

13 February 2018

**REF: SHA/21017**

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**APPEAL AGAINST NORTH (YORKSHIRE & HUMBER) AREA TEAM, NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY ANR LOCUMS LIMITED FOR A RELOCATION THAT DOES NOT RESULT IN A SIGNIFICANT CHANGE TO PHARMACEUTICAL SERVICES PROVISION UNDER REGULATION 24 FROM THE OLD SCHOOL BUILDING, BIERLEY LANE, BRADFORD BD4 6AA TO 73A HAMBLEDON AVENUE, BIERLEY, BRADFORD BD4 6AX**

## 1 Outcome

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

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**APPEAL AGAINST NORTH (YORKSHIRE & HUMBER) AREA TEAM, NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY ANR LOCUMS LIMITED (BIERLEY PHARMACY) FOR A RELOCATION THAT DOES NOT RESULT IN A SIGNIFICANT CHANGE TO PHARMACEUTICAL SERVICES PROVISION UNDER REGULATION 24 FROM THE OLD SCHOOL BUILDING, BIERLEY LANE, BRADFORD BD4 6AA TO 73A HAMBLEDON AVENUE, BIERLEY, BRADFORD BD4 6AX**

## 1 The Application

By application dated 29 May 2018, ANR Locums Ltd (Bierley pharmacy) ("the Applicant") applied to NHS Commissioning Board (NHS England) for a relocation that does not result in a significant change to pharmaceutical services provision under Regulation 24 from The Old School Building, Bierley Lane, Bradford BD4 6AA to 73a Hambledon Avenue, Bierley, Bradford BD4 6AX. In support of the application it was stated:

- 1.1 In response to why the application should not be refused pursuant to Regulation 31 the applicant stated: "n/a".
- 1.2 The applicant stated that the new pharmacy is located around other amenities such as a local convenience store and post office. It is at the heart of the Bierley community. A lot of houses are located at walking distance from the new location; hence it is more accessible on foot as well as car. A lot of people living in Bierley regularly use the convenience store and post office. At the same time, they can also use the pharmacy. There is also a very busy cash point located at the post office, again making it a lot easier for customers to use the other services.
- 1.3 At present Bierley pharmacy is not at a prime location, it does not present as a typical shop front and a lot of people do not walk to it. It is very isolated and sometimes not even noticed by residents of Bierley despite it being on a main road.
- 1.4 The pharmacy will still be in the same neighbourhood and the major road (A6177) separating Bierley from the other neighbouring areas will not be required to be crossed over.
- 1.5 The distance between Bierley pharmacy and the new premises is 0.2 miles. The walk should take no more than 5 minutes. Both the Google maps detailing the driving times and walking times are provided. In fact by relocating, the pharmacy next to the post office would make it more convenient for residents making it a one stop shop.

- 1.6 There is no question of detriment. The applicant would like to outline the benefits for the residents of Bierley after this relocation:
- 1.6.1 One stop shop for Bierley residents.
  - 1.6.2 Cash point, post office, convenience store and a pharmacy all based at one place.
  - 1.6.3 Extremely large number of elderly residents access the post office and convenience store having a pharmacy next door would make it more convenient for them.
- 1.7 The applicant indicated that the services to be provided at the new premises will be the same as those at the existing premises.
- 1.8 The applicant indicated that there would be no interruption in service provision.
- The applicant intends to provide the following services:
- 1.8.1 Essential services
  - 1.8.2 Clinical governance
  - 1.8.3 Appliances – Part IX of the Drug Tariff
  - 1.8.4 Advanced and Enhanced services as specified on the application form.
- 1.9 The applicant's proposed core opening hours are:
- 1.9.1 Mon to Fri 9.00am to 5.00pm
  - 1.9.2 Sat -
  - 1.9.3 Sun -
- 1.10 The applicant's proposed total opening hours are:
- 1.10.1 Mon to Fri 9.00am to 5.45pm
  - 1.10.2 Sat 9.00am – 12 noon
  - 1.10.3 Sun -

## 2 The Decision

NHS England considered and decided to refuse the application. A covering letter dated 8 October 2108 included a letter from NHS England dated 5 October 2018 which states:

- 2.1 The Pharmaceutical Services Regulations Committee of NHS England (North –Yorkshire & Humber) has considered the above application and is writing to confirm that it has been refused.

- 2.2 The Panel considered the application, comments from interested parties and report to the Panel in relation to this application.
- 2.3 The Panel was satisfied that Regulation 31(2)(a) does not apply as there is no pharmacy at the same or adjacent premises to the proposed site, and Regulation 31(2)(b) does not apply as there is no suggestion that any of the nearby pharmacies are in any way connected with this application or that it would be reasonable to treat the services offered in this application as being part of the same services being offered at the same site. They were also satisfied that Regulation 24(3)(c) does not apply as the applicant has not relocated within the last 12 months.
- 2.4 The Panel determined to refuse this application under Regulation 24 as they was not satisfied that Regulation 24 had been met as they determined that more information was required on the application form. The Panel agreed that the applicant had not detailed any disadvantages that current patient groups were experiencing and that the applicant had not identified any locality or patient groups that would benefit from the application.

