PINS Ref: APP/E3715/W/23/3322013
LPA Ref: R18/0186
Appeal by Brandon Estates Limited
Site Address: Coventry Stadium, Rugby Road, Coventry, CV8 3GP

Demolition of existing buildings and outline planning application (with matters of access, layout, scale, and appearance included) for residential development (Use Class C3) including means of access into the site from the Rugby Road, provision of open space and associated infrastructure and provision of sports pitch, erection of pavilion and formation of associated car park.

PLANNING OBLIGATION LEGAL SUBMISSIONS
ON BEHALF OF THE LOCAL PLANNING AUTHORITY

Words in quotations **underlined and bold** is the emphasis of the author.

1. Regulation 122 of the CIL Regulations 2010 provides:

> "(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
> (2) Subject to paragraph (2A), a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
>> (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.
>
> (2A) …
> (3) In this regulation—
> "planning obligation" means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation; and
> "relevant determination" means a determination made on or after 6th April 2010—
>> (a) under section 70, 73, 76A or 77 of TCPA 1990 of an application for planning permission; or
>> (b) under section 79 of TCPA 1990 of an appeal."

2. In *R(University Hospitals of Leicester NHS Trust) v Harborough District Council* [2023] EWHC 263 (Admin) ("*Leicester*") [CD15.5.58], Holgate J. held at [29]:

> "It is common ground that for the obligation sought by the Trust to have been material to the determination of the planning application for the SDA, HDC had to be **satisfied that each of the three tests** in reg.122(2) was met. Regulation 122 made the application of those tests, including the necessity test in sub para. (a), **a legal requirement**, rather than a policy requirement as had previously been the case (*R (Working Title Films Limited) v Westminster City Council* [2017] JPL 173 at [20]; *Good Energy Generation Limited v Secretary of State for Communities and Local Government* [2018] JPL 1248 at [71]-[72] and [75]). The **application** of each of those tests is a matter of **evaluative judgment** for the local planning authority, subject only to judicial review applying the *Wednesbury* standard (see e.g. *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417 at [118]; *Working Title Films* at [25]). Although the application of the three tests in reg.122(2) is a matter of judgment for the decision-maker, the interpretation of the language used in para.(2) is a matter of law for the court. ….".

3. In *R(Worcestershire Acute Hospitals NHS Trust) v Malvern Hills District Council & ors* [2023] EWHC 1995 (Admin) ("*Worcestershire*") [CD15.5.59], Holgate J. held at [69]:

> "… The Trust here accepts that **unless** it could show a funding gap, and indeed the size of that gap, there would be **no legal justification** for the defendants to require the developer to pay any s.106 contribution to the costs of the Trust's services in order for planning permission to be granted. In those circumstances, a s.106 requirement to make such a contribution would breach reg.122(2) of the CIL Regulations and **render the permission unlawful** (see the *Leicester* case at [14] to [15] and [134] to [137] and also [140] to [145])."

4. There are thus two key questions for a decision-taker:
   a. has a funding gap been satisfactorily demonstrated, and if so,
   b. how big is it?

5. In *Leicester* Holgate J. found:

> "156. …. What the Trust repeatedly failed to explain in its representations to HDC was **why the annual negotiations for a block contract for the next financial year do not, or could not, take into account population growth during that year**, given that CCG funding has an element for future population growth. ….

> 157….. Even if a population increase attributable to a specific development or policy cannot be taken into account in the discussions between CCGs and the Trust each year, **the fundamental question still remained to what extent is *population growth* in the area taken into account in the negotiations, or could be taken into account, given the agreed position that funding for that purpose is provided to the CCGs** for the relevant year.
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> 158. … the Trust failed to deal with an obviously important point. **They did not explain how much population growth was allowed for in the funding provided to the CCGs and then to the Trust**, and how that compared, for example, to up to 220 "new" persons that might be expected to start living at East Lutterworth in any year, or to any other annual population estimate from HDC based on its housing trajectory. **That would be directly and obviously relevant to whether there was a funding shortfall at all, and if so how much.**"

6. In Worcestershire, Holgate J. summarised the statutory framework for funding NHS services:

> 54. This was set out in some detail in the *Leicester* case at [43] to [74].
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> 55. A CCG has a duty to arrange for the provision of a range of health services to such extent as it considers necessary to meet the reasonable requirements of "the persons for whom it has responsibility." Essentially those are persons registered with GPs or otherwise "usually residing in the area" of the CCG ([46]). NHS England is responsible for allotting funds each financial year to each CCG towards meeting the expenditure of that group "attributable to the performance by it of its functions in that year." A CCG must then ensure that its expenditure on the performance of its functions does not exceed the amount allotted to it, plus any other sums received by it in that year ([50]).
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> 56. An NHS Trust provides services for the purposes of the heath service. The claimant is one of the providers from whom CCGs obtain services in order to discharge their functions ([52]). **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]).
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> 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).

