

REF: SHA/19964

1 Trevelyan Square
Boar Lane
Leeds
LS1 6AE

APPEAL AGAINST NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY SHARIEF HEALTHCARE LIMITED FOR A RELOCATION THAT DOES NOT RESULT IN A SIGNIFICANT CHANGE TO PHARMACEUTICAL SERVICES PROVISION UNDER REGULATION 24 FROM 2 WHITSWOOD CLOSE, MOSS SIDE, MANCHESTER, M16 7AW TO 117B WITHINGTON ROAD, MANCHESTER, M16 8EE

Tel: 0113 86 65500
Fax: 0207 821 0029
Email: appeals@resolution.nhs.uk

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.

Advise / Resolve / Learn

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

INVESTORS
IN PEOPLE | Accredited
since 2020

REF: SHA/19964

1 Trevelyan Square
Boar Lane
Leeds
LS1 6AE

APPEAL AGAINST NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY SHARIEF HEALTHCARE LIMITED FOR A RELOCATION THAT DOES NOT RESULT IN A SIGNIFICANT CHANGE TO PHARMACEUTICAL SERVICES PROVISION UNDER REGULATION 24 FROM 2 WHITSWOOD CLOSE, MOSS SIDE, MANCHESTER, M16 7AW TO 117B WITHINGTON ROAD, MANCHESTER, M16 8EE

Tel: 0113 86 65500
Fax: 0207 821 0029
Email: appeals@resolution.nhs.uk

1 A summary of the application, decision, appeal and representations and observations are attached at Annex A.

2 Preliminary Consideration and Site Visit

2.1 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.

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

2.3 An oral hearing of the appeal was held on 12th February 2019 at the offices of NHS England, 3 Piccadilly Place, Manchester. The Committee comprised of Mr A Tomlinson (chair), Mr P Bratley and Mr P Chapman.

2.4 The Applicant was represented by Mr K Harrall accompanied by Mr Suhail Sharief and Mr W Sheikh. The appeal was observed by Mrs D White, Mrs M Kakar, Mr S Neale and Ms L Reid who took no part in the proceedings.

2.5 Before the hearing started the Committee undertook a site visit. The Committee drove south down Princess Road, a major dual carriageway leading out of the city centre. The Committee observed the Asda store next to the Hulme High Street retail park and the small Cohens pharmacy on the east side of Princess Road close to the junction with Claremont Road. Princess Road was seen to be a significant barrier to the passage of pedestrians and vehicles although a number of light controlled crossing points are available.

2.6 The Committee turned right into Claremont Road then drove across the northern end of the large Alexandra Park and parked next to the Applicant's pharmacy. This was seen to be next to but not attached to a surgery. The Committee observed a small car park and plenty of side street parking available. The pharmacy is not easily visible from the nearby main roads and because of its position within a cul de sac and the lack of other nearby facilities is unlikely to attract any passing trade.

- 2.7 The surrounding area was seen to be mainly residential with a mix of housing types but mainly what appeared to be social housing, most with private driveways. The whole area is level and the pavements are in reasonable condition with good street lighting. Some pavement surfaces were seen to be slightly broken and crumbly but at all points where the pavement met side roads there are dropped kerbs for prams and wheelchairs.
- 2.8 The Committee walked along Yarburgh Street to the Everest Pharmacy at the junction with Withington Road. The walk took 5 minutes at a leisurely pace. There were no major roads to cross or other obstacles. This pharmacy was seen to be newly and smartly appointed with an attractive fascia, lighting and signage. Side street parking is available and limited parking on Withington Road. On the south side of the junction there is an empty shop then the Range Pharmacy and the Range Medical Practice. Close by on Withington Road are a number of shops including a Tesco Express, a fruit and vegetable shop, a post office and a number of takeaways. The area was reasonably busy with visiting shoppers.
- 2.9 The Committee then walked back to the Applicant's pharmacy and drove along Westerling Way to Withington Road then east along Yarburgh Street onto Claremont Road before turning into the housing to the north of Claremont Road. The housing in this area was seen to be dense, mainly social housing. The Committee returned to Princess Road along Great Western Street.
- 3 A summary of the above observations was provided to those in attendance. They were invited to comment upon them or indicate if any of the observations appeared to be inaccurate. In particular the Chair commented that in the opinion of the Committee the pavements had been seen to be in reasonable condition and that the parking facilities at the Applicant's proposed location were at least as sufficient as at the current location. Such comments as were made in response to these observations appear in the next clause.
- 4 **Oral Hearing Submissions**
- 4.1 **Mr K Harrall (for the Applicant)**
- 4.1.1 He introduced Mr Sheikh as being the owner of Everest Pharmacy. He had good local knowledge and owned four pharmacies two of which were 100 hour pharmacies.
- 4.1.2 Mr Sharief represented the Applicant company which owned 21 pharmacies mainly in the north of the country. Together with other pharmacies they ran Allied Pharmacies, a buying group.
- 4.1.3 None of Mr Sheikh's pharmacies were part of the Allied group.
- 4.1.4 Allied had purchased 11 pharmacies from Lloyds including the pharmacy in Whitswood Close. Some of the pharmacies purchased had issues. This pharmacy achieved 4,500 items per month. However the landlord (the NHS) had indicated that the rent would rise from £5,000 per year to £18,000 per year. Negotiations were ongoing but the viability of the business was at risk.

