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4 October 2024

REF: SHA/26246

APPEAL AGAINST SOUTH WEST LONDON ICB DECISION TO REFUSE AN APPLICATION BY VR PHARMA LIMITED FOR INCLUSION IN THE PHARMACEUTICAL LIST OFFERING UNFORESEEN BENEFITS UNDER REGULATION 18 AT 29 TANGLEY PARK ROAD, HAMPTON, MIDDLESEX, TW12 3YH

1 Outcome

1.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, confirms the decision of the Commissioner, therefore the application is refused.

A copy of this decision is being sent to:

Pharmacy Sales & Consultancy representing VR Pharma Ltd (the Applicant)
Richmond HWB
PCSE on behalf of the Commissioner
Temple Bright LLP representing Japotheca Ltd
Richmond Healthwatch

NHS Resolution

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1 The Application

By application dated 16 November 2023, VR Pharma Limited ("the Applicant") applied to South West London ICB ("the Commissioner") for inclusion in the pharmaceutical list offering unforeseen benefits under Regulation 18 at 29 Tangley Park Road, Hampton, Middlesex, TW12 3YH. In support of the application it was stated:

In my/our view this application should not be refused pursuant to Regulation 31 for the following reasons:

1.1 "There is no other pharmacy in close proximity."

Information in support of the application

1.2 "Application by VR Pharma for inclusion in the Pharmaceutical List of the Richmond upon Thames Health & Wellbeing Board:

1.3 *Location: 29 Tangley Park Road, Hampton, Middlesex, TW12 3YH*

1.4 We act for VR Pharma Limited. In accordance with the NHS (Pharmaceutical Services) Regulations 2013 we would ask the South West London ICB to take into account the following information when considering this application for inclusion in the pharmaceutical list.

1.5 We believe that, should the ICB grant this application, it will secure improvements in terms of access to pharmaceutical services for the local population and the wider area.

Background

1.6 This application has been prompted by a significant reduction in pharmaceutical services provision within this area within the last few weeks. It is our client's position that the cumulative effect of these closures is such that the residents of this area will no longer have reasonable access to pharmaceutical services.

1.7 The following pharmacies have closed:

1.7.1 Boots, 29 Tangley Park Rd, Hampton TW12 3YH- Effective on **21st October 2023**

1.7.2 Boots, 28B Priory Rd, Hampton TW12 2NT- Effective on **11th November 2023**

1.8 The map below shows the locations of these two pharmacies highlighted with red circles. Other pharmacies in the wider area are also shown. Map [See page 1 of Appendix A for Committee]

1.9 The closed pharmacies dispensed the following average number of prescriptions for the 3 months to July 2023, the latest month for which data is available (source Pharmdata):

1.9.1 29 Tangley Park Road – **5,991**

1.9.2 28B Priory Road – **5,344**

1.10 The loss of these two pharmacies will result in a combined loss of approximately 11,300 dispensing items per month in the Hampton area. Based on the England average of around 1.5 prescriptions per person per month, 11,300 items equates to more than **7,500 patients** who will no longer have access to pharmaceutical services from the pharmacies they have been accustomed to using.

1.11 The only pharmacy left in Hampton following these closures is the Boots Pharmacy at 3 Station Approach, Ashley Road, Hampton, TW12 2HZ which is shown at the bottom of the map on the previous page near the train station. We discuss this pharmacy in a little more detail later.

1.12 In the top left of the map provided, a further Boots branch can be seen. This is located at 107 Bear Road, Hanworth, TW13 6SA. This pharmacy serves a very different area to Hampton and in our view is irrelevant to this application.

1.13 In our client's view, the pharmacies in the wider area will not be able to adequately meet the needs of local residents within the target area after the closure of these Boots branches.

1.14 We are aware that the Richmond upon Thames PNA has only very recently been published (March 2023), and did not identify any gaps in pharmaceutical services provision within the HWB. However, the closure of these two pharmacies located relatively close to each other within a densely populated area could not have been foreseen by the authors of the PNA.

1.15 It is our client's position that the closure of these pharmacies is a material change of circumstances in the area and that the benefits our client proposes are therefore *unforeseen* in the context of the 2013 NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (as amended).

Local Area

1.16 The proposed location for this application is the premises that were, until recently, occupied by Boots at 29 Tangley Park Road.

1.17 The nature of the local area is an important consideration in this case, and can be seen in the aerial image below, looking south towards Hampton railway station and the River Thames beyond. The proposed site is marked with a red star.

1.18 Photo 1 [See page 2 of Appendix A for Committee for Committee]

1.19 It can be seen from this image that the surrounding area is densely populated.

1.20 It is also apparent, when looking at the closer image below that there are a number of key features of this area:

1.21 Photo 2 [See page 2 of Appendix A for Committee for Committee]

1.21.1 The proposed site is located within Hampton Square adjacent to a Sainsbury's supermarket. This is the main destination grocery shop for residents living in the heart of this substantial residential area.

1.21.2 There is extensive free parking at this site.

1.21.3 The area in which the premises are located forms a very clear and significant community hub for the local population, and includes: A children's centre.

1.21.3.1 YMCA centre;

1.21.3.2 A nursery school;

1.21.3.3 A primary school;

1.21.3.4 A public house;

1.21.3.5 A care home;

1.21.3.6 Hampton Youth Project;

1.21.3.7 A hospice;

1.21.3.8 A hair and beauty salon.

1.22 The closure of the only pharmacy within this important community hub will be a major blow for this population, who will no longer have reasonable access to pharmaceutical services when going about their daily lives. This situation will be compounded by the closure of the next nearest pharmacy on Priory Road.

Remaining Pharmacy Provision

1.23 This was historically an area where there was a good choice of pharmacy provision. The residents of Hampton had access to three community pharmacies within the area, and whilst these were all owned by Boots, they were all slightly different in character and provided patients with adequate choice.

1.24 For residents who have been accustomed to accessing pharmaceutical services form Hampton Square, the nearest pharmacy to the south is now the Boots at 3 Station Approach. As can be seen from the image below, this pharmacy is located 1.4km away by the shortest practicable route.

1.25 Map [See page 3 of Appendix A for Committee]

1.26 This journey will take approximately 20 minutes on foot for a person with good levels of mobility. The journey will clearly be significantly longer for any patients who our elderly or otherwise have their mobility impaired.

1.27 During a site visit on Wednesday 8th November, it was noted that the space inside these pharmacy premises for patients to wait is very limited. In fact, as can be seen in the image below, taken at midday, patients were queuing in the rain outside the premises, due to the lack of space inside.

1.28 Photo [See page 4 of Appendix A for Committee]

1.29 It was also notable that parking at this location was very difficult as might be expected near a railway station. There is a single yellow line outside the pharmacy (no parking between 8.30am and 6.30pm) and double yellow lines on surrounding roads. Where dedicated parking spaces are provided these were all full at the time of our visit, apparently occupied by local residents. It was necessary to park approximately 300m away.

1.30 The nearest pharmacy to the north is Boots at Bear Road. The journey on foot to this pharmacy can be seen on the map overleaf.

1.31 Whilst this pharmacy is very slightly closer to Hampton Square (1.2km on foot by the shortest route), it is located in Hanworth rather than Hampton and serves a very different population.

1.32 Map [See page 5 of Appendix A for Committee]

1.33 Once again this would be a challenging journey for patients with any form of reduced mobility. Furthermore it is not a journey many residents would like to make after dark.

1.34 As with the other Boots pharmacy there is very limited parking provided, with only 5 spaces provided to serve a parade of 5 shops which includes a Tesco Express store. Parking to the rear of the parade is for residents of nearby flats. Once again it was not possible to park nearby at the time of our site visit.

1.35 Beyond these two pharmacies, the next nearest options for patients are in Hampton Hill, 2km to the east.

Unforeseen Benefits

1.36 As discussed earlier, within the Richmond upon Thames Pharmaceutical Needs Assessment, published in 2023, there is no specific mention of a gap in pharmaceutical services within the proposed area. Therefore this application is made to provide 'unforeseen benefits' to the local community in accordance with Regulation 18, in response to the further reduction in pharmaceutical services provision since the PNA was published.

1.37 We are required by NHS England to address two specific questions in this supporting information:

1.37.1 *"Please describe the unforeseen benefit(s) that you are offering to secure and how it will secure improvements or better access to pharmaceutical services, or pharmaceutical services of a specified type in the HWB area".*

1.37.2 *Please explain how you intend to secure the unforeseen benefit(s)*.

1.38 When considering these questions, it is worth noting the provisions of Regulation 18(2)(b) as highlighted below: [Quoted in full]

1.39 The implication is that the ICB does not have to find evidence in respect of all three of these matters. These are simply matters it is required to take into account when deciding the application.

1.40 In fact, even if it does not find that any of the three matters discussed in (18)(2)(b) apply, the overarching test is whether *granting the application would secure improvements, or better access, to pharmaceutical services in the area of the HWB.* In our opinion there is clear evidence that it would.

1.41 We have addressed both of the questions above by setting out in further details below:

Securing better access and choice

1.42 The matters of access and choice are inextricably linked. Whilst it may be the case that there is a choice of pharmacy provider within the Health & Wellbeing Board (HWB) area, this does not mean that the choice for residents is *reasonable* if they are not able to access these pharmacies when they need to.

1.43 As discussed earlier, taking into account the number of residents in this densely populated area there is no longer reasonable choice for these residents. The only pharmacies in the vicinity are located well away from the area where they go about their daily business and are beyond reasonable walking distance for many people.

1.44 If these residents do not have reasonable access to pharmaceutical services then they do not have reasonable choice.

1.45 Many residents of Greater London do not own a car so will be reliant on either walking a significant distance to a pharmacy or incurring costs to travel by public transport. Patients who are elderly or less mobile, particularly when suffering from acute illness, may find this journey challenging regardless of how they travel.

1.46 By approving this application, it is clear that local residents will benefit by having a choice of pharmacy contractor.

1.47 If this application is approved, the applicant will offer the local residents a full and comprehensive pharmaceutical service, ensuring that local residents can, once more, access pharmaceutical services when they need them.

Patient groups sharing protected characteristics

1.48 For those people who are elderly, less abled or families with very young children (all of which can be classified as having protected characteristics) access to the existing pharmacies is likely to be more difficult than for those who are more able. This would particularly apply if these people are unable to drive or don't have access to a motor vehicle.

1.49 Granting the application will significantly improve the accessibility of pharmaceutical services for these people.

Summary

1.50 In our client's view it can be clearly seen that the residents of this area would benefit greatly from having a community pharmacy reinstated within the area identified. This application clearly demonstrates benefits which were unforeseen and not identified when the PNA was published.

1.51 The resident population do not have a reasonable choice of provider or enjoy easy access to any existing pharmacy contractors now the Boots pharmacies have closed, especially for those who are on foot, are reliant on public transport, elderly, infirm or disabled. There is a gap in pharmaceutical services in this area.

1.52 Notwithstanding the fact that there is clearly a geographical gap in the provision of pharmaceutical services resulting from these closures, it is also relevant that when one or more pharmacies close the shortfall in service provision is felt far more acutely by patients than in areas where there has never been any provision.

1.53 We firmly believe if this application is approved it will secure improvements in choice and better access to pharmaceutical services and thus provide significant benefits for the resident population.

1.54 Finally, our client would wish to attend any oral hearing convened by the ICB to consider this application."

2 The Decision

The Commissioner considered and decided to refuse the application. The decision letter dated 7 June 2024 states:

2.1 “NHS England has considered the above application and I am writing to confirm that it has been refused. Please see the enclosed report for the full reasoning.

