



**WITNESS STATEMENT OF ELLA CASEY MRTPI ON BEHALF OF RUGBY BOROUGH
COUNCIL (CD18.14)**

**APPEAL BY BRANDON ESTATES
AT COVENTRY STADIUM, RUGBY ROAD, COVENTRY, CV8 3GJ**

RBC REFERENCE: R18/0186

THE PLANNING INSPECTORATE REFERENCE: APP/K3715/W/23/3322013

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1.0 Qualifications and Experience

- 1.1. My name is Ella Casey. I am a Senior Major Projects Officer within the Planning team at Rugby Borough Council. I hold a BSc (Hons) degree in Chemistry from the University of Liverpool, and a Master of Arts Degree in Planning Built Environments from Birmingham City University. I am a member of the Royal Town Planning Institute.
- 1.2. I have over 6 years' experience of working in town planning in local government (planning policy and development management) and currently determine standalone major applications, major applications on both sustainable urban extensions and deliver town centre regeneration workstreams.
- 1.3. The evidence which I have prepared and provide for this appeal is true and has been prepared and is given in accordance with the guidance of my professional institution. I confirm that the opinions expressed are my true and professional opinions.

2.0 Introduction

- 2.1. This witness statement addresses the Council's case in respect of the NHS UHCW obligation request relating to planning application reference R18/0186, for the development of land at Coventry Stadium, Rugby Road, Coventry.
- 2.2. This statement sets out the statutory provisions alongside recent case law concerning University Hospitals NHS contributions and their CIL compliance. In addition, it considers further if the request relating to this appeal is CIL compliant by adding to the Council's existing CIL compliance statement which has a section on this matter (CD17.3).

3.0 Statutory Provisions

- 3.1. Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010 (as amended) makes it clear that obligations should only be sought where they are: (a) necessary to make the development acceptable in planning terms; (b) directly related to the development; and (c) fairly and reasonably related in scale and kind to the development. If a requested planning obligation does not comply with all of these tests, then it is not possible for the Inspector to take this into account when determining the appeal.

4.0 High Court Judgements

University Hospitals of Leicester NHS Trust v Harborough District Council [2023] EWHC 263 (Admin) (CD15.5.58)

- 4.1. Within this case Holgate J was concerned with a request for a significant health contribution in respect of a new settlement. The main focus of the decision (ground 3) was whether the Trust had established that there was a funding gap.
- 4.2. The need for such a contribution had not been identified in the development plan process and was not explicitly reflected in development plan policy. The case concerned what was, in effect, a revenue contribution. The need for such a contribution was said to arise from a funding gap because, it was asserted, there was a delay in reflecting population increases in the funding which the Trust received. This was said to be due to the fact that the funding formula used data from those registered with GP practices and there was a lag in new residents being reflected in the funding formula. The Trust relied on an impact assessment which it said demonstrated that extra costs which would be incurred due to the hospitals already operating at full capacity.
- 4.3. This judgement contained a detailed analysis of the NHS funding rules (paragraphs 43-75) and it was concluded that the Trust had not established that there was a funding gap. Rather, it was considered that the Trust was not precluded from receiving funding from the CCG (now ICB – see paragraph 59) which took account of population projections (paragraph 73). In relation to the NHS funding structure paragraphs 60, 62 and 73 of the judgement are of particular note and therefore are replicated below (emphasis added):

“60. In December 2021 NHS England published a “Technical Guide to Allocation Formulae and Convergence”. This deals with the allocation of funding by NHS England to ICBs under s.223G of the 2006 Act and covers the 3-year period 2022/3 to 2024/5. The preceding document which dealt with the allocation of funding to CCGs, and concerned the 5-year period 2019/20 to 2023/4, was published in May 2019. The **starting point** for determining the population base was **GP registrations** as at October 2021. GP registrations in October 2021 were **projected forward for each year** from 2022/3 through to 2024/5, **using** the ONS 2018-based Sub-National **Population Projections** published at the level of Local Authority Districts. Weights were applied to these figures to reflect a range of differences across the country, including ages of the population, variations in health and deprivation, and higher costs of delivery of services in some parts of the country. It is common ground that this

method (i) did not take into account persons residing in an area but not registered with GPs and (ii) relied upon the ONS projections for population figures for subsequent years rather than updated GP registrations. The earlier document published in May 2019 used GP registrations average over the 12 months to October 2018 and population projections in the ONS 2016-based projections.”

