

4 October 2023

REF: SHA/26063

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**APPEAL AGAINST NHS ENGLAND DECISION TO
REFUSE AN APPLICATION FOR CHANGE OF
OWNERSHIP FROM MOORLAND PHARMACY LTD TO
ASTON CHEMISTS LTD IN RESPECT OF MOORLAND
PHARMACY, 5 PENNINE ROAD, SIMMONDLEY,
GLOSSOP, DERBYSHIRE, SK13 6NN**

1 Outcome

- 1.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, quashes the decision of NHS England and redetermines the application.
- 1.2 The Committee determined that the application should be granted.

A copy of this decision is being sent to:

Aston Chemists Ltd
Moorland Pharmacy Ltd
NHS England

Advise / Resolve / Learn

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1 The Application

By application dated 24 May 2022, Aston Chemists Ltd (“the Applicant”) applied to NHS England for a change of ownership from Moorland Pharmacy Ltd in respect of 5 Pennine Road, Simmondley, Glossop, Derbyshire, SK13 6NN. In support of the application it was stated:

- 1.1 Basis of the change of ownership:
- 1.2 Please confirm whether you are buying the pharmacy business on a
 - 1.2.1 “Non debts and liabilities basis” – the Applicant ticked “No”.
 - 1.2.2 “Debts and liabilities basis, with or without access to the existing bank account – the Applicant ticked “Yes”.
- 1.3 Pharmaceutical services to be provided at these premises:
 - 1.3.1 Essential Services (paragraphs 3 to 22, Schedule 4 – pharmacies)
- 1.4 In response to “In my/our view this application should not be refused pursuant to Regulation 31 for the following reasons:” the Applicant left this blank.
- 1.5 Information in support of the application
- 1.6 In response to “Are the services you are undertaking to provide the same as those that the current owner is providing” the Applicant ticked “Yes”.
- 1.7 In response to “Will there be any interruption to service provision” the Applicant ticked “No”.

2 The Decision

NHS England considered and decided to refuse the application. The decision letter dated 13 July 2023 states:

- 2.1 NHS England has considered the above application and is writing to confirm that it has been refused. Please see the attached report for the full reasoning.

Extract from the decision report

[Any reference to ‘Committee’ in this section is not to be confused with the Pharmacy Appeals Committee of NHS Resolution]

- 2.2 The application meets the criteria of Regulation 26(1), change of ownership.

- 2.3 Reg 31 is not applicable as no person on the pharmaceutical list is providing or has undertaken to provide pharmaceutical services from:
 - 2.3.1 Premises to which the application relates or
 - 2.3.2 Adjacent premises
- 2.4 The new owner is offering to provide the same hours as the previous owner.
- 2.5 Regulation 26 (1) would cause the application to be refused as the applicant is not intending to provide the same advanced and enhanced pharmaceutical services which are currently provided by the current owners.
- 2.6 **Moorland Pharmacy provides current owner**
- 2.7 Do not provide enhanced services but do however provide: Community Pharmacy Consultation Service, Home Delivery Service, Hypertension and Smoking Cessation.
- 2.8 **Aston Pharmacy proposed owner**
- 2.9 Has advised that they intend to supply:
 - 2.10 New Medicines Service, FLU Vaccination, Community Pharmacy Consultation Service and Home Delivery Service and the Minor Ailments Scheme.
 - 2.11 Fitness to practise was not applicable, as the applicant is already included on the pharmaceutical list in respect of other premises.
 - 2.12 The Committee agreed that the approval of the application will have an impact on those with protected characteristics or on NHS England's duty on health inequality as the same services will not be provided under the new ownership.
 - 2.13 The Committee **refused** the application.

3 **The Appeal**

In an email of 22 July 2023 the Applicant appealed against NHS England's decision. The grounds of appeal are:

- 3.1 This application was refused and the Applicant wishes to appeal.
- 3.2 The appeal grounds are as follows:
 - 3.3 This application was made about 18 months ago and only now has the Applicant been informed of the decision.
 - 3.4 When the Applicant made the application, they did state that there will be no change in any of the services. Moorland Pharmacy Ltd is owned by the Applicant. This application is to simply [sic] the accounts.
 - 3.5 In practical terms there is no change of ownership but legally there is.
 - 3.6 Moorland Pharmacy does provide enhanced services. The Applicant will provide all the services that Moorland Pharmacy currently provides as it the company that directs Moorland Pharmacy in the first place. [sic]
 - 3.7 The Applicant is providing CPCS, Home Delivery services, Hypertension and Smoking Cessation and any other services that will be commissioned under Moorland Pharmacy Ltd and will continue to do so under its own name.

