

18 February 2019

REF: SHA/21034

1 Trevelyan Square
Boar Lane
Leeds
LS1 6AE

APPEAL AGAINST NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY TANVEER AHMED FOR INCLUSION IN THE PHARMACEUTICAL LIST OFFERING UNFORESEEN BENEFITS UNDER REGULATION 18 ON OR AROUND MAIN ROAD, CRICK, NORTHAMPTONSHIRE IN ACCORDANCE WITH REGULATION 40(2) (CONSIDERATION OF WHETHER THERE HAS BEEN SUBSTANTIAL AND RELEVANT CHANGE OF CIRCUMSTANCES AFFECTING THE CONTROLLED LOCALITY)

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1 Outcome

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

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1 The Application

By application dated 28 July 2018, Tanveer Ahmed ("the Applicant") applied to NHS Commissioning Board ("NHS England") for inclusion in the pharmaceutical list offering unforeseen benefits under Regulation 18 on or around Main Road, Crick, Northamptonshire. In support of the application it was stated:

This application should not be refused pursuant to Regulation 31 for the following reasons:

1.1 The area is in need of a pharmacy because the nearest pharmacy is 3.8 miles.

Information in support of the application:

1.2 No pharmacy within 3.8 miles.

1.3 People will have access to services.

1.4 The local population have difficulty accessing services both from a physical and service availability point of view.

1.5 Patients will have better access to both NHS services and NHS commissioned services and over the counter medication and services.

Explain how you intend to secure the unforeseen benefits:

1.6 The total reliant population is around 5,370.

1.7 Pharmacy services are located a considerable distance from the application site, access to pharmaceutical service is difficult whether on foot, car or public transport.

1.8 The local population have difficulty accessing services both from a physical and services availability point of view.

1.9 This pharmacy will improve access both physically and in terms of access to pharmacy services for residents of Crick and Kilsby.

1.10 NHS England currently commission smoking cessation, EHS, needle and syringe exchange, supervised consumption, minor ailments and sharps waste collection service and medicine disposal.

1.11 These services are required by the Local Authority as per their health improvement strategies as published in the PNA.

- 1.12 By granting this application NHS England will secure current / future improvements in service and better access to these services for substantial population.
- 1.13 The granting of this application will significantly improve access resulting in significantly improved availability of pharmacy services. The location is easily accessible by all the local population, the pharmacy will be operational for more than 59 hours weekly providing adequate cover for residents who require access to a full range of pharmaceutical services.
- 1.14 The pharmacy will provide the full range of services including essential, advanced and enhanced from premises that will be professionally fitted and fit for purpose.
- 1.15 This will allow substantial improvement and better access both in terms of pharmacy opening hours and the range of services that the population are able to access.
- 1.16 The pharmacy extended opening hours means patients will receive care whenever they require. They won't have to travel out of the village to purchase over the counter medications or to disperse prescriptions. This will reduce appointments made with the doctor surgery.
- 1.17 Nearly 1,000 patients are over the age of 65 years. These patients require better access to services, especially if they can't drive or need help out of hours.
- 1.18 If the surgery is closed, the pharmacy can supply emergency medicine thus reduces the burden on the out of hours service team and saves the patients from travelling far.
- 1.19 The pharmacy will provide two advanced services, MURs and NMS. These two services will help the doctors and reduce hospital admissions due to medication side effects. By offering this service, patients will get the best out of their medication. At the moment this service is not available for them to access.
- 1.20 During the winter season, the NHS is under immense pressure. If the patients had access to a pharmacy they could access all services including flu vaccinations. This will increase uptake of the vaccination in turn reducing hospital admissions.
- 1.21 Average doctor appointment time is two weeks waiting. Instead of waiting for an appointment, they can access the pharmacy.
- 1.22 The pharmacy will offer free delivery services three times.
- 1.23 The Applicant will offer medicine compliance aid for those patients on multiple medications to reduce undertaking or overtaking of medications.
- 1.24 The population is always growing due to the new building of homes. This growth is creating a need for a pharmacy.

2 **The Decision**

NHS England considered and decided to refuse the application. The decision letter dated 18 October 2018 states:

- 2.1 NHS England has considered the above application and have determined that by virtue of regulation 40(2) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 it must be refused.
 - 2.1.1 Previous application to the area refused on 01 September 2016. Jhoots Pharmacy Limited application offering unforeseen benefits within the village of Crick (Best estimate is within 200 metres of the postcode NN6 7TF), Crick, Northamptonshire.

2.1.2 No evidence provided of significant change to the area.

2.2 The Applicant has a right of appeal to the Secretary of State against this decision.

3 The Appeal

In a letter dated 13 November 2018 addressed to NHS Resolution, Rushport Advisory LLP representing Tanveer Ahmed (the Applicant) appealed against NHS England's decision. The grounds of appeal are:

3.1 On behalf of the Applicant, the Applicant's representative writes to appeal the decision of NHS England in rejecting this application, their case number CAS-1177042-S5J6W6, communicated 18 [October] 2018.