### 3 The Appeal

In a letter dated 6 November 2018 addressed to NHS Resolution, Charles Russell Speechlys LLP appealed on behalf of the applicant against the NHS England's decision. The grounds of appeal are:

#### Regulation 24(1)(a)

- 3.1 As NHS Resolution will be aware, this application falls to be determined pursuant to regulation 24 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. Regulation 24 provides (quoted).
- 3.2 NHS Resolution has produced guidance on its approach to a regulation 24 application. The applicant believes that the most relevant extracts of the guidance for the purposes of this submission are:

“Specific patient groups

- 3.3 *Patient groups might be identified in relation to:*

3.3.1 *local GP practices.*

3.3.2 *methods of travel (on foot, by car, or public transport).*

3.3.3 *types of pharmaceutical services accessed (dispensing/collection and delivery).*

3.3.4 *the location of the patient group's starting point of the journey to the pharmacy.*

3.3.5 *demography.*

3.3.6 *care homes; and/or.*

3.3.7 *areas of deprivation.*

- 3.3.8 *Patient groups will likely overlap. This can be an issue where the applicant identifies patient groups in one way and parties providing representations identifying patient groups in other ways ...*

Considering patient groups together

- 3.3.9 *The overlap in the membership of patient groups means that consideration of each patient group individually may result in a large amount of duplication. Previous determinations have sought to reduce this duplication while ensuring that all comments relating to patient groups are taken into account."*
- 3.4 In relation to defining patient groups, the Authority is invited to consider the judgment of Mr Justice Langstaff in the case of R (on the application of Community Pharmacies (UK) Limited v The National Health Service Litigation Authority [2016] EWHC 1595 (QB)
- 3.5 Mr Justice Langstaff provided guidance on the application of regulation 24 and, in particular, on the interpretation of "patient groups" for the purposes of regulation 24.
- 3.6 He stated relevantly:
- 3.6.1 *"31. Adopting the approach I have set out, the word "patient groups" does not refer to groups acting as such: going to a pharmacist for a prescription is not in itself a group activity. Regulation 24(1 )(a) is concerned with the question of accessibility. As was pointed out at one stage for the Claimant, a group defined by their being red-haired would not be a relevant group for the purposes of defining access, since colour of hair has nothing relevant to offer in relation to that question. So, too, is this true of the issue of the nature of their clinical conditions, which are in general irrelevant to accessibility - the only exception might be those conditions which may of their very nature have a real relevance in relation to assessing the accessibility of premises. Those, for instance, who suffer from a COPD, or spinal disc herniation, or palsy may be affected by distance, incline, unevenness of ground, or the need to negotiate stairs rather than gentle slopes; but to group those who require analgesia, or anti-depressants, or steroids, or are in dental pain as separate groups would make no sense where the purposes of grouping is to aid an assessment of accessibility.*
- 3.6.2 *32. If, then, in context, the purpose of grouping is to facilitate a decision as to the accessibility of the new premises, the starting point is considering what makes a relocated pharmacy less easy to go to physically, mentally or socially, and "groups" must have their identities determined with that in mind ...*
- 3.6.3 *33. So long as the NHSCB, or on appeal the FHSAU, bears in mind that the purpose of identifying the groups is to make a broad assessment of the question of accessibility, and that therefore to identify too many groups which are too small in number to assist with that process would risk over-focussing and losing sight of the whole broad picture, and provided the Board or Committee takes a practical and pragmatic view of the groupings that might assist it to a*

conclusion, by reference to which it may analyse the available evidence, it will not go far wrong.

3.6.4 34. *The guidance offered by the Department of Health itself, illustrated by a number of cases decided by the committees, suggests that "patient group" reflects the requirement for HWBs when developing their pharmaceutical needs assessments to "have regard to the demography of the area and different needs of people in their area who share a protected characteristic, for example, a large travellers' site, a large sheltered housing complex .. [and] those other characteristics such as age, sex and disability that form the basis of the public sector equality duty under the Equality Act 2010".*

3.6.5 *I regret I do not consider this guidance helpful, because the concept of protected characteristics – of which it must be remembered there are nine in the **Equality Act**, most if not all of which have very little to say about the accessibility of one location when compared to another - is not obviously related to accessibility, even if the Act is a starting point for deciding issues of equal treatment.*

3.6.6 *40... I would merely observe that in subsequent cases the FHSAU may wish to consider whether to identify the relevant patient groups at a preliminary stage, so that all interested parties to an appeal can then focus their energies on assessing whether any group would find the proposed location not only less accessible but significantly so."*

3.7 Having regard to the above, for the patient groups that are accustomed to accessing pharmaceutical services at the existing premises the proposed premises would not be significantly less accessible.

#### Patient groups

3.8 The applicant has used information from a number of sources in order to identify the patient groups that are accustomed to accessing pharmaceutical services at the existing premises.

3.9 The pharmacy conducted a survey of its walk-in patients at the end of October 2018. The survey was carried out by pharmacy staff asking all patients coming into the pharmacy a short questionnaire. 91 patients completed the survey, and the applicant believes that the results are a representative sample of the pharmacy's patients.

3.10 The applicant has also obtained published data from the Business Services Authority in relation to the surgeries from which the pharmacy's prescriptions originated in the most recent month published (July 2018), together with the pharmacy's PMR and the applicant's local knowledge.

3.11 Whilst there will inevitably be a significant overlap in any definition of the pharmacy's patient groups, because patients will form part of more than one group, these can be defined as follows:

#### Patients who access pharmaceutical services remotely

3.12 Approximately 80% of the pharmacy's patients access services remotely. For those patients, the prescriptions are collected from the patients' GP surgeries

or sent electronically, the medicine is assembled in the pharmacy, and the medication is delivered to the patient. Those patients do not access pharmaceutical services at the premises and so can be disregarded in relation to the assessment of regulation 24.

Patients who access pharmaceutical services after a visit to their GP

- 3.13 Patients who access pharmaceutical services from the existing premises after a visit to their GP will require access to dispensing services. They are unlikely to access other pharmaceutical services at that point or at least, if they do, that will not be their primary purpose for visiting the pharmacy.
- 3.14 The applicant has obtained details of all prescriptions dispensed by the pharmacy by reference to the GP surgery at which that patient is registered.
- 3.15 In July 2018 (the last month for which such data is publicly available), the pharmacy dispensed 3,990 items.
- 3.16 The prescriptions originated from the following practices (applying a *de minimis* of 1%):

<u>Name of Surgery</u>	<u>Percentage of items (%)</u>
Bowling Hall Medical Practice BD4 7SS	44
Rooley Lane Medical Centre	23
Tong Medical Practice	23
Windsor House Surgery	3

- 3.17 Very few of the pharmacy's patients actually visit the pharmacy straight after a visit to their GP, with only 4% of the pharmacy's walk-in patients coming to the pharmacy immediately after a visit to their GP during the survey period. The remainder access the pharmacy at other times.