2.2 You have a right of appeal to the Secretary of State against NHS England’s decision. Should you choose to appeal then you should either complete the online form available on the NHS Resolution website or send a concise and reasoned statement of the grounds for your appeal within 30 days of the date of this letter to appeals@resolution.nhs.uk or:

2.3 Primary Care Appeals, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU.”

Decision Report by London Pharmaceutical Services Regulations Committee dated May 2024 on behalf of South West London ICB

2.4 “The PSRC have determined that there is enough information within the papers to decide the application without an oral hearing

Regulation 31

2.5 There are no pharmacies in the immediate vicinity of this application so Regulation 31 is not engaged

Regulation 32

2.6 There are currently no LPS designations in this area therefore Regulation 32 is not engaged.

General Comments

2.7 The HWBB and Healthwatch have raised some issues that we are not in a position to ascertain. The ICB will assess the application within the regulations on its merits and complete the checks that we are required to under the regulations. What we are unable to do is confirm that if granted that we can ensure business continuity at the site.

Applicant’s Information

2.8 [See paragraphs 1.5 to 1.53 above].

Richmond HWB Comments

2.9 Richmond HWB support this application and believes that the closure of the Boots pharmacy, which was formerly located at this site, does create a gap in local pharmaceutical services provision. The HWB has formally published a Supplementary Statement to the Richmond Pharmaceutical Needs Assessment 2023-2026 following the closure.

2.10 Hampton North is relatively more deprived in comparison with other wards in the borough and has a higher proportion of older residents. Hampton North also has poor public transport connections. Therefore, accessibility to pharmacy services could be an issue for the local population as the nearest remaining pharmacies are located 1.4 km to the south and 1.2 km to the north by foot.

2.11 Richmond HWB members did not raise any concerns regarding the application, including the supporting information provided by VR Pharma. [See paragraphs 1.2 to 1.53 above].

2.12 With HWB members unanimously in favour of supporting the application of a new pharmacy in this area, Richmond HWB note the proximity of the proposed new

pharmacy to the local community hub (shortly to become a Family Hub). In addition, Sainsbury's supermarket located adjacent to the proposed site, provides ample free parking. The proposed pharmacy location is also a short walking distance from densely populated housing estates.

2.13 The HWB has also considered feedback from other agencies, including a survey performed by Healthwatch Richmond (published in January 2024), which collated experiences from over 700 residents and NHS staff on the provision of pharmacy services. It was identified that '*significant challenges have been caused by the closures of the two pharmacies'* in this location. Their research also identified that:

2.13.1 79% of users reported their waiting time has increased across all pharmacies since the closures.

2.13.2 61% stated travel time has increased by at least 15 minutes.

2.13.3 52% had experienced difficulties with accessing medication due to stock and pharmacy capacity issues since closures.

2.14 Whilst the report recognised that some improvements had been made, Healthwatch Richmond informs us that they continue to receive concerns about pharmacy provision in the Hampton area and remain concerned that the current capacity presents significant risks to delivering sustainable services, managing business continuity issues, and providing enhanced pharmacy services such as Pharmacy First. Considering these factors, Richmond HWB believe that the granting of this application will significantly improve the accessibility of pharmaceutical services for residents, including those with greater need. Pressure on local GP surgeries may also be relieved, as well as for the remaining two closest pharmacies which are currently struggling to cope with increased service demand. (In addition to being an HWB member, we understand HWR will also be responding in their own right as an Interested Party.)

2.15 Richmond HWB notes that the supporting information suggests the applicant is "Pharmacy First ready''; meaning that it is in a position to deliver the new Pharmacy First service, which launched 31 January 2024. In addition, it is noted that they are able to offer other services, including population health programmes such as flu jabs and testing and this is welcomed.

2.16 According to Companies House, VR Pharma was formed in August 2023. At this point in time VR Pharma doesn't have any previous trading history or accounts to aid the decision. NHSE should ensure that the applicant is capable of delivering the services proposed in the application and be confident that VR Pharma can ensure business continuity at this site, given that the pharmacy previously located here, was closed by Boots.

2.17 In preparing this response, Richmond HWB have consulted with local ward councillors in Hampton North and Hampton, we've included their comments in Appendix 2. Munira Wilson, MP for Twickenham, is also strongly in favour of the application and has made a submission in her own regard.

2.18 Given the positive support for a new provider at this site and should this result in a decision to grant the current application, Richmond HWB would wish NE ICB to consider seeking assurances from the applicant to reopen pharmacy services at this site within a 12 month period and should adequate progress not be made, to allow permission to expire after 12 months to allow other applications to be received and considered.

Richmond Healthwatch

2.19 Healthwatch Richmond (HWR) offers the following representation to NHSE Market Entry as an Interested Party to:

2.20 Application offering Unforeseen Benefits at 29 Tangley Park Road, Hampton, Middlesex, TW12 3YH by VR Pharma Limited. Ref: CAS-261646-R3T2P9. 23rd January 2024.

2.21 Healthwatch Richmond provides the following response in support of the application on the site of a former Boots pharmacy that closed in late 2023.

2.22 This statement is based on two separate sources of evidence:

2.22.1 Our published Hampton Pharmacy Closures review which concerns the impact of pharmacy closures on the residents served by this application

2.22.2 Discussions with key stakeholders to this application (GPs, Health & Wellbeing Board, Public Health and front line staff within the remaining pharmacies)

Hampton Pharmacy Closures review

2.23 In late 2023, we collected experiences of the impact of pharmacy closures from c700 residents of Hampton and visited 5 locations within the area including community centres, GP practices, Boots Station Approach Pharmacy and Boots Bear Road Pharmacy in Hanworth. The full findings of this are published in this report:

2.24 https://www.healthwatchrichmond.co.uk/sites/healthwatchrichmond.co.uk/files/Hampton%20Pharmacy%20report_0.pdf

2.25 Our work identified extreme levels of demand on the remaining pharmacies in Hampton. The impacts of this pressure included:

2.25.1 c200 people reporting having to queue outside of a pharmacy due to demand.

2.25.2 over 1 in 3 respondents reported waiting times of 30-60 minutes (confirmed by our observations).

2.25.3 people experiencing delays to accessing medication due to errors and stock issues.

2.26 We note with particular reference to this application that the provision of enhanced services in the area is limited at the remaining pharmacies by both staff capacity and the premises. The inclusion of extensive enhanced services within this application are therefore welcomed.

Stakeholder Engagement

2.27 The Health & Wellbeing Board agreed a Supplementary Statement to the Richmond Pharmaceutical Needs Assessment 2023-2026 following the closure. We agreed this statement as a member of the Health & Wellbeing Board and continue to support it.

2.28 We have had occasion to have extensive discussions with clinicians in GPs and pharmacies, community organisations, the MP and ward Councillors in the surrounding area. The feedback from all of these supports the need for further pharmacy provision within Hampton.

2.29 Hampton North is an area of relative deprivation with 2 LSOAs in the 20% most deprived areas of the country. It is also geographic isolated as it is encircled by a large A road/motorway and both the Thames and Longford rivers. In some areas, the nearest pharmacy is c1mile by foot.

2.30 This, combined with limited public transport options, significantly limits access for residents to services outside of the immediate area.

2.31 The proximity of the proposed new pharmacy to the local community hub (shortly to become a Family Hub), free parking and that it would be located in a densely populated area of deprivation not currently served by Community Pharmacy strongly support the case for this application.

2.32 As a result we agree with Richmond Health & Wellbeing Board's position that this application will significantly improve the accessibility of pharmaceutical services for residents, including those with greater need. Pressure on local GP surgeries may also be relieved, as well as for the remaining two closest pharmacies which are currently struggling to cope with increased service demand.

2.33 We recognise that VR Pharma was formed in August 2023 and therefore does not have a trading history or accounts on which we can form a view of the provider. NHSE should therefore ensure that due diligence is undertaken and that they are confident that VR Pharma can deliver the services that it has applied for and that it will be financially sustainable as we cannot comment on this.

2.34 Given the strong support for a new provider at this site, and the need for enhanced as well as essential services, we support this application. We do however note that the premises are not secured, the provider does not have a track record that we can see and that the previous pharmacy at this site closed. With that in mind, we encourage decision makers to consider the importance of ensuring that the geography has a sustainable services in place at the earliest opportunity.

2.35 We would be pleased to provide further evidence in support of our submission should that be helpful and ask that our published report and the response from the previous provider be considered within the decision making process on its own merits.

Further comments from Richmond Healthwatch

Introduction:

2.36 We acknowledge the challenges faced by pharmacy colleagues and deeply appreciate their service to Hampton residents. However, we must respectfully disagree with the accuracy of Japotheca's submission regarding pharmacy access in Hampton.

Reasonable Access and Choice:

2.37 Japotheca's claim of adequate pharmacy choice and access hinges on the inclusion of pharmacies in Hampton Hill. Unfortunately, this is not a reasonable position.

2.38 The Longford River creates a continuous barrier separating the residents of Hampton from the pharmacies of Hampton Hill, making these pharmacies impractical for Hampton residents. Return trips typically take an hour, involving lengthy walks (60 minutes, 4 miles) or public transport with significant walking segments (50 minutes, including 2 miles of walking).

2.39 Our recent survey of 700 Hampton households provides further compelling evidence that Hampton Hill Pharmacies are not accessible to Hampton residents:

2.39.1 Reliance on pharmacies outside Hampton surged from 3.3% to 31.5% after closures.

2.39.2 Of these, the majority reported travel time increases exceeding 15 minutes each way.

2.40 These independent findings clearly demonstrate that Hampton Hill pharmacies do not provide reasonable access for Hampton residents, rendering Japotheca's assertion inaccurate.

Prescriptions Dispensed Out-of-Area:

2.41 Japotheca's argument regarding dispensed prescriptions appears to be based on the flawed assumption that Hampton Hill pharmacies are *"main options"* for Hampton residents. Given the impractical travel times, this argument is self-defeating.

2.42 Our comprehensive report on 700 Hampton households directly contradicts Japotheca's claim. While some residents use pharmacies in Hampton Hill and beyond, this is because there of lack of provision in Hampton itself. It is not because other pharmacies are accessible:

2.42.1 95% of respondents identified proximity as a crucial factor when choosing a pharmacy.

2.42.2 Increased travel times were accompanied by a shift in transportation modes:

2.42.2.1 Walking usage dropped from 84% to 47%.

2.42.2.2 Car usage doubled from 21% to 44%.

2.42.2.3 Bus usage rose significantly from less than 2% to 13%.

2.42.3 Many residents reported difficulties with public transport and limited parking at remaining pharmacies.

2.42.4 Reliance on family members to collect prescriptions increased due to travel challenges.

Pharmaceutical Needs Assessment:

2.43 As a member of the Pharmaceutical Needs Assessment (PNA) Steering Group, we can confirm that Japotheca's claim of historic *"overprovision"* is unfounded. Conversely, the PNA Supplementary Statement for 2023 explicitly highlights the service gap created by the closure of the two pharmacies.

Impact of Closures:

2.44 The closure of the two pharmacies significantly reduced pharmacy access for Hampton residents, placing many outside a reasonable distance (1-mile radius or 20-minute travel time). Our research unequivocally demonstrates that residents do not enjoy reasonable access as asserted by Japotheca:

2.44.1 98% of Station Approach Pharmacy users reported worse or significantly worse waiting times since the closures.

2.44.2 52% experienced medication stock issues, including unavailable prescriptions, misplaced medications, and redirects to other pharmacies.