7. In *Worcestershire* Holgate J. found:

"11. … **The Trust therefore accepted that it will receive *some* funding for the services it provides to new residents on the site during their first year of occupation.** That funding is therefore available to make at least some contribution to the costs of services provided by the Trust to new residents and hence to the alleged funding gap. But the Trust never explained to MHDC how the funding allocated to CCGs for population growth translates, or should be translated, into funding for the Trust, so as to identify the true size of the funding gap it says would exist, if any. …"

18. The Trust's representations then explained how CCGs are funded, **which includes an allowance for population growth applied to the starting point of the number of people registered with a GP practice in the relevant area.** Paragraph 29 of the document stated that the Trust receives two types of payments from CCGs. The first are National Tariff payments for each patient seen or treated. The second are block contract payments to address non-elective admissions, A and E attendances, and same-day emergency care. **"Activity levels" for the previous year form the basis for the contractual negotiations with CCGs for the following year.** Growth experienced during that following year is "never entirely funded" (para. 30). **Still the Trust did not say what proportion is funded and identify the true gap alleged.**"

"23. Likewise, **it was necessary for the Trust to demonstrate to the defendants how the size of any "first year" funding gap takes into account the funding which is available under the NHS scheme (e.g. for CCGs) for population growth.** The officers' report accurately recorded the Trust's position as being that the funding for its services would "not fully fund demand for services associated with population growth arising from new housing development in its first year" (para.3.12). The officers were not satisfied from the information provided by the Trust that there was a funding gap or that the allowance to CCGs for population growth could not address the issue raised by the Trust in the negotiations for block contracts (paras.3.14 to 3.15). The officers also pointed out that in so far as services were paid for in accordance with National Tariff rates (or payment by

results), there should be no funding gap (para.3.14). The committee accepted that advice and resolved that the authority was not persuaded that the Trust's request fully met reg.122(2) of the CIL Regulations. In my judgment, if there was no legal flaw in that conclusion, that was sufficient to dispose of the Trust's request for a financial contribution."

"71. **It should have been obvious to the Trust that the question it needed to address was why should the negotiations for a block contract not adequately address population growth on, for example, this development site?** …. The Trust had accepted that it was partly funded for the population growth the subject of its s.106 request, but did not estimate the extent of that funding and the residual gap (if any). Nor did it explain how those conclusions were arrived at. Indeed, para.3 of the Trust's response on the officers' report was distinctly unhelpful if not misleading. It claimed that "the total available financing at a local system level is based on a comprehensive national funding formula which uses the historic population registered with GPs along with weighting factors to reflect its particular demographic profile/characteristics." **That simply ignored the population growth for which NHS funding was provided**."

"76. It follows that **the defendants were entitled to conclude that they were not satisfied that the Trust's request was "necessary"** for the purposes of reg.122(2) of the CIL Regulations. On that basis, the defendants could not lawfully have required the developer to pay the contribution requested in order to make the proposed development acceptable in planning terms. Irrespective of the sequence in which the committee's resolutions were set out, compliance with regulation 122(2) was a legal test which had to be satisfied before the defendants would even need to consider whether the s.106 requirements already approved by the defendants had a higher priority than the Trust's request, or what the effect of revisiting viability appraisals might be. Accordingly, it follows that the other grounds of challenge fall away. However, the defendants did go on to address those other issues. I will also deal with the remaining grounds of challenge."

8. Holgate J. found on the facts of the *Leicester* case that a funding gap had not been adequately demonstrated. But his judgment went further:

What if a funding gap could be demonstrated for a particular NHS trust?

147. But what if in a future case a NHS trust could demonstrate that it would suffer a funding gap in relation to its treatment of new residents of a development during the first year of occupation? On one level it would be a matter for the judgment of the local planning authority as to whether the three tests in reg.122(2) of the CIL Regulations 2010 are satisfied and

whether it would be appropriate to require a financial contribution to be made, after taking into account other requirements and any impact on the viability of the scheme. But all that assumes that there is no legal (or other) objection to a contribution of the kind sought in the present case. The argument in this case does not enable the court to decide that issue as a legal question. This judgment should not be read as deciding that there would be no legal objection.

148. Where a housing development is carried out, some of the new residents may be entitled to **social welfare benefits**, which, like the need for secondary healthcare, arises irrespective of where that person lives. Of course, no one would suggest that the developer should make a contribution to funding those benefits.