Patients who access pharmaceutical services from home

- 3.18 The survey showed that almost two-thirds (64%) of the pharmacy's walk-in patients had come to the pharmacy from their homes.
- 3.19 Both the existing pharmacy premises and the proposed premises are located in the Bierley area of Bradford. The majority of the pharmacy's patients live in Bierley, with 88% of patients having a BD4 postcode (south east Bradford) and 69% having a BD4 6 postcode (Bierley).

Patients who access pharmaceutical services from elsewhere

- 3.20 Of the remaining patients who did not access the pharmacy from either their homes or the GP surgery, the survey showed that:
  - 3.20.1 two (2%) patients had come from the dentist with a prescription.
  - 3.20.2 four (4%) had come from the local shops.
  - 3.20.3 three (3%) had come from Asda.

- 3.20.4 nine (10%) had come from Bierley.
- 3.20.5 four (4%) had come from work.
- 3.20.6 one ( 1%) had come from school.
- 3.20.7 two (2%) had come from Leeds.
- 3.20.8 one (1%) was visiting a family member.
- 3.20.9 two (2%) did not specify their starting point.

#### Services accessed

- 3.21 Most of the pharmacy's patients visit the pharmacy in order to access dispensing services. That accounted for 86% of the pharmacy's patients during the survey period (and includes patients who also made an OTC purchase or accessed an additional service such as an MUR).
- 3.22 Out of a total of 91 patients surveyed, 4% were seeking advice, 3% purchased an OTC item and one patient (1%) had an MUR. 5 patients did not state their reason for visiting the pharmacy during the survey.
- 3.23 The pharmacy also provides some commissioned services, in particular, it provides an average of 20 MURs per month, 4 NMS per month and 2 supervised methadone patients per month. The pharmacy participates in the flu vaccination scheme, and provided 32 vaccinations in October 2018.

#### Method of transport

- 3.24 The majority of the pharmacy's patients (63%) drive to the pharmacy. Of the remainder, 36% walk, with one using the bus.

#### Demographic data

- 3.25 The applicant does not believe that there are any demographic or other factors which would assist the Authority in its primary purpose, being to consider the accessibility of the proposed premises.
- 3.26 However, by way of background information, the Authority should be aware that the Tong ward (which is the ward in which the existing and proposed premises are located) has a relatively young population (according to the 2011 census), with a mean age of 34.3 compared to 39.4 for England and Wales as a whole. In relation to age profile, only 10.9% of residents are aged 65 and over compared to 16.5% in England and Wales.
- 3.27 According to the 2011 census for the Tong ward, the health profile of local residents is broadly in line with the England and Wales averages.
- 3.28 Accessibility should therefore be considered having regard to the relative youth and average health of the local population.

#### Accessibility to the proposed premises

- 3.29 Having defined above the pharmacy's patient groups, the Authority must then consider whether, for those patient groups, the proposed premises would be

significantly less accessible. There will, of course, be significant overlaps in relation to accessibility for each patient group and there are some general principles in relation to access which will be applicable to each patient group. These include:

3.29.1 The distance between the existing and proposed premises is short-approximately 350 metres.

3.29.2 The terrain is flat.

3.29.3 The existing premises are set back from the road in an old school building, whereas the proposed premises would be co-located with the local convenience store (the Bierley Superstore) and Post Office.

3.29.4 There are no physical, social or mental barriers between the existing and proposed locations: both premises are within Bierley with identical housing types in the vicinity.

3.29.5 The local area (including the route between the existing and proposed premises) is predominantly residential in nature, with no busy roads to cross.

3.30 Taking each group in turn, the applicant comments as follows:

Patients who access pharmaceutical services remotely

3.31 The pharmacy's patients who access dispensing services remotely do not visit the pharmacy either to hand in a prescription or to receive their medication.

3.32 A prescription collection and medication delivery service will continue following the proposed relocation, so that this patient group will be entirely unaffected by the re location, and will certainly not find the proposed premises to be significantly less accessible.

Patients who access pharmaceutical services after a visit to their GP

3.33 For the patient group which consists of those accessing the pharmacy immediately after a visit to their GP, there is no material difference in distance of travel for the proposed premises compared to the existing premises.

3.34 The applicant has set out in the table below the comparative distances.

<u>Name of surgery</u>	<u>Distance to existing premises (m)</u>	<u>Distance to proposed premises (m)</u>
Bowling Hall Medical Practice	550	900
Rooley Lane Medical Centre BD4 7SS	550	900

Tong Medical Practice BD4 9QA	1,500	1,400
Windsor House Surgery LS27 9NB	9,900	9,800

- 3.35 Of the four patients who came into the pharmacy directly from their GP during the survey period, two came from Bowling Hall, one from Rooley Lane and one from Tong Medical Practice; three of those patients had travelled by car and one patient (who came from Tong Moor) had walked.
- 3.36 For those patients accessing pharmaceutical services from any surgery and by whatever means of transport, the proposed premises would therefore not be significantly less accessible: the maximum additional distance of travel would be 350 metres, which is not significant, particularly because those patients with a slightly longer journey were driving, whereas the patient who was travelling on foot would have a slightly shorter journey from their GP to the proposed site compared to the existing premises.

Patients who access pharmaceutical services from home

- 3.37 The survey conducted by the applicant indicated that almost two thirds of the pharmacy's patients accessed the pharmacy from home. As stated, the majority of patients live in Bierley.
- 3.38 Given the short distance between the existing and proposed premises and the fact that the proposed premises are within the local convenience store and Post Office, the proposed premises will not be significantly less accessible from patient homes compared to the existing premises.

