32. On 19th August 2024 the consultants wrote again saying that the lender had provided authority for the execution of the section 106 agreement. A final extension of time to 30th August 2024, to allow for the set sealing days of the two councils, was sought on the basis that this would be sufficient and that no further extension would be needed. The email then said:

> **"**The s.106 will make clear that this supersedes the Unilateral Undertaking submitted to PINS on Friday and would avoid the need for the imposition of a Grampian condition as proposed. Otherwise, we would welcome the Inspector's confirmation that the Unilateral Undertaking (coupled with a Grampian condition as proposed) would be acceptable here should a further extension not be agreed on this occasion."

33. In her witness statement the Inspector said that she considered the Advice Note which had been submitted on 16th August 2024 but that she did not consider the Unilateral Undertaking.

34. At paragraphs 32 and 33 of her witness statement the Inspector said:

> **"**32 At no time between the close of the Hearing and the 16 August did the Claimant suggest that the only way to proceed might be through submission of a UU. There was no discussion at the Hearing about any form of obligation that was not a S106 agreement, and as such this is what I was expecting to receive by the deadline.
>
> 33 The UU was submitted without any pre-warning on the absolutely final deadline of 16 August that had been agreed., The advice note from Howes Percival stated that the UU contained the same obligations and covenants already agreed with the Council but also included a covenant referring to a Deed of Adherence. Therefore, as I had already found the draft S106 agreement to be flawed I felt there was no justification for spending time examining a different form of obligation. Had I read the UU at the time, I would have come

> to the exact same conclusion I had already come to on the draft S106 agreement: its provisions would be insufficient to ensure that the affordable plots being offered would meet the definition of DMS affordable housing."

35. The Inspector said that if she had been minded to allow the appeal she would not have accepted the Unilateral Undertaking without "significant scrutiny" and without consulting the Second Defendant. She then said "however, this was not necessary as I was already minded to dismiss the appeal for other reasons and affordable housing was not a determinative issue."

36. The Inspector reverted to her reasons for not considering the Unilateral Undertaking at paragraphs 41 and 42. Having noted that the Claimant has made reference to paragraph 82 of the Planning Obligations section of the Planning Inspectorate's Inspector Training Manual as a matter in support of the claim the Inspector said:

> "41**...** I consider departure from paragraph 82 was justified as the obligation I was expecting to be provided with was a S106 agreement. This was what was agreed at the hearing and at no time between the end of the Hearing in June and the final deadline for the agreement on 16 August, did the Claimant ever suggest that it might be necessary for them to submit a UU instead of a S106 agreement.
>
> 42 In addition, I had already considered the S106 agreement and found it to be flawed and as the Advice Note stated that the provisions of the UU were the same, there was no justification in me reviewing this obligation. Also, as I was already minded to dismiss the appeal, and I knew affordable housing wasn't a determinative issue, I did not need to consider the obligation."

37. Having considered the Advice Note the Inspector consulted her professional lead in the Planning Inspectorate. She did this because the Advice Note had said that the stance which she was taking was unreasonable.

38. In her email of 19th August 2024 to her professional lead the Inspector said:

> "I gave strict deadlines (4 weeks post event) at a hearing and then agreed an extension for another 2 weeks. This gave them until 16th August (last Friday). Last week they asked for a further extension, but (having taken advice) I refused to grant this as it is now 7 weeks since this Rosewell hearing took place and I will be dismissing the scheme for other reasons.
>
> Although the appellant assures me It's all been agreed it has not been executed as the financier has clearly got some concerns. In any event I have some concerns about the draft I've seen and consider it to be flawed.
>
> They have now sent me a UU and a 10 page legal opinion basically accusing me of being unreasonable. I was intending to edit my decision taking on board the advice of scenario 8 of the ITM chapter on planning obligations, but I'm sure you can imagine that I am somewhat nervous about doing so without taking further advice."

39. An online meeting followed the same day and at paragraph 38 of her statement the Inspector said:

> **"**The Professional Lead advised me that as I was already going to dismiss the appeal for other reasons and the Claimant had not met my deadline for the provision of a S106 agreement, I should side-step the issue of affordable housing in my Decision Letter because it was not a determining factor in my decision..."

40. The Inspector revised her draft decision letter in light of that advice and emailed her professional lead on the evening of 19th August 2024 saying:

> **"**I attach my decision for you to take a quick look at if you have time. I have edited it in the light of your comments and your view that I should take a robust stance on the S106 and the affordable housing issue.
>
> One of the Council's RfRs was the lack of affordable housing which is the reason I thought I would have to address it in my decision. However, I have reduced it to a single paragraph in the section on the S106.
>
> No doubt I could make the decision shorter, but I wanted to ensure that I have covered the losing party's points."

41. On the morning of 20th August 2024 Mr Walters replied to the planning consultants' email of 19th August 2024 saying:

> "This extension for the agreement has been rejected by the inspector.
>
> The inspector gave a deadline and was accommodating by agreeing to an extension. The agreement was not submitted in accordance with that extended deadline, so she will make her decision accordingly."

