



Resolution

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January 2024
FOI_6331

The following information was requested on 17 December 2023:

I am writing to request information regarding decisions made under Regulation 31 for applications based on unforeseen benefits.

I recently came across your contact information on the NHS website and noted that you invite individuals to enquire about past decisions that may not be available online. I am specifically interested in obtaining information on both successful and unsuccessful decisions made under Regulation 31 for applications related to unforeseen benefit.

Could you please provide me with details of the decisions, including the basis for the decisions and any relevant information that can be shared. I am particularly interested in understanding the criteria that were considered for success or failure in these cases. Additionally, if there are any documents or guidelines related to the decision-making process that could be shared, I would greatly appreciate it.

My goal is to gain a comprehensive understanding of the factors that contribute to a successful application under Regulation 31, as well as any insights into why some applications may not meet the criteria.

Our Response

Thank you for your email which we have treated as a FOI request.

Whilst you have requested decisions made under Regulation 31 for applications based on unforeseen benefits, the consideration of Regulation 31 applies to all routine and excepted applications. There is no separate consideration of Regulation 31 for unforeseen benefits applications.

All our published pharmacy market entry type decisions at [PCA Decisions Archive - NHS Resolution](#) contain a finding on Regulation 31 i.e. whether the application should be refused pursuant to Regulation 31 or whether it does not fail under Regulation 31 and the substantive application can be considered. This is the decision-making process.

Refusals under Regulation 31 are rare. The attached decisions, whilst relating to a pharmacy relocations, considered and refused the applications pursuant to Regulation 31.

This concludes our response to your request.

If you are not satisfied with the service that you have received in response to your information request, it is open to you to make a complaint and request a formal review of our decisions. If you choose to do this, you should write to [Tinku Mitra](#), Deputy Director of Corporate and Information Governance for NHS Resolution, within 28 days of your receipt of this reply. Reviews of decisions made in relation to information requests are carried out by a person who was not involved in the original decision-making about the request.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner for a review of the decision. Generally, the Information Commissioner will not make a decision unless you have exhausted the local complaints procedure. The address of the Information Commissioner's Office is:

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

<https://ico.org.uk/>

17 January 2019

REF: SHA/19993

1 Trevelyan Square
Boar Lane
Leeds
LS1 6AE

APPEAL AGAINST NORTH (CHESHIRE & MERSEYSIDE) AREA TEAM, NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY CLAUGHTON PARTNERSHIP LIMITED FOR A RELOCATION THAT DOES NOT RESULT IN A SIGNIFICANT CHANGE TO PHARMACEUTICAL SERVICES PROVISION UNDER REGULATION 24 FROM 2 UPTON ROAD, CLAUGHTON, WIRRAL, CH14 0DF TO CLAUGHTON MEDICAL CENTRE, 161 PARK ROAD NORTH, CLAUGHTON, WIRRAL, MERSEYSIDE, CH14 0DD

Tel: 0113 86 65500
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Email: appeals@resolution.nhs.uk

1 Outcome

- 1.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, confirms the decision of NHS England to refuse the application pursuant to Regulation 31.

Advise / Resolve / Learn

NHS Resolution is the operating name of NHS Litigation Authority – we were established in 1995 as a Special Health Authority and are a not-for-profit part of the NHS. Our purpose is to provide expertise to the NHS on resolving concerns fairly, share learning for improvement and preserve resources for patient care. To find out how we use personal information, please read our privacy statement at www.nhs.uk/About-us/How-we-use-your-information---FHSALU.aspx



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1 The Application

By application dated 18 June 2018, Claughton Partnership Limited ("the Applicant") applied to NHS Commissioning Board (NHS England") for a relocation that does not result in a significant change to pharmaceutical services provision under Regulation 24 from 2 Upton Road, Claughton, Wirral, CH14 0DF to Claughton Medical Centre, 161 Park Road North, Claughton, Wirral, Merseyside, CH14 0DD. In support of the application it was stated:

In response to why the application should not be refused pursuant to Regulation 31 the applicant stated:

- 1.1 Whilst the application is made to relocate to premises which are currently included in the pharmaceutical list, regulation 31 does not apply to the determination of this application for two reasons:
- 1.2 Should the relocation application be granted, Paxton Limited will give notice to NHS England to cease the provision of pharmaceutical services at the Claughton Medical Centre. Only upon the closure of Paxton Limited's existing pharmacy will the Applicant relocate the Claughton Partnership Limited pharmacy to the Claughton Medical Centre site.
- 1.3 Since there is only one available unit within the Claughton Medical Centre in which a pharmacy can be located, NHS England can be satisfied that there is no prospect that the Applicant would relocate to Claughton Medical Centre whilst the Paxton Limited pharmacy is providing pharmaceutical services.
- 1.4 In any event, regulation 31 does not apply to the determination of this application by reason of regulation 31(2)(b). In particular, NHS England cannot be "satisfied that it is reasonable to treat the services that the applicant proposes to provide as part of the same services the existing services (and so the premises to which the application relates and the existing list of premises should be treated as the same site)."

- 1.5 The pharmacy which is the subject of this application is owned and operated by Claughton Partnership Limited the pharmacy which is currently located at the Claughton Medical Centre is owned and operated by Paxton Limited. The Applicant's pharmacy has entirely separate processes and procedures for the provision of pharmaceutical services from the Paxton Limited pharmacy. There is no connection between the pharmaceutical services provided by Claughton Partnership Limited and those provided by Paxton Limited.
- 1.6 In those circumstances, it is not reasonable to treat the services that Paxton Limited provides as being part of the same services that the Applicant would provide were they to relocate to the Claughton Medical Centre pursuant to this application.
- 1.7 Regulation 31 therefore does not apply in the circumstances of this application.

In response to why the Applicant considers the new premises are not significantly less accessible for the patient groups that are accustomed to accessing pharmaceutical services at the existing premises the Applicant stated:

- 1.8 As NHS England will be aware, *'the purpose of identifying the groups is to make a broad assessment of the question of accessibility'* (R (on the application of Community Pharmacies (UK) Limited v The National Health Service Litigation Authority [2016] EWHC 1595 (QB)).
- 1.9 The distance between the existing and proposed premises is short, at approximately 65 metres, which is a negligible distance. There are no barriers between the existing and proposed locations. The terrain is flat, pavements are in good order and well-maintained and roads are easily crossed (including a traffic light controlled crossing point). Pedestrian access at the proposed site compared to the existing premises is therefore virtually identical.
- 1.10 In terms of access by bus, both the existing and proposed premises are served by the same bus stops and bus routes, so that patients using public transport would have a virtually identical journey to access the proposed premises compared to the existing premises.
- 1.11 In terms of access by car, there is no parking immediately outside the existing premises, with parking only available on side streets. In contrast, there is parking available at the Claughton Medical Centre.
- 1.12 The Applicant refers to NHS Resolution's guidance in relation to regulation 24 applications which states, relevantly, that:
- "19. The Committee was of the view that in extremely limited circumstances, it could be presumed that the proposed location is not significantly less accessible to any patient groups without any need to identify the patient groups. An example might be where the proposed premises are next door to the existing premises. It is highly likely that no patient group would find the proposed premises in this example significantly less accessible."*
- 1.13 Given the extremely short distance between the existing and proposed premises, in accordance with NHS Resolution's guidance, this is a situation where 'it is highly likely that no patient group would find the proposed premises ... significantly less accessible'. NHS England should therefore not

over-focus on the definition of patient groups when the distance between the existing and proposed premises is so short as to be negligible.

In response to why the Applicant considers that granting the application will not result in a significant change to arrangements that are in place for the provision of local pharmaceutical services or pharmaceutical services (other than those provided by dispensing doctors) in any part of the HWB's area or any controlled locality within 1.6kmn of the new premises the Applicant stated:

- 1.14 Given the extremely short distance between the existing and proposed premises granting this application will not result in a significant change in arrangements in place for the provision of pharmaceutical services in the HWB's area. The pharmacy would continue to serve the same population from premises which are only a stone's throw away from the existing premises.

In response to why the Applicant considers granting the application will not cause significant detriment to the proper planning in respect of the provision of pharmaceutical services in the HWB's area, the Applicant stated:

- 1.15 The Applicant is not aware of any plans in place to which significant detriment would be caused by the granting of this application.
- 1.16 The Applicant confirmed that the services to be provided at the new premises are the same as those that have been provided at the current premises by ticking "Yes".
- 1.17 The Applicant confirmed that there will be no interruption to service provision by ticking "No".

2 The Decision

NHS England considered and decided to refuse the application. The decision letter dated 5 September 2018 states:

- 2.1 We have considered the above application and I am writing to confirm that it has been refused.
- 2.2 Please see the attached decision minutes regarding this application

The Pharmaceutical Services Regulations Committee minutes of 29 August 2018 stated:

- 2.3 Status of location
- 2.3.1 Non controlled locality
- 2.4 Relevant Regulations and guidance
- 2.5 Regulations 24 – relocations that do not result in significant change to pharmaceutical services provision The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations") which requires consideration of the following five criteria:

24. (1) Section 129(2A) of the 2006 Act (regulations as to pharmaceutical services) does not apply to an application from a person already included in a pharmaceutical list to relocate to different premises in the area of the relevant HWB (HWB1) if—

(a) for the patient groups that are accustomed to accessing pharmaceutical services at the existing premises, the location of the new premises is not significantly less accessible;

(b) in the opinion of the NHSCB, granting the application would not result in a significant change to the arrangements that are in place for the provision of local pharmaceutical services or of pharmaceutical services other than those provided by a person on a dispensing doctor list—

(i) in any part of the area of HWB1, or

(ii) in a controlled locality in the area of a neighbouring HWB, where that controlled locality is within 1.6 kilometres of the premises to which the applicant is seeking to relocate;

(c) the NHSCB is satisfied that granting the application would not cause significant detriment to proper planning in respect of the provision of pharmaceutical services in the area of HWB1;

(d) the services the applicant undertakes to provide at the new premises are the same as the services the applicant has been providing at the existing premises (whether or not, in the case of enhanced services, the NHSCB chooses to commission them); and

(e) the provision of pharmaceutical services will not be interrupted (except for such period as the NHSCB may for good cause allow).

2.6 In consideration of Regulation 24(1)(a)

(a) for the patient groups that are accustomed to accessing pharmaceutical services at the existing premises, the location of the new premises is not significantly less accessible;

2.7 The applicant states that:

2.8 “the distance between the existing and proposed premises is short at approximately 65 metres which is a negligible distance. There are no barriers between the existing and proposed locations. The terrain is flat, pavements are in good order and well maintained and roads are crossed easily (including a traffic light controlled crossing point).

2.9 Pedestrian access at the proposed site compared to the existing premises is therefore virtually identical.

2.10 In terms of access by bus both the existing and proposed premises are served by the same bus stops and bus routes, so that patients used to using public transport would have a virtually identical journey to access the proposed premises compared to the existing premises.

- 2.11 In terms of access by car there is no parking immediately outside the existing premises with parking only available on the side streets. In contrast, there is parking available at the Claughton Medical Centre.”
- 2.12 The applicant states that “Given the extremely short distance between the existing and proposed premises, in accordance with NHS Resolutions guidance, this is a situation where it is highly likely that no patient group would find the proposed premises significantly less accessible”. NHS England should therefore not over-focus on the definition of patient groups when the distance between the existing and proposed premises is so short as to be negligible”.
- 2.13 The applicant also cites NHS Resolutions guidance in relation to regulation 24 which states that “the committee was of the view that in extremely limited circumstances, it could be presumed that the proposed location is not significantly less accessible to any patient groups without the need to identify the patient groups. An example might be where the proposed premises are next door to the existing premises. It is highly likely that no patient group would find the proposed premises in this example significantly less accessible.”
- 2.14 The committee should note that without reference to the paper in which this quote is taken they are unable to substantiate that this guidance has been given by NHS Resolution. As such the committee should be cognisant of any defined patient groups and whether they do find the new premises significantly less accessible. However there is no information understood by NHS England which indicates that special consideration needs to be given to any group based on a 'protected characteristic'.
- 2.15 The premises are also on the other side of the road from the proposed premises and 65 meters away and as such cannot be defined as “next door” as per the example cited by the applicant.
- 2.16 Never the less given the accessibility and increased parking and the absence of any concerns raised as part of the consultation process, the committee can consider that the proposed premises would not be significantly less accessible than the existing premises to any patient groups.
- 2.17 Therefore for criterion (a) based on the information the committee can determine that the patient groups accustomed to accessing pharmaceutical services in this location would not find the new location significantly less accessible.
- 2.18 In consideration of Regulation 24(1)(b)
- (b) in the opinion of the NHSCB, granting the application would not result in a significant change to the arrangements that are in place for the provision of local pharmaceutical services or of pharmaceutical services other than those provided by a person on a dispensing doctor list—

Relocation to the proposed site would potentially result in the colocation of two pharmacies within the same building

The overall Pharmaceutical provision would remain the same or as indicated by the applicant the contract currently located in the

proposed site would close thus reducing current provision by one 100 hour contract.