2.44.3 Increased demand at remaining pharmacies led to longer wait times and reduced staff availability for consultations.

2.44.4 Residents reported difficulties accessing over-the-counter medications and supplies within Hampton, requiring travel or reliance on others.

2.45 The overwhelming evidence contradicts Japotheca's comments and conclusions. The PNA findings, resident experiences, and realities of travel confirm a service gap that this application is well-positioned to address.

2.46 Whilst we disagree with Japotheca's submission, we do recognise that their patients view their services positively in terms of service quality. This may well be why some residents of Hampton have chosen their services. It is however notable that providing a good service for those who are able to choose it does not in itself close the gap in pharmacy provision for those residents of Hampton who cannot.

Richmond HWB Additional Comments

2.47 Thank you for sharing a representation submitted by Japotheca Ltd on the 8th of March 2024. We wish to comment on the representation as a point of correction to the last paragraph which stated:

2.48 *"It could well be concluded that the Pharmaceutical Needs Assessment of March 2023 did not identify any gaps in pharmaceutical service provision within the HWB because there was a degree of over-provision, and that despite closure of two Boots pharmacies in Hampton there is now no obvious under provision. The remaining pharmacies in this local area appear to provide reasonable choice and access for the relevant Hampton residents, and appear ready and able to provide the required and desired pharmaceutical services."*

2.49 We can advise that this representation did not acknowledge the Supplementary Statement to the PNA which was issued in December 2023 and should be considered alongside the PNA. Following the closure of two pharmacies in Hampton, we advised "The health and wellbeing board considers that the closure of these two pharmacies would **create a gap** in the provision of pharmaceutical services in that local area."

18. (1)(a)

2.50 *The ICB receives a routine application and is required to determine whether it is satisfied that granting the application, or granting it in respect of some only of the services specified in it, would secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB**;***

2.51 The PSRC considers that Regulation 18(1)(a) was satisfied in that the ICB was required to determine whether it was satisfied that granting the application or granting it in respect of some only of the services specified in it, would secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB.

18. (1)(b)—

2.52 *the improvements or better access that would be secured were or was not included in the relevant pharmaceutical needs assessment in accordance with paragraph 4 of Schedule 1 in determining whether it is satisfied as mentioned in section 129(2A) of the 2006 Act (regulations as to pharmaceutical services), the ICB must have regard to the matters set out in paragraph (2).*

2.53 The relevant PNA for this Application is the PNA published by Richmond HWBB in August 2023. This is the latest published PNA.

2.54 The PSRC considered the Pharmaceutical Needs Assessment 2023 to 2026 ("the PNA") prepared by Richmond Health and Wellbeing Board, conscious that the document provides an analysis of the situation as it was assessed at the date of publication. The ICB bears in mind that, under regulation 6(2), the body responsible for the PNA must make a revised assessment as soon as reasonably practicable (after identifying changes that have occurred that are relevant to the granting of applications) unless to do so appears to be a disproportionate response to those changes. Where it appears disproportionate, the responsible body may, but is not obliged to, issue a Supplementary Statement under regulation 6(3). Such a statement then forms part of

the PNA. It is noted that the PNA was dated August 2023 and that there had been one supplementary statement issued, in December 2023. This latest statement detailed changes that have occurred since the PNA was published. The PNA states that the HWBB believes that there is now a gap in pharmaceutical services.

2.55 The applicant seeks to provide unforeseen benefits to residents in the Hampton area of Richmond. The improvements or better access that the Applicant was claiming would be secured by its application were not included in the relevant pharmaceutical needs assessment in accordance with paragraph 4 of Schedule1. However, the subsequent Supplementary statement has indicated a gap in services, so is now included in the PNA. At the point of considering this application the supplementary statement was issued indicating a gap in service, therefore the application for an unforeseen benefit cannot be considered.

2.56 Therefore, the application would not need to be assessed in accordance with the regulations under 18(2).

2.57 [Quotes Regulation 18(2) in full].

2.58 PSRC determined that the application would not need to be assessed in relation to regulations under 18(2) as detailed above.

Regulation 19 - Deferral

2.59 n/a as not deferred

Decision

2.60 The PSRC have determined that there is enough information within the papers to decide the application without an oral hearing.

2.61 There are no pharmacies within the immediate vicinity of the application, so regulation 31 is not engaged.

2.62 With regard to 18(1)(a) the ICB is satisfied that they were required to determine the application.

2.63 With regard to 18(1)(b) the ICB is satisfied that the application would not need to be assessed in accordance with the regulations under 18(2).

2.64 The PSRC have determined that the applicant **DID NOT** fulfil the criteria as required in regulation 18(1) & 18 (2) and therefore the Pharmaceutical Services Regulations Committee have refused the application.

2.65 Determination made by NHS North East London ICB on behalf of NHS South West London ICB."

3 **The Appeal**

In a letter dated 25 June 2024 addressed to NHS Resolution, Pharmacy Sales & Consultancy on behalf of the Applicant appealed against the Commissioner's decision. The grounds of appeal are:

3.1 "We act for VR Pharma Limited and have enclosed a letter of authorisation confirming our instructions in this matter.

3.2 Our client has been notified by the London Pharmaceutical Services Regulations Committee ("PSRC") that the above application, made pursuant to Regulation 18 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("The

Regulations"), has been refused. I have enclosed a copy of their decision letter and report for your information.

3.3 Our client wishes to appeal this decision and we set out the key grounds for appeal below:

3.3.1 Whilst our client is aware that the Primary Care Appeals ("PCA") committee will consider this matter afresh, there was a significant process error on the part of NHS England in respect of its failure to notify our client of third-party comments in response to the application.

3.3.2 Having acknowledged that a supplementary statement to the PNA had identified a gap at the location our client proposed to offer pharmaceutical services (subsequent to the submission of our client's application), the ICB should have used its discretion to consider the position with the PNA at the time our client's application was submitted i.e. prior to the publication of the supplementary statement.

3.4 We have provided further detail below in respect of our client's grounds for appeal as well as additional information to assist the PCA Committee in considering this matter.

3.5 For ease we have attached a copy of the original application and supporting documents which were submitted with the application and ask that this information it taken into account to avoid undue repetition within this appeal.

First ground of appeal

3.6 Our client was notified on the 7th of June that its application for inclusion in the pharmaceutical list had been refused. This came as a great surprise as neither we nor our client had been provided with copies of third-party representations at the appropriate stage of the consultation process.

3.7 It is common and standard practice that applicants are provided with these third-party comments, and have 14 days to respond to them, prior to the application being determined by the ICB. As our client was denied the ability to make such representations, it is our client's opinion that the decision to refuse the application was made partly as a result of the failure to take into account all relevant information.

Second ground of appeal

3.8 Our client's application under regulation 18 was submitted in November 2023. At that time the PNA had not identified any 'gaps in provision' (as discussed in Schedule 1 to the Regulations), so an 'unforeseen benefits' application was appropriate.

3.9 In December 2023, Richmond-upon Thames HWB issued a supplementary statement to the PNA stating that a gap in provision had arisen following the closure of two Boots pharmacies. One of those closures was at the site identified in our client's application.

3.10 Our client was not aware that this supplementary statement was published and was not notified of this by the ICB, despite the fact it was material to our client's application. Furthermore, as our client was not provided with copies of the representations made within the first 45 days, it only became aware of this information when the decision was published.

3.11 The effect of the publication of the supplementary statement was to amend the PNA to reflect an identified 'current need' at the site proposed by our client.

3.12 There appears to be no doubt, therefore, that such a need exists and the PSRC, in its decision report, does not appear to have reached a different view. Clearly the HWB

supported the application in the circumstances as they recognised that granting the application would address this identified need.

3.13 The reason for refusing our application provided by the PSRC was that, as a need had been identified by the HWB in the PNA, the application no longer met the requirements of regulation 18 in that the benefits proposed were no longer 'unforeseen'.

3.14 It is our client's position that the PSRC is permitted by the regulations to consider, when determining an application, whether it is appropriate to do so by reference to a 'previous PNA.' In this case that would mean the 2023 Richmond-upon-Thames PNA prior to the publication of the supplementary statement.

3.15 If the PSRC has followed this approach, and taken into account the fact that the HWB was clear that a need had arisen at the proposed location, then it should have considered the PNA as it was on the date our client's application was submitted. It would then have found that the application should not automatically fail and would, in our client's opinion, have found that it should have been granted based on the support from the HWB.

3.16 Our client firmly believes if this application is approved it will meet the need subsequently identified by the HWB secure improvements in choice and better access to pharmaceutical services and thus provide significant benefits for the resident population.

3.17 We therefore urge Primary Care Appeals to overturn the decision of the ICB and grant this application accordingly.

3.18 Our clients would wish to attend an oral hearing should the committee decide to convene one."

3.19 [Enclosures

3.19.1 Letter of authority dated 25 June 2024

3.19.2 Copy of application and supporting information (see 1.1 to 1.56 above)

3.19.3 Copy of the Commissioner's decision (see 2.1 to 2.65 above)].

4 Summary of Representations

This is a summary of representations received on the appeal.

4.1 RICHMOND HEALTH AND WELLBEING BOARD

4.1.1 "The Richmond Health and Wellbeing Board (HWB) wish to make a formal statement regarding VR Pharma Limited/PCS's appeal to NHS Resolution concerning the application process for opening a new pharmacy in Tangley Park, Hampton.

4.1.2 The request by NHS Resolution was for the HWB to dispute the determination made by the Market Entry Team against Regulation 18(1) wherein the applicant submitted an 'unforeseen benefit application' to open a new pharmacy in Tangley Park. The HWB however have wider concerns regarding this application process, which we believe has caused harm, delays and does not advocate for the needs of our population.

4.1.3 Our four main [sic] concerns are:

4.1.3.1 Delays in Notification: The HWB received notification of the application two months after VR Pharma submitted it, which may impact service continuity.

4.1.3.2 Lack of Guidance: Applicants lack clear guidance and support on the correct application type.

4.1.3.3 Processing Delays: The application took nearly 7 months, causing a gap in provision.

4.1.3.4 Not seeing the bigger picture: The supplementary statement supported the need for a pharmacy.

4.1.3.5 The absence of oversight and accountability within the system.

4.1.4 The HWB were notified of this application on the 23rd of January 2024, which is two months after VR Pharma submitted the application on 16th November 2023. In December 2023, the HWB submitted a supplementary statement addressing the gap in provision in the Hampton area. Technically, by the time the HWB was notified of the application, it would not meet the 'unforeseen benefits' application type as a supplementary statement was issued. This is a cause for concern, as in order to offer continued services with minimal disruption, applications to open new pharmacies in areas where there have been recent closures should be reviewed and escalated in a shorter timeframe.

4.1.5 Secondly, we are concerned that the nullification of this application, due to the HWB creating a supplementary statement, was not identified by the Market Entry team prior to the escalation to interested parties. This means that this application type was encouraged to proceed understanding that it would not be successful, with no support or guidance provided to the applicant. This process seems to ignore the many responsibilities held by interested parties in responding to changes in pharmaceutical services. It is for interested parties to submit an application when an opportunity becomes available, and it's for the HWB to create a supplementary statement when we're made aware of changes in pharmaceutical provision. It should not be the case that applicants need to wait until a supplementary statement has been produced in order to submit. Consideration should be made by Market Entry team to recognise and be aware of a potential overlap between closure, application and supplementary statements at each stage.