Patients who access pharmaceutical services whilst present in the local area

- 3.39 To the extent that patients are accustomed to accessing the existing premises as part of their daily routine (for example whilst shopping or those who stated that they had come from "Bierley"), the proposed premises are within the local convenience store, so are likely to be more easily accessible for local shoppers.
- 3.40 The Asda Bradford Superstore (from which 3 patients had come prior to visiting the pharmacy) is located approximately 750 metres to the north of the existing premises and across the A6177. The route to the proposed premises from the Asda store is virtually identical, save that the proposed premises are a further 350m to the south. This will not present a barrier for patients who are already able to travel 750m from the Asda store to the existing premises and cross the A6177.
- 3.41 In relation to access from the dentist, there is no dental surgery in Bierley so that the distance from the proposed and existing locations to the nearest dentists is virtually identical. Both patients with a dental prescription had driven to the pharmacy.

- 3.42 Finally, regarding access from school, the proposed premises are 400m from the Newhall Park Primary School and the existing premises are 450m.
- 3.43 Even for those patients who are present in the vicinity of the existing premises the proposed premises would not be significantly less accessible for this patient group (being no more than an additional 350m journey in any event).

#### Services accessed

- 3.44 The applicant has already set out above how, for those patients who access dispensing services, the proposed premises would not be significantly less accessible.
- 3.45 In relation to patients who come into the pharmacy in order to obtain advice or to purchase OTC items, three quarters of those patients were travelling from home, with the remainder travelling from local shops or visiting a relative.
- 3.46 The same considerations will apply to accessibility for patients who access non-dispensing services as are set out above. Irrespective of which service patients access, the proposed premises would not be significantly less accessible.

#### Method of transport

- 3.47 For those patients travelling by foot, the proposed premises would not be significantly less accessible compared to the existing premises for the reasons given above. The local terrain is flat and easy to walk around, and the maximum additional distance that a patient may have to walk would be 350m with no busy roads to cross.
- 3.48 For those patients who currently drive, there is a parking bay outside the proposed premises, and free on street car parking on all local roads. For the single patient who came to the pharmacy and was travelling by bus, she was visiting her sister and came into the pharmacy for advice. All bus routes run along Bierley Lane, but, because of the location of the bus stops, the distance to the proposed location from the nearest bus stop is virtually identical to the existing premises and it is likely that a patient would alight from the same bus stop.

#### Demographic data

- 3.49 The applicant does not believe that there are any patient groups accustomed to accessing pharmaceutical services from the existing premises that could be defined by reference to demographic characteristics for whom the proposed premises would be significantly less accessible for the reasons given above.
- 3.50 In fact, demographic data suggests that the local population is relatively young, which would indicate a more mobile population which would not find a maximum additional journey of 350 metres a significant barrier to access.
- 3.51 For patients with reduced mobility, the proposed premises will be fully accessible, including with a ramp to the front entrance.

#### Regulation 24(1)(b) to (e)

- 3.52 In relation to the other matters contained within regulation 24, granting the application would not result in a significant change to the arrangements that are in place for the provision of pharmaceutical services in the HWB's area, because the move is to premises which are a relatively short distance from the existing premises and the pharmacy will remain in the Bierley area, serving the same patient groups and within the local convenience store and Post Office.
- 3.53 Similarly granting the applicant's application would not cause significant detriment to proper planning in respect of the provision of pharmaceutical services in the HWB's area. The applicant is not aware of any plans in relation to the provision of pharmaceutical services in the HWB's area to which significant detriment could be caused.
- 3.54 Finally, the applicant confirms that the same services will be provided at the proposed premises as are provided at the existing premises, and the provision of services will be uninterrupted (save for any such period as NHS England may, for good cause, allow).
- 3.55 For the reasons given above, the applicant invites the Authority to conclude that this application satisfies the requirements of regulation 24 and to grant it.

#### **4 Summary of Representations**

This is a summary of representations received on the appeal.

##### **Boots UK Ltd**

- 4.1 Boots agree with NHS England and their reasoning to refuse the application. Boots note that the appellant has now provided some information on the patient groups and ask NHS Resolution consider as to whether this satisfies the criteria for such an application.
- 4.2 Boots understand that a questionnaire was conducted and challenge as to whether this is considered to be taken from a representative sample and for a reasonable length of time? It is unclear how long the questionnaire ran for.

##### **Lloyds Pharmacy Ltd**

- 4.3 Lloyds would be grateful if the Appeals Committee would consider all relevant matters with regards to Regulation 24 as part of the determination of the appeal.

##### **NHS England**

- 4.4 NHS England refused the application for a no significant change relocation from the Old School Building, Bierley Lane, Bradford, BD4 6AA to 73 Hambledon Avenue, Bierley, Bradford, BD4 6AX on the grounds that the applicant had not demonstrated that they would comply with Regulation 24 (1) (a) of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.

- 4.5 NHS England was satisfied that Regulation 31(2) (a) did not apply as there is no pharmacy at the same or adjacent premises to the proposed site, and Regulation 31(2)(b) does not apply as there is no suggestion that any of the nearby pharmacies are in any way connected with this application or that it would be reasonable to treat the services offered in this application as being part of the same services being offered at the same site. They were also satisfied that Regulation 24(3)(c) does not apply as the applicant has not relocated within the last 12 months.
- 4.6 NHS England was not satisfied that the applicant had met Regulation 24 (1) (a) due to the limited information provided on the application form. NHS England agreed at the time of consideration that the applicant had not detailed any disadvantages that current patient groups were experiencing and that the applicant had not identified any locality or patient groups that would benefit from the application.
- 4.7 NHS England notes in the letter from Charles Russell Speechlys dated 6 November 2018, the appellant conducted a survey of its walk-in patients at the end of October 2018.
- 4.8 NHS England would like the Appeal Unit to note that this application was dated 29 May 2018, the application was considered in September 2018 and the decision letter to the applicant was dated 5 October 2018. The survey was conducted after all the above and NHS England would like it to be noted that that the information regarding the survey was not available at the time the committee considered the application. NHS England would have taken into account the information/results that the survey provided had it been included in the original application form.
- 4.9 Based on the original application and information provided at the time NHS England is still satisfied that the correct decision was reached in relation to this application, and would therefore ask that the appeal be dismissed.