4 Summary of Representations

This is a summary of representations received on the Appeal.

4.1 NHS ENGLAND

4.1.1 Thank you for your letter dated 31 July 2023. The commissioner on behalf of Derbyshire ICB would like to make the following representations.

4.1.2 Regulation 26(1)

“Section 129(2A) of the 2006 Act(a) (regulations as to pharmaceutical services) does not apply to an application from a person who is not included in a pharmaceutical list for inclusion in the list, or from a person included in a pharmaceutical list for inclusion in that list also in respect of other premises than those already listed in relation to that person, if.

(a) the applicant is undertaking to provide pharmaceutical services at premises

(i) that are already listed chemist premises, and

(ii) at which another person is providing pharmaceutical services.

(b) The applicant is proposing to carry on at the listed chemist premises, in place of the current owner, the business in the course of which the current owner is providing pharmaceutical services at those premises.

(c) The applicant is undertaking to provide the same pharmaceutical services as those that the current owner is providing; and

(d) the provision of pharmaceutical services at the premises will not be interrupted (except for such period as the commissioner may for good cause allow).”

4.1.3 Aston Chemist Ltd had submitted an application for a change of ownership which did not provide confirmation that the applicant is undertaking to provide the same pharmaceutical services as those that the current owner is providing; and therefore, the applicant was not compliant with regulation 26(1)c.

4.1.4 Within the application Aston Pharmacy advised that they intended to supply:

4.1.4.1 New Medicines Service, Community Pharmacy Flu Vaccination Service, Community Pharmacy Consultation Service, Home Delivery Service, and the Minor Ailments Scheme

4.1.5 Moorland Pharmacy the current owner supplied:

4.1.5.1 No enhanced services but did however provide: Community pharmacy consultation service, home delivery service, Hypertension and Smoking cessation.

4.1.6 The application by Aston Chemist Ltd was submitted to the Pharmaceutical Service Regulations Committee on the 24 April 2023.

4.1.7 The Committee [of NHS England] refused the application as they felt that the pharmacy was not intending to provide the same advanced and enhanced pharmaceutical services as those currently provided by the current owner.

4.1.8 The Committee [of NHS England] agreed that if the approval of the application would have an impact on those with protected characteristics or on NHS

England's duty on health inequality as the same pharmaceutical services would not be provided under the new ownership. [sic]

5 Observations

No observations were received by NHS Resolution in response to the representations received on the Appeal.

6 Consideration

6.1 The Pharmacy Appeals Committee ("Committee") appointed by NHS Resolution, had before it the papers considered by NHS England.

6.2 It also had before it the responses to NHS Resolution's own statutory consultations.

6.3 Since 1 April 2023, Integrated Care Boards have taken on delegated responsibility for the commissioning of pharmaceutical services. NHS England made the decision which is the subject of this Appeal. NHS Resolution will issue this decision to NHS England and it is for NHS England to inform the relevant Integrated Care Board.

6.4 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.

6.5 The Committee first considered Regulation 31 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations") which states:

(1) A routine or excepted application, other than a consolidation application, must be refused where paragraph (2) applies.

(2) This paragraph applies where -

(a) a person on the pharmaceutical list (which may or may not be the applicant) is providing or has undertaken to provide pharmaceutical services ("the existing services") from -

(i) the premises to which the application relates, or

(ii) adjacent premises; and

(b) the NHSCB is satisfied that it is reasonable to treat the services that the applicant proposes to provide as part of the same service as the existing services (and so the premises to which the application relates and the existing listed chemist premises should be treated as the same site).

6.6 The Committee noted that the Applicant had not provided any information in the application form on this point but the Committee noted that the wording of the application form only required the Applicant to include information in the relevant section if the proposed premises were adjacent to, or in close proximity to, another pharmacy or dispensing appliance contractor premises. The Committee considered it reasonable to determine that the lack of information in the application form on this point when read with the wording of the application form allowed it to be reasonably satisfied that the Applicant considered that the proposed premises were not adjacent to, or in close proximity to, another pharmacy or dispensing appliance contractor premises. The Committee therefore determined that it was not required to refuse the application under the provisions of Regulation 31. The Committee was therefore not required to refuse the application under the provisions of Regulation 31.