4.1.6 Thirdly, the overall duration is unnecessarily long. This application took just under 7 months from application to conclusion. It is estimated that the two pharmacies that closed in this area supplied around 11,300 dispensing items per month to residents. Over the course of 7 months where there has been a gap in provision, this equates to around 79,100 dispensing items that need to be sourced at pharmacies 1.2km - 1.4km away. This is considering that many patients may struggle to travel to these pharmacies, which have been identified as already being already in high-demand or lacking space/services needed for these citizens. In the interim, other service sectors have applied to vendor from these premises including a fast-food outlet which reached a determination faster than this Market Entry application.

4.1.7 Fourthly, there is frustration around why this application was not approved despite the supplementary statement. Regulation 18(1) advises that an 'unforeseen benefits' application can be made if it highlights a gap not otherwise identified via the PNA. Our supplementary statement advised that 'the closure of these two pharmacies would create a gap in the provision of pharmaceutical services in that local area' and this application was denied on the premise that it neglected to identify this document, published 1 month after their application, even though they both seek to address the deficit that they

were trying to complete. In essence, this application to improve provision was denied due to a supplementary statement advising that increased provision was needed.

4.1.8 Lastly, the HWB are concerned that there is no scrutiny or intention to reform these processes. We appreciate that the process to approve or deny an application requires a rigorous review to ensure patient safety, however efficiencies need to be sought. The legislation is complex and offers no flexibility where applications are miscategorised. We request that Section 18 of the legislation allows considerations for applications under 'unforeseen benefit' to continue to be processed even if a supplementary statement is issued.

4.1.9 Please find below a timeline of the application to highlight some of the issues raised:

November 16, 2023	VR Pharma Ltd – Submitted Application
December, 2023	Supplementary statement issued
January 23, 2024	Interested parties notified of application
March 3, 2024	Richmond HWB submitted a written representation
March 8, 2024	End of 45-day deadline to submit representation
March 15, 2024	Received representations from other interested parties, invited to refute comments
March 29, 2024	End of 14-day deadline to comment on representations
June 7, 2024	Received notification on outcome of application

4.1.10 The HWB hope that NHS Resolution are able to review the Market Entry processes, considering the length of time from application to determination and what rigor can be applied to ensure that applicants are supported when seeking to provide much needed services."

4.2 THE COMMISSIONER

4.2.1 "I am responding to this appeal on behalf of London PSRC.

4.2.2 Applications are processed on our behalf by PCSE, we have been advised by them that the 3rd party comments were not shared with the applicant or their adviser. Unfortunately, we were only advised of this after the determination had been made and the applicant had requested for the application to be re-determined as they had not seen these. PCSE have apologised for this error, however, unfortunately, there is no opportunity for PSRC to make a re-determination in this situation. Therefore, the only option for the applicant is to make an appeal, which is what they have done. We have requested PCSE to ensure that these are sent out to parties in future as per the regulations.

4.2.3 The applicant has suggested that the ICB should have advised the applicant that a supplementary statement was issued, however, this is not the responsibility of the ICB to advise applicants of any changes. An application is always determined against the PNA published at the time of the decision. Whilst the PSRC can determine to use a previous PNA, with agreement of the applicant and interested parties, this was not the case with this application as it was a supplementary statement that was issued.

4.2.4 The PSRC have determined that as the supplementary statement has been issued there is now a current need in this area and therefore an unforeseen benefits application cannot be considered."

4.3 TEMPLE BRIGHT LLP ON BEHALF OF JAPOTHECA LIMITED

4.3.1 “I act for Japotheca Limited which is included in the pharmaceutical list for premises trading as Health on the Hill, 62 High Street, Hampton, TW12 1PD.

4.3.2 On behalf of my client I write further to your letter of 16th July 2024 and in order to submit representations to NHS Resolution in relation to an appeal by VR Pharma Limited against a decision of NHS England to refuse its application for inclusion in the Richmond Upon Thames pharmaceutical list for premises at 29 Tangley Park Road, Hampton, Middlesex, TW12 3YH.

4.3.3 The applicant raises two grounds of appeal, to which my client responds as follows:

Procedural error

4.3.4 The applicant asserts that it was not provided with copies of representations made by interested parties on its application and was, therefore, not in a position to respond to those representations.

4.3.5 My client is unable to comment on whether the applicant was, or was not, provided with copies of the representations on its application. However, my client was provided with a copy of the representations on the application by PCSE, and PCSE’s letter stated that it was being sent to both the applicant and interested parties. It would therefore appear that the correspondence was provided to the applicant, but NHS England can no doubt respond direction [sic] in relation to this ground of appeal.

Relevant PNA

4.3.6 The applicant asserts that the “relevant PNA” for the purposes of this application should be the Richmond Upon Thames pharmaceutical needs assessment, published in 2023, but excluding any subsequent supplementary statements.

4.3.7 Whilst this ground of appeal is not entirely clear, the applicant appears to assert that NHS Resolution should determine this application having regard to only the 2023 PNA and not any supplementary statement since the applicant was not aware that the supplementary statement had been issued when the application was submitted. The applicant appears to be concerned that the publication of the supplementary statement may undermine the basis upon which this application was submitted (ie that it was submitted on the basis that it would secure improvements in, and better access to, pharmaceutical services that are not contained in the relevant PNA). Such an approach would be flawed for two reasons.

4.3.8 Firstly, disregarding a supplementary statement when determining an application would defeat the purpose of the Regulations, since it would result in a decision being made which was not based on the most up-to-date information.

4.3.9 Secondly, whilst the applicant correctly notes that the supplementary statement was issued shortly after the application was submitted, the supplementary statement was published 9 months ago, in December 2023. It was entirely open for the applicant to submit a further application if it considered that this was supported by the supplementary statement. If the applicant has chosen not to submit a fresh application, that is no reason to disregard the supplementary statement when determining the current application.

Comments on the substantive application

4.3.10 The applicant has not rehearsed, in its letter of appeal, why it considers that this application meets the requirements of regulation 18. However, it has provided a copy of the original application form.

4.3.11 In its representations to NHS England dated 8th March 2024, my client detailed the general movement of patients in the local area and the provision of pharmaceutical services both leading up to, and after, the closure of the Boots pharmacies. I do not propose to repeat those representations in this letter, since no doubt NHS Resolution will have been provided with a copy of my client's letter by NHS England. For the sake of completeness, I also attach a copy of those representations to this letter.

4.3.12 In addition to the comments made in my client's representations to NHS England, my client further comments as follows.

4.3.13 As a preliminary matter, this application is based solely on the closure of the Boots pharmacies in late 2023, so almost a year ago. However, as NHS Resolution will be aware, the pharmacy market entry regulations in England are not based on a "one in, one out" system. That is, simply because a Boots pharmacy has closed does not mean that an application must be granted in order to replace that closed pharmacy. Instead, the applicant must demonstrate why its application meets the relevant regulatory test and provide evidence to support any such assertion. My client believes that the applicant has failed to provide any, or any sufficient, evidence in support of its application.

4.3.14 The applicant's principal assertion appears to be based on a mathematical calculation that is deeply flawed. In essence, the applicant asserts that (by its calculation), the two Boots pharmacies that closed were dispensing 11,000 items a month between them, which equates to 7,500 patients (an average of 1.5 items per patient per month), meaning that there are 7,500 patients "in Hampton" who have been left without pharmaceutical service provision as a result of the closure.

4.3.15 The flaw in this assertion is clearly demonstrated in my client's representations to NHS England, because patients who used the Boots pharmacies which have closed do not live in a sealed off area that they cannot (or will not) leave. Patients who live in this area can, and readily do, leave "Hampton" in order to access a whole range of services.

4.3.16 The applicant's narrow focus on an area (and the apparent attempt to re-introduce the concept of "neighbourhoods" into the determination of this application) is understandable given the number of pharmacies outside "Hampton" which wholly undermine the rationale for this application.

4.3.17 The area in the immediately vicinity of the proposed location is largely residential in nature.

4.3.18 Since Hampton is part of the Greater London area, its borders are ill-defined and blend seamlessly into surrounding areas. Hampton itself is bordered by Hanworth, Feltham, Twickenham and Teddington. It is located to the west of Kingston Upon Thames and to the south of Hounslow, which act as "city centres" for this part of southwest London, containing a full range of shops and other services. The applicant's overly narrow focus on "Hampton" therefore fails to take into account the wider context of the area.

4.3.19 Also, substantial numbers of residents of the largest western area of Hampton access Hampton Hill for reasons other than visiting a pharmacy. Many in fact

are patients of the Hampton Hill Medical Centre, which is between the two pharmacies in Hampton Hill. Bushy Park is a very popular destination for walking, picnicking, dog-walking, running, sports (the cricket fields, rugby pitches, etc.). There are two gates in Hampton Hill to access the park: the southern gate is near the junction of the A312 and the High St, and the northern gate is near the junction of Windmill Road and the High Street (in fact, virtually adjacent to my client's Health On The Hill pharmacy). There is also a greater variety of shops and services in Hampton Hill (including library, gym, KidsGym, etc.) than the "village" of Hampton.

4.3.20 As NHS Resolution will be aware it must have regard, in particular, to the desirability that patients have a reasonable choice of pharmaceutical service provision in the HWB's and must assess whether the proposed pharmacy would confer significant benefits in terms of that reasonable choice. It is submitted on behalf of my client that there is a reasonable choice of service provision in the HWB's area.

4.3.21 As a starting point, there are 4 pharmacies within a 1-mile radius of the proposed location, 7 pharmacies within a 1.5-mile radius and 23 pharmacies within a 2-mile radius.

4.3.22 Whilst it is accepted that for pharmacies to secure a reasonable choice they must be reasonably accessible, the existing pharmacy network is reasonably accessible to those living in the Hampton area.

4.3.23 Using the proposed location as a starting point, the applicant states that "the only pharmacy left in Hampton is the Boots Pharmacy at 3 Station Road". The applicant notes that the distance to this pharmacy is 1.4km or a 20-minute walk. In terms of that journey by foot, it is worth noting that there are no physical barriers between the proposed location and Boots Pharmacy at Station Approach – the walk is straightforward, being along The Avenue/Percy Road and then turning left into Priory Road and right into Ashley Road. Where there are roads to cross along the route, there are appropriate crossing points for pedestrians, including dropped kerbs. The local terrain is level, all pavements are well-maintained and have appropriate street lighting.

4.3.24 The applicant and HWB make reference to Longford River, inferring that it is a barrier to accessing services in Hampton Hill, but this is incorrect. Whilst the river does run between the applicant's proposed location and the pharmacies in Hampton Hill, the Longford River poses no practical barrier. People walk or drive or cycle from the largest area of Hampton to Hampton Hill along either (i) the route taking them finally along the A312 then left (north) along the High Street of Hampton Hill to the shops and pharmacies there, or (ii) turning right (east) from A312 along Windmill Road which joins the High Street of Hampton Hill between the two pharmacies. Route (i) is the one taken also by bus R70. Using either of these routes – which are the natural routes for anyone to take to travel to Hampton Hill means that the river presents no barrier.

4.3.25 Given that Boots Pharmacy at Station Approach is located very close to the nearest train station to the proposed location – Hampton Station - with commuter trains running into Kingston and on to Central London, this is no doubt a route that many local residents will be familiar with.

4.3.26 The applicant asserts that there is limited car parking at Boots pharmacy on Station Approach.

4.3.27 However, on-street parking is available throughout the area. According to information from the 2021 census, 78.3% of homes in the Hampton north ward (which the proposed location is almost at the centre of) have at least one car or van compared to 76.5% nationally, meaning that car ownership in the

immediate vicinity of the proposed location is slightly higher than the average for England.

