

Case Name: *The University Hospitals of Leicester NHS Trust, R (On the Application Of) v Harborough District Council* [2023] EWHC 263 (Admin) (13 February 2023)

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Commentary:

This case concerns an unsuccessful challenge by the University Hospitals of Leicester NHS Trust (the “Trust”) to the decision by Harborough District Council (the “Council”) to grant outline planning permission for a mixed-use development including up to 2,750 homes without requiring a financial contribution, through the section 106 agreement, to the Trust’s delivery of health care services in the area, which it argued would be adversely impacted by the increase in residents as a result of the development.

From the financial year 2020/21, clinical commissioning groups in the area paid for the Trust’s services under a block contract which provided for payment by a lump sum, regardless of the number and type of activities undertaken, and which was renegotiated each year based on plans informed by the previous year’s data. This funding system meant that the Trust was not entitled to any additional payment if actual activity exceeded estimates, nor was it required to repay any amount by which the funding it received exceeded the cost of its actual activity. It was considered that any funding issues could be addressed through the annual review and renegotiation of the block contract.

The Trust asked for a section 106 contribution of about £914,000 to mitigate “the harmful effects of additional demands upon its services from that proportion of the people moving to the site who would be new to the Trust’s area” which it estimated to be 38.5% or 2,896 people, however the Council granted the permission without requiring the requested contribution.

The 4 grounds of challenge were:

1. that the Council misinterpreted national policy provisions about health, and failed to consider the health impacts of the development;
2. that the Council misunderstood and failed to take into account the NHS Trust’s funding system;
3. that the Council had incorrectly refused to accept that the NHS Trust had established that a “funding gap” existed during the first year that new residents moved into the NHS Trust’s area due to the funding system; and
4. that the Council failed to consider representations submitted to it between the date of its resolution to grant permission (28 July 2020) and the date of issue of its decision notice granting permission (17 May 2022).

In his judgment, Mr Justice Holgate rejects all 4 grounds, however the main focus of the decision is ground 3.

In paragraphs 131 to 138 of his judgment, Mr Justice Holgate gives the “short answer” in relation to ground 3, that the Council was correct in reaching the conclusion that the Trust had failed to provide sufficient information to establish any “funding gap” and that the requested contribution would therefore fail the “necessity” test under regulation 122(2)(a) of the Community Infrastructure Levy Regulations 2010.

In paragraphs 139 to 151 of his judgment, Mr Justice Holgate goes on to consider the wider issues of whether section 106 contributions could be used in this way if a funding gap was established, and whether individual development sites should be required to make contributions to address what may instead be a “systemic problem in the way national funding is distributed” to public services, including the NHS. Holgate J does not go as far as to suggest that section 106 contributions can never be used in this way, but does cast significant doubt over the idea.

The challenge failed and the planning permission was upheld.

Case summary prepared by Sophie Bell