“62. **The upshot is** that although the ONS projections are not influenced by specific development plan policies, or the grant of planning permissions in accordance with such policies, a local planning authority may adopt policies to accommodate projected population growth to the extent they consider appropriate. **Accordingly, it would be wrong to infer that there is no connection between an ONS projection of population growth in an area, used in the funding of CCGs, and new development in an area to accommodate that growth. On the contrary, the two are related. They are not divorced.**”

“73. HDC’s case does not depend upon being able to show that Rule 2d in Chapter 3 of the NT applied to the Trust’s arrangements. Its alternative position was that **the NT Rules (and the Model Contract) do not preclude the CCGs and the Trust from negotiating a block contract which has regard to population growth, or to additional activity resulting from first year occupancy of new development, when negotiating a block contract for the next financial year.** Mr. Cairnes KC accepted that that is **correct.**”

- 4.4. The judgement made it clear that there is a planning judgement to be made as to whether the contributions sought passed each of the tests now contained in regulation 122 of the CIL Regulations 2010. The application of those tests is primarily a matter for the planning authority to decide subject to review by the Court.
- 4.5. In relation to if a funding gap could be established the judgement explained that in this circumstance it would be legitimate for a planning authority to scrutinise the appropriateness of the contribution sought (paragraph’s 147-151). In fact, at paragraph 150 Holgate J identified the issue that any funding gap may be due to systemic problems in distributing funds between regions and if this is so, it may affect the question of how appropriate it is to require individual development sites across the country to make section 106 contributions to address that problem.
- 4.6. The factual context of this case is therefore that there was no basis for the contribution in the development plan. It concerned a request for a revenue contribution to deal with

a short-term funding gap and no discrete infrastructure items were identified which were said to arise from impact of the development at issue. The Planning Court (Holgate J) therefore rejected the Claimant Trust's challenge to Harborough District Council's decision to grant planning permission in this case.

R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC and others [2023] EWHC 1995 (Admin) (CD15.5.59)

- 4.7. This case reflects that of the above in that the Trust submitted a judicial review challenge relating to a decision by three local councils to reject its request for developer contributions towards healthcare service provision for a 2,200 dwelling development. This case followed the University Hospitals of Leicester Case.
- 4.8. Worcester City Council, Malvern Hills District Council and Wychavon District Council rejected the request of £1.84 million in financial contributions towards Trust services, stating that the information provided by the Trust failed to convince the Council's planning officers that there was any such funding gap or that it was 'necessary' to require a financial contribution from the developer. The planning application had also been subject to a detailed investigation with respect to viability and the Trust's request could only be met at the expense of other vital housing and education infrastructure or affordable housing considered necessary to make the development acceptable in planning terms.
- 4.9. The Trust progressed 6 grounds of argument with ground 3 relating to the councils failing to give lawful reasons as to why the contribution requested by the Trust did not comply with Regulation 122(2) of the CIL Regulations 2010 and ground 4 relating to the council taking into account an irrelevant consideration as a determinative factor when applying regulation 122 (2) of the CIL Regulations 2010, namely that there would be no funding gap if the Trust were to switch to a payment by results method.
- 4.10. It was observed by Holgate J that it is for the trust to demonstrate the existence and size of any funding gap. In giving 'clear and ample' reasons for their conclusion that the trust had failed to do so, officers rightly had in mind the necessity test within Regulation 122(2) of the CIL Regulations.
- 4.11. The Malvern Hills case again looked into the statutory framework for funding NHS services and references the detail that the Leicester case set out (paragraph 54). Paragraph 55 of the judgement sets out the CCG's (now ICB) duty to arrange for the

provision of a range of health services to such an extent as it considers necessary to meet the reasonable requirements of ‘the persons for whom it has responsibility.’ The judgement identified ‘the persons for whom it has responsibility’ as persons registered with GPs or otherwise ‘usually residing in the area’ of the CCG. Paragraph 55 concludes that NHS England is responsible for allotting funding in each financial year to each CCG towards meeting the expenditure of that group ‘attributable of the performance by it of its functions in that year.’