The Decision Letter.

42. It was against that background that the Appeal Decision dated 20th August 2024 was sent to the parties.

43. At [7] the Inspector said:

> "A draft planning obligation was submitted prior to the Hearing which would ensure that the development would meet the definition of self-build housing set out in the Self-Build and Custom Housebuilding Act 2015 (the Act). Secondly, it would secure financial contributions to County Council services relating to education, school transport, early years facilities and libraries. This addressed the Council's seventh reason for refusal. Following discussions at the Hearing I gave a deadline for receiving a completed obligation of 2 August and subsequently agreed an extension to 16 August. However, although I received an amended draft, it had not been executed and I therefore cannot take it into account in my decision."

44. At [8] the Inspector set out the following three main issues rather than the five which she had identified in the draft decision letter:

> "Taking all of the above into consideration the main issues are therefore:
>
> a) Whether the site is suitable for residential development having regard to the Council's spatial strategy:
>
> b) Whether the site's location would provide adequate access to services and facilities for future residents:
>
> c) The effect of the proposal on the character and appearance of the countryside."

45. The passage in the draft decision letter in which the Inspector had addressed affordable housing was not replicated in the Decision Letter and the Inspector dealt thus with the planning obligation at [39] – [41]:

> **"**39 A draft planning obligation was submitted with the appeal. However, no executed agreement was provided to meet the deadline set after the Hearing had concluded.

> However, it would have secured a Protected Occupation Period for each Self-Building Dwelling to meet the requirements of the Act.
>
> 40 I also acknowledge that a number of financial contributions towards the provision of County Council services would have been secured through the obligation. I was satisfied that these were reasonable and necessary and met the tests of the set out in the Community Infrastructure Levy Regulations.
>
> 41 The Council also refused the scheme due to a lack of a legal agreement to secure affordable housing. However, as I have found the scheme unacceptable for other reasons, it has not been necessary for me to address this issue."

46. The Inspector then turned to the planning balance. She made no reference to affordable housing in that balance and concluded that the balance weighed against the proposed development. That led to her conclusion, at [47], that the proposed development conflicted with the Development Plan and that "the material considerations do not indicate that a decision should be made other than in accordance with the development plan" which thereby explained the dismissal of the appeal.

The Reasons Challenge.

47. The starting point is Lord Brown's summary of "the proper approach to a reasons challenge in the planning context" as set out in *South Bucks DC v Porter (No2)* [2004] UKHL 33, [2004] 1 WLR 1953 at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the `principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

48. In considering how the Decision Letter is to be read I have had regard to the seven principles enunciated by Lindblom J, as he then was, in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), [2017] PTSR 1283 at [19] and reaffirmed by him in the Court of Appeal in *St Modwen v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR at [6].

49. In the context of this case there are three questions to be addressed. First, was it necessary for the Inspector to give reasons for her failure to take account of the provision for affordable housing made in the Unilateral Undertaking? Second, did the

Decision Letter when properly read set out those reasons? Third, did the Claimant suffer substantial prejudice as the result of any failure to state those reasons?

50. Miss Sargent, rightly, focused her submissions on the Decision Letter and the exchanges which had preceded it. She submitted that these, when read properly and in context, gave adequate reasons for the failure to take account of the Unilateral Undertaking. In her witness statement of January 2025, the Inspector explained at some length why she had not taken account of the Unilateral Undertaking. I will address below the very limited extent to which that statement is relevant to the issue of the rationality of the Decision. In light of the authorities I will summarise below it cannot, however, operate to enhance the adequacy or otherwise of the reasons given in the Decision Letter. The witness statement and the Inspector's exchanges with her colleagues in the Planning Inspectorate do, nonetheless, throw some light on what her reasons in fact were and, in doing so, do provide a check on whether those reasons were properly expressed in the Decision Letter.

51. The extent to which subsequent material can assist in remedying defects in decisions or in the inadequate expression of reasons will depend on the nature of the underlying decision and on the source of the obligation to give reasons. Stanley Burnton J explained the position in *Nash v Chelsea College of Art and Design* [2001] EWHC 538 (Admin) (as adopted by Elias J, as he then was, in *Herefordshire Waste Watchers Ltd v Herefordshire Council* [2005] EWHC 191 (Admin) at [45]). Where it is itself a condition of the legality of the decision that adequate reasons are given the court will only accept subsequent evidence of the reasons in exceptional circumstances if at all. See also *United Trade Action Group Ltd* at [125(4) and (5)]. Where it is not a condition of legality that adequate reasons are given the court will exercise considerable caution in having regard to subsequent material but may in an appropriate case and for an appropriate purpose do so: see *United Trade Action Group Ltd* at [125(1) - (3)] and *R (Ermakov) v Westminster City Council* [1996] 2 All ER at [315].