4.3.28 Additionally, whilst the applicant refers to access to Boots Pharmacy by foot and car, the applicant fails to mention that the area is served by bus route 111. Bus route 111 runs along The Avenue (the road which passes the local shopping parade in which the proposed pharmacy would be located) and passes along Station Road and within 300m of the Boots pharmacy. Bus route 111 operates a service every 8-12 minutes during the daytime Monday to Friday and every 9-13 minutes on Saturday. Bus route 111 continues eastwards into Kingston Upon Thames and northwards to Hounslow and Heathrow airport. Route map below (with the proposed location marked with a red dot).

4.3.29 Map [See page 1 of Appendix B for Committee]

4.3.30 There are also other bus routes which serve the wider Hampton area, even if they do not stop immediately outside the proposed location.

4.3.31 The R70's route (buses every 12 minutes) in particular stops at many locations in the central and NW part of Hampton (south of the Longford River) on its way to Hampton Hill then on to Twickenham and Richmond. Route map below (with the proposed location marked with a red dot).

4.3.32 Map [See page 2 of Appendix B for Committee]

4.3.33 The R68 (3 or 4 buses an hour) stops along the SE area of Hampton on its way to from Hampton Court to Twickenham and Richmond and Kew. Route map below (with the proposed location marked with a red dot).

4.3.34 Map [See page 2 of Appendix B for Committee]

4.3.35 The 285 (buses every 9 – 14 minutes) stops along the NW area of Hampton (north of the Longford River) on its way from Heathrow to Kingston. Route map below (with the proposed location marked with a red dot).

4.3.36 Map [See page 3 of Appendix B for Committee]

4.3.37 In relation to other pharmacies, the applicant notes that there is another Boots Pharmacy at 107 Bear Road, Hanworth, but states that "this pharmacy serves a very different area to Hampton and in our view is irrelevant to this application". Not only is the applicant incorrect to assert that those in Hampton would not use the Boots Pharmacy at 107 Bear Road (as shown in my client's representations to NHS England, patients do use and are using that pharmacy as an alternative following the Boots closures), it would be entirely inappropriate to disregard the Boots Pharmacy at 107 Bear Road since it is actually the closest pharmacy to the proposed site.

4.3.38 As shown in the map provided with the applicant's application, it is 1.2km from the proposed location to the Boots Pharmacy at 107 Bear Road, or a 17-minute walk; again, there are no physical barriers between the proposed location and the Boots Pharmacy at 107 Bear Road which would restrict access by foot.

4.3.39 The Boots Pharmacy at 107 Bear Road has a car park to the rear of it, as well as on-street parking on local side roads.

4.3.40 In terms of access by bus, bus route 111 stops immediately outside the local shopping centre within which the Boots pharmacy is located.

4.3.41 In addition, my client's pharmacy is located 1.9km away in Hampton Hill and Hampton Hill pharmacy is located 2.2km away, with on-street car parking along the length of the High Street. As well as parking along the length of the High St in Hampton Hill, there is a 47-bay car park (the "High St car park"), free for two hours, just adjacent to Health On The Hill (behind Sainsbury's Local and the Library). The northern Hampton Hill gate into Bushy Park is in the southern corner of this car park. There is also the pay-and-display Taylor Close car park, with 72-bays, directly behind Hampton Hill Pharmacy in the northern part of the Hampton Hill High Street. Richmond Borough residents (so all Hampton residents) with a RichmondCard or who have registered with RingGo can get free parking for stays of up to 30 minutes, or pay the reduced tariffs for longer stays. Residents with Band A vehicles and a https://richmond.gov.uk/hampton_hill_area_car_parks) .

4.3.42 There are also extended-hour pharmacies within the large Tesco's supermarkets in Sunbury on Thames and Feltham and pharmacies within the main shopping centres in Hounslow and Kingston-upon-Thames, which also have large car parks.

Reg 18(2)(b)(i) – there being a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB

4.3.43 My client invites NHS Resolution to conclude that granting this application would not confer significant benefits in terms of patients having a reasonable choice of service provision, since a reasonable choice is already secured by the existing pharmacy network as summarised above and in my client's representations to NHS England.

Reg 18(2)(b)(ii) – people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that, in the area of the relevant HWB, are difficult for them to access.

4.3.44 In relation to regulation 18(2)(b)(ii), the applicant provides no evidence of patients who share a protected characteristic and who require access to pharmaceutical services but who currently find access difficult. For the reasons given above, my client asserts that existing pharmacies are not difficult to access whether by foot, car or bus for those living in Hampton.

4.3.45 In conclusion, my client invites NHS Resolution to conclude that the applicant has failed to discharge the burden of proving that this application would meet the regulatory test contained within regulation 18 and to refuse this appeal.

4.3.46 I look forward to hearing from you."

Japotheca Limited letter to the Commissioner dated 8 March 2024 [Note this was not quoted within the Commissioner's decision letter]

4.3.47 "The application attempts to prove that the proposed pharmacy will provide "significant benefits" because the current choice of pharmacies for residents of Hampton is not reasonable. This is not evident from the application, and certainly not true.

4.3.47.1 Practically, for residents of the Hampton area, the "local area" is that within the physical and practical boundaries of A308 to the south, Bushy Park to the east, Burtons Road and the A312 to the northeast, and the A316 to the northwest.

4.3.47.2 Residents of Hampton currently readily access the services of numerous pharmacies within this area:

4.3.47.3Boots, Station Approach – in the southern part

4.3.47.4Boots, Bear Road – in the north-western part

4.3.47.5Hampton Hill Pharmacy – in the eastern part

4.3.47.6Health On The Hill – in the eastern part

4.3.47.7For many years, residents throughout Hampton, including many with protected characteristics, have actively chosen to routinely (not just occasionally) access pharmacies which are not located in the more "central" area of Hampton. These pharmacies include Hampton Hill Pharmacy, Health On The Hill, Boots Bear Road.

4.3.48 Residents have also chosen to access pharmacies near to but outside of the above Hampton "local area," such as Teddington Pharmacy, Maple Leaf Pharmacy, other pharmacies in Teddington, Twickenham, etc.

4.3.48.1For those who have great difficulty in travelling to these pharmacies, even to any pharmacy near to their home or work, many local and nearby pharmacies – Boots Station Approach, Boots Bear Road, Hampton Hill Pharmacy, Health On The Hill, Maple Leaf Pharmacy, etc. – have for many years delivered medicines to their homes, as needed, on most occasions for free.

4.3.48.2In recent years (well prior to the late-2023 closure of two Boots pharmacies in Hampton), there has been a marked trend for residents from all parts of Hampton to increasingly choose pharmacies which were not in "central" Hampton. This is evident from the rising proportion of prescriptions issued by Hampton-based surgeries whose patients are predominantly Hampton residents - Hampton Medical Centre and Broad Lane Surgery – that have been dispensed by pharmacies other than Boots Priory Rd or Boots Tangley Park (source: Pharmdata). As such, pharmacies in Hampton Hill – Hampton Hill Pharmacy and Health On The Hill – have experienced in recent years obvious increases in footfall of new patients who reside in Hampton (not in Hampton Hill), and have dispensed an increasing share of the items on prescriptions issued by the two surgeries in Hampton - Hampton Medical Centre and Broad Lane Surgery.

4.3.48.3The proportion of items on prescriptions issued by Hampton Medical Centre that were dispensed by the two Hampton Hill pharmacies combined increased from approximately 10% in early 2022 to over 15% by mid-2023.

4.3.48.4The proportion of items on prescriptions issued by Hampton Medical Centre that were dispensed by the two Hampton Hill pharmacies combined increased from approximately 20% in early 2021 to approximately 25% in mid-2022, to nearly 30% in by mid-2023.

4.3.48.5The Hampton resident patients choosing voluntarily to use the services of pharmacies in Hampton Hill rather than pharmacies located more in the "centre" of Hampton might well have appreciated the level of service provided by these pharmacies, but also practically found little problem with accessing them when needed. The applicant's statement on page 6 of the Supporting Documentation – *"… the next nearest option for patients is in Hampton Hill, 2km to the east*" – makes no explanation whatsoever for the voluntary choice of these people to routinely access pharmacies in Hampton Hill before the closure of Boots pharmacies in late 2023.

4.3.48.6 The closure of the Boots pharmacies in “central” Hampton has merely accelerated this trend. Since the closure of Boots in Tangley Park Road in October and Boots in Priory Road in November 2023 - changes in patients’ “nominations” (source: Pharmdata) show that Hampton residents have readily accessed the remaining pharmacies in the local area:

4.3.48.7 From 7th August 2023 (when Boots’ imminent closures must have been announced locally) until 4th March 2024, the nominations of Boots Station Approach have increased by nearly 2,000 and those of Boots Bear Road by about 1,500. During the same period, the nominations of the two pharmacies in Hampton Hill combined have increased by a far lower number, about 1,100.

4.3.49 (Apart from a background increase in nominations of approximately 5 per pharmacy week, the vast majority of these increases in nominations can be assumed to be previous patients of Boots Priory Road and Boots Tangley Park).

4.3.49.1 In November 2023, the two Hampton Hill pharmacies combined dispensed a little over 25% of the items on prescriptions issued by Hampton Medical Centre and over 35% of the items on prescriptions issued by Broad Lane surgery. As these pharmacies have gained about 465 nominated patients since then, we could assume that in March these proportions will be higher.

4.3.49.2 In November 2023, Boots Station Approach dispensed a little over 32% of items on prescriptions issued by Hampton Medical Centre and over 24% of the items on prescriptions issued by Broad Lane surgery. As this pharmacy has gained about 234 nominated patients since then, we could assume that in March these proportions will be higher.

4.3.49.3 In November 2023, Boots Bear Road dispensed approximately 10% of the items on prescriptions issued by Hampton Medical Centre and over 8% of the items on prescriptions issued by Broad Lane surgery. As this pharmacy has gained about 583 nominated patients since then, we could assume that in March these proportions will be markedly higher.

4.3.49.4 In November 2023, pharmacies other than the above four dispensed the remaining 32% of the items on prescriptions issued by Hampton Medical Centre and remaining 32% of the items on prescriptions issued by Broad Lane surgery.

4.3.50 These pharmacies each dispensed fewer than about 3% of these surgeries’ prescribed items, and include many nearby pharmacies which residents of Hampton have chosen to routinely use for many years, such as Maple Leaf Pharmacy, Teddington Pharmacy, Kirby Chemist in Teddington, Kc Pharmacy in Teddington, Twickenham Pharmacy, etc. As the above 4 main pharmacies have gained about 1,280 nominations since then, we could assume that these remaining proportions in March will be lower, perhaps closer to 25%.

4.3.51 It is worth noting that it is very common for this level of 65-75% of items prescribed by surgeries to be dispensed by four or fewer local pharmacies, and for many nearby pharmacies and many more distant pharmacies (including some online-only pharmacies) together dispense the remaining 25-35% of items, with each of these pharmacies dispensing a low proportion, e.g. fewer than 3-5%. In this sense, the supply of prescription medicines to the patients of the Hampton surgeries has not been abnormal since the closure of the two Boots pharmacies.

4.3.52 From this, it is clear that Hampton residents have been able to access prescription medicine supply from the remaining pharmacies in the Hampton area.