3.2 The Applicant's representative appeals on the basis that the application has been rejected based on Regulation 40(2), NHS England decision letter states:

3.3 [Quotes 2.1.1 and 2.1.2 above]

3.4 The grounds for appeal being:

3.5 NHS England has erred in terms of process and procedures. The Applicant's application was received 31 July 2018 and there has been no correspondence from NHS England in relation to Regulation 40.

3.5.1 NHS England has not confirmed that a previous application was considered in 2016.

3.5.2 NHS England has not provided the Applicant with an opportunity to review the previous application or provide evidence of any significant change in the area.

3.6 NHS England has made it impossible due to their lack of communication to provide evidence of significant change, although there is evidence which can be provided.

3.7 The application form refers to a growing population:

3.8 [Quotes 1.24 above]

3.9 This information has not been considered by NHS England.

3.10 The population growth is in relation to new housing developments in the area.

3.11 The Applicant's representative include Northamptonshire Local Economy Assessment 2015 which details in terms of housing a need for new housing across the Local Authority Area. This report published March 2015 was available for consideration in relation to the previous application in 2016 but importantly housing developments at that time were not in process or complete.

3.12 The Applicant's representative include detail of a substantial new housing development at St Margaret's View, Main Road, Crick, NN6 7SL which is constructed by Barratt Homes.

3.13 The development layout is as below (135 New Homes): [available to Committee]

3.14 It is important to note that this development is now complete. As below the final home is currently on the market (November 2018).

3.15 [see document of St Margaret view – available to Committee]

- 3.16 The significant development central to the best estimate address put forward by the Applicant is a significant change in the area since the previous application was determined in 2016.
- 3.17 The Applicant in their application form focusses in terms of Regulation 18 on better/improved access to pharmaceutical services having raised issues of reasonable choice and people sharing protected characteristics and their difficulty in terms of access to pharmaceutical services. None of the specifics in relation to Regulation 18 have been considered by NHS England as the application has incorrectly been rejected in relation to Regulation 40.
- 3.18 In summary NHS England has failed to allow the Applicant the opportunity to understand that a previous application was determined and to provide evidence of a substantial change that would allow NHS England to proceed to consider Regulation 18. The substantial people in the area of the application deserve to have this application considered on its merits in relation to Regulation 18 and therefore with respect the Applicant's representative asks that Primary Care Appeals considers the substantial change in circumstances and refer the application back to NHS England for consideration of Regulation 18.
- 3.19 [Supporting documents available to Committee]

4 **Summary of Representations**

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

5 **Consideration**

- 5.1 The Pharmacy Appeals Committee ("Committee") appointed by NHS Resolution, had before it the papers considered by NHS England, together with a plan of the area showing existing pharmacies and doctors' surgeries and the location of the proposed pharmacy.
- 5.2 It noted there were no responses to NHS Resolution's own statutory consultations.
- 5.3 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 5.4 The Committee had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations").

Regulation 40 – Applications for new pharmacy premises in controlled localities: refusals because of preliminary matters

- (1) *This paragraph applies to all routine applications-*
- (a) *for inclusion in a pharmaceutical list as an NHS pharmacist; or*
 - (b) *from an NHS pharmacist included in such a list –*
 - (i) *to relocate to different pharmacy premises in the area of the relevant HWB, or*
 - (ii) *to open, within the area of the relevant HWB, additional pharmacy premises from which to provide pharmaceutical services,*

where the applicant is seeking listing of pharmacy premises which are in a controlled locality.

(2) *If the NHSCB receives an application (A1) to which paragraph (1) applies, it must refuse A1 (without needing to make any notification of that application under Part 3 of Schedule 2), where the applicant is seeking the listing of premises at a location which is-*

(a) *in an area in relation to which outline consent has been granted under these Regulations, the 2012 Regulations or under the 2005 Regulations within the 5 year period –*

(i) *starting on the date on which the proceedings relating to the grant of outline consent reached their final outcome, and*

(ii) *ending on the date on which A1 is made; or*

(b) *within 1.6 kilometres of the location of proposed pharmacy premises (other than proposed distance selling premises), in respect of which-*

(i) *a routine application under these Regulations or the 2012 Regulations, or*

(ii) *an application to which 22(1) or (3) of the 2005 Regulations (relevant procedures for applications) applied,*

was refused within the 5 year period starting on the date on which the proceedings relating to the refusal reached their final outcome and ending on the date on which A1 is made,

unless the NHSCB is satisfied that since the date on which the 5 year period started, there has been a substantial and relevant change of circumstances affecting the controlled locality.