52. In the context of planning appeals the requirement for an inspector's reasons to be contained in the decision letter is set out in rule 19 of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000. The effect is that there is an express statutory requirement that reasons be given and that they be contained in the decision letter: see *Ioannou v Secretary of State for Communities and Local Government* [2013] EWHC 3945 (Admin) at [51] per Ouseley J, endorsed on appeal by Sullivan LJ at [41] in [2014] EWCA Civ 1432, and *Ikram v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 2 at [58] per Singh LJ.

53. It follows that it is necessary to focus on the Decision Letter read in context and having regard to the approach set out in *St Modwen*. The emails which were sent to the Claimant before the despatch of the Decision Letter are relevant as part of its context and account can be taken of those.

54. Against that background I turn to consider <u>whether the Inspector was required to explain her reasons</u> for failing to take the provision of affordable housing in the Unilateral Undertaking into account. That depends on whether the provision of affordable housing was a principal contentious issue.

55. The effect which the provision of affordable housing had on the planning balance was clearly a matter of importance. The failure to provide affordable housing had been one of the original reasons for refusal and the Second Defendant had said that it meant that the proposed development was contrary to the Development Plan. At the conclusion of the hearing the Inspector had made it clear that the provision of affordable housing would be a positive factor operating in favour of the proposed development in determining the planning balance.

56. It was against that background that the Inspector had extended the time for providing an executed section 106 agreement. The Unilateral Undertaking made provision for affordable housing and was accompanied by reasoned submissions as to why it should be taken into account if the Inspector declined to grant a further extension of time for providing an executed section 106 agreement.

57. The Inspector Training Manual does not lay down rules and nor does it derive its force from statute. Instead, it provides guidance from which an inspector may depart where the circumstances of a particular case justify doing so (see paragraph 1 of the Planning Obligations chapter). Nonetheless it does provide an indication of what is to be seen as good practice in the absence of circumstances justifying taking a different course. Paragraphs 47 and 82 together with scenario 6 in Annex A: Casework Scenarios indicate that it is normally good practice for an inspector to accept a planning obligation and to have regard to it even if it is delivered after any deadlines which have been imposed. They also indicate that it is normally good practice to refer to the obligation and its relevance in the decision letter although in an appropriate case this can be done in short terms.

58. It is also of note that in her draft decision letter the Inspector had identified the question of "whether the development should contribute towards the provision of affordable housing" as one of the "main issues". In that draft she had addressed that question at some length and had concluded that the provision of affordable housing was a factor of "moderate weight" in favour of the appeal.

59. Miss Sargent advanced two closely-related arguments as to why it was not necessary for the Inspector to explain why she had not taken account of the Unilateral Undertaking. First, that permission had been given for the Claimant to provide an executed section 106 agreement after the end of the hearing but there had been no permission to provide other material. Second, that there was no obligation on the Inspector to explain why she had not taken account of unsolicited and unauthorized material provided after the hearing. Context is all important and I do not accept that those arguments can prevail in the context here. Time had been extended so that the Claimant could make provision for affordable housing. Although it had been envisaged that this would be done by way of a section 106 agreement the mechanism by which the affordable housing was to be provided was of very limited relevance. The key point was the provision of affordable housing. The Unilateral Undertaking addressed the very topic which was to have been the subject of a section 106 agreement. It was, moreover, provided within the deadline which the Inspector had set for provision of an executed section 106 agreement. In any event, as already noted, paragraph 82 of the Planning Obligations chapter of the Manual makes it clear that deadlines are not necessarily conclusive. There is force in Miss Sargent's submission that it may not be necessary for an Inspector to give a reason for not addressing every unsolicited post-hearing document but the position here was different. The Unilateral Undertaking addressed a

point which the Inspector had herself indicated was of potential relevance and it had been accompanied by a reasoned submission.

60. The provision of affordable housing was a matter of importance in the context of the appeal and the acceptability or otherwise of the Claimant's proposals in that regard was also an important issue. The 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 Decision Letter. The articulation of the reasons could have been short, but reasons needed to be given.

61. I turn, therefore, to the question of whether the reasons given were adequate.

62. Miss Sargent relied on the case worker's email of 20th August 2024 and the Decision Letter at [7] and [39] – [41]. That material did not provide an adequate explanation of the reasons for the Inspector's decision not to take the Unilateral Undertaking into account even when those passages are read together in context and with regard to the proper approach to the reading of decision letters.

63. The email of 20th August 2024 said clearly that the Inspector had refused the Claimant's request to extend the deadline for submitting an executed section 106 agreement. However, it made no reference to the Unilateral Undertaking and the statement that the Inspector "will make her decision accordingly" cannot be read as a statement that she would take no account of the Unilateral Undertaking. Those words made it clear that the Inspector was going to proceed on the footing that she had not been provided with a concluded section 106 agreement but they did not go beyond that. It is relevant in this regard that the legal submissions which accompanied the Unilateral Undertaking and the application for an extension of the deadline proposed two alternatives to the extension of time those were: coupling the Unilateral Undertaking with a *Grampian* condition and a *Grampian* condition standing on its own. The 20th August 2024 email did not address those alternatives. It did not say that the Inspector had decided not to take either of those courses and still less did it give the reasons for such a decision.