4.3.53 The largest number of patients who have moved from the closed Boots pharmacies have moved to Boots Station Approach. This certainly does not support the applicant's comments about access to this pharmacy. In November, this pharmacy was closed for some times for renovations and rearrangement of the layout of the dispensary and waiting areas to provide sufficient space for the expected much greater dispensing workload. During these renovations, certainly many patients experienced some difficulties in accessing prompt service. No doubt, the applicant's visit on 8th November (page 5 of Supporting Documentation) occurred during this time, when service was unusually interrupted and slow due to these works. But, since 25th December, nominations there have increased by about 350, by a relatively consistent number each week (average of about 32 patients per week). By all accounts that we have heard, and by these changes in nominations, Hampton residents are readily and voluntarily accessing services from this pharmacy, and actively choosing it over other local pharmacies.

4.3.54 Many patients who have moved from the closed Boots pharmacies have moved to Boots Bear Road. This certainly refutes the applicant's statement that this pharmacy "*serves a very different area to Hampton and in our view is irrelevant to this application*." As these patients have chosen Bear Road instead of Boots Station Approach or any other local pharmacy, it seems quite clear that these patients find access to this pharmacy reasonable. Simply stating (on page 5 of the Supporting Documentation) that "… *it is located in Hanworth rather than Hampton and serves a very different population*" is obviously not true. It would be very reasonable to believe that a substantial proportion of patients accessing the Boots Bear Road pharmacy in the recent years prior to late 2023 would have been residents of Hampton, and not of Hanworth. It is likely that many of these people reside in that part of Hampton which is closer to Bear Road than to Bushy Park or Station Approach. No doubt, this pharmacy has also adapted in many ways before and since October 2023 to accommodate the expected increase in patient workload.

4.3.55 Some patients who have moved from the closed Boots pharmacies have moved to pharmacies in Hampton Hill. This certainly confirms that Hampton residents continue to be willing and able to access pharmacy services in the eastern part of the Hampton area, as they have been for many years previously. Those patients who previously used the closed Boots pharmacies certainly have not shown any sign of difficulty in accessing pharmacies in Hampton Hill, or uttered to the staff in these pharmacies any concern about accessing them. That is not surprising, as the buses R70, R62 and 285 stop outside both pharmacies, there is ample available parking nearby, and it is not difficult to cycle or walk to the High St of Hampton Hill from large parts of Hampton. The dispensary and retail / waiting areas of Hampton Hill Pharmacy have been re-arranged in recent years to accommodate a substantial increase in dispensing workload and patient footfall anticipated by the trend of an increasing number of patients from the Hampton area.

4.3.56 Furthermore, the application dramatically overstates the number of patients who will "*no longer have access to pharmaceutical services from the pharmacies they have been accustomed to using*" at more than 7,500. From the increase of approximately 4,600 in nominations since 7th August 2023 at Boots Station Approach, Boots Bear Road, Hampton Hill Pharmacy and Health On The Hill (which probably represent the vast majority of patients moving their nominations from the closed pharmacies), it would seem that the number of previous patients of the closed pharmacies who have needed prescription

medicines from local pharmacies during the 7 months since then has been closer to 4,500 or even 4,000.

4.3.57 In summary, the applicant's *point of view* that the relevant resident population do not have a reasonable choice of community pharmacy provider is evidently not correct.

4.3.57.1 The applicant seems to discount that the relevant resident population currently enjoy reasonable access to a local Boots pharmacy at Station Approach.

4.3.57.2 Furthermore, the available space within this pharmacy has been re-arranged and renovated in November 2023 to accommodate the expected increase in dispensing activity in particular.

4.3.57.3 The applicant inappropriately discounts the fact that a substantial proportion of the relevant resident population have for many years prior to late 2023, and since, voluntarily chosen not to use an available pharmacy in Priory Road Hampton or Tangley Park Hampton, and instead have chosen to use other pharmacies in the area. These include one in the north-western part of the relevant area (Boots at Bear Road) and two in the eastern part of Hampton (Hampton Hill Pharmacy and Health On The Hill).

4.3.57.4 The fact that patients of two pharmacies which closed in late 2023 have needed to use different local pharmacies since then, does not in itself mean that access and choice provided by the remaining local pharmacies is unreasonable or inadequate. It simply means that more residents of Hampton now use the remaining four main pharmacies in the local area than before.

4.3.57.5 The fact that 25-30% of the items prescribed by the two Hampton surgeries – Hampton Medical Centre and Broad Lane surgery – will be dispensed by pharmacies other than the four main local pharmacies above is not at all unusual, and does not demonstrate that residents of Hampton do not have reasonable choice or access to local pharmacies. No doubt a reasonable proportion of the relevant resident population routinely use pharmacies further afield from these surgeries such as Teddington Pharmacy, Maple Leaf Pharmacy, etc.

4.3.57.6 Many residents with protected characteristics who might well find it difficult to access any local pharmacy, no matter how distant from their home, have the choice between a number of pharmacies in the area for delivery of medicines to their homes, on most occasions currently for free.

4.3.57.7 It could well be concluded that the Pharmaceutical Needs Assessment of March 2023 did not identify any gaps in pharmaceutical service provision within the HWB because there was a degree of over-provision, and that despite closure of two Boots pharmacies in Hampton there is now no obvious under-provision.

4.3.58 The remaining pharmacies in this local area appear to provide reasonable choice and access for the relevant Hampton residents, and appear ready and able to provide the required and desired pharmaceutical services."

5 **Late Representations**

5.1 RICHMOND HEALTHWATCH

5.1.1 “My apologies from [sic] this delayed response from Healthwatch Richmond. This is because of planned leave and the dates of responses to our requests for information from the Dentistry, Optometry and Pharmacy Commissioning Hub – London.

5.1.2 We are aware that Richmond's Health & Wellbeing Board has submitted a response and, as a member of that Board, we support that response in its entirety.

5.1.3 Having read the appeal letter we also agree that it appears to fit our understanding of the facts of this matter.

5.1.4 This is all amply well evidenced.

5.1.5 I would like to draw your attention to 2 further matters of public record which should be considered within the resolution process.

5.1.6 **The Parliamentary debate on this issue on 26th July** which is captured here: https://hansard.parliament.uk/commons/2024-07-26/debates/1BE91F79-18D6-4293-929C-07C91B84AD8C/PharmacyProvisionHampton

5.1.7 The MP's account for the process and the Minister's response align with the appellants and HWBB's accounts and grounds of appeal.

5.1.8 I would also like to make you aware that we **formally requested information on this matter from the Market Entry** team directly prior to being advised of the appeal.

5.1.9 Our request for information is attached as is the response from the Market Entry Team.

5.1.10 Our requests largely align to the questions posed by both the appellant and the Health & Wellbeing Board.

5.1.11 The formal response to our requests however does not answer our questions and therefore does not discharge the statutory duty to respond to requests from a Healthwatch.

5.1.12 Instead it provides generic information about the market entry process, which I think typifies the issues here.

5.1.13 The Market Entry team have offered no evidence to address the numerous failings that have been identified: failing to inform the HWBB about the closures of Pharmacies or the subsequent applications which led to the publication of an inaccurate PNA and the issuing of a Supplementary Statement. Failing to provide the applicant with submissions (which specifically referenced the Supplementary Statement) and thereby preventing them from discovering that the need was no longer unforeseen.

5.1.14 Notably our requests for explanations as to why these failings occurred were met with generic information about how the process works rather than answers.

5.1.15 As a result, we are not in a position to contribute anything new to the process beyond noting:

5.1.15.1our support for the appeal,

5.1.15.2our support of the Health & Wellbeing Board's response."

5.1.16 [Copy letters:

5.1.16.1Richmond Healthwatch to The Commissioner dated 16 July 2024 and

5.1.16.2The Commissioner to Richmond Healthwatch dated 30 July 2024

5.1.17 Appendix C available for Committee]

6 **Additional Comments**

After reviewing the appeal and the paperwork provided by the Commissioner, NHS Resolution applied its discretion under Schedule 3, Part 3, paragraph 7 and allowed the Applicant, to make comments on original representations which were made to the Commissioner (which the Commissioner omitted to circulate to the Applicant) and on the Supplementary Statement issued in December 2023.

PHARMACY SALES & CONSULTANCY ON BEHALF OF THE APPLICANT

6.1 "Many thanks for your email with various attachments. Please accept this short response on behalf of our client.

6.2 It is clear from the representations submitted by Richmond Healthwatch and the Health and Wellbeing Board (including the supplementary statement) that there is widespread support for a pharmacy at the location identified by our client. The only objections raised were by a local pharmacy contractor who clearly has a commercial interest in seeking to prevent the opening of a new pharmacy. Those bodies who are in a position to be entirely objective recognise that a clear gap in the provision of pharmaceutical services exists.

6.3 One of the key matters for the Primary Care Appeals Committee to consider in this case is whether the publication of the supplementary statement identifying a gap automatically required the ICB to refuse an application offering unforeseen benefits. It was the ICB's opinion that because a 'current need' had been identified, it was not able to approve an application submitted under Regulation 18.

6.4 Our client's view is that the refusal of an application that would meet an identified need in these circumstances defies common sense. It is essentially a matter of timing.

6.5 We believe that the ICB could have used the discretion available to it to consider the position in respect of the PNA as it was on the date the application was submitted. If it had done so we believe it would have been able to take the information provided by the HWB and Healthwatch as being evidence that there was a clear need for a pharmacy at the proposed location, and it could have granted our client's application on the basis the need was 'unforeseen' at the date the ICB received the application.

6.6 Due to process failings by NHS England, our client was not given the opportunity to respond to these representations prior to the application being determined by the ICB. Had our client been able to do so, it would have pointed out these points and the ICB may have made a different decision.

6.7 We have no additional comments to make at this time."

7 **Observations**

7.1 PHARMACY SALES & CONSULTANCY ON BEHALF OF THE APPLICANT

7.1.1 “Thank you for your letter dated 21st August enclosing third party representations in respect of the above application.

7.1.2 We continue to act for VR Pharma Limited and wish to make the following final observations.

7.1.3 HWB representations – 070824

7.1.4 We note that the HWB have made several submissions since the initial application was submitted, including their response to our client’s appeal, which vociferously support our client’s application.

7.1.5 It is relevant that, in raising concerns about failings in the process and delays in notification, the HWB confirm that they did not see our client’s application until after the supplementary statement had been published. They also raise the same concerns our client has raised about the failure of NHS England to take a flexible approach when a supplementary statement is published after an Unforeseen Benefits application has already been submitted.

7.1.6 Most importantly, the HWB feel very strongly that there is a need for a pharmacy to open at the proposed location and they have provided evidence throughout their submissions that this is the case.

7.1.7 Healthwatch Richmond – email dated 20th August

7.1.8 We note that Healthwatch, another entirely objective consultee, fully supports the position of the HWB in this matter, and therefore fully supports our client’s application.

7.1.9 The points they raise are made clearly and articulately so we have nothing further to add.

7.1.10 DMB – Letter dated 15th August

7.1.11 NHS England confirm the comments made by our client that we were not provided with copies of third-party representations prior to the application being determined.

7.1.12 Whilst we accept that the ‘clock cannot be turned back’, this failing in process is relevant in that our client was not made aware of some of the issues raised by third parties until after the application had been determined. Had the correct processes been followed, our client would have had the opportunity to put its case to NHS England that it was able to disregard the supplementary statement. It would also have had the option to consider taking a different approach such as submitting a new application to meet ‘Current Needs’.

7.1.13 NHS England state “*Whilst the PSRC can determine to use a previous PNA, with agreement of the applicant and interested parties, this was not the case with this application as it was a supplementary statement that was issued*”. We respectfully disagree with the ICB on this matter as we have discussed previously. In our opinion there is no reason why the ICB cannot determine an application by reference to a version of the PNA prior to the publication of a supplementary statement in exactly the same way it can determine an application by reference to a previous PNA, where it seems reasonable to do so.