2.19 The applicant states that :

2.20 “Given the short distance between the existing and proposed premises, granting this application will not result in a significant change in arrangements in place for the provision of pharmaceutical services in the health and wellbeing area. The pharmacy would continue to service the same population from premises that are only a stone’s throw away from the existing premises”

2.21 Therefore for criterion (b) the committee can determine that granting the application would not result in a significant change to the arrangements that are in place for the provision of local pharmaceutical services or of pharmaceutical services other than those provided by a person on a dispensing doctor list.

2.22 In consideration of Regulation 24(1)(c)

(c) Is the NHSCB is satisfied that granting the application would not cause significant detriment to proper planning in respect of the provision of pharmaceutical services in the area of HWB

2.23 It should be noted that NHS England does not have any plans relating to the provision of pharmaceutical services in the area of Wirral HWB

2.24 The proposed change in premises would not materially affect the provision of pharmaceutical services in the area. The committee should note that the applicant states that in granting this application one contract would close thus reducing the available services by one 100 hour contract

2.25 However there are sufficient providers in order to ensure patients have a choice of provider. Therefore there is no significant change to the provision of services in the area.

2.26 As such, if the application is approved, the ability of NHS England thereafter to plan for the provision of services would not be affected in a significant way. It cannot therefore be determined that significant detriment to the proper planning of pharmaceutical services would result from the grant of the application.

2.27 In consideration of Regulation 24(1)(d)

Are the services the applicant undertakes to provide at the new premises the same as the services the applicant has been providing at the existing premises (whether or not, in the case of enhanced services, the NHSCB chooses to commission them);

2.28 Proposed core opening hours

Monday	09:30 – 13:00 14:00 – 18:00
Tuesday	09:30 – 13:00 14:00 – 18:00
Wednesday	09:30 – 13:00

	14:00 – 18:00
Thursday	09:30 – 13:00
	14:00 – 18:00
Friday	09:30 – 13:00
	14:00 – 18:00
Saturday	Closed
Sunday	Closed
Total	40

2.29 Proposed total opening hours:

Monday	09:30 – 13:00
	14:00 – 18:00
Tuesday	09:30 – 13:00
	14:00 – 18:00
Wednesday	09:30 – 13:00
	14:00 – 18:00
Thursday	09:30 – 13:00
	14:00 – 18:00
Friday	09:30 – 13:00
	14:00 – 18:00
Saturday	Closed
Sunday	Closed
Total	40

2.30 These hours have been confirmed as the same as currently provided at the existing premises.

2.31 The applicant has stated that they will provide

2.31.1 Essential Services (paragraphs 3-22, schedule 4 pharmacies)

2.31.2 Clinical Governance (paragraph 28, Schedule 4 or paragraph 18 , Schedule 5)

2.31.3 Provide appliances as specified in part IX Drug Tariff

2.31.4 MUR

2.31.5 NMS

2.31.6 Flu vaccination

2.31.7 NUMSAS

2.32 These are consummate with the services currently provided at the existing premises.

2.33 They also state they will provide

2.33.1 Supervised consumption/needle exchange

2.33.2 NUMSAS

2.33.3 EHC

2.33.4 Minor Ailment Service

2.33.5 Blood Pressure Monitoring

2.33.6 Alcohol identification and brief advice support

2.34 However; it should be noted that as these are either locally commissioned services or private services these are out of scope for consideration in this application.

2.35 As such services the applicant undertakes to provide at the new premises are the same as the services the applicant has been providing at the existing premises

2.36 In consideration of Regulation 24(1)(e)

The provision of pharmaceutical services will not be interrupted (except for such period as the NHSCB may for good cause allow).

2.37 The applicant has given assurances that there will be no interruption of service.

Regulation 31 – refusal: same or adjacent premises

31 Refusal: same or adjacent premises

(1) A routine or excepted application, other than a consolidated 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).

2.38 In consideration of Regulation 31(2)(a) a person on the pharmaceutical list is providing pharmaceutical services from the premises to which the application relates.

2.39 The application acknowledges the current provision from the proposed premises in Claughton Medical Centre by Paxtons Ltd of a 100 hour pharmacy.

2.40 The applicant goes on to state that:

- 2.41 “Should the relocation application be granted Paxton Ltd will give notice to NHS England to cease the provision of pharmaceutical services at the Claughton Medical Centre. Only upon the closure of Paxton Limited’s existing pharmacy will we relocate the Claughton Partnership limited Pharmacy to the Claughton Medical Centre site.
- 2.42 Since there is only one available unit within the Claughton Medical Centre in which a pharmacy can be located, NHS England can be satisfied that there is no prospect that we would relocate to Claughton Medical Centre whilst the Paxton Ltd Pharmacy is providing pharmaceutical services.
- 2.43 In any event, regulation 31 does not apply to the determination of this application by reason of regulation 31(2)(b). In particular NHS England cannot be “satisfied that it is reasonable to treat the services that the applicant proposes to provide as part of the same existing services (and so the premises to which the application relates and the existing list of premises should be treated as the same site)”
- 2.44 The applicant justifies this by stating:
- 2.45 “The pharmacy which is the subject of the application is owned and operated by Claughton Partnership Limited. The pharmacy which is currently located at the Claughton Medical Centre is owned and operated by Paxton Limited. Our pharmacy has entirely separate processes and procedures for the provision of pharmaceutical services from Paxton Limited pharmacy. There is no connection between the pharmaceutical services provided by Claughton Partnership Limited and those provided by Paxton Limited.
- 2.46 In those circumstances it is not reasonable to treat the service that Paxton Limited provides as being part of the same services that we would provide were we to relocate to the Claughton Medical Centre pursuant to this application.
- 2.47 Regulation 31 therefore does not apply in the circumstances of our application.”
- 2.48 In consideration of Regulation 31 and the information submitted by the applicant:
- 2.49 It can be noted that the applicant has stated that although there is another pharmacy included in the pharmaceutical list for the area of Wirral HWB at 161 Park Road North, Claughton and therefore regulation 31(2)(a) is met, regulation 31(2)(b) is not met because:
- 2.49.1 There is only one unit available at the address.
- 2.49.2 NHS England cannot be satisfied that it is reasonable to treat the services 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).
- 2.49.3 The applicant's pharmacy (Upton Road Pharmacy) is owned by Claughton Partnership Ltd. The pharmacy at 161 Park Road North,

Claughton (Claughton Pharmacy) is owned and operated by Paxton Ltd.

- 2.49.4 It is claimed that Upton Road Pharmacy has entirely separate processes and procedures for the provision of pharmaceutical services compared to Claughton Pharmacy.
- 2.49.5 It is further claimed that there is no connection between the pharmaceutical services provided by Claughton Partnership Ltd and those provided by Paxton Ltd.
- 2.50 On the face of it, it would appear that the two pharmacies are run by separate companies and therefore regulation 31 is not satisfied.
- 2.51 However there is a degree of shared control and ownership between the two companies in that they share a director and the director of Claughton Partnership Ltd and directors of Paxton Ltd are all directors of a third company, T&C Hunt (Pharmacy) Ltd and in addition all three companies share the same registered office address, namely at the address of the pharmacy run by T&C Hunt (Pharmacy) Ltd. Companies House also shows that there are links between the directors in respect of other companies too.
- 2.52 Fitness to Practise information held by NHS England for Claughton Partnership Ltd and Paxton Ltd confirms that the two companies share a director (Mitul Harshad Patel, GPhC number 2059295). In addition the two companies have the same registered office. That in itself is not unusual as accountants' offices are often used by more than one company for example, however in this case the address for the two registered offices is another pharmacy which is owned by T&C Hunt (Pharmacy) Ltd of which it would appear from the Companies House website that Mitul Harshad Patel is also a director.
- 2.53 There is case law on how regulation 31 should be interpreted including March 2013 JR decision (Case No: CO/10112/2012) and also an appeal decision from July 2017 (REF: SHA/18750) which is similar to this application albeit it concerns a sole trader and a body corporate.
- 2.54 In summary the Judge described three situations:
- 2.54.1 If there is absolutely no connection at all in terms of ownership and control between two companies, difficult to see how they could be regarded as providing the same service, even if the services which they were going to provide were complementary to each other – reg 31 is not applicable;
- 2.54.2 If the same company owns both pharmacies – reg 31 is applicable;
- 2.54.3 There is an intermediate position where there is commonality of ownership, but owners not exactly the same – reg 31 may be applicable.
- 2.55 In the appeal case one pharmacy was owned by a body corporate and the other by a sole trader. The sole trader and one of the directors are brothers who share an email address, and throughout the case there was clearly a considerable degree of closeness between the two which led both NHS

England and the then FHSAU to refuse the application on the grounds of regulation 31.

- 2.56 It would appear that in this case, from the Fitness to Practise information held by NHS England and from information publically available on Companies House, that there is evidence of shared control and ownership between the two companies.
- 2.57 Paxton Ltd has not given notice of its intention to withdraw from the pharmaceutical list for the area of Wirral HWB, and it is possible that the two companies could arrange the single unit that is available so as to operate two separate pharmacies.
- 2.58 It can also be noted that there is an additional link between Paxton Ltd and the GPs providing primary medical services at 161 Park Road North in that a number of the current partners used to be directors of Paxton Ltd until September 2016 when it appears they all resigned and the current directors took over the company.
- 2.59 Also as discussed both the companies have a director in common and this director is a director of other pharmacy owning companies.
- 2.60 If as the applicant states that there is no connection between Paxtons Ltd and Claughton Partnership Limited then the applicant cannot give assurance on behalf of Paxton Limited regarding its business planning and as such the assurances that Paxtons Limited would cease to provide pharmaceutical services cannot be taken as appropriate assurance. Even if Paxtons do give assurance, until the date that this services is removed from the pharmaceutical list they would retain the right to continue to provide pharmaceutical services even if the Claughton Partnership Limited pharmacy did relocate on to the same premises.
- 2.61 The Paxtons Pharmacy is a 100 Hour pharmacy and would have to give 6 months notice of its intention to close before NHS England remove from the Pharmaceutical list.
- 2.62 As such NHS England can be satisfied that it is reasonable to treat the services that the applicant proposes to provide as part of the same existing services (and so the premises to which the application relates and the existing list of premises should be treated as the same site)"
- 2.63 As such there is a requirement to refuse this application under the provision of Regulation 31.
- 2.64 Additional information
- 2.65 Consideration of representations for interested parties:
 - 2.65.1 Superdrug- only request that NHS England ensure that the appropriate regulations have been taken in to regard in their consideration of this application
 - 2.65.2 Rowlands – no comment

2.65.3 LPC -The LPC has considered the application under regulation 24(1) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 and believes this application satisfies all of the criteria.

2.65.4 In terms of Regulation 31, NHS England must consider whether the application must be refused due to the same or adjacent premises and it is reasonable to treat the services that the applicant proposes to provide as part of the same service as the existing services. NHS England should note that the applicant has provided an explanation as to why in their view their application should not be refused pursuant to regulation 31 and indicated that the relocation will only occur if and when the existing pharmacy within the medical centre ceases to provide pharmaceutical services.

2.65.5 Boots- Asks NHS England to be satisfied regarding Regulation 31.

2.65.6 Boots state that the application has failed to identify patient groups.

2.65.7 Boots believes that the application does not meet all regulatory requirements.

Recommendation

2.66 NHS England is satisfied that criteria specified in the regulations have not been met. Specifically with respect to the requirement to refuse this application under Regulation 31- same or adjacent premises

2.67 Decision: Application Refused

2.68 Rights of Appeal: Applicant only.

3 The Appeal

In a letter dated 1 October 2018 addressed to NHS Resolution, Charles Russell Speechlys on behalf of the Applicant appealed against NHS England's decision. The grounds of appeal are:

3.1 NHS England refused Charles Russell Speechlys clients application on the ground that, in its opinion, regulation 31 applied to the determination of the application. The Applicant's ground of appeal is that NHS England failed to apply the correct legal test in its determination of the application.

3.2 By way of background, the premises to which the Applicant seeks to relocate its pharmacy – the Cloughton Medical Centre – is currently included in the pharmaceutical list in the name of Paxton Limited. Paxton Limited operates a 100 hour pharmacy at the Medical Centre premises.

3.3 The Applicant recently purchased Rowlands Pharmacy at 2 Upton Road. The Applicant seeks to relocate the former Rowlands Pharmacy to the Cloughton Medical Centre and, at the same time, Paxton Limited will cease the provision of pharmaceutical services from the Medical Centre.

3.4 In its decision, NHS England noted that no notice to cease the provision of pharmaceutical services had been submitted to NHS England by Paxton

Limited. That notice has now been given, and a copy of the notice is attached to this letter of appeal. NHS Resolution will note that the notice is conditional upon the Applicant's relocation being granted.