64. At [7] the Decision Letter made reference to "a draft planning obligation". It is, however, clear from the penultimate sentence of that paragraph that this was a reference to the concluded section 106 agreement which had been envisaged. The paragraph operated as a clear explanation of why the Inspector had not taken account of the draft unexecuted section 106 agreement but it did not give any indication of the Inspector's approach to the Unilateral Undertaking let alone explain why no account had been taken of that.

65. The parties advanced different interpretations of [39] – [41] of the Decision Letter and in particular of the last of those paragraphs. The Defendant submitted that [41] 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. The Claimant said that the Inspector was addressing the contention that the absence of affordable housing meant that the proposal was inconsistent with the Development Plan and was saying that she did not need to address that issue of potential incompatibility. I am satisfied that the Claimant's interpretation is the correct one. That paragraph is to be read against the context of [7] where the Inspector had said that she was not taking account of the draft section 106 agreement. It is also to be read in the light of the fact that the alleged incompatibility with the

Development Plan flowing from the lack of affordable housing was one of the Second Defendant's reasons for refusal. It is clear that the Inspector was referring to this when we note that the first sentence of [41] referred expressly to one of the reasons for refusal given by the Second Defendant. The next sentence went on to say that the Inspector was not taking account of this because she had "found the scheme unacceptable for other reasons". The Inspector was there addressing reasons why the development might be "unacceptable" (of which inconsistency with the Development Plan might be one) rather than commenting obliquely on the result of the planning balance. It is also relevant to note that the next portion of the Decision Letter addressed the planning balance. If the Defendant's interpretation of [41] were correct one would have expected the paragraph to appear after or as part of the planning balance as an explanation at that stage of why the lack of affordable housing had not featured in that balance. It follows that [39] – [41] cannot properly be read as an explanation that the Unilateral Undertaking had not been taken into account nor as giving the reasons for the adoption of that course. In this regard the email which the Inspector sent to her professional lead on 19th August 2024 is of note. In that the Inspector said that she had edited an earlier draft in light of the professional lead's view that the Inspector "should take a robust stance on the s106 and affordable housing issue". She then added "one of the Council's RfRs was the lack of affordable housing which is the reason I thought I would have to address it in my decision. However, I have reduced it to a single paragraph in the section on the s106". That shows the Inspector explaining that [41] was concerned with the question of the lack of affordable housing operating as a factor against the appeal for the reason given by the Second Defendant namely inconsistency with the Development Plan. The Decision Letter has to be read objectively and the Inspector's view as to what she meant to say cannot be used as an aid to interpretation. Nonetheless, it is to be noted that the conclusion I have reached as to the correct interpretation by considering the language used in context is consistent with the approach which the Inspector's contemporaneous correspondence said that she had taken in the Decision Letter.

66. It appears from the Inspector's witness statement at paragraphs 33 – 35 that the Inspector had particular reasons for not considering the Unilateral Undertaking. It is not entirely clear whether in her witness statement the Inspector was saying that those were the reasons which she had at the time or that they can be said to have been the reasons with the benefit of hindsight. Whichever of those is the position the reasons set out there appear nowhere in the Decision Letter.

67. The position can be stated shortly. The Inspector made a deliberate decision to side-step the question of affordable housing in the Decision Letter. She took, therefore, a deliberate decision not to explain either why she was not taking the proffered affordable housing into account as a positive factor in favour of the appeal nor why she had no regard to the Unilateral Undertaking. This was not the result of inadvertence or of reasons being expressed in a clumsy or abbreviated form. It was a choice deliberately made by the Inspector. It had the effect that the Claimant was not given even the briefest of explanations as to why the affordable housing, for which the Unilateral Undertaking made provision, had not been taken into account. There was a failure to provide the reasons for the decision on a contentious matter of importance.

68. Did the failure to provide reasons cause substantial prejudice to the Claimant? The court must look to the reality of matters and must view assertions of prejudice with a degree of scepticism. I am nonetheless satisfied that on the facts of this case the Claimant did

suffer real and substantial prejudice. The Decision Letter simply did not explain why no account was taken of the Unilateral Undertaking nor of the provision there of affordable housing. The Claimant's ability to assess the lawfulness and rationality of the Decision was thereby impaired as was its ability to understand whether any different proposal would be acceptable. The reality of the prejudice suffered is shown by the way this claim was brought. The main element of ground 1 in the claim, as issued, was the contention that there had been a material error of fact with the Inspector having been in error as to whether an executed obligation had been provided. It was only after the Detailed Grounds of Defence and the accompanying documents were served that the Claimant was in a position to know that the Inspector had understood that she had received an executed undertaking but had chosen (for reasons which were not stated in the Decision Letter) not to take it into account. If, as I find it was, the Claimant was prejudiced at the time of receipt of the Decision Letter in August 2024 the material provided in January 2025 after proceedings had been commenced and permission given cannot remove that prejudice.

69. In those circumstances the Claimant's reasons challenge succeeds. I will consider below the First Defendant's argument that relief should nonetheless be refused.

