

18 April 2024

REF: SHA/26191

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APPEAL AGAINST BRISTOL, NORTH SOMERSET AND SOUTH GLOUCESTERSHIRE ICB DECISION NOT TO GIVE THIRD PARTY APPEAL RIGHTS TO JHOOTS PHARMACY IN RESPECT OF THE DECISION TO GRANT AN APPLICATION BY EASTON DAY NIGHT HEALTHCARE LTD FOR A NO SIGNIFICANT CHANGE RELOCATION FROM CONISTON MEDICAL PRACTICE, THE PARADE, PATCHWAY, BRISTOL, BS34 5TF TO UNITS 5 – 7, THE PARADE, PATCHWAY, BRISTOL, BS34 5LP

1 Outcome

- 1.1 Jhoots Pharmacy is a person with third party appeal rights against the decision of the Commissioner set out in its letter dated 12 March 2024 (and notified to Jhoots Pharmacy by letter dated 12 March 2024).

A copy of this decision is being sent to:

Healthcare Plus Consulting Ltd on behalf of Easton Day Night Healthcare Ltd
Jhoots Pharmacy
Community Pharmacy Avon
PCSE on behalf of Bristol, North Somerset and South Gloucestershire ICB

Advise / Resolve / Learn

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1 The Application

By application dated 1 December 2023, Easton Day Night Healthcare Ltd (“the Applicant”) applied to Bristol, North Somerset and South Gloucestershire ICB (“the Commissioner”) for a no significant change relocation from Coniston Medical Practice, The Parade, Patchway, Bristol, BS34 5TF to Units 5 – 7, The Parade, Patchway, Bristol, BS34 5LP.

2 Process

The Commissioner gave notice of the notifiable application in accordance with the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”) by cover letter dated 8 December 2023. This is a summary of representations made to the Commissioner by Jhoots Pharmacy in a letter dated 19 January 2024 (i.e. within 45 days as set out in the Regulations):

- 2.1 “Thank you for your letter date 8th December 2023 informing of the application by Easton Day Night Healthcare for relocation in Patchway. On behalf of Jhoots Pharmacy (as an interested party) I would wish to make the following representation for the Committee to consider.
- 2.2 Although the application for move is over a relatively short distance the applicants’ representative has failed to provide insufficient information on the regulatory criteria.
- 2.3 For example:
 - 2.3.1 The applicant says that c20% of the prescriptions are delivered and that this is significant.
 - 2.3.2 The applicant says that the number of patients therefore accessing the premises is minimal.
 - 2.3.3 This cannot be minimal. Some 80 per cent access the current premises which is significant.
 - 2.3.4 The applicant has also not made it clear whether the data they refer to is based upon prescription items or patients.
- 2.4 Under the section ‘Patients whose mobility is impaired’, the applicant says “Having assessed the pharmacy’s patients, there are none that are accustomed to accessing the current premises that have Equality Act 2010 Protected Characteristics”. No details

are provided as to what 'assessment', and how any such 'assessment' was undertaken. It is therefore difficult for the Committee to put into context the summary of their statement and make a decision under part of the Regulatory test based on the evidence provided.

- 2.5 The applicant also says the proposed location is situated on a busy shopping parade. No supporting evidence is provided to substantiate this. No details of other retail services are provided in the supporting evidence.
- 2.6 We submit the applicant has failed to meet the criteria of Regulation 24 in the Regulations and cannot be approved."

3 The Decision

The Commissioner considered and decided to grant the application by Easton Day Night Healthcare Ltd. The decision letter dated 12 March 2024 did not give a right of appeal to any party.

- 3.1 "NHS commissioning has considered the above application and we are writing to confirm that it has been granted. Please see the enclosed report for the full reasoning."

Extract from the South West Pharmaceutical Services Regulations Committee ("PSRC") Decision report of 1 March 2024

- 3.2 "The SW Committee noted:
- 3.3 The distance between the current pharmacy location and the proposed new location is approx. 0.1 miles.
- 3.4 The pharmacy was previously owned by Lloyds. Easton Day Night took ownership in August 2023.
- 3.5 This not a controlled locality.
- Nature of the application
- 3.6 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).
- 3.7 Regulation 24 (1) states: [quoted in full]
- Public Involvement
- 3.8 The SW Committee noted full details of the applicant's proposals were notified to various parties in accordance with the Regulations. Representations were received and reviewed from:
 - 3.8.1 Boots acknowledge the application but offer no opinion on the outcome.
 - 3.8.2 Community Pharmacy Avon is supportive of the relocation.
 - 3.8.3 Jhoots Pharmacy note the distance is short but state the application has not provided sufficient information and has failed to meet the criteria of Regulation 24.
- 3.9 Regulation 31 (same or adjacent premises) states: [quoted in full]

- 3.10 There are currently no other contractors currently providing pharmaceutical services from the premises to which the application relates, or from adjacent premises. The nearest pharmacy is 0.9 miles (Jhoots Pharmacy, Rodway Road). The SW Committee was satisfied it is not required to refuse the application by virtue of Regulation 31.