- 3.5 Regulation 31 therefore does not apply to the determination of the Applicant's application since the Applicant will not relocate its pharmacy until such time as Paxton Limited has vacated the premises (there is only one available unit within the Claughton Medical Centre).
- 3.6 Even if, the Applicant did seek inclusion in the pharmaceutical list prior to Paxton Limited vacating the premises, regulation 31 does not apply to the determination of this application. NHS England failed to have proper regard to regulation 31(2)(b) in particular, only if NHS England was satisfied that it was reasonable to treat the services proposed by Claughton Partnership Limited as being part of the same services currently offered by Paxton Limited could regulation 31 apply. NHS England therefore had to make a positive finding that it was reasonable to treat the services as being the same and as such a positive finding required substantive evidence beyond a shared directorship between the two companies.
- 3.7 In its decision, NHS England referred to the judgement of His Honour Judge Stephen Davies in R (on the application of Pharmacy Care Plus Limited) V Family Health Service Appeal Unit 2013 EWHC824 (admin) but failed to have proper regard to the judgement itself in the context of the relevant facts.
- 3.8 It is submitted that the starting point when considering whether regulation 31 applies to the determination of an appeal is whether the applicant and the person included in the pharmaceutical list in respect of premises to which the applicant relates is the same legal entity. If the existing and proposed pharmacies are operated by different legal entities with absolutely no connection at all in terms of ownership and control between the two of them then, in the words of His Honour Judge Stephen David [sic] *"it would be difficult to see how they could be regarded as providing the same service, even if the services which they were going to provide were complementary to each other"*. In contrast, if they were both to be provided by exactly the same company *"then that would be an extremely relevant consideration going the other way"*.
- 3.9 In relation to this application and appeal, the existing pharmacy in the Medical Centre and the Applicant pharmacy are operated by different legal entities (Paxton Limited and Claughton Partnership Limited) respectively.
- 3.10 However, there is, in the words of His Honour Judge Stephen Davies, some "commonality of ownership" between Paxton Limited and Claughton Partnership Limited as there is shared ownership and a shared director.
- 3.11 It was therefore necessary for NHS England to consider *"such things as the nature of the respective businesses: whether or not they are going to be physically separate or separate from a business point of view; whether or not the employees would be working in both businesses and any other relevant matters"*.
- 3.12 There is no evidence that NHS England did consider those additional relevant matters and, as a result, its decision was flawed. Had NHS England had

proper regard to those matters it should have concluded that regulation 31 does not apply for the following reasons:

- 3.12.1 As stated above, there is no intention for two pharmacies to be operated from the Cloughton Medical Centre because the pharmacy operated by Paxton Limited will close prior to the pharmacy owned by Cloughton Partnership Limited relocating;
- 3.12.2 There is insufficient space within the premises for two pharmacies to operate;
- 3.12.3 Paxton Pharmacy Limited is a 100 hour pharmacy, whereas Cloughton Partnership Limited is a 40 hour pharmacy;
- 3.12.4 Until very recently, the pharmacy owned by Cloughton Partnership Limited was operated by Rowlands and so has a distinct identity, procedures and policies and, for example, continues to use the Standard Operating Procedures put in place by Rowlands;
- 3.12.5 The pharmacies operated by Cloughton Partnership Limited and Paxton Limited have separate payroll systems and make separate payments to HMRC;
- 3.12.6 The two companies make separate VAT claims and have different VAT registration numbers;
- 3.12.7 None of the directors of Paxton Limited have ever worked in the pharmacy operated by Cloughton Partnership Limited;
- 3.12.8 None of the staff of Paxton Limited work in the pharmacy operated by Cloughton Partnership Limited;
- 3.12.9 The two pharmacies offer different services. For example, Paxton Limited offers the following services which are not offered by Cloughton Partnership Limited: EHC, sharps collection service, needle exchange programme, supervised consumption, palliative care.
- 3.13 Regulation 31(2)(b) therefore does not apply in the circumstances of the Applicant's application and NHS England erred in law in refusing the application on the basis of regulation 31.
- 3.14 In relation to regulation 24, it is of note that NHS England was satisfied that this application meets the requirements of relevant statutory test [sic].
- 3.15 The distance between the existing and proposed premises is short, at approximately 65 metres, which is a negligible distance. There are no barriers between the existing and proposed locations. The terrain is flat, pavements are in good order and well maintained and roads are easily crossed (including traffic light controlled crossing point). Pedestrian access to the proposed site is therefore virtually identical compared to the existing premises.
- 3.16 In terms of access by bus, both the existing and proposed premises are served by the same bus stops and bus routes, so that patients using public

transport would have a virtually identical journey to access the proposed premises compared to the existing premises.

3.17 In terms of access by car, there is no parking immediately outside the existing premise, with parking only available on side streets. In contrast, there is dedicated car parking available at the Cloughton Medical Centre.

3.18 Charles Russell Speechlys refer to NHS Resolution's guidance in relation to regulation 24 which states relevantly that:

"19. The Committee was of the view that in extremely limited circumstances, it could be presumed that the proposed location is not significantly less accessible to any patient group without any need to identify patient groups. An example might be where the proposed premises are next door to the existing premises. It is highly likely that no patient group would find the proposed premises in this example significantly less accessible."

3.19 Given the extremely short distance between the existing and proposed premises, in accordance with the NHS Resolution's guidance, this is a situation where "it is highly likely that no patient group would find the proposed premises ... significantly less accessible".

3.20 NHS England was therefore correct not to over-focus on the definition of patient groups when the distance between the existing and proposed premises is so short as to be negligible and was correct to conclude that this application satisfies the requirements of regulation 24.

3.21 On behalf of the Applicant, for the reasons given above, Charles Russell Speechlys invite NHS Resolution to uphold this appeal and grant the application.

4 Summary of Representations

No observations were received by NHS Resolution in response to the appeal.

5 Additional information

Further information was requested from the parties to enable the Pharmacy Appeals Committee (the "Committee") to consider the appeal. In paragraph 2 above, NHS England refers to shared directorships and shared addresses. The appeal letter referred to a shared director but also to "*shared ownership*" but did not provide any further details. The lack of representations on this appeal meant that, in order for the Committee to consider Regulation 31 and the judgement of His Honour Judge Stephen Davies, particularly relating to "*commonality of ownership*", clarity was required on the extent of any shared ownership of the two pharmacies.

Representations on this point were received by NHS Resolution by the parties listed below.

5.1 CHARLES RUSSELL SPEECHLYS ON BEHALF OF THE APPLICANT

5.1.1 As stated in the letter of appeal, there is shared ownership of Cloughton Partnership Limited and Paxton Limited. In relation to shareholdings, Cloughton Partnership Limited is wholly owned by Paxton Limited. The two companies share a registered office.

- 5.1.2 Since Paxton Limited submitted its notice to cease the provision of pharmaceutical services from premises at Claughton Medical Centre, NHS England has acknowledged the notice. Charles Russell Speechlys enclose a copy of the acknowledgment for NHS Resolution's information.

5.2 NHS ENGLAND

- 5.2.1 In response to the letter dated 17 December 2018, NHS England would like to reiterate their position:

5.2.1.1 There is commonality of ownership between Claughton Partnership Ltd and Paxton Ltd as the two companies share a director namely Mitul Harshad Patel, GPhC number 2059295.

5.2.1.2 In addition the two companies have the same address for their respective registered offices namely 205 Plumstead Road, Norwich, United Kingdom, NR1 4AB.

5.2.1.3 The registered office address is also the site of Hunt's Pharmacy (<https://www.nhs.uk/Services/pharmacies/Overview/DefaultView.aspx?id=12991>) which according to the GPhC register is owned by T & C Hunt (Pharmacy) Ltd. The directors of Paxton Ltd are also directors of T & C Hunt (Pharmacy) Ltd and the secretary of Paxton Ltd is a director of T & C Hunt (Pharmacy) Ltd.

5.2.1.4 Whilst noting to bullet points 4 to 8 in Charles Russell Speechlys' letter of appeal NHS England is of the opinion that the above points indicate that there is commonality of ownership.

5.2.1.5 With regard bullet point 9 in Charles Russell Speechlys' letter of appeal which argues that both pharmacies offer different services including EHC, Sharps Collection Service, needle exchange programme, supervised consumption, palliative care. NHS England can confirm that as none of the services listed are commissioned by NHS England then they do not fall within the definition of pharmaceutical services and are therefore not relevant to the consideration of regulation 31.

5.2.1.6 In response to CRS statement that:

"There is no evidence that NHS England did consider those additional relevant matters and, as a result, its decision was flawed."

5.2.1.7 NHS England would like it noted that NHS England is not under any binding obligation to evidence consideration of each of those various examples of matters that it might be appropriate to take into account.

- 6.1 The Committee appointed by NHS Resolution had before it the papers considered by NHS England, together with a plan of the area showing existing pharmacies and doctors' surgeries and the location of the proposed pharmacy.
- 6.2 It also had before it the responses to NHS Resolution's own statutory consultations.
- 6.3 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 6.4 The Committee had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations").
- 6.5 The Committee first considered Regulation 31 of 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 considered that, as the application was not a consolidation application, it must be refused if both Regulation 31(2)(a) and 31(2)(b) apply.
- 6.7 The Committee considered that Regulation 31(2)(a) applies as a person on the pharmaceutical list, Paxton Ltd, is providing pharmaceutical services from the premises to which the application relates, i.e. Cloughton Medical Centre. The Committee notes that this is not disputed by any of the parties to the appeal.
- 6.8 The Committee noted that in the appeal letter, the Applicant indicated that Paxton Ltd had submitted a notification to withdraw from a pharmaceutical list. The Applicant, in its additional information, provided the notification and the response from NHS England in relation to that notification. The Committee noted that NHS England had not provided any representations on the submission of the notification directly to NHS Resolution for the purpose of this appeal.
- 6.9 The Applicant indicates in its appeal letter that the notification of withdrawal is conditional on the Applicant's relocation application being granted and that

therefore Regulation 31 does not apply to the determination of the Applicant's application on the basis that the Applicant will not relocate until such time as Paxton Ltd has vacated the premises.

- 6.10 The Committee was of the view that Regulation 31(2)(a) applies regardless of whether a notification of withdrawal from the pharmaceutical list has been submitted provided that a person listed on the pharmaceutical list is providing pharmaceutical services from the premises. Regulation 31(2)(a) does not refer to a point in time in the future but instead looks to the situation as it is when the decision-maker is making their decision in respect of the application.
- 6.11 As at the date of this determination, there is no disagreement that Paxton Ltd is listed on the pharmaceutical list as providing pharmaceutical services from the premises to which the application relates, i.e. Cloughton Medical Centre.
- 6.12 The Committee therefore considered that the submission of notification of withdrawal from the pharmaceutical list was not enough to displace the finding that Regulation 31(2)(a) applies to the present application.
- 6.13 The Committee went on to consider whether Regulation 31(2)(b) applies.
- 6.14 The Committee noted the reference by NHS England in its original decision and by the Applicant in its appeal letter to a court case that centred on wording in a previous iteration of the Regulations that was similar to the wording of the existing Regulation 31 - R (on the application of Pharmacy Care Plus Ltd) v Family Health Services Appeals Unit [2013] EWHC 824 (Admin). The Committee considered that this case would likely provide a guide to interpreting Regulation 31(2)(b).
- 6.15 In that court case, one company submitted an application to open a pharmacy adjacent to an existing pharmacy run by a separate company. Judge Stephen Davies accepted at paragraphs 34 and 35 that:

"it will almost always be an extremely relevant consideration to know whether or not there is any connection in terms of ownership and control between the entities who carry on the existing business and who propose to carry on the proposed new business. So, for example, if an existing business was owned by Company A and the proposed new business was owned by Company B, and there was absolutely no connection at all in terms of ownership and control between the two of them, it would be difficult to see how they could be regarded as providing the same service, even if the services which they were going to provide were complementary to each other. In contrast, if they were both to be provided by exactly the same company, then that would also be an extremely relevant consideration going the other way.

But also I can well accept that there may be intermediate positions; so, for example, there may be a commonality of ownership but the owners may not be exactly the same, and it may very well be that in such cases one would have to consider things such as the nature of the respective businesses; whether or not they are going to be physically separate or separate from a business point of view; whether or not the employees would be working in both businesses, and any other relevant matters. That conclusion seems to me to be consistent

with the guidance given in 2009 by the Department of Health, to which I have been referred, whereby in short, the question is said to be whether or not the primary care trust is satisfied that the Applicant has a sufficiency distinct identity and will be providing a distinct service from the already listed contractor."