The alleged Failure to take an obviously material Consideration into Account.

70. The Claimant says that the Inspector's failure to take the Unilateral Undertaking and the provision it made for affordable housing into account was an irrational failure to have regard to an obviously material consideration. Mr Parkinson accepted that in order to make out this ground of challenge he had to surmount a high hurdle and that the question of whether the Inspector had irrationally failed to take account of an obviously material consideration was to be seen in the context of the wide ambit of the Inspector's planning judgement.

71. In considering this challenge I have had regard to the Decision Letter and to the Unilateral Undertaking and the accompanying legal submission which are to be seen in context. Here the context includes the issues at the appeal hearing; the exchanges between the Inspector and the parties at the conclusion of the hearing and thereafter; and the draft decision letter prepared on 9th August 2024. The Inspector's witness statement is of only very limited value in this context. As I noted above it throws light on the reason why as a matter of fact the Inspector did not take the Unilateral Undertaking into account and that had some relevance to the reasons challenge. However, to the extent that it consists of assertion by the Inspector as to the rationality of the approach she took it can carry no more weight than any other submission.

72. For the following reasons I am satisfied that notwithstanding the wide scope of the Inspector's planning judgement her failure to take into account the provision which the Unilateral Undertaking made for affordable housing to be included in the development was irrational and amounted to a failure to have regard to an obviously material consideration.

73. First, it is to be noted that the Unilateral Undertaking was a substantial professionally-drawn document which had been executed and which was accompanied by reasoned legal submissions. The Unilateral Undertaking made provision for the development to include affordable housing and for a financial contribution to be made to the Second

Defendant in the event that any of the plots designated for affordable housing were in fact sold at open market prices.

74. Next, the absence of affordable housing had been one of the reasons why the Second Defendant had refused planning permission. The Second Defendant's position had been that this absence meant that the proposed development was inconsistent with the Development Plan. The Claimant and the Second Defendant had disagreed on that point, but it was clear that the absence of affordable housing was, at least arguably, to be seen as a factor militating against the appeal. That was a factor which was being addressed by the Unilateral Undertaking.

75. However, matters went further than that. The Inspector had herself raised the issue of affordable housing at the conclusion of the hearing. As she confirms in her witness statement at paragraph 7 it was the Inspector who "made it clear that the provision of affordable housing, if secured through the s106 agreement would be a positive factor for me to consider in the planning balance". I will consider below the relevance of the Inspector's reference to the provision being secured through the section 106 agreement. The important point at this stage is that it was the Inspector who indicated that the provision of affordable housing would be a positive factor and who triggered the exercise of the post-hearing submission of documents seeking to make that provision.

76. The draft decision letter is revealing. It shows the Inspector's provisional assessment as at 9th August 2024. In that document the Inspector identified the question of whether the development should contribute to the provision of affordable housing as one of the main issues. She analysed the question of affordable housing in some detail at [31] – [36]. At [35] the Inspector set out her belief that if below-market price purchasers were not found for the affordable housing plots then "no other mechanism for contributing towards affordable housing need, such as a commuted sum, has been offered". It was against that background that the Inspector concluded, at [53], that the provision of affordable housing went into the planning balance in favour of the appeal as "a benefit of moderate weight". The Claimant says that the Inspector had misunderstood the position and that provision for a contribution had been made by the time of the draft decision letter. In any event the Unilateral Undertaking did make provision for a financial contribution. That could be expected to have increased the weight to be attached to the provision of affordable housing. The only other matter that had changed between the time of the draft decision letter and the sending of the Unilateral Undertaking was that the mechanism proposed for ensuring the affordable housing was provided was to be the Unilateral Undertaking combined with a *Grampian* condition rather than a section 106 agreement. For the reasons I will expand on below the difference in mechanism did not justify the failure to take account of the proffered affordable housing. It follows that in disregarding the Unilateral Undertaking the Inspector was failing to take account of a factor which she had herself identified as being of moderate weight in the planning balance as at 9th August 2024. She was, moreover, doing so where the weight to be attached to that factor had not diminished and had potentially increased.

77. As I have explained at [57] above the Inspector Training Manual is an indication of the course which will normally be good practice. As such it is indicative of the course which a rational inspector would normally be expected to follow. Of particular note for current purposes are:

i) Paragraph 82 which says, under the heading "always accept a completed planning obligation":

> "Regardless of any deadlines that you or PINS have set – you must accept and consider a completed obligation if it is received before your decision is issued. A completed and correctly executed obligation will have legal effect, even if you have not seen it. It will, therefore, bind the parties to do, or not do, whatever they have promised. Consequently, an existing planning obligation must be assessed by you."

ii) Casework Scenario 6 which is addressing cases where the lack of a planning obligation is a reason for refusal but an obligation is provided during the appeal process. The guidance at that point in the Manual expressly contemplates that an obligation could "provide a benefit such as affordable housing which could weigh in favour of the development (and so might need to be balanced against any harm)". The commentary makes it clear that even if the appeal is being dismissed for reasons other than the lack of the obligation explanation is likely to be called for where a proffered obligation provides for affordable housing and this indicates it is likely to be a material consideration.