4.12. Paragraph 56 follows this and sets out that an NHS Trust provides services for the purposes of the health service. The Trust is therefore one of the providers from whom the CCGs obtain services. Paragraph 56 states “CCGs and NHS Trusts negotiate contracts for these purposes ([54] *et seq*). An NHS Trust is obliged to ensure that its revenue is not less than sufficient, taking one financial year with another, to meet its revenue outgoings ([53]).”

4.13. Paragraph 57 of the judgement concludes this matter as follows (emphasis added):

“57. The detailed schemes dealing with **different types of funding arrangements are, to say the least, convoluted and lacking in transparency** (*Leicester* at [66] to [72]). Even with the assistance in that case of **experienced specialist counsel it was impossible to pin down which part of these schemes applied to block contracts**. However, Mr Cairnes accepted in *Leicester* that **the funding rules do not preclude a CCG and NHS Trust from negotiating a block contract for the next financial year which takes into account population growth, or additional hospital activity resulting from first year occupancy of new development during that financial year ([73])**. The Trust in the present case did not adopt any different position. Indeed, the Trust’s representations to the defendants proceeded on that basis (see e.g. para.30 of the representations dated 14 January 2021).”

4.14. The evidence in relation to the statutory framework for funding NHS services in both the Leicester and Malvern Hills cases was therefore not materially different. In this case Holgate J found the Trusts grounds unarguable and rejected the claimant’s challenge.

5.0. NHS UHCW Contribution Request

5.1. UHCW have requested a contribution to address NHS revenue shortfalls for acute and emergency treatment. The detail of this request is set out within Appendix 1 of RBC’s CIL compliance statement (CD 17.3). The request has since been updated by the NHS

to reflect the correct dwelling numbers proposed and the correct affordable housing provision discount. The Trust is therefore requesting £133,754 as set out within CD18.7 towards the funding gap in respect of A&E and acute care at University Hospitals of Coventry and Warwickshire.

- 5.2. The request is a contribution to revenue costs based on what it contends is a funding gap. In substance the request is the same kind sought in both the University Hospitals of Leicester and the Worcestershire Acute Hospitals cases (section 4).
- 5.3. Firstly, in relation to the request (appendix 1 of CD17.3) I address specific content in light of the high court judgements.
- 5.4. Paragraphs 6 and 7 of CD17.3 refer to annual negotiations with the ICB and assert that the Trust cannot predict when planning applications are made and delivered. These paragraphs do not grapple with the issues identified by Holgate J. there is a lead in time for developments which could reasonably be expected to be visible when future contracts are being negotiated. Given the steps which are usually required to be undertaken it is unlikely for any major development to be occupied within a year of permission. For this application, if permission were to be granted, a reserved matters application for landscaping, discharge of conditions applications and Section 38/278 applications all need to be made and approved. These applications in themselves will occupy the first year at least following any permission. Paragraph 15 of the request asserts that there is no way of reclaiming additional costs for ‘unanticipated activity’ but this begs the prior question of why any foreseeable increases in population cannot inform the contractual negotiations. As noted in the Leicester and Malvern Hills cases above, there is nothing in the funding rules to prevent an NHS Trust and an ICB from negotiating on that basis.
- 5.5. Paragraph 12 of the request references ‘financial penalties due to the Payment by Results regime’. The essence of payment by results is that payments are made for those actually treated. It is not clear how asserted future effects of anticipated “penalties” due to underperformance can realistically be said to be due to effects which directly relate to the development.
- 5.6. Paragraphs 22 – 24 discuss the blended payment model known as Aligned Payment Initiative (API) and refers back to the ‘contracted values’ and asserts the fixed element of funding based on previous years activities. This analysis does not grapple with the

legal analysis of Holgate J in paragraph 73 of the University Hospitals of Leicester case.