REGULATION 24(1) – Relocation

- 3.11 Reg 24(1)(a) – Patient Groups

- 3.12 The applicant defines the following patient groups:

3.12.1 Patients that utilise the free collection and delivery services.

3.12.2 Patients that originate from the local GP surgeries requiring access to Pharmaceutical Services.

3.12.3 Patients that require access to Pharmaceutical Services other than after a visit to a GP surgery.

3.12.4 Patients whose mobility is impaired.

- 3.13 The SW Committee noted the applicant offers explanation on why each patient group will not find the proposed premises significantly less accessible: the applicant describes how patients currently accessing the pharmacy on foot, by car and by public transport, along with how they will continue to do so in the same way at the new location, with minimal impact. The applicant concludes it is clear that the proposed location will not be significantly less accessible (as a separate unit) and will actually be more accessible to a large number of patients given the short distance involved.

- 3.14 The SW Committee discussed the consultation response from Jhoots Pharmacy, who raised queries around the data provided by the applicant. It was noted, however, they do not offer an opinion on whether the application should be approved or refused. Jhoots challenge the statement in the application that 20% of patients being delivered to is a significant number: they feel 80% accessing the premises is significant. Reflecting on this and revisiting the application, the SW Committee determined the applicant made this comment in the section about the first patient group, i.e. patients that utilise the free collection and delivery service.

- 3.15 The applicant has clarified this patient group is 20% of its workload and the patient group make 'minimal' use of the premises, so will not find the new premises significantly less accessible.

- 3.16 The SW Committee noted the applicant has included a patient group of those whose mobility is impaired and agreed this is not specific enough. The SW Committee felt it appropriate to include a category for patients with protected characteristics, albeit noting no evidence has been provided to suggest that patients with impaired mobility or with other protected characteristics will find the new premises significantly less accessible than the current premises. Though Jhoots have questioned the time period over which the applicant assessed whether any current patients have impaired mobility, the SW Committee noted they have not provided any evidence that the new premises is significantly less accessible to this patient group.

- 3.17 The SW Committee noted the distance between the two sites is short, and both sites are serviced by the same car park. Photos taken from Google maps show the car park is large and spacious and there are parking spaces next to each site so patients can park near to the service they want to access.

- 3.18 Reg 24(1)(b)(i) and (ii) – (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

- 3.19 No evidence has been presented that suggests the relocation would result in a significant change to arrangements for the provision of local pharmaceutical services or of pharmaceutical services in any part of the HWB area.
- 3.20 The SW Committee was satisfied that granting the application would not result in a significant change to the arrangements in place for the provision of pharmaceutical services.
- 3.21 Reg 24(1)(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
- 3.22 No evidence has been presented that suggests the relocation would cause significant detriment to proper planning.
- 3.23 The SW Committee was satisfied that granting the application would not cause significant detriment to proper planning of pharmaceutical services.
- 3.24 Reg 24(1)(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
- 3.25 The applicant has confirmed that the same services will be available at the new premises that are available at the current premises.
- 3.26 The SW Committee was satisfied that the same services would be available at the proposed premises.
- 3.27 Reg 24(1)(e) the provision of pharmaceutical services will not be interrupted (except for such period as the NHSCB may for good cause allow
- 3.28 The applicant has confirmed that there will be no interruption to services.
- 3.29 The SW Committee was satisfied that there will be no interruption to services.
- 3.30 Reg 24(3)(a-d) an application pursuant to this regulation must be refused if the existing pharmacy premises from which the applicant is seeking to relocate
 - 3.30.1 is in an approved retail area (24(3)(a)
 - 3.30.2 is part of a one-stop primary care centre (24(3)(b)
 - 3.30.3 has relocated in the last 12 months (24(3)(c)
 - 3.30.4 this is not a distance selling premises 24(3)(d)
- 3.31 Regulation 24(3)(a-d) is not applicable in this case.