78. The adoption of a different course from that set out in the Manual is not necessarily irrational but can be an indication of irrationality because it shows the adoption of an unusual course. All will depend on the context of the particular case but there was nothing in the circumstances of this case which justified taking a different course.

79. I turn to the points made in favour of the argument that the approach taken by the Inspector was rational and was properly open to her. They are not persuasive and an analysis of the issues they raise supports the conclusion that the Inspector went outside the wide ambit of her planning judgement in failing to take account of the provision of affordable housing in the Unilateral Undertaking.

80. The first point made on behalf of the First Defendant is that it is said that the Inspector had agreed that a section 106 agreement could be provided after the conclusion of the hearing, and had provided a timetable for such provision. She had extended the deadline but was not obliged to extend it further and nor was she required to take account of a different form of document which was provided unilaterally by the Claimant.

81. In paragraph 7 of her witness statement the Inspector said that she had made it clear that she would regard affordable housing "if secured through the s106 agreement" as a positive factor. Miss Sargent contended that this meant that the Inspector had imposed a requirement that the provision of affordable housing had to be by way of a section 106 agreement. I am not persuaded that is a correct reading of the Inspector's witness statement when read as a whole. Although I accept that paragraph 7 is most naturally read as indicating that the Inspector had specified that there had to be a section 106 agreement the point is only made in a single sub-clause and not expanded upon. Moreover, I note that at paragraph 32 and following where the Inspector explained why she did not take the Unilateral Undertaking into account, one of the reasons she gave was that she had been expecting to receive a section 106 agreement. She did not, however, say that not only had she been expecting to receive such an agreement but that she had stipulated that the affordable housing be provided in that way. I am satisfied that the Inspector had not in fact done that. It is right that all involved envisaged that the provision for affordable housing would be made in a concluded section 106 agreement. That was because there was already a draft section 106 agreement which

had been provided to the Planning Inspectorate before the hearing and which dealt with other matters. I have no doubt that all involved contemplated that the existing draft would be modified and that was the course which was initially taken. It does not follow that the Inspector was to be understood as requiring the further provision to be made in that way. There would be no need for her to impose such a requirement where all anticipated that route being taken.

82. I am reinforced in that assessment by the terms of Mr Waller's email of 28th June 2024 to the Claimant's solicitors. That was sent the day after the hearing and in it Mr Waller reported on the events at the hearing. Mr Waller dealt in some detail with what would need to be included in the section 106 agreement which was being contemplated. However, he did not say that the Inspector had specified that the provision be made by way of a section 106 agreement. Indeed, when commenting on potential drafting difficulties with such an agreement he said "if we can't make it work, we need to consider a Unilateral Undertaking". He would have been highly unlikely to have said that if the Inspector had expressly required the provision to be by way of a section 106 agreement.

83. However, if I am wrong and if the Inspector did in fact state that she would only take the provision of affordable housing into account if it were to be provided through a section 106 agreement then that course would not provide a rational justification for disregarding the Unilateral Undertaking. That is because for the reasons I will explain below the differences between provision under a section 106 agreement and provision by way of a unilateral undertaking would not have justified the Inspector in imposing the original requirement.

84. The fact that a different mechanism from that which had been envisaged was put forward does not, of itself, mean that the Inspector was thereby entitled to disregard that mechanism or the affordable housing being provided. The key question was whether a mechanism was being advanced which would be effective to provide affordable housing. There is no magic in a section 106 agreement. Paragraphs 6 – 8 of the Planning Obligations chapter of the Inspector Training Manual are relevant in this regard. The Manual notes that section 106 agreements and unilateral undertakings "have equal legal status" and each can be effective. The Manual says that section 106 agreements "are generally preferable". However, the reasons for that are: (a) that unilateral undertakings might allow an appellant to offer less (for example a lesser financial contribution) than a local planning authority was seeking (paragraph 7), and (b) that a unilateral undertaking will not be binding on a local planning authority which will then not be subject to covenants such as to spend a contribution to infrastructure in a particular way (paragraph 8). Neither of those considerations was relevant in this case where the intention was that the terms of the Unilateral Undertaking should cover the same ground as the proposed section 106 agreement. At most the differences between provision by way of a section 106 agreement and provision by way of a unilateral undertaking identified in the Manual might justify attaching less weight to the latter than to the former. However, it is hard to see that even that course would normally be appropriate given that the matter going into the planning balance is the potential benefit and the way the benefit is being provided is unlikely to be relevant to its weight.