- 6.16 The Committee considered that the judgement constituted judicial guidance on wording that is similar to the current Regulation 31(2)(b). The Committee was of the view that this guidance indicated that the Committee could not automatically conclude that, for the purposes of Regulation 31(2)(b), the service provided by the Applicant and Paxton Ltd were separate (and therefore that Regulation 31(2)(b) did not apply) simply because the Applicant and Paxton Ltd were separate legal entities. The Committee considered that further consideration of the ownership and control of the two entities was required.
- 6.17 The Committee noted that the information provided in the course of the original decision on this application and in the course of this appeal indicates that there is shared ownership and control of the two entities. NHS England has indicated that:
- 6.17.1 both entities share a director;
- 6.17.2 the director of the Applicant and the directors of Paxton Ltd are all directors of a third company – T&C Hunt (Pharmacy) Ltd;
- 6.17.3 all three companies share the same registered office address (the address of the pharmacy run by T&C Hunt (Pharmacy) Ltd; and
- 6.17.4 there are further links between the directors in respect of other companies.
- 6.18 In the further information provided by the Applicant, it was indicated that the Applicant company is wholly owned by Paxton Ltd.
- 6.19 The Committee considered that the information provided clearly shows that there is commonality of ownership and control between the Applicant and Paxton Ltd.
- 6.20 The Committee is therefore satisfied that this commonality of ownership and control makes it reasonable for the Committee to consider that the services that the Applicant proposes to provide would be part of the same services 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).
- 6.21 The Committee noted that the Applicant was not looking to deny the commonality of ownership and control.
- 6.22 Instead the Committee considered that it is the Applicant's position that, regardless of this commonality of ownership and control, Regulation 31(2)(b) should not be considered to apply where there is a clear intention to close the pharmacy at the proposed location prior to the relocation of the other pharmacy.

- 6.23 The Applicant states expressly at paragraph 3.5 above that Regulation 31 does not apply to the determination of the Applicant's application since the Applicant will not relocate its pharmacy until such time as Paxton Ltd has vacated the premises.
- 6.24 The Committee considered whether this was enough to displace the position that Regulation 31(2)(b) appeared to be met.
- 6.25 As indicated above, the Committee was satisfied that there was commonality of ownership and control such that if the application was granted and the Applicant submitted its notice of commencement, the services that the Applicant would provide would be part of the same services as the services provided by Paxton Ltd (and so the premises to which the application relates and the existing listed chemist premises should be treated as the same site).
- 6.26 The Committee considered that the Applicant was arguing that this scenario would never arise as the Applicant would not commence provision of services at the proposed site until it had been vacated by Paxton Ltd. To indicate the intent of Paxton Ltd to vacate the premises, notification of withdrawal of Paxton Ltd had been submitted to NHS England.
- 6.27 The Committee noted NHS England's response to the notification of withdrawal (which was provided by the Applicant with its further information). In particular, the Committee noted that NHS England referred to the "conditional" nature of the notice. NHS England indicated that there was no regulatory mechanism under which a conditional closure could be submitted. In addition, NHS England indicated in its response that the notification of withdrawal could itself be withdrawn at any time prior to the date that the pharmacy was to be removed from the relevant pharmaceutical list.
- 6.28 The Committee considered that the intent behind Regulation 31 was to avoid a situation where the same services were provided at the same premises pursuant to two entities on the pharmaceutical list and those entities had commonality of ownership and/or control. If there was a possibility of this occurring, then Regulation 31 had to be applied to avoid it.
- 6.29 The Committee considered that there was nothing in the information provided to doubt the intent of the Applicant and Paxton Ltd to relocate the pharmacy only after the existing pharmacy vacated the premises. The Committee however considered that if the relocation application was granted, NHS England would, upon service of a notice of commencement under paragraph 34 of Schedule 2 to the Regulations find itself obliged by the Regulations to enter the Applicant in the pharmaceutical list for the proposed premises. This could happen prior to Paxton Ltd vacating the premises and there was nothing NHS England could do under the Regulations to prevent this from happening.
- 6.30 This means there is a possibility of the situation arising whereby the same services were provided at the same premises pursuant to two entities on the pharmaceutical list and those entities had commonality of ownership and/or control – the situation which Regulation 31 appeared to be aimed at avoiding.
- 6.31 Additionally, it might be possible for Paxton Ltd to rescind the notification of withdrawal. Although there was no evidence to suggest that this would

happen, it remained a possibility. If it did happen, this would be a situation which Regulation 31 appeared to be aimed at avoiding.

6.32 In support of this position, the Committee noted that there was no express wording in the Regulations that:

6.32.1 a notice of closure could not be rescinded by the person submitting it;

6.32.2 would enable NHS England to take any action under the Regulations if a person, who gave an undertaking not to relocate until a notice of closure of the relevant premises took effect was, went back on that undertaking; or

6.32.3 enables NHS England or the Committee to grant an application that requested relocation on the condition that the existing pharmacy at the relevant premises closed.

6.33 To further support its position, the Committee noted that the only express application type to which Regulation 31 does not apply is a consolidation application under Regulation 26A of the Regulations.

6.34 The Committee considered that the intent behind a consolidation application was not dissimilar to the intent of the Applicant. The Committee considered that it was relevant that the Regulations required a specific type of application to be introduced to enable a similar type of change to that which the Applicant envisaged, which suggests that prior to the amendments that introduced consolidation applications, the Regulations did not enable the type of change that the Applicant envisaged to be made.

6.35 The Committee therefore determined that the Regulations in their present form do not enable a change of the type envisaged by the Applicant such that it was reasonable for the Committee to consider that the intention to close one pharmacy before relocating the other pharmacy to the premises was not enough to displace a finding that, where there was commonality of ownership and control between the relevant entities, Regulation 31(2)(b) applied resulting in the application needing to be refused.

6.36 The Committee therefore determined that the Regulations required that the application be refused by virtue of Regulation 31.

6.37 As the Committee had determined that the application was to be refused under Regulation 31, the Committee was not required to consider the Regulation 24 in relation to the application.

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

6.38.1 confirm NHS England's decision;

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

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

6.39 The Committee considered 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.

6.40 The Committee noted that representations on Regulation 31 had already been made by parties to NHS England, and these had been circulated and seen by all parties who made representations on the application, as part of the processing of the application by NHS England. The Committee further noted that when the appeal was circulated representations had been sought from parties on Regulation 31.

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

7 Decision

7.1 The Committee confirms the decision of NHS England to refuse the application pursuant to Regulation 31.

7.2 The application is refused.



Jill Jackson
Case Manager
Primary Care Appeals

A copy of this decision is being sent to:

Charles Russell Speechlys on behalf of the Applicant
NHS England

13 July 2022

REF: SHA/24700

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APPEAL AGAINST SOUTH WEST AREA TEAM, NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY BADHAM PHARMACY LTD FOR A RELOCATION THAT DOES NOT RESULT IN A SIGNIFICANT CHANGE TO PHARMACEUTICAL SERVICES PROVISION UNDER REGULATION 24 FROM 5 HIGH STREET, PRESTBURY, CHELTENHAM, GL52 3AR TO THE NEW MEDICAL CENTRE, 236 PRESTBURY ROAD, CHELTENHAM, GL52 3ET

1 Outcome

- 1.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, confirms the decision of NHS England to refuse the application pursuant to Regulation 31.

A copy of this decision is being sent to:

Temple Bright on behalf of Badham Pharmacy Ltd
Lloyds Pharmacy
PCSE on behalf of NHS England

Advise / Resolve / Learn

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INVESTORS IN PEOPLE
We invest in people Silver



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APPEAL AGAINST SOUTH WEST AREA TEAM, NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY BADHAM PHARMACY LTD FOR A RELOCATION THAT DOES NOT RESULT IN A SIGNIFICANT CHANGE TO PHARMACEUTICAL SERVICES PROVISION UNDER REGULATION 24 FROM 5 HIGH STREET, PRESTBURY, CHELTENHAM, GL52 3AR TO THE NEW MEDICAL CENTRE, 236 PRESTBURY ROAD, CHELTENHAM, GL52 3ET

1 The Application

By application dated 12 September 2021, Badham Pharmacy Ltd ("the Applicant") applied to NHS Commissioning Board ("NHS England") for a relocation that does not result in a significant change to pharmaceutical services provision under Regulation 24 from 5 High Street, Prestbury, Cheltenham, GL52 3AR to the New Medical Centre, 236 Prestbury Road, Cheltenham, GL52 3ET. In support of the application it was stated:

- 1.1 In response to why the application should not be refused pursuant to Regulation 31 the applicant stated:
 - 1.1.1 There are no other pharmacies on or adjacent to the proposed premises, therefore Regulation 31 does not apply in this instance.
- 1.2 The Applicant stated, in response to "why you consider that granting the application will not result in a significant change to the arrangements that are in place for the provision of local pharmaceutical services or pharmaceutical services (other than those provided by dispensing doctors) in any part of the HWB's area or any controlled locality within 1.6 kilometres of the new premises":
 - 1.2.1 There are no LPS contracts within the locality of the existing or proposed sites and the PNA has not identified any need for such a contract.
 - 1.2.2 The relocation of the pharmacy to the new Medical Centre will not result in a significant change to the arrangements in place for the provision of pharmaceutical services in any part of the Health and Wellbeing Board, as the same pharmaceutical services will be provided, that are currently provided, will be maintained.
 - 1.2.3 The relocation will not result in a reduction in overall services to patients.
- 1.3 In response to "explain why you consider granting the application will not cause significant detriment to the proper planning in respect of the provision of pharmaceutical services in the HWB's area" the Applicant stated:
 - 1.3.1 Granting this application will not cause any significant detriment to the proper planning in place in relation to the provision of pharmaceutical services in the Health and Wellbeing Board area.
 - 1.3.2 The distance is fairly short, there are no barriers between the two sites.
 - 1.3.3 Adequate car parking has been provided.

- 1.3.4 There are public transport links.
- 1.3.5 The Applicant will continue to support the same patients with the same service platform.
- 1.3.6 There will not be an increase in pharmacy numbers in Cheltenham. The relocation will continue to provide a cost effective pharmacy service to Cheltenham and the locality.
- 1.4 The Applicant confirmed that the services to be provided at the new premises are the same as those that have been provided at the current premises by ticking “Yes” on the application form.
- 1.5 In response to will be any interruption to service provision, the Applicant confirmed that there would not be by ticking “No” on the application form.

In support of the application the Applicant stated:

- 1.6 This Application will be determined under regulation 24 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulation 2013.
- 1.7 The most relevant extracts of the guidance for the purpose of this submission are Specific patient groups such as:
 - 1.7.1 Local GP practices,
 - 1.7.2 Method of transport,
 - 1.7.3 Patients who access the pharmacy remotely,
 - 1.7.4 Care homes, and
 - 1.7.5 Index of deprivation.

Background

- 1.8 The new medical centre, in Prestbury Road Cheltenham, will commence providing services in January 2022.
- 1.9 This new centre will have a patient list of over 20,000 patients in premises that will include free parking for patients on site.

Local GP Surgeries

- 1.10 There are currently no GP Surgeries in Prestbury Road Cheltenham. The Crescent Bakery Surgery, the Royal Well Surgery and the Berkeley Surgery are going to relocate to the new Medical Centre.

Where are the current prescriptions generated?

- 1.11 Using data from the PMR, in the month of August 2021, a total of 3,843 items were dispensed to 1,056 patients.
- 1.12 1,028 items were delivered to 128 patients, some of whom had weekly medication trays, or are housebound. It is important to stress that in this patient group are many patients who are house bound and patients who have weekly medication trays delivered. These patients are not able to access services at the pharmacy.

- 1.13 The following chart details the distance patients currently have to travel from their GP surgery to the pharmacy, and the distance they will travel after the proposed relocation of the pharmacy from Prestbury to the new Medical Centre in Prestbury Road.

Name of surgery	% of patients	Distance to existing premises	Distance to proposed premises
St Pauls Medical Centre	19	2.1 miles	1.3 miles
Yorkleigh	4	2.8 miles	1.9 miles
Underwood	2	2.7 miles	1.9 miles
Sixways	3	2.3 miles	1.2 miles
Overton Park	4	2.3 miles	1.8 miles
Cleevelands	51	4.1 miles	4.4 miles
Stoke Road	0.5	3.5 miles	3.8 miles
Berkeley Place	7	2.0 miles	Zero
Royal Crescent	4	2.4 miles	Zero
Crescent Baker	4	2.2 miles	Zero

- 1.14 The reason why the percentage of patients using Cleevelands is so high, is because that surgery was previously called Seven post-Surgery and located in Prestbury Road near the site of the new medical centre.

- 1.15 The Applicant believes that once the new medical centre opens, some patients will transfer to the new surgery, as it takes two bus trips to reach Cleevelands Medical Centre in Bishops Cleeve.

Method of transport

- 1.16 A patient questionnaire has been running now for over a week and has captured 178 responses. This is a representative sample as the Community Pharmacy patient Consultation Service only requires a pharmacy of this prescription turnover to have captured 75 responses.
- 1.17 Patients have been asked where they have come from, where they are going, their mode of transport, their GP surgery and the service they have accessed.
- 1.18 Nearly 60% (57%) of patients drive to the pharmacy in its current location 40% walk, 1% cycle.
- 1.19 It is remarkable how many patients drive to the pharmacy when you consider the parking provision is so limited, this is because many patients choose to park on double yellow lines close to the pharmacy. The majority of patients therefore drive to the pharmacy, no one used public transport.
- 1.20 Nearly 90% of patients (88%) came to the pharmacy to collect or to have a prescription dispensed.

- 1.21 Nearly all of the walk-in patients confirmed they had walked from home and were walking home again. One stated they were seeing friends; one they were going to the park and one that they were going shopping.