(3) *For the purposes of paragraphs (1) and (2), if no particular premises are proposed for listing in A1, the applicant is to be treated as seeking the listing of pharmacy premises at the location which is the best estimate that the NHSCB is able to make of where the proposed listed pharmacy premises would be, having regard to the best estimate given by the applicant under paragraph 1(7)(a)(ii) of Schedule 2.*

(4) *Paragraph (2)(b) does not apply where the NHSCB is satisfied that there are reasonable grounds for believing the person making the refused application was motivated (wholly or partly by a desire for that application to be refused.*

(5) *The refusal of an application pursuant to paragraph (2)(b), or regulation 40(2)(b) of the 2012 Regulations (applications for new pharmacy premises in controlled localities; refusals because of preliminary matters) is to be ignored for the purposes of the calculation of a 5 year period pursuant to paragraph (2)(b).*

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

5.5.1 confirm NHS England's decision;

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

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

Regulation 40(1)

- 5.6 The Committee noted there is no dispute between the parties that the premises where the Applicant is seeking listing of pharmacy premises is in a controlled locality.

Regulation 40(2)(b)

- 5.7 The Committee noted the Applicant's representative states in its appeal that there was no correspondence from NHS England in relation to regulation 40. However, the Committee is also mindful that there is no dispute that there was a previous decision in the area.
- 5.8 The Committee was of the view that the Applicant is seeking listing in respect of premises at a location which is within 1.6km of the location of a routine application which was refused within the 5 year period starting on the date on which the proceedings relating to the refusal reached their final outcome and ending on the date the current application is made.
- 5.9 The Committee considered, based on the information before it, whether since the date on which the 5 year period started, there has been a substantial and relevant change of circumstances affecting the controlled locality.

Regulation 40(3)

- 5.10 In determining this application, the Committee had regard to the Applicant's best estimate of where the proposed listed premises would be namely on or around Main Road, Crick, Northamptonshire.

Regulation 40(4)

- 5.11 The Committee noted it had no information to show that there are reasonable grounds for believing the person making the refused application was motivated wholly or partly by a desire for that application to be refused.
- 5.12 The Committee noted that the Applicant's representative had stated that NHS England had made it impossible due to their lack of communication to provide evidence of significant change although it had evidence of such change.
- 5.13 However in this regard the Committee noted that amongst the paperwork provided by NHS England to Primary Care Appeals there included an email and letter addressed to the Applicant dated 28 September 2018. The cover email states:
- 5.13.1 *"Please find attached a letter notifying that NHS England have determined that your application lies within a controlled locality to which the five year bar applies (Regulation 40(2))."*
- 5.14 The letter goes on to quote regulation 40(2), and states the previous application was:
- 5.14.1 *"Jhoots Pharmacy Limited application offering unforeseen benefits within the village of Crick (Best estimate is within 200m of the postcode NN6 7TF), Crick, Northamptonshire – Application refused by NHS England 1 September 2016"*
- 5.15 The letter requests evidence of any substantial and relevant change of circumstances by 12 October 2018. On 18 October 2018, NHS England emailed the Applicant stating:

5.15.1 *“Further to my letter of the 28 September we have received no evidence that Crick has undergone significant change since the refusal of the application by Jhoots Pharmacy in 2016.*

5.15.2 *Please therefore find attached a letter notifying the refusal of the application under regulation 40(2).*”

5.16 The Committee is of the view therefore that the Applicant had been given prior notice of NHS England’s intention to consider the application with regard to regulation 40 including information relating to the previous application and affording an opportunity for the Applicant to provide representations in this regard.

5.17 In any case if for some reason the Applicant did not receive said communication, the Committee was mindful that the appeal is not a review of the decision of NHS England but a reconsideration of the application and is based on information available to the Committee at the time that it makes its decision.

5.18 The Committee is also mindful that the Applicant through their representative, had the opportunity in the appeal to provide information to this Committee as to why there had been a substantial or relevant change to the controlled locality. Given this was a matter which was raised on appeal, the Committee was satisfied that the Applicant was aware of this.

5.19 The Committee noted that Applicant’s representative had stated on appeal that it has evidence of significant change (in the area) and makes reference to the application form which refers to the growing population which it states that NHS England has not considered. In its appeal the Applicant’s representative provides information including a brochure from Barretts homes for a development of 135 houses at St Margaret’s View which the Applicant’s representative states is now complete and at November 2018, the final house was on the market and also the Northamptonshire Local Economy Assessment 2015 which details housing needs across the Local Authority area.

5.20 The Committee was of the view that whilst the Applicant had provided information to show that there had been development in the area, it was not satisfied that the Applicant had demonstrated that these were to such an extent that within the context of the area there had been a substantial and relevant change to the controlled locality, since the previous application was finally refused in December 2016.

6 Decision

6.1 The Committee confirms the decision of NHS England.

6.2 The Committee was not satisfied that since the date on which the 5 year period started, there has been a substantial and relevant change of circumstances affecting the controlled locality.

6.3 Accordingly, the application should be refused.

Primary Care Appeals

A copy of this decision is being sent to:

Rushport Advisory LLP representing Mr T Ahmed
NHS England