Decision

- 3.32 The SW Committee was satisfied that the application should be GRANTED because:
 - 3.32.1 It is not necessary to refuse the application under Regulation 31

- 3.32.2 The new premises are not significantly less accessible for those accustomed to using the existing premises;
- 3.32.3 Granting the application would not result in a significant change to arrangements.
- 3.32.4 Granting the application would not result in significant detriment to proper planning in respect of the provision of pharmaceutical services;
- 3.32.5 The services to be provided will be the same; and
- 3.32.6 There will be no interruption of services

Appeal rights

- 3.33 No party is granted appeal rights as none made a reasonable attempt to express grounds for opposing the application adequately in their representation."

4 The Appeal

In a letter dated 10 April 2024 addressed to NHS Resolution, Jhoots Pharmacy appealed against the decision of the Commissioner not to give them third party rights of appeal. The grounds of appeal are:

- 4.1 "In response to the decision by NHS England South West PSRC Committee (12th March 2024) to approve to above listed application I wish to appeal.
- 4.2 The decision by NHS England has not granted us as an interested party a right of appeal. I wish to appeal against this as a preliminary matter Regulation 63(5). Jhoots Pharmacy submitted a letter of representation (attached) date 19th January 2024. This is acknowledged in the PSRC decision report and the PSRC discuss it. We challenged the evidence provided in the application on a number of grounds and we concluded by saying Regulation 24 was not met and therefore the application could not be approved. We dispute the suggestion that Jhoots Pharmacy had not provided a meaningful representation in response to the application, and we submit this can be seen in the attached letter date 19th January 2024. Jhoots Pharmacy should have a right to exercise an appeal and we would ask Primary Care Appeals (PCA) to grant this.
- 4.3 Should PCA grant our right to appeal our appeal is as follows:
- 4.4 While it is accepted the move is over a short distance, the application and the consideration within the PSRC decision report has failed to clearly deal with the matters below that are relevant to the application and Regulation 24.
- 4.5 The application, Healthcare Plus supporting document (appendix 1) quite clearly states in section 1 "We note that the pharmacy is a steady business (5,263 Rx items dispensed in Jun 23) with 94% of Rx sent to the pharmacy by EPS with a significant number (c20%) delivered to patients".
- 4.6 The fact 94% of Rx are sent electronically to the pharmacy but only c20% are delivered, means the number of patients accessing the premises to receive pharmaceutical services cannot be minimal as some 80% will be accessing the premises to receive a service. NHS England decision report (paragraph 10) says the applicant sought to clarify this information (which was not circulated to interested parties) that it related to workload, but this categorisation is itself unclear.
- 4.7 The applicant fails to make it clear whether the data they refer to is based upon prescription items or patients. The data provided by the applicant refers to Rx. It is assumed this means Repeat prescriptions although the applicant does not define this

specifically. If this is relating to repeat prescriptions, there is no reference to patient groups with acute prescriptions?

- 4.8 Within the applicant supporting document section 4 'Patients whose mobility is impaired', the applicant says, "Having assessed the pharmacy's patients, there are none that are accustomed to accessing the current premises that have Equality Act 2010 Protected Characteristics". No details are provided as to what 'assessment', and how any such 'assessment' was undertaken. It is therefore difficult for the Committee to put into context the summary of their statement and make a decision under part of the Regulatory test based on the evidence provided.
- 4.9 NHS England in the decision report section 11 "noted the applicant has included a patient group of those whose mobility is impaired and agreed (our emphasis) this is not specific enough". The SW Committee so go on to say they "felt it appropriate to include a category for patients with protected characteristics, albeit noting no evidence has been provided to suggest that patients with impaired mobility or with other protected characteristics will find the new premises significantly less accessible than the current premises". Having accepted that the applicant was not specific enough with evidence, the Committee then include a category for patients with protected characteristics and conclude there is no evidence despite the fact this had not been addressed by the applicant.
- 4.10 The applicant in section 3 of their supporting document says the proposed location is situated on a busy shopping parade. No evidence is provided at all to explain or substantiate this further.
- 4.11 We submit the applicant has failed to meet the criteria of Regulation 24 in the Regulations and we ask for the application to be reconsidered and this appeal upheld."