Patients who choose to walk

- 1.22 The new premises are located 795 metres (0.49 miles) from the current pharmacy, along the Prestbury Road. There are no barriers between the two sites. Pavements are flat, well-lit and with dropped curbs. There are plenty of opportunities to cross the road safely.
- 1.23 Before the Seven post-surgery moved to Bishops Cleeve, patients could walk from the Seven post-surgery to the current location of the pharmacy, as stated earlier Seven post was located in Prestbury Road.

Summary

- 1.24 Patients who choose to walk to the surgery will have no barriers, the distance from the current location of the pharmacy to the new proposed location is relatively short.

Patients who currently use public transport to access the Pharmacy in Prestbury

- 1.25 There are public transport links to both Prestbury and the new site of the health centre in Prestbury Road.
- 1.26 The 606 and W service both operate between both sites; the journey time is about 2 minutes.
- 1.27 Patients who currently get off the bus at the main bus stop adjacent to the war memorial in Prestbury walk 230m to the pharmacy to its current location. If these patients got off the bus at Chelbury Mews Prestbury Road, bus stop, they would have a walk of 175m to the location of the proposed pharmacy.
- 1.28 Patients who currently travel in the opposite direction from Cheltenham Centre up Prestbury Road, they could get off the bus by Coronation Street, and this is a distance of 238m to the proposed new location. If these patients currently get off the bus at the War Memorial, that would be a distance of 170m to the current site of the pharmacy.

Summary

- 1.29 There are good public transport links to the new surgery. Patients who access Prestbury via the two services 606 and W, will not have to change bus. There are no barriers for this patient group access the proposed new site.

Patients who currently use private transport to access Pharmacy Services

- 1.30 Patients who use private cars currently have limited options at the current site. There are double yellow lines on both sides of the roads in the vicinity of the current location of the pharmacy. The pharmacy is located on a blind sharp bend; there are limited facilities to park outside. At the side of the current location of the pharmacy is Church Lane, this has about three car spaces, and these are unrestricted. These spaces are usually occupied by cars owned by local residents and therefore not available to patients of the pharmacy.
- 1.31 There are three parking spaces on the side of the road 150m away from the pharmacy; these are restricted to a maximum of 30 mins stay.
- 1.32 There are 8 spaces on the "Bank", which is adjacent to the war memorial and also 13 spaces in the Idsall public carpark; however, this car park is 230m away from the

pharmacy. In addition, Cheltenham Borough Council is currently looking at disposing of this car park for development.

- 1.33 In comparison the new location will have parking for 66 patients and staff cars in addition to drop off and collection points for taxis and private cars.
- 1.34 In addition, there is parking available in Fir Tree Close, York Row, Barley Road and parking on Prestbury Road, all adjacent to the site.

Summary

- 1.35 Patients who use private transport will find parking at the new site significantly improved over the current provision in Prestbury.

Patients who have just been to their doctor and are using Public Transport

- 1.36 Patients who have visited their GP in Bishops Cleeve could use the D and E service, which runs into Clarence Street in Cheltenham, where they can find connections to public transport links to Prestbury.
- 1.37 Patients who use the Underwood Surgery, Overton Park Surgery and Yorkleigh in the locality of St Georges Road Cheltenham, the closest Public Transport service is the A service that runs down St Georges Road and up Prestbury Road.
- 1.38 This service then goes up Whaddon Road, towards the cemetery. Patients who currently use this service have to walk from the Whaddon Road stop to Prestbury. This is a distance of 1.1 miles. The proposed new premises are close to the Whaddon Road bus stop, a distance of 0.6 miles. Thus, for this patient group the proposed relocation would require them to walk a shorter distance.
- 1.39 Patients who use one of the five Surgeries at St Pauls in Cheltenham also have to use the A service. They can access the bus service at Boots corner in the centre of Cheltenham, but again they will have half a mile less to walk to access the proposed new premises in Prestbury Road.
- 1.40 Patients travelling from Leckhampton have to use the 10 Gold service which takes them into Cheltenham centre. They then have the choice of various connections in Cheltenham.

- 1.41 The 606 bus service commences from the Royal Well Bus Station. The two closest surgeries to this location, Royal Crescent and Crescent Bakery are two of the three surgeries that are relocating to the new medical centre in Prestbury Road. Some patients may currently use public transport to access the pharmacy in Prestbury from this location, however with the Surgeries relocating there will no longer need to travel across Cheltenham, and this service enables patients to access the health centre from the same service.

- 1.42 The W service commences from Pittville Street in the centre of Cheltenham.

Summary

- 1.43 For patients who use Berkley surgery, Royal Well and Crescent bakery, the new proposed new location of the pharmacy will be of a benefit, as they will have a co-located pharmacy in the centre, and therefore not need to make a second journey to access their medication.
- 1.44 For patients who are reliant on the A bus service, the new proposed location will be closer to the bus stop at the junction of Whaddon Road and Prestbury Road.

- 1.45 Patients using public transport will find the new location as convenient, if not more convenient than at present.

Patients who are accessing services remotely

- 1.46 Patients who are ordering their prescriptions online, or via the pharmacy, and then having the medications delivered will find the service exactly the same.

- 1.47 There is no intention to terminate the free delivery service, in fact it is our expectation that demand will continue to rise as new patients find this free service so much more convenient.

Summary

- 1.48 The location of the pharmacy therefore has no bearing on this patient group.

Patients who collect their prescriptions from the pharmacy at its current location

- 1.49 Patients who collect their medications from the pharmacy, will have walked, used public transport, or used their own private car.

- 1.50 The Applicant has detailed the accessibility to the proposed new site for patients using the three modes of transport, and accessibility to the new proposed location is not significantly less accessible, indeed the reverse will be the case for many patients, the new location will be significantly more accessible.

Summary

This application is to be determined under Regulation 24(1)(a)

- 1.51 The proposed new location for the pharmacy will therefore not be significantly less accessible for the patient groups accustomed to accessing the current premises in Prestbury.

- 1.52 Whether they choose to walk, use private transport, or travel by public transport.

- 1.53 The distance is short for patients who walk.

- 1.54 There are good public transport links for patients who currently travel by bus. Patients who travel directly from their surgery will find the new proposed location of the Pharmacy, easier to access.

- 1.55 Car parking will be significantly easier for patients who use private transport. Patients who are registered with the relocating surgeries, will benefit from an on-site pharmacy, and they will not have to make the additional journey to locate pharmacy services.

Patients who access the pharmacy remotely

- 1.56 The Applicant currently offers a free delivery service, and has no intention of charging for this service in the future, 27% of the prescriptions this pharmacy currently dispenses are delivered.

- 1.57 These patients will find no difference in the service provided. This group represents a significant proportion of the patient pool, who are outside of the scope of Regulation 24, because the proposed relocation will have no effect on them.

Care Homes

- 1.58 The branch currently does not currently serve any care homes, however this patient group is irrelevant to the consideration as all medications to care homes are delivered. All other services such as Flu Vaccinations to staff and residents is normally provided in the home.

Deprivation

- 1.59 The OCSI Gloucestershire Parish Profiles 2016 report confirms that:

1.59.1 15% of residents in Prestbury have no car compared with 26% average in England.

1.59.2 18% of residents have a health issue which compares with the average for England.

1.59.3 8% of children are in poverty compared with 19% of Children Poverty in England.

- 1.60 Prestbury is clearly not a locality of deprivation.

Summary

- 1.61 The distance between the current location and the proposed new location is fairly short, with no barriers.

- 1.62 Patients who are registered with the Surgeries which are relocating will have the benefit of a pharmacy on site.

- 1.63 Patients who are registered with other surgeries will almost all have a shorter distance to travel, with improved public and private transport links.

2 The Decision

NHS England considered and decided to refuse the application. The decision letter dated 24 March 2022 states:

- 2.1 NHS England have considered the above application and is writing to confirm that it has been refused.

- 2.2 Please see attached report for the reason behind the decision.

Extract from the NHS England & NHS

The Committee noted:

- 2.3 In June 2019 Badham Pharmacy Ltd applied to relocate their pharmacy at 6 Prestbury Road, Cheltenham to the proposed new medical centre at 236 Prestbury Road, Cheltenham. The application was approved by the PSRC. The decision was appealed by Lloyds Pharmacy Ltd.

- 2.4 The Applicant subsequently withdrew the application. In light of the Applicants' decision to withdraw, NHS Resolution allowed the appeal and quashed the original decision to approve the application.

- 2.5 In January 2020 Badham Pharmacy Ltd applied to relocate their pharmacy at 84 St Georges Road, Cheltenham to the proposed new medical centre at 236 Prestbury Road, Cheltenham. This application was declined by the PSRC. The Applicant appealed but NHS Resolution declined the appeal.

- 2.6 In March 2021 Badham Pharmacy Ltd submitted a new application to relocate the 6 Prestbury Road pharmacy to the proposed new medical centre. The application was declined by the PSRC. The Applicant appealed and the decision was overturned by NHS Resolution and the application approved. Badham Pharmacy has until December 2022 to relocate, with the option to apply for an extension of up to 3 months.
- 2.7 In September 2021 Badham Pharmacy Ltd submitted an application to relocate their pharmacy at 5 High Street, Prestbury to the proposed new medical centre at 236 Prestbury Road, Cheltenham, which is the application now under consideration.
- 2.8 The distance between the current pharmacy location at 5 High Street, Prestbury and the proposed new location is 0.5 miles.
- 2.9 The Committee noted this is not a controlled locality.
- 2.10 The Committee noted this is an application ‘for a relocation of pharmacy premises that does not result in significant change to pharmaceutical services provision’ and is an excepted application and considered under Regulation 24 (1).

Regulation 24 (1) [quoted in full]

- 2.11 Public Involvement
- 2.12 The Committee noted full details of the Applicant’s proposals were notified to various parties in accordance with the Regulations.
- 2.13 Representations have been received from:
- 2.14 Boots state:

“In response, Boots UK Ltd wish to make the following comments:

We do not believe that the applicant has provided enough evidence to satisfy the committee regarding their patient groups. For example, there is no information on where their current patient groups reside, they have instead focused on providing information on the distance & journeys between the two locations. Not all patients will be starting their journey from the current location of their premises.

There are a large percentage of patients who attend the applicant’s current premises that are not registered with the GP surgeries that are moving to Prestbury Road, but no information has been provided on where these patient’s journeys originate.

We believe the journey to the proposed premises may be significantly less accessible for some patient groups, particularly those who are elderly or less mobile, who may be required to make an additional journey to access the proposed premises from their home.

We would also point out that not all patients access a pharmacy following a visit to their G.P. so it is important to consider the patient journey from where they originate.

When detailing patients who access their pharmacy remotely, the applicant states:

“There is no intention to terminate the free delivery service, in fact, it is our expectation that demand will continue to rise as new patients find this service so much more convenient.”

One would question **why** they expect demand for this service will increase?
[emphasis added by Boots]

With this in mind, we do not believe that this application satisfies the criteria set out in Regulation 24 and we request that the committee to refuse this application.

Please be aware that we may wish to make further representations at a later stage and attend any oral hearing and, if it proves that our interests are adversely affected, appeal against a decision to grant the application.”

2.15 Lloyds state:

“Thank you for your letter dated 5 October 2021 advising of the above application. I would like to submit the following response.

The Pharmacy in its current location at 5 High Street, Prestbury is listed on the current DH list of PhAS (Pharmacy Access Scheme) pharmacies and is also listed on the proposed list for 2022. The DHSC states that the PhAS will protect access in areas where there are fewer pharmacies with higher health needs, so that no area need be left without access to NHS community pharmaceutical services.

The applicant states that the distance between the two locations is 748 metres and that 40 per cent of patients surveyed access the current premises by foot. The applicant references the journey from patients’ homes, but it is not clear what areas these are from. From the data provided by the applicant, 85 per cent of the prescriptions dispensed at 5 High Street are from surgeries not relocating to the proposed new surgery premises for this application.

The applicant has regard to the patient group using public transport and references the 606-bus service. The timetable is not provided with the application but from Prestbury - War Memorial towards Cheltenham are 08:26 09:35 11:35 12:56 13:35 14:46 15:39(school days) 15:59 (school holidays) 17:46 18:53. The times are therefore not regular and can be over an hour between services. I have included a copy of the timetable for reference.

I would be grateful if the Committee would take these comments into consideration as part of the determination of the application.”

2.16 Superdrug stores plc state:

“Thank you for your letter of 5th October, in respect of the above application.

We ask that NHS England validate that the applicant has fulfilled the criteria for an application under this excepted category under Regulation 24(1).

We would like noted that Badham Pharmacy Ltd already have an application for the relocation of their pharmacy at 6 Prestbury Road, Cheltenham GL5 2PW to the same location at the Medical Centre, which at present is at Appeal: two pharmacy licences at the same location are definitely not required!

We trust that should the application be approved at the new Medical Centre, it will be clear to patients that even though there is a pharmacy within the Centre, they are still free to choose from which pharmacy to have their prescribed medicines dispensed.

Please keep us informed of the situation. We look forward to hearing from you in due course.”