### **Community Pharmacy West Yorkshire**

- 4.10 Community Pharmacy West Yorkshire members still feel that their comments made in their letter to NHS England on 2 August 2018 are valid. These were as follows:
- 4.10.1 *Community Pharmacy West Yorkshire members would like to make the following observations:*
- 4.10.1.1 *Paragraph 1 of Schedule 2 has been met.*
- 4.10.1.2 *This application does not appear to breach regulation 31.*
- 4.10.2 *And the following comments:*
- 4.10.3 With regards Regulation 24(1):
- 4.10.3.1 *Members did not believe that this relocation would significantly alter the accessibility of pharmaceutical services.*
- 4.10.3.2 *The proposed relocation will result in the pharmacy being situated within a housing estate alongside a post office and*

*convenience store with parking located outside. The journey between the 2 sites is less than 500 metres, through a well-lit mainly residential area with pavements on both sides of the road. The journey requires crossing of Bierley Lane (which as a road off Rooley Lane is relatively busy). There are however 2 places en-route where pedestrian refuges are available to assist with safely crossing the road. Bierley Road also has road humps as traffic calming measures. The other roads to cross between the existing and proposed sites are side-roads / within a housing estate.*

*4.10.3.3 Members felt that it was unlikely that granting this application would cause significant changes to the arrangements that are in place for the provision of pharmaceutical services or significant detriment to the proper planning of the provision of pharmaceutical services.*

*4.10.3.4 The proposed services and hours are the same as those provided at the current premises.*

*4.10.4 Members felt that for patients that were accustomed to accessing pharmaceutical services at the existing premises, the location of the new premises would not be significantly less accessible.*

*4.10.5 Members supported the granting of this application.*

4.11 Members wish these comments to be taken in to consideration by the Authority.

## 5 **Observations on representations**

Observations were received by NHS Resolution in response to the representations received on appeal.

### **Charles Russell Speechlys LLP (on behalf of the Applicant)**

5.1 The applicant writes in order to respond to representations submitted by interested parties on its appeal. Taking each letter in turn the applicant comments as follows:

#### Community Pharmacy West Yorkshire

5.2 The applicant has no comment to make in respect of the letter from CPWY save to note that CPWY supports the application.

#### Boots UK Limited

5.3 The survey was conducted over a week during the third week of October. The pharmacy gathered 91 survey forms, which is in excess of the number required by NHS England as part of the pharmacy's Annual Community Pharmacy Patient Questionnaire (which requires 75 questionnaires to be completed by the pharmacy). It is therefore believed to be a representative sample of the pharmacy's patient groups.

Lloyds Pharmacy Limited

- 5.4 The applicant has no comment to make on this letter.

NHS England

- 5.5 As NHS Resolution will be aware, NHS England has misstated the legal test which must be applied to the determination of this application and has therefore erred in law in its determination of the application. NHS England erroneously states that the applicant "had not detailed any disadvantages that current patient groups were experiencing and that the applicant had not identified any locality or patient groups that would benefit from the application". This is not the correct regulatory test.
- 5.6 In relation to the information provided with the applicant's letter of appeal, it is correct that not all of this information was provided to NHS England prior to its determination of the application. However, since this is a determination of the application *de novo* by NHS Resolution, it is irrelevant whether the information provided with the appeal was available to NHS England at the time of its determination.

**6 Consideration**

- 6.1 The Pharmacy Appeals Committee ("Committee") appointed by NHS Resolution had before it the papers considered by NHS England, together with plans of the area showing existing pharmacies and doctors' surgeries and the location of the proposed pharmacy.
- 6.2 It also had before it the responses to NHS Resolution's own statutory consultations.
- 6.3 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 6.4 The Committee noted the applicant's assertion on appeal that NHS England had misstated the legal test to be applied to the determination of its application. In the applicant's view, this was because NHS England had stated that the applicant: "...had not detailed any disadvantages that current patient groups were experiencing and that the applicant had not identified any locality or patient groups that would benefit from the application." The Committee took no view on that matter, mindful that it would be considering the application afresh in accordance with the regulations below.
- 6.5 The Committee had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations").
- 6.6 The Committee first considered Regulation 31 of the regulations which states:
- (1) A routine or excepted application must be refused where paragraph (2) applies*
- (2) This paragraph applies where -*

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

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

*(ii) adjacent premises; and*

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

6.7 The Committee noted that in response to Part 6 of the application form (reference to Regulation 31) the applicant had stated: "n/a". Also, NHS England's decision letter includes: "*The Panel was satisfied that Regulation 31(2)(a) does not apply as there is no pharmacy at the same or adjacent premises to the proposed site, and Regulation 31(2)(b) does not apply as there is no suggestion that any of the nearby pharmacies are in any way connected with this application or that it would be reasonable to treat the services offered in this application as being part of the same services being offered at the same site.*" The Committee, having regard to the information provided to it including that the above had not been disputed on appeal, determined that it was not required to refuse the application under the provisions of Regulation 31.

