**Case Name:** *Worcestershire Acute Hospitals NHS Trust, R (On the Application Of) v Malvern Hills District Council & Ors* [2023] EWHC 1995 (Admin) (31 July 2023)

**Full case:** Click Here

**Commentary:**
This was an unsuccessful application for permission to bring a claim for judicial review against the decision of three Worcestershire Councils to grant permission without securing a financial contribution towards the provision of NHS services.

The factual background to the claim is lengthy and is set out in the judgment. The Councils had resolved in 2018 to grant permission for development on part of an allocated site which traversed all three of its jurisdictions and, in considering the numerous financial obligations attracted by the proposal, the Councils had decided to prioritise the funding of highway and education infrastructure, as well as 20% affordable housing which – their viability advisors had informed them – was the maximum achievable on the site. Some ten months later, the NHS Trust ("the Claimant") made its first representation on the application, in which it asked that the developer be required to make a financial contribution to what it alleged would be a funding gap between the first occupation of each residential unit to the end of the financial year in which that occupation began. The scale of the funding gap was not explained but the amount of contribution sought was £3.4m. Having considered this request, officers referred the matter back to the relevant Committees with a recommendation that the planning obligations already agreed in principle were higher in priority and remained necessary to make the development acceptable in planning terms.

There followed a gap of 17 months, following which the Claimant wrote again to request a financial contribution, this time in the order of £1.8m, and the letter included a detailed justification as to why the contribution should be considered necessary to make the development acceptable. Officers again returned the matter to Committee and the report records their reservations as to whether there was indeed a funding gap and that – regardless – an overall judgment needed to be reached as to what was necessary, with regard to viability and deliverability, noting that acceding to the Claimant's request would be at the expense of infrastructure or affordable housing. Ultimately, the lead Council passed resolutions to the effect that the NHS contribution sought was a material consideration, but that it would not try to secure it within the section 106 agreement.

The challenge was brought on six grounds, though the fifth was not argued at the hearing. The remaining grounds were briefly as follows:

1. That the Councils did not take into account or investigate an obviously material consideration, being the effect on the provision of other infrastructure if the Trust's request was accepted;

2. That, in breach of its statutory obligation, the lead Council had not made available the viability appraisal submitted by the developer, so that the Claimant could not interrogate the reason given by the Council for rejecting its request for a financial contribution;

3. That the Councils failed to give reasons as to why the financial contribution sought by the Claimant did not comply with regulation 122(2) of the Community Infrastructure Levy Regulations 2010 ("the CIL Regs");

4. That the Council took into account an irrelevant consideration in applying the CIL Regs;

5. That there was no evidence to support a statement in the officer's report that new health infrastructure would be secured as part of the development.

The judge dealt firstly with ground 4 and found that the Claimant had failed to explain the funding issues properly and that – although it had asserted that one of the paragraphs in the officer's report was factually incorrect – the Claimant hadn't explained how any of its conclusions were reached. The key issue, said Holgate J, was that the Claimant had accepted that it would be partly funded for the first year of each residential unit's occupation but that it hadn't estimated what that funding would be or the size of any residual gap.

On ground 3, the judge doubted that a duty to give reasons arose in these particular circumstances. If there had been such a duty, however, he found that the reasons for rejecting the Claimant's request for a financial contribution were "clear and ample" and that the Claimant had had plenty of time to seek clarification from the lead Council and to make further representations.

On the basis of these findings, Holgate J found that the Councils had been entitled to conclude that the financial contribution was not necessary to make the development acceptable in planning terms and that, having reached this conclusion, the Councils could not lawfully have requested the contribution. The remaining grounds of challenge were then academic, but the judge went on to consider each of them.

Ground 6 concerned the delivery of health infrastructure and revolved around a paragraph within the officer's report which, said the Claimant, was unsupported by evidence. NHS Property Services had an option to purchase an area of land at open market value to accommodate a new GP surgery and the developer was to make a £1.72m contribution to be applied towards the cost of acquisition of the land and additionally or alternatively, to be applied towards the improvement of ten existing GP surgeries. The Claimant argued that the officer's report misled the Committee by

suggesting that the £1.72m would itself fund the delivery of the new surgery but Holgate J found this to be an "overly forensic" reading of the report.

Ground 1 involved an allegation that the Councils had closed their figurative minds to the Claimant's request by relying on the initial viability appraisal and this, it was said, was irrational because: the appraisals were by this time very old; the appraisals were not publicly available and so could not be interrogated by the Claimant; and the Councils had not considered the possibility of reducing other contributions so as to make way for the Claimant's requested contribution.
The judge rejected ground 1 for multiple reasons – firstly that, having concluded that the contribution was not necessary, it could not have been incumbent on the Councils to investigate further the viability implications of accepting the request for the contribution. The Claimant had not ever sought to argue that the Councils had been wrong to find that the infrastructure and affordable housing contributions were necessary and should be prioritised. Additionally, the Claimant had never suggested that – if new viability evidence showed that there was headroom – that the financial contribution it sought should be preferred over increasing the amount of affordable housing. The Claimant's application for disclosure of the viability assessment was rejected.

Ground 2 concerned around the statutory obligation on the lead Council, under section 100D of the Local Government Act 1972, to make background papers available for inspection. The relevant background papers were the viability assessments and whether or not there had been a breach of section 100D turned on whether the viability assessments contained exempt information. The officer's first report to Committee, in which the grant of permission was recommended, was dated March 2018. The Planning Practice Guidance ("PPG") had subsequently been amended in July of that year to require that viability appraisals be prepared using standardised inputs and avoid the use of commercially-sensitive information. The PPG did not require this at the time that the recommendation was made and Holgate J found that officers had treated the protection of commercially-sensitive information as more important than the public having access to that information, as they were entitled to do. Having struck that balance, the information was exempt and there was then no obligation on the lead Council to make the viability appraisals available to the public and nor was the Claimant entitled to view them. The judge rejected the idea that the updates to the PPG were a material change of circumstance which should have caused the Council to review its decision. There is an absorbing, if academic in this case, discussion beginning at paragraph 127 of the judgment as to what the effect of a breach of section 100D would be, Holgate J concluding that if there had been a breach the Claimant had suffered no material prejudice and so the grant of permission was not unlawful or invalid. Applying section 31 of the Senior Courts Act 1981, the judge also found that even if the viability appraisals should have been provided, it was highly likely that the outcome for the Claimant would have been the same since the fundamental problem was that it had not

convinced the Councils that the financial contribution it sought was necessary.

Comment: the judgment appears to owe much to the conduct of the Claimant, it being criticised repeatedly by Holgate J for failing to explain its request properly and to raise its objections sooner. The judgment leaves a number of issues open for consideration and it will be interesting to see how the NHS responds – neither this judgment, or the Leicester case ([2023] EWHC 263 Admin) which preceded it, completely close the door on future attempts to seek funding for the first year of occupation via section 106 agreement. This is the second occasion on which an NHS Trust has challenged the grant of permission, rather than the resolution to grant, and the Councils and Interested Parties had suggested that this was too late. For the second time, the judge declined to deal in detail with this argument and so while the timing of the challenge was a peripheral matter in this case it may re-present itself as an issue to be grappled with in future.

*Case summary prepared by Aline Hyde*