- 2.17 The Committee noted the Applicant submitted a counter response addressing the points raised by each consultation response. The Applicant also provided further detail on bus routes and a map showing the geographical spread of the Prestbury pharmacy patients and summarises:

“Summary

The responses from the three interested parties do not bring any substantive evidence or reason not to grant this application.

Maps have been provided to further assist the panel in their decision making process, these maps confirm where our patients who visit our pharmacy live and the relative short extra distance some may have to walk. Some patients will have a shorter distance to walk and some will use their car as the new location is at least as accessible as the current one.

The submission of the timetable of the W service now confirms patients do have a choice of a regular bus service to the new medical centre.

The evidence submitted confirms this application fully meets the criteria of Regulation 24(1) and I urge the panel to grant this application.”

Consideration by Committee

- 2.18 Regulation 31 (same or adjacent premises) states:

31.— (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).

- 2.19 The Committee noted the recent history of previous applications to relocate a pharmacy to the proposed new medical centre and in particular noted the Applicant already has an approved application to relocate his pharmacy currently located at 6 Prestbury Road, to the new medical centre; the application approval will lapse in December 2022.
- 2.20 The Committee discussed Part 2(a) of Regulation 31 which states an application must be refused where ‘a person on the pharmaceutical list is providing or has undertaken to provide pharmaceuticals services from the premises to which the application relates’.
- 2.21 The Committee agreed that nobody is currently providing services from the proposed or adjacent premises. However, the Committee was aware there is an existing application that has been granted for a relocation to the proposed site. The Committee decided it had to determine if this meant that there is an undertaking to provide pharmaceutical services at the premises to which this application relates by virtue of the approved application to relocate the pharmacy from 6 Prestbury Road.

- 2.22 The Committee noted that under “undertakings” Paragraph 9 (1)(c) of Schedule 2 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 states:

(c) if A is seeking inclusion in a pharmaceutical list or (if A is already listed in that list) the listing of premises in relation to A that are not already listed in relation to A, an undertaking—

(i) to comply with all the obligations that are to be their terms of service under regulation 11 if the application is granted, and

(ii) in particular, in relation to any proposed pharmacy premises, to provide all the services and perform all the activities at those premises that are required under the terms of service to be provided or performed as or in connection with essential services;

[emphasis added by NHS England]

- 2.23 The Committee concluded that this meant that in submitting an application the applicant is giving an undertaking to provide pharmaceutical services. Given there is an existing granted application for a relocation to the premises to which this application relates 31(2)(a) must be engaged.
- 2.24 Having decided that 31(2)(a) applied, the Committee went on to consider 31(2)(b). The Committee noted that:
- 2.24.1 Badham Pharmacy Ltd has a granted application to relocate from Relocation from 6 Prestbury Rd, Cheltenham, GL52 2PW to new medical centre, 236 Prestbury Rd, Cheltenham, GL52 3ET (Granted on appeal reference SHA/24619).
- 2.24.2 The application being considered here is made by Badham Pharmacy Ltd to relocate to the same premises.
- 2.24.3 The superintendent pharmacist on both applications is the same person and both applications are signed by the same representative of the company.
- 2.24.4 In this application the Applicant states that as there is no pharmacy at the proposed address Regulation 31 does not apply.
- 2.24.5 Superdrug had commented that there was no need for 2 pharmacies at the same site.
- 2.24.6 The DH guidance published in 2012 which states the purpose of Regulation 31 is to prevent a contractor from applying for multiple inclusions in a pharmaceutical list at the same address with no benefit to patients.
- 2.25 The Committee concluded that the Applicant for both applications was the same company. The Committee noted that in the follow up comments the Applicant had indicated that he would not relocate both sites to the proposed site but was of the view that this was not an explanation of why it is not reasonable to treat the proposed services as part of the existing services (undertaken to provide).
- 2.26 If the Committee were to grant this application the Applicant would have 2 granted applications and could submit notices of commencement for both premises to relocate. Since both sites are owned by the same company the Committee was of the view that in that situation there would only be a single pharmacy and team to staff the site and could not see this would confer any benefit to patients.

- 2.27 The Committee was therefore 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.
- 2.28 The Committee was satisfied that Regulations 31(2)(a) AND b were engaged and so was required to REFUSE the application.
- 2.29 The Committee determined that as it was required to refuse the application under Regulation 31 that there was no need to continue to consider Regulation 24.

Decision

- 2.30 There is already a person on the pharmaceutical list who has undertaken to provide pharmaceutical services from the proposed site AND the Committee is satisfied that it is reasonable to treat the proposed services as part of the same service as the existing services.
- 2.31 The application is REFUSED by virtue of Regulation 31.

Appeal rights

- 2.32 The Applicant is afforded appeal rights.

3 The Appeal

In a letter dated 8 April 2022 addressed to NHS Resolution, Temple Bright on behalf of the Applicant appealed against NHS England's decision. The grounds of appeal are:

- 3.1 Temple Bright act for Badham Pharmacy Limited. On behalf of the Applicant, Temple Bright write to appeal a decision of NHS England to refuse its application for a no significant change relocation from 5 High Street, Prestbury, Cheltenham, GL52 3AR to the New Medical Centre, 236 Prestbury Road, Cheltenham, Gloucestershire, GL52 3ET. The decision was notified to the Applicant by letter dated 24th March 2022.
- 3.2 The Applicant's ground of appeal is that NHS England wrongly determined that regulation 31 applies to the application.

Regulation 31

- 3.3 By way of background, Badham Pharmacy has given the three Surgeries that are relocating to the New Medical Centre at 236 Prestbury Road a commitment to provide exceptional pharmaceutical Services to support the new enhanced GP services. Heads of Terms for a lease of the pharmacy unit in the New Medical Centre were agreed in August 2019. Construction of the New Medical Centre will be completed shortly.
- 3.4 Badham Pharmacy is included in the pharmaceutical list for premises at 6 Prestbury Road, Cheltenham and applied to NHS England for a no significant change relocation of the 6 Prestbury Road pharmacy to the New Medical Centre in May 2020.
- 3.5 That application was refused by the PSRC on the 19th July 2021. Badham Pharmacy appealed this decision, and this appeal was granted by a decision dated 3rd December 2021 (appeal reference SHA/24619).
- 3.6 Whilst the 6 Prestbury Road pharmacy relocation application was being determined, Badham Pharmacy acquired Prestbury Pharmacy (at 5 High Street, Prestbury) from Rowlands, with the sale completing in September 2021.
- 3.7 Prestbury Pharmacy is closer to the New Medical Centre than the pharmacy at 6 Prestbury Road (795m compared to 1,100m). Badham Pharmacy therefore submitted a second no significant change relocation application, to seek to relocate Prestbury

Pharmacy to the New Medical Centre. Badham Pharmacy does, of course, only intend to relocate one of its pharmacies to the New Medical Centre.

- 3.8 It is that second application which has been refused by NHS England and which is the subject of this appeal.
- 3.9 In its determination of the Prestbury Pharmacy relocation application, NHS England concluded that regulation 31 applied to the determination of the Prestbury Pharmacy relocation application. In essence, NHS England determined that because Badham Pharmacy has an extant grant to relocate the pharmacy at 6 Prestbury Road to the same premises as those specified in the Prestbury Pharmacy relocation application, Badham Pharmacy has “undertaken to provide pharmaceutical services” at the proposed site.
- 3.10 In reaching this decision, NHS England misapplied the legal test.
- 3.11 Firstly, regulation 31 explicitly applies only where a person is “on the pharmaceutical list” at the premises to which the application relates. A person is “on the pharmaceutical list” only when a notice of commencement has been filed pursuant to a grant (paragraph 34(2) of Schedule 2 to the NHS Regulations).
- 3.12 Badham Pharmacy has not submitted a notice of commencement pursuant to the 6 Prestbury Road relocation application. Badham Pharmacy therefore cannot be “on the pharmaceutical list” at the New Medical Centre in respect of the 6 Prestbury Road relocation application.
- 3.13 Regulation 31 therefore does not apply.
- 3.14 Secondly, NHS England has stated that, in submitting an application to relocate its 6 Prestbury Road pharmacy to the New Medical Centre, Badham Pharmacy “has undertaken to provide pharmaceutical services” at the New Medical Centre premises. In its determination, NHS England stated relevantly as follows:
- “16. The Committee concluded that this meant that in submitting an application the applicant is giving an undertaking to provide pharmaceutical services. Given there is an existing granted application for a relocation to the premises to which this application relates 31(2)(a) must be engaged.”
- 3.15 However, the undertakings included in the 6 Prestbury Road relocation application form do not mean that Badham Pharmacy has “undertaken to provide pharmaceutical services” at the New Medical Centre. Badham Pharmacy is under no obligation to relocate the 6 Prestbury Road pharmacy pursuant to the relocation grant and has not submitted a notice of commencement to NHS England in respect of that grant.
- 3.16 NHS England appears to have misunderstood the use of the word “undertaken” in regulation 31 to mean a person who has provided the undertakings at the end of a market entry application form.
- 3.17 In fact, the use of the word “undertaken” in regulation 31 merely reflects the wording in regulation 10 of the NHS Regulations, which states relevantly as follows:

(1) In respect of the area of each HWB, the NHSCB must prepare, maintain and publish 2 lists of persons (if there are any), other than medical practitioners or dental practitioners, who undertake to provide pharmaceutical services from premises situated in that area.

(2) Those lists (which are pharmaceutical lists) are—

(a) a list of persons who undertake to provide pharmaceutical services in particular by way of the provision of drugs; and

(b) a list of persons who undertake to provide pharmaceutical services only by way of the provision of appliances.

- 3.18 In accordance with regulation 10, a person included in a pharmaceutical list is a person who has “undertaken” to provide pharmaceutical services from the listed premises. It is therefore only a person who is included in the pharmaceutical list at the premises specified in a market entry application who is relevant for the purposes of regulation 31.
- 3.19 If it were intended that regulation 31 would apply to premises to which there is an extant grant, regulation 31 would explicitly state as such. The fact that no such interpretation is anticipated by regulation 31 is clear from the Department of Health Guidance note on no significant change relocation applications which states, relevantly, as follows:

“58. Where the premises within an excepted application to relocate are:

- already included in a pharmaceutical list; or*
- adjacent to or in close proximity to premises that are already included in a pharmaceutical list,*

the applicant will have had to explain why their application should not be refused pursuant to regulation 31.”

Regulation 24

- 3.20 As NHS Resolution will be aware, Badham Pharmacy provided details to NHS England of the patient groups accustomed to accessing pharmaceutical services from the proposed premises and explained why, for those patient groups, the proposed premises would not be significantly less accessible.
- 3.21 This information was provided in the Applicant’s application form and additional information was given in its response to representations from interested parties.

Background

- 3.22 By way of background, the application is made to relocate Prestbury Pharmacy to the new Medical Centre which is currently nearing completion and which is located at 236 Prestbury Road in Cheltenham. Once constructed, the new Medical Centre will house 3 Cheltenham GP Practices: Berkeley Place, Crescent Bakery (Prestbury Park) and Royal Crescent. As stated above, Badham Pharmacy Limited has agreed heads of terms for a lease of the pharmacy unit at the new Medical Centre.
- 3.23 Prestbury Pharmacy is the closest pharmacy to the new Medical Centre.
- 3.24 The existing and proposed premises are located a short distance (around 800m) from each other. This is shown on the map (at Appendix A).
- 3.25 As can be seen from the map, the route between Prestbury Pharmacy and the new Medical Centre is straightforward, being a simple direct journey along Prestbury Road.
- 3.26 Prestbury Road itself is mostly flat, is well-lit and has a pedestrian footpath along its entire length. The route along Prestbury Road itself does not cross any main roads, and where it crosses side streets then there are dropped kerbs. There are, therefore, no barriers between the existing and proposed locations.

Patient Groups

- 3.27 As NHS Resolution will be aware, “the purpose of identifying the groups is to make a broad assessment of the question of accessibility” R (on the application of Community Pharmacies (UK) Limited v The National Health Service Litigation Authority [2016] EWHC 1595 (QB)).
- 3.28 In order to define the pharmacy’s patient groups, the Applicant used a range of information sources, including information held by the pharmacy’s PMR, local knowledge and information published by the Business Services Authority. The Applicant also ran a survey of patients in September 2021. During the survey period, 105 patients participated in the survey.
- 3.29 Having carefully considered the various sources of information, the pharmacy’s patient groups can be defined as follows:
- 3.29.1 GP surgeries
- 3.29.2 Mode of transport
- 3.29.3 Services accessed
- 3.29.4 Patient starting point
- 3.30 The Applicant also considered whether additional patient groups may be defined by reference to other matters, such as a shared protected characteristic or local demographic data but determined that there were no patient groups that could usefully be defined in that way which would assist NHS Resolution in its “broad assessment of the question of accessibility”.
- 3.31 In relation to the nature of the local area, the proposed and existing premises are in a suburban area towards the north-eastern edge of Cheltenham. According to the 2011 census for the Prestbury ward:
- 3.31.1 The number of patients reporting “bad or very bad” health is lower than the English average (at 4.3% compared to 5.4%).
- 3.31.2 Housing is largely detached or semi-detached (80.5%) and most is privately owned (86.2%) with very little social housing (only 4.8%).
- 3.31.3 Car ownership is high, with 86.4% of households owning at least one car or van.
- 3.32 The local population is therefore relatively affluent, in relatively good health and highly mobile.