7.1.14 In this case it does appear perverse, as stated by the HWB and Healthwatch Richmond, that an application should be refused when it would deliver precisely the benefits identified by the HWB as constituting a ‘current need’.

7.1.15 The Primary Care Appeals committee will no doubt form a view on this matter.

7.1.16 Letter from Temple Bright – dated 15th August

7.1.17 **Procedural Error**

7.1.18 Whilst not directly relevant to the committee's decision, we have addressed this matter previously and NHS England have confirmed that our client did not receive copies of third-party comments.

7.1.19 **Relevant PNA**

7.1.20 We have addressed this matter earlier in this letter and in previous correspondence, so we have nothing more to add on this point.

7.1.21 In respect of the objector's second point, once it became aware of the publication of the supplementary statement (when notified of the ICB decision to refuse the application) our client did submit a fresh application under Regulation 13 for this site, and that application is currently out for consultation. That application was submitted without prejudice to the Regulation 18 application (and therefore this appeal), which our client maintains should have been approved by the ICB.

7.1.22 It remains our client's position that the Primary Care Appeal committee is in a position to grant this Unforseen Benefits application for the reasons provided previously and within this letter. This would be in the best interests of patients because it is inevitable, unfortunately, that Mr Wardle's client, who is the sole objector to our client's application, will seek to further frustrate plans to open the pharmacy by objecting to the new Regulation 13 application and lodging an appeal against any decision to grant the application, resulting in further delays.

7.1.23 The comments made by the HWB and Healthwatch Richmond make it clear that the delays in this process have been very damaging to patients and that there is an urgent need for a pharmacy to open at the proposed location. We would urge the committee to be mindful of this when it determines this appeal to avoid the risk of further unnecessary delays to the re-provision of pharmaceutical services in Hampton.

7.1.24 **Comments on the substantive application**

7.1.25 Our client explained within its application why it believed that the requirements of Regulation 18 had been met. We respond a little later to the comments submitted by Japotheca Limited and deal first with those made by Mr Wardle of Temple Bright.

7.1.26 Our client is aware of the relevant regulatory test and has not sought to argue that the only reason for granting the application is the closure of two Boots pharmacies. It is clear that there is significant evidence, not least from the comments made by the HWB and Healthwatch Richmond, that granting the application would secure significant benefits.

7.1.27 The purpose of submitting information regarding the number of prescriptions dispensed by the closed pharmacies is that it highlights the extent to which pharmaceutical services were historically provided in the area and are no longer available. There has been no claim made that patients live in a "sealed off area" but the regulations consider whether patients have reasonable choice, and we submit that the 'reasonableness test' is a key consideration in this case.

7.1.28 To consider an extreme example, if there was only one pharmacy in England, all patients in England would access that pharmacy as they would have no alternative. That would not be evidence that the choice they had was 'reasonable'. It is not sufficient to argue that, just because patients are receiving pharmaceutical services from *somewhere* following the closure of the pharmacies they have been accustomed to accessing, they have reasonable choice. In this case we believe there is clear evidence that the choice is not reasonable and that they are accessing services from other pharmacies because they have no choice other than to do so.

7.1.29 In terms of the nature of the Hampton area, our client maintains its position that Hampton is very different in character from the other areas listed by the objector. Whilst clearly the concept of neighbourhoods no longer exists in a regulatory sense, it still remains the case that neighbourhoods, in common parlance, have relevance in respect to how patients go about their daily lives. Just because *some* patients *can* access other areas on occasion, such as Hampton Hill, this is not evidence that it is reasonable for them to do so when they require pharmaceutical services.

7.1.30 The objector makes reference to the number of pharmacies within a given radius. The committee will find this to be of little help as distances in a straight line clearly do not reflect how people actually travel between two locations. Mr Wardle goes on to discuss the route to Boots at 3 Station Road. Whilst the journey may not in itself render that pharmacy inaccessible for *some* patients, those who are less mobile will clearly find the distance to be significant and, as discussed in our client's application, this pharmacy suffers from significant waiting times and inadequate premises.

7.1.31 In respect of parking at Boots in Station Road, we have visited this location on more than one occasion and found parking near this pharmacy to be very difficult. This may well be a function of these homes having higher than average car ownership resulting in very few spaces being available for people who wish to access the pharmacy.

7.1.32 Whilst it may be the case that there is a bus that stops near the proposed location, it is also the case that the proposed location, which has a range of amenities including a Sainsbury's supermarket, provides all the amenities many Hampton residents require when going about their daily lives. In our client's opinion it is not reasonable for patients to have to make an otherwise unnecessary bus journey which will incur costs and take time simply to access pharmaceutical services.

7.1.33 Our client maintains its position that Bear Road in Hanworth is not a location that people resident in Hampton would have reason to travel to. The 'evidence' supplied by the objector in respect of which pharmacies now dispense prescriptions following the closure of two other Boots stores is not evidence that any of these patients actually attend 107 Bear Road in person.

7.1.34 Boots operate an extensive delivery network and we would suggest it is far more likely that the additional prescriptions this pharmacy dispenses are via deliveries rather than patients attending in person. In terms of the 'car park' referred to by the objector, this is actually a residents' only car park. As discussed in our client's application there are only 5 parking spaces serving the entire Bear Road parade. As a consequence there are very rarely parking spaces available in our experience.

7.1.35 **Comments from Japotheca Limited - 8th March**

7.1.36 Despite Mr Wardle's comments about neighbourhoods, we note that Mr Cox starts his letter by seeking to define a 'neighbourhood' with boundaries that

encompass several different pharmacies. In our opinion these boundaries do not properly reflect how residents go about their lives.

7.1.37 It may well be the case that, over the years, some residents of Hampton have found that it is convenient to access pharmacies further afield. There may be a number of reasons for this such as where they work, or where their children go to school. However it is very clear that a significant number of Hampton residents chose to use one or both of the Boots pharmacies that recently closed.

7.1.38 Mr Cox refers to the delivery service but, of course, delivery services do not provide the full range of pharmaceutical services such as vaccinations or Pharmacy First consultations.

7.1.39 The objector seeks to make a case that there has been a trend of patients moving away from Hampton in recent years. Whilst this may or may not be the case, it is very clear from the data we have provided that prior to their closure, the two Boots pharmacies were very well used. There is clearly a significant cohort of patients who did not wish to (or were not able to) use pharmacies further afield.

7.1.40 It is hardly surprising that many of the nominations from the closing Boots store were transferred to other Boots pharmacies because it would be entirely expected for Boots to invite patients to transfer their nominations to their other branches as part of their closure plan.

7.1.41 Mr Cox goes into great detail to try to analyse dispensing patterns but this does not diminish the fact in any way that two pharmacies, which served a significant population, have closed and patients have suffered as a result. It is not clear to us how the data provided supports the objector's case.

7.1.42 In conclusion, therefore, it remains our client's position that the requirements for an Unforeseen Benefits application have been met and its application should be approved."

8 **Consideration**

8.1 The Pharmacy Appeals Committee ("the Committee"), appointed by NHS Resolution, had before it the papers considered by the Commissioner, together with a plan of the area showing existing pharmacies and doctors' surgeries and the location of the proposed pharmacy.

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

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

8.4 The Commissioner has, in its representations, acknowledged "*that the 3rd party comments were not shared with the applicant or their adviser*" and that this was only discovered after they had made the determination, for which it apologised and said steps had been taken to ensure this does not happen again. The Committee noted that all parties have now had sight of the third party comments on the application and have also been provided with a copy of the Supplementary Statement which is relevant to this application and appeal.

8.5 The Committee had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations").

Regulation 31

8.6 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) NHS England 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).

8.7 The Applicant, in its application stated "*There is no other pharmacy in close proximity*." The Committee noted this was not disputed by the Commissioner in its decision or parties on appeal or in subsequent representations. The Committee was of the view that this criteria was not met as the Applicant was not providing pharmaceutical services in adjacent premises.

8.8 The Committee was therefore not required to refuse the application under the provisions of Regulation 31.

Regulation 18

8.9 The Committee noted that this was an application for "unforeseen benefits" and fell to be considered under the provisions of Regulation 18 which states:

"(1) If—

(a) NHS England receives a routine application and is required to determine whether it is satisfied that granting the application, or granting it in respect of some only of the services specified in it, would secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB; and

(b) the improvements or better access that would be secured were or was not included in the relevant pharmaceutical needs assessment in accordance with paragraph 4 of Schedule 1,

in determining whether it is satisfied as mentioned in section 129(2A) of the 2006 Act (regulations as to pharmaceutical services), NHS England must have regard to the matters set out in paragraph (2).

(2) Those matters are—

(a) whether it is satisfied that granting the application would cause significant detriment to—

(i) proper planning in respect of the provision of pharmaceutical services in the area of the relevant HWB, or

(ii) the arrangements NHS England has in place for the provision of pharmaceutical services in that area;

(b) whether, notwithstanding that the improvements or better access were not included in the relevant pharmaceutical needs assessment, it is satisfied that, having regard in particular to the desirability of—

(i) there being a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB (taking into account also NHS England's duties under sections 13I and 13P of the 2006 Act (duty as to patient choice and duty as respects variation in provision of health services)),

(ii) people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that, in the area of the relevant HWB, are difficult for them to access (taking into account also NHS England's duties under section 13G of the 2006 Act (duty as to reducing inequalities)), or

(iii) there being innovative approaches taken with regard to the delivery of pharmaceutical services (taking into account also NHS England's duties under section 13K of the 2006 Act (duty to promote innovation)),

granting the application would confer significant benefits on persons in the area of the relevant HWB which were not foreseen when the relevant pharmaceutical needs assessment was published;

(c) whether it is satisfied that it would be desirable to consider, at the same time as the applicant's application, applications from other persons offering to secure the improvements or better access that the applicant is offering to secure;

(d) whether it is satisfied that another application offering to secure the improvements or better access has been submitted to it, and it would be desirable to consider, at the same time as the applicant's application, that other application;

(e) whether it is satisfied that an appeal relating to another application offering to secure the improvements or better access is pending, and it would be desirable to await the outcome of that appeal before considering the applicant's application;

(f) whether the application needs to be deferred or refused by virtue of any provision of Part 5 to 7.

(g) whether it is satisfied that the application presupposes that a gap in pharmaceutical services provision has been or is to be created—

(i) by the removal of chemist premises from a pharmaceutical list as a consequence of the grant of a consolidation application, and

(ii) since the last revision of the relevant HWB's pharmaceutical needs assessment other than by way of a supplementary statement.

(3) NHS England need only consider whether it is satisfied in accordance with paragraphs (2)(c) to (e) if it has reached at least a preliminary view (although this may change) that it is satisfied in accordance with paragraph (2)(b)."

8.10 The Committee noted that the Commissioner, in its decision, had refused the application:

8.10.1 "… *the subsequent Supplementary statement has indicated a gap in services, so is now included in the PNA. At the point of considering this application the supplementary statement was issued indicating a gap in service, therefore the application for an unforeseen benefit cannot be considered*.

8.10.2 *Therefore, the application would not need to be assessed in accordance with the regulations under 18(2)*."