85. In the circumstances of this case, it is clear that if a concluded section 106 agreement had been provided by the Inspector's deadline she would have taken it into account and would have attached at least moderate weight to the provision of affordable housing as

a benefit in favour of the appeal. Instead of an executed section 106 agreement the Inspector was provided with the executed Unilateral Undertaking. This was accompanied by legal submissions and a proposal for the imposition of a *Grampian* condition. The intention was that the Unilateral Undertaking should replicate the provision which would be made through a section 106 agreement. Miss Sargent drew attention to a number of differences between the terms of the proposed section 106 agreement and those of the Unilateral Undertaking. However, subject to the point I will consider at [91] below, it was not suggested that the Unilateral Undertaking would not be effective to make provision for affordable housing nor was it suggested that by proffering the Unilateral Undertaking the Claimant was seeking to reduce the provision or contribution which would otherwise be made. The latter contention would, in any event, be untenable given that primary thrust of the legal submissions accompanying the Unilateral Undertaking was that the time for providing an executed section 106 agreement should be extended with the proffering of the Unilateral Undertaking being advanced as an alternative to that. It follows that in the circumstances of this case neither the general differences between section 106 agreements and unilateral undertakings identified in the Manual nor the particular differences between the terms of the documents in this case were such as to provide a rational justification for giving moderate weight to provision made by a section 106 agreement while taking no account at all of the provision made by the Unilateral Undertaking.

86. At one point Miss Sargent suggested that the fact that the obligations under the Unilateral Undertaking were conditional upon the grant of planning permission and the commencement of the development provided a basis for the Inspector's decision not to take it into account. However, the proposed section 106 agreement was subject to exactly the same conditionality, and so this could not justify disregarding the Unilateral Undertaking in circumstances where a section 106 agreement would have been taken into account.

87. Miss Sargent was right to say that deadlines are important and that procedural rigour is required in the appeal process. However, context is all important. The Claimant did not send the Unilateral Undertaking to the Inspector out of the blue. It was sent against the background of the Inspector's comments at the end of the hearing; the provision of draft section 106 agreements; and the exchanges seeking extensions of time. Moreover, the Unilateral Undertaking was accompanied by detailed legal submissions pressing again for an extension of time but offering the Unilateral Undertaking as an alternative course. The situation was very different from that which would have been the position if the Claimant had sent the Unilateral Undertaking unheralded and in the absence of the intervening exchanges (though I note that paragraph 82 of the Inspector Training Manual suggests that even in such circumstances it should have been taken into account).

88. At paragraph 42 of her witness statement the Inspector said "as I was already minded to dismiss the appeal and I knew affordable housing wasn't a determinative issue I did not need to consider the obligation". Rightly Miss Sargent did not place any weight on this point in her rationality argument (as opposed to her submissions on relief) and the point can be dismissed shortly.

89. The questions of whether a consideration is material and whether it is determinative are different. A consideration can be obviously material with the consequence that it has to be taken into account in the planning balance even if it is not determinative. Indeed,

any other approach would undermine the concept of conducting a balancing exercise. If a consideration is trivial, such that it can bear no weight in the planning balance, then it will not be material. Rationality does not require such a consideration to be taken into account. The position is wholly different where a consideration is obviously capable of bearing weight in the planning balance. In such circumstances rationality requires the matter in question to be taken into account and considered as part of the balancing exercise. Rationality requires a decision maker to take account of those considerations which are obviously material in the sense of being relevant to the planning merits of an application. The assessment of the weight to be attached to a consideration comes at a later stage and is part of the exercise of taking the consideration into account.

90. For the reasons I have already given the provision of affordable housing was obviously a matter of weight in the planning balance in this case. It was, therefore, to be taken into account even though doing so might not have changed the ultimate outcome. In this context it is relevant to note that the Inspector explains in her witness statement that although she read the legal submissions which accompanied the Unilateral Undertaking she did not consider the Unilateral Undertaking. The Inspector says that this was because she was told that it was the same as the section 106 agreement and that for the reasons I will consider next she did not regard that as satisfactory. The fact is that this meant that the Inspector did not consider the Unilateral Undertaking and conclude that it did not advance matters but simply decided not even to consider the Unilateral Undertaking.

91. In her witness statement at paragraphs 18 – 20 the Inspector says that the terms of the draft section 106 agreement of 13th August 2024 were such that the agreement would not provide affordable housing within the definition in the National Planning Policy Framework. This was because the draft did not contain any reference to local incomes or to any cap on the income of purchasers. The Inspector made no reference to this point in the exchanges with the Claimant before the Decision Letter let alone in the Decision Letter itself. The witness statement appears to be the first time the point was raised. This is precisely the kind of post-decision material which the court must approach with caution. It cannot be relied upon at this stage to justify the course which the Inspector took. Even if I were to have regard to it this explanation would not advance matters and would not provide a justification for the Inspector's decision to take no account of the Unilateral Undertaking. In that regard I note that it is apparent that the Second Defendant took the view that the section 106 agreement was effective to provide affordable housing: otherwise, there would have been no point in the Second Defendant agreeing the terms of the draft. That, of itself, should have given the Inspector pause for thought and raises doubts about her interpretation of the draft agreement. However, even if the Inspector was right and affordable housing under the draft agreement was not affordable housing for the purposes of the NPPF that would not be the end of the matter. The agreement and the Unilateral Undertaking made provision for a form of affordable housing and for a financial contribution to affordable housing needs in the event that the properties were sold at market value. The fact that this was not affordable housing for the purposes of the NPPF did not mean that this provision was irrelevant. The divergence from the definition in the NPPF would go to the weight to be attached to the affordable housing as a factor in favour of the appeal but did not justify disregarding it entirely.