- 5.7. The summary of the request at paragraph 41 seems to assert the very thing that Holgate J questioned which is that the Trust cannot plan for 'unanticipated growth'. It is unclear why legally and/or practically it cannot be incorporated into the funding arrangements negotiated in advance for the year in which the dwellings will come on stream (as advised in paragraph 73 of the University Hospitals of Leicester case).
- 5.8. Secondly, the witness statement submitted by Daniel Gilks on 21 September 2023 (CD18.6) is analysed. It is not considered that Mr Gilks' witness statement remedies any of the above shortcomings. The high court judgements (or their content) are not referred to in any of his analysis. Paragraph 6 touches on the issue of when development can be taken account of. Mr Gilks states that the Trust cannot take account of an application that is not known when negotiating its contract with the ICB. This seems far fetched as presented above all developments have a lead in time and are capable of being considered in the negotiations that take place annually. The Council (along with others) publishes a report annually giving details of its expected housing land supply in the next 5 years. Mr Gilks' analysis in paras 6 and 7 does not explicitly address the statutory scheme which was analysed carefully by Holgate J within the high court cases. The statement continues to assert that there will be a funding gap without grappling with the lead in times to development or Holgate J's analysis that the statutory scheme was capable of accommodating future population projections in negotiations between the Trust and the ICB.
- 5.9. Finally, the NHS Speaking Note (CD18.8) is the latest material submitted on behalf of the trust. Paragraph 3 states that the CIL compliance statement was filed on 15 September 2023, for clarity this statement was submitted to the inquiry on 5 September 2023. Nothing new is introduced through the speaking note and therefore the above analysis stands.
- 5.10. The speaking note does touch on the additional funding to provide extra education capacity. The requests relating to education are not revenue based and do not request additional staff members but additional floorspace to provide the spaces needed from the development in the same way the ICB request a monetary value associated with expanding existing practices to accommodate patients. The funding requested is therefore not comparable to this contribution request as this is not a request for specific

infrastructure but rather the asserted impacts of the funding scheme on existing infrastructure.

6.0. Summary

- 6.1. The updated contribution request alongside the witness statement and speaking note submitted on behalf of the Trust has been considered. It is concluded that the legal requirements to satisfy regulation 122(2) of the CIL Regulations 2010 (as amended) are not satisfied due to the information submitted by UHCW to date.
- 6.2. The contribution is not necessary, when funding for this type of NHS care is intended to be provided through national funding. UHCW is unable to demonstrate that the burden on services arises directly from the development proposed, as opposed to being a consequence of the funding mechanisms it negotiates for care and treatment. The request made is to meet a funding gap over the forthcoming 12-month period and is requested on commencement of development, consideration should be given as to whether it is likely that this development is likely to be built out and occupied by residents from outside of the existing trust area within 12 months, and therefore be the source of burden on services as calculated. UHCW has not demonstrated through evidence that the burden on services arises fairly from the assessment of genuine new residents likely to occupy the dwellings. Therefore, it has not been demonstrated that the request fairly and reasonable relates in scale and kind to the development proposed.
- 6.3. The contribution request, witness statement of Daniel Gilks and the NHS speaking note do not explicitly grapple with the reasoning of Holgate J in either of the High Court cases. In particular it is not explained why Holgate J's conclusion that the statutory scheme does not preclude the CCG/ICB and the Trust taking account of population growth in their contractual negotiations (paragraph 73 of the UHL case) is wrong or otherwise inapplicable. Instead, it seems that UHCW is proceeding on the basis that this is not how things work in practise. Similar arguments were presented within the UHL case and rather than take such a statement at face value, Holgate J took the approach of testing the analysis of how contractual negotiations (between the CCG/ICB and University Hospitals) work against a rigorous analysis of the applicable statutory provisions. There is no legal analysis from the NHS Trust which explains why Holgate J's legal analysis is incorrect or inapplicable.
- 6.4. Given the visibility of developments coming through before any development is occupied (including the outline nature of this development) and Holgate J's evaluation

of the statutory scheme, it has not been demonstrated that any such foreseeable impacts cannot be taken into account in negotiations between the ICB and the Trust.

- 6.5. The Council is not satisfied that the Trust has shown that there will be any residual funding gap, nor, if there is such a funding gap, what the size of that gap is. Therefore, it would be unlawful to require the payment of the contribution sought by the Trust.
- 6.6. This request is therefore not considered to meet the test of the CIL Regulations and the Council invite the inspector to remove this from the submitted draft Section 106 agreement.