6.8 The Committee had regard to Regulation 24(1) which requires the following five conditions to be met:

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

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

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

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

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

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

- (e) *the provision of pharmaceutical services will not be interrupted (except for such period as the NHSCB may for good cause allow).*
- 6.9 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:
- 6.9.1 confirm NHS England's decision;
  - 6.9.2 quash NHS England's decision and redetermine the application;
  - 6.9.3 quash NHS England's decision and, if it considers that there should be a further notification to the parties to make representations, remit the matter to NHS England.
- 6.10 The Committee considered the position in relation to each condition.
- 6.11 In relation to condition (a), the Committee considered the maps submitted by NHS England which clearly show the locations of the existing pharmacies as well as the proposed site and medical practices within the area.
- 6.12 The Committee considered the information before it with regard to the patient groups who are accustomed to accessing pharmaceutical services at the existing premises. The Committee considers that it must seek to identify the patient groups who would potentially be affected by the relocation based upon the information provided by the parties. This information is most commonly going to be provided by the applicant but others may also be able to contribute to the information on which the Committee will proceed to determination.
- 6.13 In this case, the applicant has identified the patient groups as:
- 6.13.1 Patients who access pharmaceutical services remotely.
  - 6.13.2 Patients who access pharmaceutical services after a visit to their GP.
  - 6.13.3 Patients who access pharmaceutical services from home.
  - 6.13.4 Patients who access pharmaceutical services from elsewhere.
  - 6.13.5 Patients who access pharmaceutical services whilst present in the local area.
- 6.14 The Committee concludes that the patient groups who are accustomed to accessing pharmaceutical services from the existing premises are those set-out above.
- 6.15 NHS Resolution received no information which indicates that special consideration needs to be given to any group based on a 'protected characteristic'. However, the Committee noted the applicant's comment that an extremely large number of elderly residents access the post office and convenience store so having a pharmacy next door would make it more convenient for them. The Committee was mindful of the need to consider any groups with protected characteristics for the purposes of the Equality Act 2010 and the Committee is therefore required to consider the elimination of

discrimination and advancement of equality between a particular patient group and persons who do not share a protected characteristic.

- 6.16 The Committee noted that the applicant conducted a survey of its walk-in patients at the end of October 2018. 91 patients had completed the survey. The Committee noted the applicant's belief that the results of the survey (which are also reflected in its comments on appeal), are a representative sample of the pharmacy's patients.

*Patients who access pharmaceutical services remotely.*

- 6.17 The Committee was of the view that if patients are not accustomed to accessing pharmaceutical services at the premises, then they were not subject to the test under condition (a). The Committee, however, was particularly mindful that the provision of essential services is not limited to the dispensing of prescriptions.

*Patients who access pharmaceutical services after a visit to their GP.*

- 6.18 The Committee noted that the applicant had obtained details of all prescriptions dispensed by its pharmacy for the month of July 2018. The applicant noted that information that the greatest number of prescriptions from a single practice came from Bowling Hall Medical Practice (44%) followed by Rooley Lane Medical Centre (23%), Tong Medical Practice (23%) and Windsor House Surgery (3%). The Committee has considered access to the applicant's proposed site for patients leaving each of the above GP practices with a prescription for dispensing. The Committee noted the applicant's comment that very few of its patients actually visit the pharmacy straight after a visit to their GP (the applicant suggested the figure was as low as 4%).
- 6.19 The Committee noted Bowling Hall Medical Practice is as shown on NHS England's map, located north east of the applicant's existing pharmacy. The Committee also noted that the applicant's proposed site is located further away from the medical practice. According to the applicant, the distances are 550 metres and 900 metres respectively.
- 6.20 The Committee had no information to show that patients cannot for reasons of geography or terrain, access the existing pharmacy on foot from the Medical Practice. As regards the additional journey needed to reach the proposed site, the Committee was mindful of the applicant's comment that the terrain is flat, residential in nature with no busy roads to be crossed, and there are no other barriers.
- 6.21 Returning to the distance, the Committee considered that 900 metres to the proposed site whilst not excessive, was not insignificant either. That said, the Committee thought it likely that there would be some patients willing and able to undertake the journey on foot. The Committee was satisfied that for those patients accustomed to accessing pharmaceutical services at the existing premises on foot, the location of the new premises is not significantly less accessible.
- 6.22 The Committee considered ease of access to the proposed site for those patients whose mobility is limited. The Committee was provided with little information regarding car ownership in the area, although the applicant stated that 63% of its patients drive to the existing pharmacy. Further for patients

using their own vehicle, there is a parking bay outside of the proposed premises and free on-street parking on all local roads (undisputed). The Committee was satisfied that for patients accustomed to accessing pharmaceutical services at the existing premises by car, the location of the new premises is not significantly less accessible.

- 6.23 The Committee next had regard to patients who are reliant on public transport. No detailed information was provided by the applicant to show the routes followed by buses in the area and the frequency of those services. The applicant's comment that all bus routes run along Bierley Lane and the distance to the proposed location from the nearest bus stop (compared to the existing site) is virtually identical, was however not challenged on appeal. The Committee was satisfied that for the patient accustomed to accessing pharmaceutical services at the existing premises by public transport, the location of the new premises is not significantly less accessible.
- 6.24 The Committee noted that Rooley Lane Medical Centre is located near to Bowling Hall Medical Practice, north east of the applicant's existing pharmacy. The Committee noted that the applicant's proposed site is located further away from the Medical Centre. According to the applicant, the distances are (as for Bowling Hall Medical Practice) 550 metres and 900 metres respectively.
- 6.25 As with Bowling Hall Medical Practice, the Committee had no information to show that patients cannot for reasons of geography or terrain, access the existing pharmacy on foot from the Medical Centre. As regards the additional journey needed to reach the proposed site, the Committee was mindful of the applicant's undisputed comment that the terrain is flat, residential in nature with no busy roads to be crossed, and there are no other barriers.
- 6.26 Returning to the distance, the Committee considered that 900 metres to the proposed site whilst not excessive, was not insignificant either. That said, the Committee thought it likely that there would be some patients willing and able to undertake the journey on foot.
- 6.27 The Committee considered ease of access to the proposed site for those patients whose mobility is limited. The Committee was provided with little information regarding car ownership in the area although the applicant stated that 63% of its patients drive to the existing pharmacy. Further for patients using their own vehicle, there is a parking bay outside of the proposed premises and free on-street parking on all local roads (undisputed). The Committee was satisfied that for the patient accustomed to accessing pharmaceutical services at the existing premises by car, the location of the new premises is not significantly less accessible.
- 6.28 The Committee next had regard to patients who are reliant on public transport. No detailed information was provided by the applicant to show the routes followed by buses in the area and the frequency of those services. The Committee was however aware of the applicant's comment that all bus routes run along Bierley Lane and the distance to the proposed location from the nearest bus stop (compared to the existing site) is virtually identical. The Committee was aware that this was however not challenged on appeal. The Committee was satisfied that for patients accustomed to accessing pharmaceutical services at the existing premises by public transport, the location of the new premises is not significantly less accessible.