Collection and delivery patients

- 3.33 As a starting point, NHS Resolution should be aware that the pharmacy operates a free collection and delivery service for all patients. The pharmacy delivers to approximately 10% of its dispensing patients.
- 3.34 These prescriptions are typically delivered to these patients who are not therefore “accustomed to accessing pharmaceutical services at the listed premises” and fall outside the scope of regulation 24. The delivery service would continue should the relocation proceed so these patients will be entirely unaffected by the move.

GP Surgeries

- 3.35 In relation to the GP surgeries from which prescriptions are received, Temple Bright have set out below a table giving this information (adopting a de minimis of 1%) which is taken from the pharmacy's December 2021 dispensing data.

GP Surgery	Percentage of the pharmacy's total prescriptions	Distance to existing premises (metres)	Distance to proposed premises (metres)
Cleevelands Medical Centre, GL52 7YU	43%	6,500	7,000
St Paul's Medical Centre Surgeries (Weston, St George's, The Royal Well Surgery, St Catherine's Surgery) GL50 4DP	21%	3,800	2,600
Berkeley Place Surgery, GL52 6DA	1.7%	3,100	2,300
Royal Crescent, GL50 3DA	5.2%	3,200	2,300
Yorkeleigh Surgery, GL50 3ED	4.7%	3,600	2,800
Prestbury Park (formerly the Crescent Bakery Surgery), GL50 3PN	4%	3,100	2,300
Overton Park Surgery, GL50 3BP	4%	3,700	2,900
Sixways Clinic, GL52 6HS	3.4%	3,800	3,900
The Leckhampton Surgery, GL53 0LA	2.3%	5,000	4,200
Underwood Surgery, GL50 3EQ	2.1%	4,700	3,200

- 3.36 As stated above, three Cheltenham GP surgeries will shortly relocate to the new Medical Centre being built at 236 Prestbury Road (Berkeley Place, Royal Crescent and Prestbury Park). Once that relocation has taken place, the relative percentages and distances will be as follows:

GP Surgery (post relocation)	Percentage of the pharmacy's total prescriptions	Distance to existing premises (metres)	Distance to proposed premises (metres)
Cleevelands Medical Centre, GL52 7YU	43%	6,500	7,000
St Paul's Medical Centre Surgeries (Weston, St George's, The Royal Well Surgery, St Catherine's Surgery) GL50 4DP	21%	3,800	2,600
New Medical Centre (Prestbury Park, Berkeley Place and Royal Crescent Surgeries) GL52 3ET	16.3%	800	0
Yorkeleigh Surgery, GL50 3ED	4.7%	3,600	2,800
Overton Park Surgery, GL50 3BP	4%	3,700	2,900
Sixways Clinic, GL52 6HS	3.4%	3,800	3,900
The Leckhampton Surgery, GL53 0LA	2.3%	5,000	4,200
Underwood Surgery, GL50 3EQ	2.1%	4,700	3,200

- 3.37 As can be seen from the above, the proposed premises are closer to most of the GP surgeries from which the pharmacy's prescriptions originate (adopting the de minimis of 1%). Whilst the proposed location is slightly further away from the Cleevelands Medical Centre (by 500m), given the distances already involved, this additional distance is not significant.
- 3.38 This was broadly reflected in the survey, where 47% of walk-in patients were registered with the Cleevelands Medical Centre, 26% from the surgeries at the St Paul's Medical Centre, 12% from the surgeries that will move into the new Medical Centre, 5% from Yorkeleigh, 5% from Overton Park and 3% from Underwood.
- 3.39 By way of information, the relative high proportion of patients registered with the Cleevelands Medical Centre is due to the fact that the Cleevelands Medical Centre used to be located in Prestbury before it relocated.

- 3.40 Once the new Medical Centre at 236 Prestbury Road opens, it is anticipated that many of the pharmacy's patients will move to the new surgery as it will be by far the closest GP surgery.
- 3.41 The GP surgery has been constructed with significant capacity for growth in patient numbers.
- 3.42 The above table also demonstrates that patients are already travelling some distance in order to visit their GP, and so are clearly mobile and able to make these journeys. Unsurprisingly given the distances involved, all of the patients who visited the pharmacy immediately after seeing their GP had travelled by car. There are no additional barriers to accessing the proposed premises from any of these surgeries compared to the existing premises.
- 3.43 For the reasons given above, for those accessing pharmaceutical services after a visit to their GP, the proposed premises would not be significantly less accessible since the distances are relatively short with no barriers to access.

Method of travel

- 3.44 Most of the pharmacy's patients either walk or drive to the pharmacy. According to the survey, just under 56% of patients drove to the pharmacy and just under 44% walked to the pharmacy. 1 person travelled by bicycle. No patients travelled by bus to access the pharmacy.
- 3.45 For those patients travelling by foot, for the reasons given above (in terms of relative distances, terrain, road conditions, etc.) the proposed premises would not be significantly less accessible.
- 3.46 The proposed premises are in a highly visible and easily accessible location on Prestbury Road.
- 3.47 They are therefore in a location that patients would be accustomed to accessing as part of their daily lives. No matter where the patient's starting point, the maximum additional distance that any patient would have to travel in order to access the proposed pharmacy compared to the existing pharmacy would be 800m, but for this patient group as a whole, there is no material difference in accessibility.
- 3.48 For those travelling by car, there is a limited amount of on-street parking at the existing location. Please see photograph [at Appendix A] of the existing premises and limited parking.
- 3.49 Patients who currently drive to the pharmacy therefore have limited parking options. There are three parking spaces to the side of the pharmacy, and then three parking spaces on the High Street approximately 150m from the existing premises. These are restricted to 30 minutes stay. There are a further 8 spaces on the "bank" adjacent to the war memorial and then 13 spaces at the Idsall public car park, which is 230m from the pharmacy.
- 3.50 In comparison, the new location will have parking for 66 patients and staff, in addition to drop off and collection points for taxis and private cars. There is also ample on-street parking on nearby roads, including Fir Tree Close, York Row, Barley Road and parking on Prestbury Road itself.
- 3.51 As stated above, the survey did not reveal any patients who travel by public transport. However, public transport is available, and serves both the existing and proposed premises. For example, the 608 and W services operate between both sites, with a journey time from one to the other of approximately 2 minutes. The walk from the bus stop to the proposed site is slightly shorter than the walk from the nearest bus stop to the existing premises (175m compared to 238m).

- 3.52 No matter which mode of transport is used by patients, the proposed premises would therefore not be significantly less accessible.

Services accessed

- 3.53 In terms of services, most of the pharmacy's patients during the survey period accessed the pharmacy in order to obtain dispensing services (83%), and details of the local GP surgeries are set out above. 13% came to purchase an OTC item (which may have included some advice from the pharmacy staff). 3% came to collect LFTs (a service which has since been discontinued) and 1% for EHC.
- 3.54 In addition to dispensing services and OTC sales, the pharmacy offers some enhanced and advanced services. Below is a list of those services, and the number of patients, on average, who access each service.

Service	Number of Patients
New Medicine Service	5 per month
Community Pharmacy Consultation Service	2.5 per month
Flu Vaccination Service	211 during the season
EHC	0 per month

- 3.55 There are no additional factors in terms of accessibility which would be specifically relevant to these additional services. Patients who come to the pharmacy to access these additional services would not find the proposed premises significantly less accessible and would not have a different journey experience than patients accessing dispensing services.

Patient starting point

- 3.56 The pharmacy survey asked people to say where they had started their journey to the pharmacy.
- 3.57 Most of the pharmacy's patients (82%) had started their journey from their home. 5% had come from their GP surgery (Cleevelands, Royal Well or St Pauls), 6% from Prestbury, 4% from work, 1% had come from the hospital and 1% had come from the dentist.
- 3.58 For those whose starting point is their home, attached at Appendix A is a map which indicates where the pharmacy's patients live. The current location is indicated with the blue pin and the proposed location is indicated with the green pin. As can be seen, the greatest cluster of patients live between the existing and proposed locations, with a smaller number living further afield.
- 3.59 It can be seen from the map that patients are well-distributed throughout the area. For the patient group which comprises of those accessing the pharmacy from their homes, access to the proposed premises is broadly the same as access to the existing premises in terms of distance. There are no additional barriers to access from patient homes to the proposed premises compared to the existing premises.
- 3.60 For those patients whose starting point is their GP surgery Temple Bright have set out, above, the relative distances and journeys for those patients.
- 3.61 For those who stated that they started their journey in "Prestbury", it is interesting to note that the average distance from their homes to the existing premises is 1,125m, compared to 1,266m to the proposed premises. All but one of the patients had driven, and the one patient who walked lives just off Prestbury Road and closer to the proposed premises (350m) than the existing premises (700m).

- 3.62 All of the patients who had come from work had travelled by car, as had the person who had come from the dentist and the hospital.

Conclusion

- 3.63 In conclusion, it remains the Applicant's view that both pharmacies meet the criteria for a relocation application to be granted. Furthermore, to grant the relocation of 5 High Street Prestbury to the new Medical Centre is in the best interests of patients and would confer significant advantages to patients for the following reasons
- 3.63.1 Prestbury Pharmacy is 795 metres from the New Medical Centre. The Badham Pharmacy at 6 Prestbury Road is 1,100 metres away. The relocation of the pharmacy from 5 High Street, Prestbury is nearly 30% closer for patients who are travelling by foot from both locations as compared to the proposed relocation of the pharmacy at 6 Prestbury Road Cheltenham.
- 3.63.2 There is only very limited parking near to Prestbury Pharmacy, limited car parking at 6 Prestbury Road, but ample free car parking at the New Medical Centre.
- 3.63.3 The proposed relocation of 6 High Street Prestbury will result in every surgery being closer to the proposed location than it currently is to the existing premises. Patients will have a shorter distance to travel to the new pharmacy from their Surgery, thereby improving accessibility for patients to pharmacy services.
- 3.64 In summary Badham Pharmacy has already stated it will not relocate both pharmacies to the New Medical Centre. The preferred pharmacy to relocate to the new Medical Centre, based on patient accessibility, is 5 High Street, Prestbury (Prestbury Pharmacy).
- 3.65 The application to relocate the pharmacy at 6 Prestbury Road has been granted. It therefore follows that the application to relocate 5 High Street Prestbury ought to have been granted, as this proposed relocation is closer, with significant improvements in accessibility for patients as detailed in the application form and subsequent written submissions in response to representations from interested parties. In any event, the proposed premises would certainly not be significantly less accessible for the pharmacy's patient groups.
- 3.66 On behalf of the Applicant, Temple Bright therefore invite NHS Resolution to conclude that regulation 31 does not apply to the determination of this application and to grant the application for the reasons given in the Applicant's application form and subsequent written submissions.

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 received 19th April 2022, addressed to Mr Speight at Primary Care Support England (PCSE) enclosing a copy of the appeal as detailed above. The NHS England & NHS Improvement South West Pharmaceutical Services Regulations Committee (PSRC) wishes to make the following comments on the appeal.
- 4.1.2 As noted in the decision report the PSRC was aware of the previous applications to the proposed new medical centre site in Prestbury Road, Cheltenham. This includes an application by the same Applicant to relocate another premises from 6 Prestbury Road, Cheltenham to the proposed new

medical centre site in Prestbury Road, Cheltenham. That application was granted on appeal by NHS Resolution (SHA/24619). The approval for the earlier application will lapse in December 2022.

- 4.1.3 The Committee considered Regulation 31(2)(a) which states an application must be refused where *'a person on the pharmaceutical list is providing or has undertaken to provide pharmaceuticals services from the premises to which the application relates'*.
- 4.1.4 The PSRC concluded that the phrase "is providing or has undertaken to provide" means that Regulation 31 may be engaged if there is someone providing services from the proposed premises OR if someone is intending (has undertaken to) provide services from the proposed location.
- 4.1.5 The Committee agreed that nobody is currently providing services from the proposed or adjacent premises. As there is an existing granted application, the Committee took the view that it had to decide if there was a person on the pharmaceutical list who has undertaken to provide services from the proposed premises by virtue of the already approved application to relocate the pharmacy from 6 Prestbury Road.
- 4.1.6 The PSRC asked itself at what point an undertaking to provide pharmaceutical services has been made. As described in its original decision, the PSRC concluded that Paragraph 9 of Schedule 2 "undertakings" at sub paragraph (c), by submitting the application an applicant is undertaking to comply with terms of service and to provide services that are required under the terms of service, to be performed as or in connection with essential services.
- 4.1.7 The Committee noted the Applicant for both applications is the same company and so is the same provider. The Committee therefore concluded that it was reasonable to treat the services that the applicant proposes in this application as part of the same service as the existing services that this applicant has already undertaken to provide in its earlier application.
- 4.1.8 The Committee concluded that Regulations 31(2)(a) AND (b) were engaged and so was required to refuse the application.
- 4.1.9 NHS England and NHS Improvement South West respectfully requests that the Committee's decision is upheld.

