

APPEAL BY BRANDON ESTATES LIMITED

LAND AT COVENTRY STADIUM, RUGBY ROAD, COVENTRY, CV8 3GP

PINS REF: APP/E3715/W/23/3322013 - LPA REF: R18/0186

CLOSING SUBMISSIONS ON BEHALF OF:

UNIVERSITY HOSPITALS & WARWICKSHIRE NHS TRUST

The Planning Impact

1. There was no dispute that the 85% bed occupancy is the threshold to maintain adequate patient care,¹ nor that the University Hospital is currently operating at over 98% capacity.²
2. Indeed, the Care Quality Commission has previously noted in relation to the University Hospital that *“patients waiting for admission to a ward spent longer in the Emergency Department than in most hospitals in England”*.³
3. Miss Casey accepted that, if left unmitigated, the additional population from this development will exacerbate this situation.
4. Moreover, Miss Casey accepted that if such a situation were left unmitigated the development would fail to *“address identified local health and well-being needs”* (contrary to paragraph 92(c) NPPF) and fail to *“contribute to ... health services and facilities”* (contrary to Policy HS1 Rugby Local Plan). Those were conflicts with local and national policy which would weigh against the grant of permission.

¹ Consultation Response, para.10.

² Gilks RPoE, para.15.

³ Consultation Response, para.10.

5. According, if it is demonstrated the impact would not be mitigated by the ordinary application of the funding mechanism for the Trust, the contribution would be clearly “necessary” to make the development acceptable in planning terms.

The Mitigation

6. Sensibly, the Council abandoned the suggestion that revenue funding via a planning obligation was somehow objectionable. Clearly, funding for revenue could be lawful if the CIL tests were met.
7. The Council rested its case two narrow points: (a) the uplift in population would already be accounted for in the funding settlement, or else (b) the Trust could ask the ICB for more funding to account for actual uplifts over the projected rise.

Is the uplift already accounted for in funding settlement?

8. The short answer is no. As Mr Gilkes explained, the ONS population projections are only one input into the ICB funding settlement from central government. Even then, ONS projections are made on the basis of birth and mortality rates and pre-existing migration trends, which do not necessarily reflect in migration as a result of new housing development. The only sure guide of the uplift in a given year is GP registrations, which is always a year behind: hence the gap. As Miss Casey acknowledged, the ONS projections are a starting point for housing need, they are not the end point.
9. However, even taking the ONS population projections by themselves (and ignoring the other adjustments for health profiles), it is plain that there is a sizeable shortfall between the new GP registrations (at around 2% a year) and the ONS projections (for next year 0.97%). Mr Gilkes has calculated that the c.1% differential between the ONS projections and the GP registration records amounts to around £6.3m.⁴

⁴ See attached calculation by Daniel Gilkes.

10. It is therefore plain that the c.£133 sought by the Trust in this appeal is far below the true extent of the funding gap. The extent to which it is below, is in the order of millions. This is therefore a case where determining the exact extent of that shortfall is unnecessary in order to form the judgment that: (a) there is a gap and (b) that gap far exceeds the request for funding.

11. The Inspector may, in the exercise of her reasonable planning judgment, determine that the extent of the shortfall is academic because it is many times greater than the amount sought.

12. A similar approach has been approved in relation to housing land supply. In *Hallam Land Management Ltd v SSCLG* [2018] EWCA Civ 1808 at [59], Lindblom LJ held:

“It could not be said, at least in the circumstances of this case, that he erred in law in failing to calculate exactly what the shortfall was. In principle, he was entitled to conclude that no greater precision was required than that the level of housing land supply fell within a clearly identified range below the requisite five years, and that, in the balancing exercise provided for in paragraph 14 of the NPPF, realistic conclusions could therefore be reached on the weight to be given to the benefits of the development and its conflict with relevant policies of the local plan. Such conclusions would not, I think, exceed a reasonable and lawful planning judgment.”

13. The Trust invites the Inspector to adopt the same approach in relation to this evidence. It is plain the funding gap between the actual new residents and the ONS projections is significantly adrift. The funding contribution which has been sought is well within the c.1% difference. Further particularity (as sought by the Council) is unnecessary to form a rational planning judgment that the gap exists. It is certainly unnecessary to answer the Council’s proposition that the c.£133 funding contribution is seeking a contribution towards a population increase which has already been accounted for by the ICB in its funding settlement.

Can the uplift be made up through annual negotiations with the ICB?