- 6.29 The Committee noted Tong Medical Practice is as shown on NHS England's map, located east of the applicant's existing pharmacy. The applicant's proposed site is situated closer to the Medical Practice. The applicant had stated that the distance to the applicant's existing pharmacy is 1,500 metres and would now be 1,400 metres.
- 6.30 The Committee had no information to show that patients cannot for reasons of geography or terrain, access the existing pharmacy on foot from Tong Medical Practice. As regards the proposed site, the Committee was mindful of the applicant's comments that the terrain around it is flat, residential in nature with no busy roads to be crossed, and there are no other barriers.
- 6.31 Returning to the distance, the Committee considered that 1,400 metres to the proposed site whilst closer, is not insignificant. However, the proposed site could not be regarded as significantly less accessible given the shorter journey to the applicant's proposed pharmacy. The Committee thought it likely that there would be some patients willing and able to undertake the journey on foot although it was unlikely, but this was no different than to the existing site.
- 6.32 The Committee next considered ease of access to the proposed site for those patients whose mobility is limited. The Committee was provided with little information regarding car ownership in the area, although the applicant stated that 63% of its patients drive to the existing pharmacy. Further for patients using their own vehicle, there is a parking bay outside of the proposed premises and free on street parking on all local roads (undisputed). The Committee was satisfied that for the patient accustomed to accessing pharmaceutical services at the existing premises by car, the location of the new premises is not significantly less accessible.
- 6.33 The Committee next had regard to patients who are reliant on public transport. No detailed information was provided by the applicant to show the routes followed by buses in the area and the frequency of those services. The Committee was however aware of the applicant's comment that all bus routes run along Bierley Lane and the distance to the proposed location from the nearest bus stop (compared to the existing site) is virtually identical. The Committee noted that this was not challenged on appeal. The Committee was satisfied that for patients accustomed to accessing pharmaceutical services at the existing premises by public transport, the location of the new premises is not significantly less accessible.
- 6.34 The Committee noted the map provided by NHS England does not show the location of Windsor House Surgery. However, the Committee noted the applicant's undisputed comment that the distance to the existing pharmacy is 9,900 metres and would now be 9,800 metres. The Committee considered that it would be unlikely that patients accessed the existing pharmacy on foot due to distance.
- 6.35 The Committee considered ease of access to the proposed site by other means. The Committee was provided with little information regarding car ownership in the area, although the applicant stated that 63% of its patients drive to the existing pharmacy. Further for patients using their own vehicle, there is a parking bay outside of the proposed premises and free on street parking on all local roads (undisputed). The Committee was satisfied that for patients accustomed to accessing pharmaceutical services at the existing

premises by car, the location of the new premises is not significantly less accessible.

- 6.36 The Committee next had regard to patients who are reliant on public transport. No detailed information was provided by the applicant to show the routes followed by buses in the area, and frequency of those services. The Committee was however aware of the applicant's comment that all bus routes run along Bierley Lane and the distance to the proposed location from the nearest bus stop (compared to the existing site) is virtually identical. This was not challenged on appeal. The Committee was satisfied that for patients accustomed to accessing pharmaceutical services at the existing premises by public transport, the location of the new premises is not significantly less accessible.

*Patients who access pharmaceutical services from home.*

- 6.37 The Committee noted that almost two thirds of the applicant's patients start their journey to its existing pharmacy from home. The majority of patients were said by the applicant to be resident in Bierley which from NHS England's map would appear to be the area bordered by the A6177 (north), Tong Street (east), Bierley Lane (west). To the south, Shetcliff Lane may or may not be southern boundary.
- 6.38 The Committee noted the applicant's undisputed claim that patients living in Bierley are likely to be regular users of the convenience store and post office; the Committee considered this was a reasonable assumption. The proposed pharmacy if relocated to a position amongst these other services, would in the applicant's view become more accessible than it is at present. Of concern to the Committee was that it had no information to show where the remaining third of the applicant's patients reside and will therefore start their journey from. In the above circumstances, the Committee was not able to make an assessment as to whether those who currently access the existing pharmacy on foot would be able to continue to do so. That said, the Committee was of the view that public transport could be a possible alternative means by which patients could attend the proposed site if they found it too difficult on foot, and although this might make the proposed site less accessible, it may not be significant. The Committee has considered public transport in the following paragraphs.
- 6.39 The Committee considered ease of access to the proposed site for those patients whose mobility is limited. The Committee was provided with little information regarding car ownership in the area although the applicant stated that 63% of its patients drive to the existing pharmacy. Further for patients using their own vehicle, there is a parking bay outside of the proposed premises and free on street parking on all local roads (undisputed). The Committee was satisfied that for the patient accustomed to accessing pharmaceutical services at the existing premises by car, the location of the new premises is not significantly less accessible;
- 6.40 The Committee next had regard to patients who are reliant on public transport (either because they have always accessed the pharmacy that way, or because they can no longer do so on foot). No detailed information was provided by the applicant to show the routes followed by buses in the area, and frequency of those services. The Committee was however aware of the applicant's undisputed comment that all bus routes run along Bierley Lane

and the distance to the proposed location from the nearest bus stop (compared to the existing site) is virtually identical. The Committee noted that this was not challenged on appeal. The Committee was satisfied that access by public transport was such that for those who used public transport to access the existing site, and for those who were no longer able to access the proposed site on foot could reasonably be expected to use public transport. Therefore the location of the new premises is not significantly less accessible.