6.7 The Committee noted Regulation 26(1) (*Change of ownership applications*) of the Regulations, which reads:

"Section 129(2A) of the 2006 Act (regulations as to pharmaceutical services) does not apply to an application from a person who is not included in a pharmaceutical list for inclusion in the list, or from a person included in a pharmaceutical list for inclusion in that list also in respect of other premises than those already listed in relation to that person, if-

- (a) *the applicant (X) is undertaking to provide pharmaceutical services at premises-*
 - (i) *that are already listed chemist premises, and*
 - (ii) *at which another person (Y) is providing pharmaceutical services;*
- (b) *X is proposing to carry on at the listed chemist premises, in place of Y, the business in the course of which Y is providing pharmaceutical services at those premises;*
- (c) *X is undertaking to provide the same pharmaceutical services as those that Y is providing; and*
- (d) *the provision of pharmaceutical service at the premises will not be interrupted (except for such period as the NHSCB may for good cause allow)."*

6.8 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:

6.8.1 confirm NHS England's decision;

6.8.2 quash NHS England's decision and redetermine the application;

6.8.3 if it considers that there should be a further notification to the parties to make representations, quash NHS England's decision and remit the matter to NHS England.

6.9 The Committee considered the position in relation to each condition.

6.10 The Committee noted that the Regulations are specific in the conditions the applicant must satisfy, if its proposed change of ownership is to succeed.

6.11 The Committee has considered each of these paragraphs in turn, applying them to the information provided in the Application Form, unless (in relation to any of those paragraphs) the Applicant has provided amended/updated information.

Regulation 26(1)(a)

6.12 The Committee noted there is no dispute that the application is in respect of listed chemist premises at 5 Pennine Road, Simmondley, Glossop, Derbyshire, SK13 6NN. The Committee was satisfied that this was sufficient for the purposes of paragraph (a).

Regulation 26(1)(b)

6.13 The Committee noted the Applicant is proposing to carry on at the listed premises in place of Moorland Pharmacy Ltd, the business in the course of which Moorland Pharmacy Ltd t/a Moorland Pharmacy is providing pharmaceutical services at those premises.

6.14 The Committee was satisfied that this was sufficient for the purposes of paragraph (b).

Regulation 26(1)(c)

6.15 The Committee noted that NHS England, in its decision letter, states that the Applicant is not intending to provide the same advanced and enhanced pharmaceutical services which are currently provided by the current owners. NHS England goes on to conclude that *“the approval of the application will have an impact on those with protected characteristics or on NHS England’s duty on health inequality as the same services will not be provided under the new ownership.”* The Committee noted the information provided by the Applicant in its Appeal as well as the undertaking in the application, as provided by NHS England, which confirm that the Applicant intends to provide the same services as those currently provided by the existing pharmacy owners.

6.16 The Committee was therefore satisfied that this was sufficient for the purposes of paragraph (c).

Regulation 26(1)(d)

6.17 On the information before it, the Committee was satisfied that were the actual change of ownership to take place, no interruption, as described in paragraph (d), would occur.

Consequences of satisfying paragraphs (a) to (d) of Regulation 26(1)

6.18 Being satisfied of the various matters set out in Regulation 26(1), the Committee considered that the application should be granted.

7 Summary

7.1 In light of the reasons given above, the Committee determined that the decision of NHS England must be quashed.

7.2 The Committee went on to consider whether there should be a further notification to the parties detailed at paragraph 19 of Schedule 2 of the Regulations to allow them to make representations if they so wished (in which case it would be appropriate to remit the matter to NHS England) or whether it was preferable for the Committee to redetermine the application.

7.3 The Committee noted that when the Appeal was circulated representations had been sought from parties on Regulation 26.

7.4 The Committee concluded that further notification under paragraph 19 of Schedule 2 would not be helpful in this case.

8 Decision

8.1 The Committee quashes the decision of and re-determines the application.

8.2 The Committee concluded that it was not required to refuse the application under the provisions of Regulation 31.

8.3 The Committee has determined that it should be granted on the following basis:

8.3.1 the Applicant is proposing to continue in place of the existing contractor, the business in the course of which that contractor is providing pharmaceutical services at the same premises;

8.3.2 they can provide the same pharmaceutical services as those that the existing contractor is providing;

8.3.3 that the provision of pharmaceutical services will not be interrupted (except for such period as NHS England may for good cause allow).

8.4 The application is granted.

Case Manager
Primary Care Appeals