92. It follows that in disregarding the Unilateral Undertaking the Inspector irrationally failed to have regard to an obviously material consideration.

Relief.

93. The grant of relief in a statutory review is discretionary. The constraints on relief contained in section 31(2A) – (3F) of the Senior Courts Act 1981 do not apply but regard is to be had to the approach set out in *Simplex.*

94. In *Simplex* the Court of Appeal said that a decision will not be quashed on the ground of irrationality if the court is satisfied that the decision would have been the same if the decision-maker had acted rationally. That requires the court to address whether the decision would have been the same even if a consideration found to have been irrelevant had not been taken into account or if an overlooked relevant factor had been taken into account. The hurdle is a high one. It is not sufficient that the decision would have been likely to have been the same but, instead, the court must be satisfied that the decision would necessarily have been the same.

95. In argument I raised the difficulty of applying the *Simplex* approach where the relevant ground of challenge relates to the adequacy of the reasons for the decision in question. Such a challenge will only succeed where there was an obligation to provide reasons; where the failure related to an important controversial issue; and, where the failure to give reasons has caused substantial prejudice. It is to be remembered that inadequacy of reasons is a distinct public law ground of challenge and so the fact that the inadequacy of the reasons did not affect the decision cannot, of itself, be a ground for refusing relief.

96. Both counsel undertook further research but were unable to find any authority directly addressing this point. Miss Sargent emphasized that the court retains a discretion as to whether to grant relief. That is right but the discretion will have to be exercised against the background that the question of whether to decline relief will only arise once the court has found that the preconditions for relief are present and those include the fact of substantial prejudice to the claimant having been established. In light of that it will only be a rare case where it will be appropriate for the court to decline relief in its discretion. The principal protection against artificiality lies in the high hurdles which have to be surmounted for a reasons challenge to succeed. There may be a greater role for discretion in relation to the form which any relief should take. Thus, in *R (Macrae)* v *Herefordshire DC* [2012] EWCA Civ 457 the court concluded that there had been a failure to give adequate reasons for a grant of planning permission. However, on the appeal the claimant had not challenged the first-instance finding that the grant of planning permission had been neither unlawful nor irrational. Moreover, the hearing in the Court of Appeal was almost two years after the grant of planning permission during which time the dwelling house which had been the subject of the permission had been built and occupied. It was in those "somewhat unusual circumstances" that Sullivan LJ concluded that it would be "disproportionate" to quash the planning permission and instead limited the relief to the grant of a declaration as to the inadequacy of the reasons (see at [30] – [32]).

97. Subject to any further submissions in light of this judgment I am satisfied that there is no basis to decline or restrict relief in respect of the Inspector's failure to give reasons. Here the Inspector had a statutory duty to provide her reasons in the Decision Letter;

there was a failure to provide the reasons in relation to a matter of importance; and I have found that the failure caused substantial prejudice to the Claimant. The starting point subject to any further submissions is, therefore, that the Decision is to be quashed.

98. Turning to the rationality challenge the First Defendant says that I can be satisfied that the Decision would have been the same even if the Inspector had taken the Unilateral Undertaking and the provision of affordable housing into account. Miss Sargent, therefore, submitted that if the rationality challenge were the only successful ground relief should be refused in accordance with the *Simplex* approach. At the heart of Miss Sargent's argument was the draft decision letter of 9th August 2024. She submitted that was a document which predated the Decision and the challenge and which demonstrated that, even when account was taken of affordable housing, the planning balance fell against the Claimant's appeal. There is force in this argument and the draft decision letter does demonstrate that the ultimate outcome would probably have been the same if the Inspector had taken account of the Unilateral Undertaking. It does not, however, demonstrate the high degree of likelihood necessary to bring *Simplex* into play. The draft decision letter was a draft. It would have been necessary for the Inspector to reflect again on the planning balance before finalizing the decision and, in particular, she would have had to reflect on whether she had correctly weighed the particular considerations. Although it is likely that the balance would have remained the same that is not necessarily the position: it may be that the weight given to various of the considerations might have been increased or reduced. In that regard it is relevant that at the time of the draft decision the Inspector took the view that no mechanism was being provided for making a financial contribution if below-market price purchasers were not found for the affordable housing plots. There is disagreement as to whether this was a correct reading of matters at the time of the draft decision letter, but it is apparent that the Unilateral Undertaking did make provision for such a contribution. It is at least possible that if the Inspector had considered the Unilateral Undertaking and had taken account of that provision she would have increased the weight she attached to affordable housing as a positive factor in favour of the appeal. It cannot, therefore, be said that the outcome would necessarily have been the same and relief is not to be refused on that basis.

Conclusion.

99. It follows that both the grounds of challenge on which the Claimant relied are successful and that, subject to any further submissions as to the form of relief, the Decision is to be quashed.