*Patients who access pharmaceutical services from elsewhere.*

- 6.41 The Committee noted the applicant's survey had indicated a variety of reasons for persons being in the Bierley area and at the same time accessing the applicant's existing pharmacy. The Committee considered those who access from elsewhere would have the same challenges as those who accessed from home, and for the reasons set out for that patient group the Committee was satisfied that the location of the new premises is not significantly less accessible.

*Patients who access pharmaceutical services whilst present in the local area.*

- 6.42 The Committee noted the applicant's reference to patients in the local area who at the same time use its pharmaceutical services. These included visitors to the Asda Superstore north of the A6177 and the Newhall Park Primary School. The former would in the applicant's view not be perturbed by the additional 350 metres journey to the proposed site. The Committee noted the Asda store is located close to Bowling Hall Medical Practice and Rooley Lane Medical Centre. Having already accepted that some patients could make the journey on foot from those locations, the Committee accepted that some patients at the Asda store may also do the same. As regards the primary school, the Committee noted that the proposed pharmacy is closer than the existing site. The Committee was satisfied that the proposed site is not significantly less accessible on foot.
- 6.43 The Committee was provided with little information regarding car ownership in the area, although the applicant stated that 63% of its patients drive to the existing pharmacy. Further for patients using their own vehicle, there is a parking bay outside of the proposed premises and free on street parking on all local roads (undisputed). The Committee was satisfied that for patients accustomed to accessing pharmaceutical services at the existing premises by car, the location of the new premises is not significantly less accessible.
- 6.44 The Committee next had regard to patients who are reliant on public transport. No detailed information was provided by the applicant to show the routes followed by buses in the area and the frequency of those services. The Committee was however aware of the applicant's undisputed comment that all bus routes run along Bierley Lane and the distance to the proposed location from the nearest bus stop (compared to the existing site) is virtually identical. The Committee was satisfied that for the patient accustomed to accessing pharmaceutical services at the existing premises by public transport, the location of the new premises is not significantly less accessible;

*Overall assessment*

6.45 In the circumstances, the Committee was satisfied that, for patient groups who are accustomed to accessing the present site, the proposed site is not significantly less accessible.

6.46 The Committee was therefore of the view that condition (a) is met.

*Regulation 24(1)(b)*

6.47 The Committee noted the applicant's comment that granting the application would not result in a significant change to the arrangements that are in place for the provision of pharmaceutical services in the HWB's area. The Committee also noted NHS England's decision letter made no reference to condition (b). No information was provided by any other interested party challenging the applicant's claim. On the information before it, the Committee was of the opinion that the granting of the application would not result in a significant change to the arrangements in place for the provision of local pharmaceutical services or of pharmaceutical services in any part of the area of HWB1 or in a controlled locality of a neighbouring HWB, where that controlled locality is within 1.6 kilometres of the premises to which the applicant is seeking to relocate. The Committee concluded that condition (b) is met.

*Regulation 24(1)(c)*

6.48 The Committee noted the applicant's comment that granting the application would not cause significant detriment to proper planning in respect of provision of pharmaceutical services in the HWB's area. NHS England's decision letter made no reference to condition (c). No information was provided by any other interested party challenging the applicant's claim. On the information provided the Committee was of the opinion that the granting of the application would not cause a significant detriment to the proper planning in respect of the provision of pharmaceutical services in the area of HWB1 and therefore concluded that condition (c) is met.

*Regulation 24(1)(d)*

6.49 The Committee noted that the applicant had indicated in its original application form, that the same services will be provided at the proposed site. In its appeal letter, the applicant confirmed categorically that the same services will be provided at the proposed premises. On the information provided, the Committee determined that condition (d) is met.

*Regulation 24(1)(e)*

6.50 In relation to condition (e), the Committee noted the applicant had indicated in its application, and subsequent representations, that there will be no interruption to service provision. In its appeal letter the applicant confirmed that the same services will be provided at the proposed premises without interruption. On the information provided the Committee determined that condition (e) is met.

### *Overall*

- 6.51 The Committee noted NHS England's decision letter did not include its consideration of all parts of Regulation 24. In those circumstances the Committee determined that the decision of NHS England must be quashed.
- 6.52 The Committee went on to consider whether there should be a further notification to the parties detailed at paragraph 19 of Schedule 2 of the Regulations to allow them to make representations if they so wished (in which case it would be appropriate to remit the matter to NHS England) or whether it was preferable for the Committee to redetermine the application.
- 6.53 The Committee noted that representations on Regulation 24 had already been made by parties to NHS England, and these had been circulated and seen by all parties who made representations on the application, as part of the processing of the application by NHS England. The Committee further noted that when the appeal was circulated representations had been sought from parties on Regulation 24.
- 6.54 The Committee concluded that further notification under paragraph 19 of Schedule 2 would not be helpful in this case.

## **7 Decision**

- 7.1 The Committee concluded that it was not required to refuse the application under the provisions of Regulation 31.
- 7.2 The Committee quashes the decision of NHS England and redetermines the application.
- 7.3 The Committee has determined that conditions (a) (b), (c), (d) and (e) are satisfied.
- 7.4 The application is granted.

### **Case Manager Primary Care Appeals**

A copy of this decision is being sent to:

Charles Russell Speechlys LLP (on behalf of the Applicant)  
NHS England  
Community Pharmacy West Yorkshire  
Boots UK Ltd  
Lloyds Pharmacy Ltd