14. The funding for the Trust from the ICB is settled on an annual basis. There is no ability, as Mr Gilkes explained, to vary the funding throughout the year. The question is therefore whether at the annual negotiation, the Trust can prospectively secure an uplift in funding from the ICB to account for planned housing development in the coming year.
15. The judgments in *Leicester*⁵ and *Worcester*⁶ determined that the Trust in those cases had failed to demonstrate “to what extent population growth in the area it taken into account in the negotiations, or could be taken into account” and “how much population growth was allowed for in the funding provided to the CCGs and then the Trust”.⁷ Those were fact-specific conclusion on the evidence before the decision taker.
16. By contrast, the Inspector here has that evidence. As set out above, the differential is around 1%, which equates to around £6.3million.
17. Moreover, Mr Gilkes, drawing on his experience as both a finance officer with the Trust but also as a commissioner, explained that there was zero prospect of the ICB uplifting the funding to account for new actual population over the ONS projections. That was because, the ICB simply did not have that money itself. Unsurprisingly, Mr Gilkes did not know of an occasion where the ICB had acceded to such a request.
18. The Council’s suggestion that the ICB may accede to a request for additional funding over the ONS projections was a bare assertion; it was not supported by any evidence. The evidence of Mr Gilkes should clearly be preferred, given his relevant experience.

⁵ CD 15.5.58 at [156].

⁶ CD 15.5.59 at [74].

⁷ *Leicester* at [157]-[158].

What about in-Borough migration?

19. The Appellant appeared to suggest there was a flaw in how the Trust had accounted for the market housing element of the scheme (noting the Trust had excluded the affordable housing element). The Appellant's point was that of the 80% market element, the Trust had overlooked the potential for in-Borough movement and had (improperly) assumed it was all in-migration.

20. The Trust submits its assumption that the market element of the scheme would be comprised of in-migrants to the area, was correct for the following reasons:
 - a. The Council is meeting (and exceeding) its five-year supply of housing land requirement.
 - b. That delivery is against the Local Plan housing requirement.
 - c. That requirement plans to meet the full objectively assessed need for Rugby and an element of the need from Coventry. That assessment would have included and accounted for concealed households.
 - d. This is a scheme coming forward over and above the planned housing trajectory of the plan.
 - e. It is therefore highly likely that the market housing element of this scheme will be filled by those outside the area, given the housing needs in the area are very likely being met by the delivery of housing above the Local Plan trajectory.

What about education?

21. The difference in treatment between the education and health contribution was so inexplicable as to be irrational.

22. Miss Casey told the inquiry she had assessed the education contribution and found it to be CIL compliant. There was no cogent explanation why that was the case when there was no evidence:

- a. Why the LEA could not plan to meet the projected uplift represented by the housing scheme?
- b. What other sources of funding are available to the LEA?
- c. What the planning impact would be if the funding were not granted?
- d. What deduction was made for existing residents, home schooling or private education?

23. On the contrary, there is **positive evidence** before the inquiry that not only is there alternative funding available to the education authority but that the education authority chooses not to spend that money in preference to seeking developer contributions to mitigate the impact of new housing. As the education authority's guidance explains:

"... Central Government funding does not negate the responsibility of developers to mitigate the impact of their development." ⁸

24. Approving the contribution request from the education authority and rejecting the request from the Trust, without cogent reasons, would not be lawful in light of that statement. It would give rise to a substantial doubt as to whether the legal principles set out by Holgate J in *Leicester* and *Worcester* had been properly and consistently applied to all the contributions.

25. Even setting that statement to one side, the CIL Compliance Statement from the education authority⁹ asserts that, in relation to secondary and post-16 education (a contribution of some £698,504):

"There is a recognised shortage of places within the Borough and discussions are ongoing with existing providers about how this need can be met. The final solution will not be known until after a formal consultation exercise has taken place."

26. It is therefore impossible to know that there would even be a gap in capacity to justify this vast sum.

⁸ CD 18.19 at p.4.

⁹ CD 17.2.

Monitoring

27. It would be possible to demonstrate and account for how the sought contribution had been spent, if it were paid. The Trust could clearly show how the c.£133k was spent and demonstrate that it went solely to mitigating the identified planning harm of increased waiting times in A&E.

Conclusion

28. The Trust submits the contribution request is:

- a. Necessary, because without it there will be a conflict with local and national planning policy which will not be accounted for in the ICB funding settlement.
- b. Directly related in scale and kind to the scheme, because it is calculated with precision in relation to cost of addressing the additional patients from the development.

29. There is no suggestion that the development would be unviable with the scheme and, indeed, the Appellant does not object to paying the contribution.

30. The obligation should therefore be found to be CIL complaint and the request for a contribution to be upheld.

ASHLEY BOWES

LANDMARK CHAMBERS
180 FLEET STREET
LONDON, EC4H 2HG

28 November 2023.