8.11 The Committee noted that the Applicant stated in its appeal that:

8.11.1 "*Our client's application under regulation 18 was submitted in November 2023. At that time the PNA had not identified any 'gaps in provision' (as discussed in Schedule 1 to the Regulations), so an 'unforeseen benefits' application was appropriate*. ……

8.11.2 *Our client was not aware that this supplementary statement was published and was not notified of this by the ICB, despite the fact it was material to our client's application. Furthermore, as our client was not provided with copies of the representations made within the first 45 days, it only became aware of this information when the decision was published*.

8.11.3 *The effect of the publication of the supplementary statement was to amend the PNA to reflect an identified 'current need' at the site proposed by our client*."

8.12 The Committee was mindful of Regulation 22 which considers which PNA should be considered when an application is made in the same period that a new PNA is published.

8.13 The Committee noted that certain parties have indicated that the Commissioner has discretion to determine the application against the PNA as it was at the time the Applicant submitted its application. The Applicant specifically refers to the Regulations as providing an ability to determine an application "*by reference to a 'previous PNA'*". The Committee noted that Regulation 22 refers to the ability to determine an application on the basis of an earlier PNA if that is the only way to determine the application justly, which it considered to be materially similar to what the Applicant has stated. However, the Committee was of the view that the reference to an earlier PNA in Regulation 22 is a reference to a PNA published in accordance with Regulation 6(1) and is not a reference to the form of a PNA that existed immediately before a supplementary statement was published. This is due to the operation of a supplementary statement as forming a part of the existing PNA. The Committee therefore considered that the current PNA in its "pre-supplementary statement" form is not an "earlier PNA" to which Regulation 22 refers. Regulation 6(3) makes clear that making a supplementary statement that forms part of the existing PNA is not a "revised assessment". The Committee also considered that to read "earlier PNA" in Regulation 22 as including the form of a "pre-supplementary statement" would mean the reference in Regulation 6(1) to "previous publication" of a PNA would also be read as including the form of a "pre-supplementary statement". That clearly undermines the intent of Regulation 6(1) to ensure a new PNA is published within three years of the "previous publication" of a PNA.

8.14 The Committee also considered that it would be perverse to ignore the most recent assessment of need that specifically takes into account the closure of the Boots

pharmacy at Tangley Park Road, Hampton, Middlesex TW12 3YH. That assessment of need is set out in the current PNA as updated by the supplementary statement.

8.15 The Richmond Health and Wellbeing Board have, in their representations, raised a number of concerns regarding the processing of the application by the Commissioner. The Committee considered that procedural issues may affect the determination of the Commissioner and consequently whether or not a determination is appealed. The Committee also noted that, if considered appropriate, it has the ability to redetermine an application which may well remedy any procedural error of the Commissioner. The Committee would therefore consider, in the course of considering the appeal, whether any procedural error with respect to the original decision of the Commissioner is relevant to the Committee's decision on the appeal.

8.16 The Health and Wellbeing Board, in reference to the Supplementary Statement state:

8.16.1 "*Our supplementary statement advised that 'the closure of these two pharmacies would create a gap in the provision of pharmaceutical services in that local area' and this application was denied on the premise that it neglected to identify this document, published 1 month after their application, even though they both seek to address the deficit that they were trying to complete. In essence, this application to improve provision was denied due to a supplementary statement advising that increased provision was needed*. ……

8.16.2 *The legislation is complex and offers no flexibility where applications are miscategorised. We request that Section 18 of the legislation allows considerations for applications under 'unforeseen benefit' to continue to be processed even if a supplementary statement is issued*."

8.17 The Commissioner, in its representations, state:

8.17.1 "*The PSRC have determined that as the supplementary statement has been issued there is now a current need in this area and therefore an unforeseen benefits application cannot be considered*."

8.18 Temple Bright LLP representing Japotheca Ltd, in its representations state:

8.18.1 "….*disregarding a supplementary statement when determining an application would defeat the purpose of the Regulations, since it would result in a decision being made which was not based on the most up-to-date information*. …….

8.18.2 *It was entirely open for the applicant to submit a further application if it considered that this was supported by the supplementary statement*."

8.19 Richmond Healthwatch have, in addition to Richmond Health and Wellbeing Board, also raised a number of concerns regarding the processing of the application by the Commissioner. The same comments on this as stated above in relation to the Health and Wellbeing Board apply equally here.

8.20 Richmond Healthwatch, in its late representations, state:

8.20.1 "*our support for the appeal*,

8.20.2 *our support of the Health & Wellbeing Board's response*."

8.21 Pharmacy Sales Consultancy, representing the Applicant, in its observations state:

8.21.1 "… *the HWB feel very strongly that there is a need for a pharmacy to open at the proposed location and they have provided evidence throughout their submissions that this is the case*. …….

8.21.2 *Healthwatch, another entirely objective consultee, fully supports the position of the HWB in this matter, and therefore fully supports our client's application*. ….

8.21.3 *it does appear perverse, as stated by the HWB and Healthwatch Richmond, that an application should be refused when it would deliver precisely the benefits identified by the HWB as constituting a 'current need' …..*

8.21.4 *our client did submit a fresh application under Regulation 13 for this site, and that application is currently out for consultation. That application was submitted without prejudice to the Regulation 18 application (and therefore this appeal), which our client maintains should have been approved by the ICB*."

8.22 The Committee is mindful of all of the above comments and in particular the comment from the Applicant's representative regarding:

8.22.1 "*the delays in this process have been very damaging to patients and that there is an urgent need for a pharmacy to open at the proposed location. We would urge the committee to be mindful of this when it determines this appeal to avoid the risk of further unnecessary delays to the re-provision of pharmaceutical services in Hampton*."

8.23 The Committee is mindful of the delays in processing this application but considered that the Regulations are clear in setting out how applications are to be processed on appeal. The Committee must therefore follow such procedures in order to reach a fair and just determination.

8.24 The Committee noted that the Commissioner had relied on the publishing of the new supplementary statement in December 2023 to refuse the application prior to any consideration of Regulation 18(2) on the basis that the new supplementary statement to the current PNA applied.

8.25 Having made its assessment of the relevant PNA to which the application should be assessed, the Committee considered the application in light of the wording of Regulation 18.

8.26 The Committee considered that Regulation 18(1)(a) was satisfied in that it was required to determine whether it was satisfied that granting the application, or granting it in respect of some only of the services specified in it, would secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB.

8.27 The Committee considered whether Regulation 18(1)(b) was satisfied, i.e. whether the improvements or better access that would be secured if the application was granted were or was included in the PNA in accordance with paragraph 4 of Schedule 1 of the Regulations.

8.28 Paragraph 4 of Schedule 1 requires the PNA to include: "a *statement of the pharmaceutical services that the HWB had identified (if it has) as services that are not provided in the area of the HWB but which the HWB is satisfied (a)* ***would*** *if they were provided….secure improvements or better access, to pharmaceutical services… (b)* ***would*** *if in specified future circumstances they were provided…secure future improvements or better access to pharmaceutical services…"* (emphasis added).

8.29 The Committee considered the PNA prepared by Richmond Health and Wellbeing Board, conscious that the document provides an analysis of the situation as it was assessed at the date of publication. The Committee noted that, under Regulation 6(2), the body responsible for the PNA must make a revised assessment as soon as reasonably practicable, after identifying changes that have occurred that are relevant to the granting of applications, unless to do so appears to be a disproportionate response to those changes. Where it appears disproportionate, the responsible body

may, but is not obliged to, issue a supplementary statement under Regulation 6(3). As noted above, such a statement then forms part of the PNA. Following its consideration of Regulation 22, the Committee reviewed the PNA dated August 2023 as updated by the supplementary statement issued in December 2023.

8.30 The Committee noted that in response to the closure of:

8.30.1 Boots, 29 Tangley Park Rd, Hampton TW12 3YH- Effective on 21st October 2023 and

8.30.2 Boots, 28B Priory Rd, Hampton TW12 2NT- Effective on 11th November 2023,

the supplementary statement issued in December 2023 concluded:

8.30.3 "*The health and wellbeing board considers that the closure of these two pharmacies would create a gap in the provision of pharmaceutical services in that local area.*

8.30.4 *Supplementary Statement issued by the Richmond Health and Wellbeing Board December 2023*."

8.31 The Committee considered that it was appropriate for NHS Resolution to enable the parties to make comments on the supplementary statement dated December 2023, as it forms part of the PNA.

8.32 The Committee noted that the wording in the supplementary statement is very specific, it said the closures "*would*" create a gap in service provision. However, the Committee also noted that the supplementary statement did not overtly state that the closures have created a current or future need. The use of the words "*would create a gap*" after the closures have already taken place presents a slight oddity in the linguistic construction of the situation and the potential for ambiguity as to its meaning.

8.33 The Committee therefore considered if, on one hand, this indicated a level of certainty in relation to a gap that could potentially be filled by an application submitted pursuant to Regulations 13, 15 or 17 (and so prevent the application of Regulation 18(1)(b) to the application) or if, on the other hand, the level of ambiguity was such as to enable the Committee to determine that the improvements or better access that the Applicant is seeking to secure were not or was not included in the PNA.

8.34 The Committee considered that "would" was being used in a conditional sense, rather than as a hypothetical, i.e. a gap would be created when a certain event occurred. Usually this language is used when looking into the future. The oddity here was that the relevant event was the closures of the pharmacies that were indicated to have already happened when the supplementary statement was published, i.e. not in the future. One would usually have expected, in this situation, the supplementary statement to say "has been" created rather than "would" be created.

8.35 The Committee was not privy to the exact reasoning as to why the supplementary statement used this language, however, regardless of why, the issue in terms of Regulation 18 (1)(b) was as to the certainty of this language. The Committee considered that the statement must mean that where the specified circumstances arise, then the outcome will definitely occur. The Committee thus considered that the word "would" provided an absolute certainty as to the outcome, and that a gap would be created. The ambiguity in the statement was not, therefore, whether a gap would be created, but when. The Committee also noted that none of the parties have stated that the reason why Regulation 18(1)(b) should apply in this situation was due to a level of uncertainty within the supplementary statement. Consequently, the Committee considered that the word "would" does not create a sufficient level of uncertainty so as to conclude that a gap had not been identified in the PNA.

8.36 The Committee considered that, despite the temporal uncertainty, it was clear that the gap could potentially be filled by an application submitted pursuant to Regulations 13, 15 or 17 and so prevent the application of Regulation 18(1)(b) to the application, even if it was not entirely clear to the Committee which one it was. The Committee noted that parties to this appeal had not been expected to provide comments on which type of application (Regulation 13, 15 or 17) could fill the gap but the Committee concluded it was not necessary in this determination to do so.

8.37 The Committee considered that any potential procedural issues raised by the parties had been remedied by the opportunity to provide representations and observations on the appeal.

8.38 The Committee considered that, in this determination, it was required to determine if the improvements or better access were not or was not in the PNA. For the reasons given above, the Committee determined that the improvements or better access were or was included in the PNA and the Committee therefore had to determine that Regulation 18(1)(b) was not satisfied.

Other considerations

8.39 Having determined that Regulation 18(1)(b) was not satisfied the Committee did not need to have regard to the matters in Regulation 18(2) in order to reach its determination of the appeal.

8.40 Pursuant to paragraph 9(4)(a) of Schedule 3 to the Regulations, the Committee may:

8.40.1 confirm the Commissioner's decision;

8.40.2 substitute for that decision, any decision that the Commissioner could have taken when it took that decision

8.40.3 quash the Commissioner's decision and remit the matter to the Commissioner for it to redetermine the decision, subject to such directions as the Secretary of State considers appropriate.

9 DECISION

9.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, confirms the decision of the Commissioner, therefore the application is refused.

Case Manager
Primary Care Appeals