4.2 LLOYDS PHARMACY

- 4.2.1 Thank you for your letter dated 14th April 2022 advising of the appeal with regards to the above application that was refused by NHS England. Lloyds Pharmacy would like to submit the following response.
- 4.2.2 The appeal primarily focuses on the fact that NHS England refused the application due to engagement of Regulation 31. The Applicant seeks to argue that Regulation 31 is not engaged because a notice of commencement has not been submitted for the extant consent (SHA/24619) to the same site.
- 4.2.3 Primary Care Appeals will be aware that when an application has been subject to a grant, provided the notice of commencement is valid it must be accepted by NHS England. Even though such notice has not yet been provided by the Applicant of SHA/24619 (which is the same Company as SHA/24700), there is nothing to prevent such notice being provided and being accepted. It must follow therefore while the extant consent is in place for SHA/24619 should SHA/24700 also be granted to the same address then two notices of commencement could be submitted and be accepted as valid and causing Regulation 31 to be engaged.

- 4.2.4 Temple Bright state that Regulation 31 explicitly applies only where a person is “on the pharmaceutical list” at the premises to which the application relates. A person is “on the pharmaceutical list” only when a notice of commencement has been filed pursuant to a grant (paragraph 34(2) of Schedule 2 to the NHS Regulations).
- 4.2.5 Temple Bright have not quoted Regulation 31 correctly as it specifically includes those who have undertaken to provide services and not just those who are already on the pharmaceutical list at the relevant premises;

(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).

[Lloyds Pharmacy emphasis]

- 4.2.6 The application form submitted for this application [see extract at Appendix B] confirmed in section 9:

I/We also undertake:

- to comply with all the obligations that are to be my/our terms of service under Regulation 11 if the application is granted, and*
- in particular to provide all the services and perform all the activities at the premises listed above that are required under the terms of service to be provided or performed as or in connection with essential services.*

[Lloyds Pharmacy emphasis]

- 4.2.7 Notwithstanding the engagement of Regulation 31 Lloyds Pharmacy also includes a copy of the letter sent to NHS England as part of the original consultation for consideration by the Committee.
- 4.2.8 In the event an oral hearing is required Lloyds Pharmacy would wish to reserve the right to attend.

In a letter dated 11 November 2021 addressed to NHS England, Lloyds Pharmacy stated:

- 4.2.9 Thank you for your letter dated 5 October 2021 advising of the above application. Lloyds Pharmacy would like to submit the following response.
- 4.2.10 The Pharmacy in its current location at 5 High Street, Prestbury is listed on the current DH list of PhAS (Pharmacy Access Scheme) pharmacies and is also listed on the proposed list for 2022. The DHSC states that the PhAS will protect

access in areas where there are fewer pharmacies with higher health needs, so that no area need be left without access to NHS community pharmaceutical services.

- 4.2.11 The Applicant states that the distance between the two locations is 748 metres and that 40 per cent of patients surveyed access the current premises by foot. The Applicant references the journey from patients' homes, but it is not clear what areas these are from. From the data provided by the Applicant, 85 per cent of the prescriptions dispensed at 5 High Street are from surgeries not relocating to the proposed new surgery premises for this application.
- 4.2.12 The Applicant has regard to the patient group using public transport and references the 606 - bus service. The timetable is not provided with the application but from Prestbury – War Memorial towards Cheltenham are 08:26 09:35 11:35 12:56 13:35 14:46 1 5:39 (school days) 15:59 (school holidays) 17:46 18:53. The times are therefore not regular and can be over an hour between services. Lloyds Pharmacy have included a copy of the timetable for reference. [Appendix B]
- 4.2.13 Lloyds Pharmacy would be grateful if the Committee would take these comments into consideration as part of the determination of the application.

5 Observations on representations

TEMPLE BRIGHT ON BEHALF OF BADHAM PHARMACY LTD

- 5.1.1 Temple Bright write further to the letter of 19th May 2022 and, on behalf of the Applicant, in order to respond to representations received from interested parties on the Applicant's appeal.
- 5.1.2 Taking each letter in turn, the Applicant comments as follows:
- Lloyds Pharmacy
- 5.1.3 Lloyds Pharmacy describe a scenario where two extant grants could lead to two notices of commencement being submitted to relocate to the proposed premises. Whilst Lloyds is correct that this scenario is theoretically possible (although the Applicant has already explicitly stated that it does not intend to relocate both pharmacies to the same site, so such a scenario will not arise in this case), that is not the issue for NHS Resolution to determine. NHS Resolution must only consider whether regulation 31 applies to the determination of the Applicant's application. For the reasons given in the Applicant's letter of appeal, it is clear that the scenario described by Lloyds Pharmacy is not caught by regulation 31.
- 5.1.4 It is denied that Temple Bright have misquoted regulation 31. Regulation 31 is explicitly stated to apply only to "a person on the pharmaceutical list". This is clear from the extract of regulation 31 provided by Lloyds Pharmacy: "*This paragraph applies **where a person on the pharmaceutical list** is providing or has undertaken to provide pharmaceutical services...*" [emphasis added]
- 5.1.5 For the reasons given in the Applicant's letter of appeal, Regulation 31 does not apply where a person has an extant grant to provide pharmaceutical services from the listed premises to which a subsequent application has been made.
- 5.1.6 For the avoidance of doubt and for the reasons stated in the Applicant's letter of appeal, the undertakings signed at the end of an application form are not undertakings for the purposes of regulation 31: indeed they cannot be an undertaking for the purposes of regulation 31, because the Applicant who signs

the undertakings at the end of an application form is not, at that stage, “a person on the pharmaceutical list” as required by regulation 31.

NHS England

- 5.1.7 The letter from NHS England merely repeats the reasons why NHS England (incorrectly) determined that regulation 31 applied to the determination of this application.
- 5.1.8 NHS England has not sought to respond to the matters raised in the Applicant’s letter of appeal and, for the reasons given in the Applicant’s letter of appeal, NHS England’s interpretation of regulation 31 was incorrect.

6 Consideration

- 6.1 The Pharmacy Appeals Committee (“Committee”) appointed by NHS Resolution had before it the papers considered by NHS England, together with a plan of the area showing existing pharmacies and doctors’ surgeries and the location of the proposed pharmacy.
- 6.2 It also had before it the responses to NHS Resolution’s own statutory consultations.
- 6.3 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 6.4 The Committee had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”).
- 6.5 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:
 - 6.5.1 confirm NHS England's decision;
 - 6.5.2 quash NHS England's decision and redetermine the application;
 - 6.5.3 quash NHS England's decision and, if it considers that there should be a further notification to the parties to make representations, remit the matter to NHS England.
- 6.6 The Committee first considered Regulation 31 of 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).*

- 6.7 The Committee noted that NHS England had refused the application under Regulation 31 as it determined that it was not satisfied that Regulation 31(2)(a) did not apply. NHS England, in their decision letter, had stated:

“There is already a person on the pharmaceutical list who has undertaken to provide pharmaceutical services from the proposed site AND the Committee is satisfied that it is reasonable to treat the proposed services as part of the same services as the existing services.”

- 6.8 NHS England had then gone on to consider Regulation 31(2)(b) and had concluded that the Applicant for both applications was the same company. NHS England had determined that it was required to refuse the application under Regulation 31.

- 6.9 The Committee noted that in response to “In my/our view this application should not be refused pursuant to Regulation 31 for the following reasons:” the Applicant had stated:

“There are no other pharmacies on or adjacent to the proposed premises, therefore Regulation 31 does not apply in this instance.”

- 6.10 The Committee noted that all parties are in agreement that there is no pharmacy currently operating from the New Medical Centre, 236 Prestbury Road, Cheltenham, Gloucestershire, GL52 3AR.

- 6.11 The Committee also noted that all parties are in agreement that there is an extant grant for a pharmacy to relocate from 6 Prestbury Road to the new Medical Centre. This relocation was granted on appeal (SHA/24691) on 7 December 2021. Again, there is agreement from all parties that the pharmacy that has the extant grant is owned and operated by Badham Pharmacy Ltd which is the same Applicant as in the instant application.

- 6.12 The Committee further noted that there is agreement from all parties that whilst there is an extant grant for Badham Pharmacy to relocate to the new Medical Centre at 236 Prestbury Road, no notice of commencement has yet been submitted for the pharmacy at 6 Prestbury Road to relocate.

- 6.13 The Committee had regard to the wording of Regulation 31 as to whether a person on the pharmaceutical list (which may or may not be the applicant) is providing or has undertaken to provide pharmaceutical services.

- 6.14 The Committee noted the parties arguments on this point and considered the actual wording of Regulation 31.

- 6.15 The Committee considered the relevant parts of Regulation 31(2)(a). The first part refers to “a person on the pharmaceutical list”. There is no dispute that the Applicant is on the pharmaceutical list. The Committee noted that if the person that held the extant grant was a new entrant and so not already on the pharmaceutical list then it is not clear how Regulation 31 is to be interpreted. This is not, however, a point which the Committee needed to determine in this present matter.

- 6.16 The next part is that the person “*is providing or has undertaken to provide pharmaceutical services (the “existing services”) from the premises to which the application relates...*”. The Committee considered that “*is providing*” is clearly a reference to their being existing service provision at the proposed location. It is not in dispute that the Applicant is not providing existing services from the proposed location.

- 6.17 The Committee went on to consider the “*or has undertaken to provide*” wording. The Committee considered that the additional wording “*or has undertaken to provide*” is a reference to an alternative contrasting situation than “*is providing*”. If this was to have the same meaning, there would have been no reason to include such wording. The

Committee considered whether it was reasonable to take the view that “*or has undertaken to provide*” refers to an extant grant.

- 6.18 The Committee noted the parties’ comments in this regard. It agreed with NHS England that it is clear that the application form contains undertakings to provide services. These are set out in Paragraph 9 of Schedule 2 of the Regulations and include at Paragraph 9(1)(c)(ii) an undertaking:

“in particular, in relation to any proposed pharmacy premises, to provide all the services and perform all the activities at those premises that are required under the terms of service to be provided or performed as or in connection with essential services”.

- 6.19 The Committee also agreed with the Applicant that undertakings provided in a granted application do not mean that the person is obligated to provide such services. The Regulations require a notice of commencement to be issued before service provision takes place and before a person is listed on the pharmaceutical list in relation to those premises.
- 6.20 The Committee noted the comments from the Applicant that references to “*undertake to provide*” services appear in Regulation 10 which relate to persons on the pharmaceutical list.
- 6.21 The Committee also noted the use of a “*has undertaken to provide*” services in Regulations 13(2)(h), 15(2)(j) and 17(2)(f). The Committee considered that these references are to extant grants and are not limited to references to persons already providing services or those that have submitted notices of commencement.
- 6.22 The Committee noted that the wording in Regulations 13, 15 and 17 is not prefaced by the requirement for that person to be on the pharmaceutical list.
- 6.23 The Committee also noted that Regulation 31 does not expressly state that the person on the list must be on the list in relation to the proposed premises.
- 6.24 The Committee was faced with differing uses of “*undertake to provide*”, or “*has undertaken to provide*”, services within the Regulations with examples of it being used when a person is on the pharmaceutical list in relation to premises and when a person is not yet on a pharmaceutical list in relation to specific premises.
- 6.25 The Committee considered it was reasonable to look to the intent of Regulation 31. The Committee noted the reference by the Applicant to the Department of Health guidance. The Committee noted that the Applicant’s reference was to a section that indicated that where premises were listed, the Applicant would have to explain why the application should not be refused pursuant to Regulation 31. The Committee did not consider that this reference adequately explains why the phrase “*has undertaken to provide*” services is used within Regulation 31.
- 6.26 The Committee noted that the Department of Health guidance clearly indicates the intent of Regulation 31:

“The purpose of this regulation is to prevent a contractor from applying for multiple inclusions in a pharmaceutical list at the same address with no benefit to patients.”

- 6.27 The Committee considered that it was reasonable to consider that if the Applicant’s two applications to relocate to the same premises were both granted, then the consequence that Regulation 31 was intended to prevent would have occurred, i.e. a contractor would have succeeded in applying for multiple inclusions in a list at the same address.

- 6.28 Having considered the finely balanced arguments of the parties and the use of “*has undertaken to provide*” in the Regulations and having considered the intent of Regulation 31, the Committee determined that it was necessary to interpret “*has undertaken to provide*” in Regulation 31 as referring to extant grants. To do otherwise would not achieve the clearly stated purpose of this Regulation.
- 6.29 The Committee therefore determined that it was required to refuse the application under the provisions of Regulation 31.
- 6.30 As a result of the above, the Committee considered that it needed to confirm the decision of NHS England.

7 Decision

- 7.1 The Committee confirms the decision of NHS England to refuse the application pursuant to Regulation 31.

Jill Jackson
Case Manager
Primary Care Appeals