149. The funding of treatment in NHS hospitals would appear to be different in two respects. First, in an area of net in-migration any increase in the need for treatment and staff will be experienced in the relevant local area, not nationally. Second, **because the patients would receive treatment even if they had not moved home, a local funding gap would only arise if funding for the relevant NHS trust did not adequately reflect a projected increase in population and/or the national funding system did not adequately provide for a timely redistribution of resources.** Population projections will involve some areas of out-migration as well as areas of net in-migration. **It is therefore significant that CCG funding across the country takes into account ONS population projections**. Accordingly, in the distribution of national funds there may be increases or decreases in funding for individual CCGs by reference to size of population.

150. It seems to me that two points follow. First, even if it could be shown in a particular area that there is a funding gap to deal with "new" residents, **HDC was entitled to raise the possibility that this is a systemic problem in the way national funding is distributed**. Although the Trust criticised HDC for taking it upon themselves to raise this point, it strikes me as being a perceptive contribution to a proper understanding of the issue. **If there really is a systemic problem, this may raise the question in other cases whether it is appropriate to require individual development sites across the country to make s.106 contributions to address that problem.** However, for the purposes of dealing with the present challenge, HDC's decision rested on the Trust's failure to show that there was a funding gap in this case, not any systemic issue.

151. Second, whether there is a lack of funding for a Trust to cope with the effects of a substantial new development is likely to depend **not on those effects in isolation**, but on **wider issues** raised by the population projections used as one of the inputs to determine funding for CCGs. The interesting arguments from counsel in this case suggest that these issues

merit **<u>further consideration as a matter of policy outside the courts and even outside the planning appeal system</u>**.

9. The request in the current case is from the University Hospitals Coventry and Warwickshire NHS Trust ("the NHST").

10. By email dated 21 September 2023 the NHST asked for the following documents to be taken into account:

    a. Its consultation response [Appx 1 to CD17.3].
    b. The w/s of Daniel Gilks [CD18.6] and attached excel document [CD18.7].
    c. The Council's CIL compliance statement ("the CILCS") [CD17.3] and caselaw referenced therein.

11. By email dated 26 September 2023 the NHST submitted the "speaking note" ("the SN") from Dr Ashley Bowes of counsel [CD18.8].

12. The case for the NHST is / appears to be:

    a. There is a funding gap of £133,754 (see SN¶2).
    b. The request is not unlawful as a matter of principle (SN¶5).
    c. The contribution would serve a planning purpose (SN¶6).
    d. Whether or not the contribution is "necessary" because NHS care is intended to be funded by general taxation is contrary to principle (see Leicester [139]) and internally inconsistent (approach to education funding).
    e. The question is whether there is a gap in funding which would give rise to land-use consequences (SN¶7a). There is and it "would give rise to a reduction in service provision for local people if the additional staff capacity cannot be funded. Accordingly, the contribution is necessary to make the development acceptable in planning terms and is therefore "necessary" within the meaning of Regulation 122 CIL Regulations 2010" (SN¶8)
    f. The request only applies to new residents on the basis set out at SN¶10:
        (1) Affordable Housing occupiers have been discounted.
        (2) A 5.6 years HLS means it is likely that the market element of the scheme will be filled by people from the wider area.
        (3) The Local Plan includes an element of meeting Coventry's OAN.

g. Although the funding settlement to ICBs includes an element for population growth, the relevant population for ICBs is the GP registration list not the ONS projections (SN¶12). Even if a request was made, the ICB would not have the funds to oblige the request (SN¶12c).

13. The evidence/submissions of the NHST do not properly grapple with the issues in Leicester and Worcestershire cases:

    a. It does not explain to what extent population growth is taken into account in funding passed on to the NHST by the CCG/ICB.

    b. It does not explain what funding it does receive to provide services to new residents during their first year of occupation.

    c. It does not explain why the annual negotiations for a block contract do / did not or could not take into account / address population growth when such negotiations are not precluded by the funding rules.

    And to the extent that any funding gap is demonstrated:

    d. Why it was not able to project increases in population arising from new housing in its area as part of its negotiations with the CCG/ICB.

    e. What is has done to address the systemic problems in the way national funding is distributed.

    f. Why it did not participate in the development plan-making process and seek to have the requirement for 'funding gap' contributions identified within the Local Plan.

    g. Why individual development sites should address that problem.

14. As a matter of evaluative planning judgment Ms Ella Casey explains in her witness statement [CD18.14] that the contribution sought by the NHST is not necessary and is not fairly and reasonably related to the development. She is also not satisfied that the NHST has shown that there will be and if so the size of any funding gap. The inspector is invited to reach the same planning judgments. The NHST requests does not comply with r122 of the CIL Regulations.

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20 November 2023