

Greenfields (IOW) Limited v Isle of Wight Council [2025] EWCA Civ 488

Changes to s.106 procedures required to safeguard planning permission

24 April 2025  Victoria Searle

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The Court of Appeal has decided that failing to publish a s.106 agreement (or unilateral undertaking or s.278 highway agreement) prior to granting planning permission can render a planning permission granted in reliance on that agreement unlawful.

Background

On 25 April 2023, Isle of Wight Council resolved to grant planning permission for 473 dwellings, a café, doctors' surgery and other associated infrastructure at Westridge Acre Park, Ryde. A s.106 agreement was completed, and planning permission was granted on 4 August 2023. Post-grant, the council published the s.106 and decision notice on its register.

The council followed a familiar process:

1. Application validated and published on the council's planning register.
2. Statutory consultation on the application.
3. Officer's report prepared and published on the register.
4. Committee resolution to grant planning permission.
5. s.106 completed.
6. Planning permission granted.
7. Decision notice and completed s.106 published on the register.

The challenge

The council's decision to grant planning permission was judicially reviewed by Greenfields (IOW) Ltd (a residents organisation). Greenfields argued, among other things, that the grant of planning permission was invalid because the council had failed to publish the s.106 agreement prior to granting planning permission. This was a mandatory procedural requirement under Article 40(3)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (DMPO), which states:

"(2) Each local planning register authority must keep, in two parts, a register ("the register") of every application for planning permission relating to their area.

(3) Part 1 of the register must contain in respect of each such application and any application for approval of reserved matters made in respect of an outline planning permission granted on such an application, made or sent to the local planning register authority and not finally disposed of —

(a) a copy (which may be photographic or in electronic form) of the application together with any accompanying plans and drawings;

(b) a copy (which may be photographic or in electronic form) of any planning obligation or section 278 agreement proposed or entered into in connection with the application;

(c) a copy (which may be photographic or in electronic form) of any other planning obligation or section 278 agreement entered into in respect of the land the subject of the application which the applicant considers relevant; and

(d) particulars of any modification to any planning obligation or section 278 agreement included in Part 1 of the register in accordance with sub-paragraphs (b) and (c)."

At first instance, HHJ Jarman KC refused permission on two grounds (including the s.106 publication ground) and dismissed the application on the other two grounds. Greenfields appealed.

The Court of Appeal's judgment

On appeal, Lewis LJ held that the council's failure to publish the s.106 prior to granting planning permission did render the decision to grant planning permission unlawful, and susceptible to being quashed by the court.

Non-compliance with any of the procedural requirements in the DMPO should be considered in light of:

1. the extent to which there has been substantial compliance with the purposes of the requirement imposed by the Parliament; and
2. the extent of any prejudice caused by the failure to comply with the requirement.

The purpose of the publication requirement in Article 40(3)(b) DMPO is to enable the public to know the terms of a proposed or agreed planning obligation, and to comment on it if they choose to do so. While Lewis LJ acknowledged that the publication requirement falls short of imposing a specific statutory duty to consult the public on the s.106, it is clear that substantial compliance requires publication in a form that allows the public to know the obligations secured, and to comment upon them if they wish, before planning permission is granted.

Lewis LJ rejected the council's argument that it had substantially complied with the requirement by publishing heads of terms in the officer's report. While the officer's report indicated that a highways contribution would be sought, the quantum of that contribution was not disclosed.

Lewis LJ held that the impact of non-compliance with the publication requirement needs to be evaluated on the facts of each case, to understand the prejudice caused. It is not the case that every failure to publish will render a planning permission invalid. However, in this case, Lewis LJ was satisfied that there was a genuine dispute regarding the quantum of the highway contribution secured (which appeared to be substantially less than the anticipated costs of the highway works required) and that Greenfields had been denied the opportunity to make representations on this issue prior to planning permission being granted.

On remedies, the council argued that the outcome would not have been substantially different if the council had published the s.106 prior to granting permission (in reliance on s.31(2A), Senior Courts Act 1981). However, Lewis LJ rejected the council's submission on the basis that the council had failed to demonstrate through its evidence that Greenfields would not have commented on the s.106 if it had been published, and that any comments they might have made would not have influenced the council's decision.

Actions that councils need to take

1. Need for publication procedures

Councils must ensure that they have procedures in place to publish s.106 agreements, unilateral undertakings, and s.278 highways agreements prior to granting planning permission.

2. Publishing s.106s submitted with planning applications

If a unilateral undertaking or draft agreement is submitted with an application, it should be published on the register with the other application documents. That way, a council can consult on the proposed planning obligation at the same time as it consults on the application, and a committee (or an officer acting under delegated authority) can consider any comments received.

3. Publishing undertakings and agreements prior to committee

If a s.106 is negotiated prior to a committee considering any comments received, it should be published immediately, and any comments received should be reported to that committee.

4. Publishing completed agreements post-committee

If a s.106 is negotiated and completed after a committee has resolved to grant planning permission, the completed agreement must be published once it has been agreed but before planning permission is granted.

The DMPO does not specify a minimum time period for publication before planning permission can be granted. However, publication immediately prior to grant would seem to defeat the intention of the requirement, as it would practically deny the public an opportunity to comment before permission is granted. Practically, the best point to publish may be when the final draft is agreed. There is usually a delay of at least a few days or a week or two, while engrossments are prepared, circulated for signature, sealed, and completed. This would afford the public a reasonable opportunity to comment, without significantly delaying the grant of planning permission.

In our view, the DMPO does not require publication of early, or multiple, drafts of a s.106 or s.278. It would be reasonable, and indeed desirable, to wait until the agreement or undertaking is substantially agreed before publishing it on the register.

5. Considering comments received

Following publication, officers will need to consider any comments received in light of the local development plan, national and local planning policies, committee's deliberations on the application, and the terms of the committee's delegation to officers. In most cases, it will be appropriate to simply proceed to grant planning permission. If, however, comments are received that call into question the validity or appropriateness of the s.106 or s.278 that has been agreed, then officers may need to consider whether the matter needs to be returned to committee.

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