5 Consideration

- 5.1 The Secretary of State for Health and Social Care has directed NHS Resolution to exercise the function of determining whether certain persons have rights of appeal on their behalf. I, as an authorised officer of NHS Resolution, have determined this appeal.
- 5.2 I have had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations"), and in particular paragraphs 30(3) and (6) of Schedule 2 which state (insofar as is relevant):

(3) P1 is a person to whom this sub-paragraph applies if—

- (a) P1 was a person whom the NHSCB was required to notify about the decision on the application by virtue of P1 being a person whose interests might, in the opinion of the NHSCB, be significantly affected by the decision, and also being—*
- (i) included in a pharmaceutical list ...*
- (b) in the case of a notifiable application, P1 made representations in writing about the application under paragraph 19(4); and*
- (c) in the case of a notifiable application but subject to sub-paragraph (6), the NHSCB is satisfied, having regard to those representations in writing and any oral representations made in accordance with paragraph 25, that P1—*
- (i) made a reasonable attempt to express P1's grounds for opposing the application adequately in P1's representations, and*
- (ii) has grounds for opposing the application, which—*

(aa) *do not amount to a challenge to the legality or reasonableness of a pharmaceutical needs assessment, or to the fairness of the process by which a HWB or Primary Care Trust undertook that assessment, and*

(bb) *are not vexatious or frivolous.*

(6) *A person to whom sub-paragraph (3)(a) and (b) applies (P2) who is not notified by the NHSCB that they are person with third party appeal rights may appeal to the Secretary of State against the determination (D1) by the NHSCB that it is not satisfied as mentioned in sub-paragraph (3)(c), provided that P2—*

(a) *notifies the Secretary of State within 30 days of the date on which that person was notified of the NHSCB's decision under paragraph 28 (D2) that P2 wishes to appeal against D1 and D2; and*

(b) *includes within that notification concise and reasoned statements of P2's grounds of appeal against both D1 and D2,*

and if the appeal against D1 is successful, P2 is a person with third party appeal rights in relation to D2 for the purposes of this Schedule.”

5.3 I first considered whether Jhoots Pharmacy was a person to whom sub-paragraph 30(3)(a) applied.

5.4 It is not disputed that Jhoots Pharmacy is included on the pharmaceutical list for premises at 108 Rodway Road, Patchway, BS34 5PG and I have not been provided with any information to the contrary. I am, therefore, of the view that Jhoots Pharmacy has met the requirements of sub-paragraph 30(3)(a).

5.5 I note that the original application from Easton Day Night Healthcare Ltd is a notifiable application under the provisions of paragraph 18 of Schedule 2 and that the Commissioner gave notice of the application to Jhoots Pharmacy on 8 December 2023. Further, I note the comments from Jhoots Pharmacy that they made representations to the Commissioner in a letter dated 19 January 2024 in accordance with paragraph 19(4) of Schedule 2.

5.6 I am therefore of the view that Jhoots Pharmacy is a person to whom sub-paragraphs 30(3)(a) and (b) apply.

5.7 The Commissioner, in its decision letter dated 12 March 2024 did not give third party rights of appeal to Jhoots Pharmacy as the Commissioner was of the view that “*no party ... made a reasonable attempt to express grounds for opposing the application adequately in their representations.*”

5.8 I note that paragraph 30(3)(c)(i) of the Regulations, it states that a party should have “made a reasonable attempt to express P1’s grounds for opposing the application adequately...”. I am of the view that:

5.8.1 Jhoots Pharmacy made a reasonable attempt to express their grounds for opposing the application, and

5.8.2 that these grounds

5.8.2.1 *did not amount to a challenge to the legality or reasonableness of the PNA nor to the fairness of the process by which a HWB or PCT undertook the assessment, and*

5.8.2.2 *are not vexatious or frivolous.*

- 5.9 I am of the view that Jhoots Pharmacy is a person to whom sub-paragraph 30(3) (a), (b) and (c) applies and that it should have been given third party rights in accordance with the Regulations.
- 5.10 I note the wording of paragraph 30(6) and that, to exercise those rights properly, the appeal should include a concise and reasoned statement of the grounds of appeal against both the decision not to be given third party rights of appeal and against the substantive decision of the Commissioner to grant the application. I am of the view that Jhoots Pharmacy has complied with both of the above.

6 Decision

- 6.1 Jhoots Pharmacy is a person with third party appeal rights against the decision of the Commissioner set out in its letter dated 12 March 2024 (and notified to the Jhoots Pharmacy by letter dated 12 March 2024).
- 6.2 The appeal will proceed in accordance with the provisions of Part 2 of Schedule 3 to the Regulations.

Head of Appeals
NHS Resolution