- 4.1.5 Everest Pharmacy dealt with 11,000 items per month. It was proposed that Everest would close in May and that the relocation would take place the day after.
- 4.1.6 With regards to regulation 31, he stated that consolidations were now permitted and he explained the background to regulation 26(a). The Applicant's proposed move would not be a consolidation but the result would be similar. Regulation 26(a) was silent on the question of opening hours so the Applicant could not rely on it as it was intended to reduce the opening hours from 100 hours for which Everest currently opened.
- 4.1.7 The outcome would be in line with the government's aim to reduce overprovision.
- 4.1.8 It was accepted that the notice served by Everest could be withdrawn so the Applicant was not relying on that. He referred to regulation 31 in particular paragraph (b) and the relevant case law, the "Pharmacy Plus" case.
- 4.1.9 He stressed that there was no common control between the two pharmacies. It could not be said that either the staff, lease, stock or anything else were shared. Establishment fees were being phased out so there would be no benefit in two pharmacies sharing an address.
- 4.1.10 He explained the confusion in the Applicant's understanding of the ownership of Everest Pharmacy that had caused the NHSE to refuse the application. The Applicant had no knowledge of Mr Mian.
- 4.1.11 He stressed that there was no link between the Applicant and Mr Sheikh, indeed they were competitors. There had been no evidence of any link between the two and there was no practical way of operating two pharmacies from the same premises.
- 4.1.12 With regards to regulation 24 he had no new information to add to the written evidence.
- 4.1.13 The pharmacy at its current location attracted no passing trade and was in a primarily residential area. It was 170 metres to the nearest bus stop.
- 4.1.14 The proposed location was much busier. There was a lot of passing traffic with many shops serving other needs. There was free parking and those with blue badges could park outside the pharmacy. There were bus stops close to the site.
- 4.1.15 It was not difficult to move around the area. There were good pavements and street lights. There was some deprivation but the local population was young and diverse with less ill health than average.
- 4.1.16 Buses ran from north to south and as a result locals walked around the area.
- 4.1.17 The distance between the sites was less than 450 metres. There were no barriers and the journey by car was easy.

- 4.1.18 The fact that a bus route linking the sites had been withdrawn showed how much people in the area walked.
- 4.1.19 There were a number of community transport providers operating in the area.
- 4.1.20 The NHSE decision was flawed in its analysis of patient groups. There were large overlaps between groups and a single patient could be in more than one group.
- 4.1.21 For the patients who visited the surgery before the pharmacy they would have to walk 420 metres to the new location. Given that they would not live at the surgery, wherever they lived the extra distance did not make the new location significantly less accessible.
- 4.1.22 He pointed out that 15% of the prescriptions issued by The Whitswood Practice were dispensed by the pharmacies on Withington Road showing that patients were used to travelling there.
- 4.1.23 Crossing Princess Road was not easy and all the figures suggested that patients gravitated to the west, using the shops on Withington Road in preference to the shops on Princess Road.
- 4.1.24 The Committee then asked questions concerning the application and some of the following replies were given by either Mr Sheikh or Mr Sharief. Mr Harrall confirmed that there was no formal agreement between the Applicant and Mr Sheikh for the purchase of Everest Pharmacy. There would probably be an exchange of money to allow the transaction to go ahead. He did not know the figures for Everest Pharmacy so could not say which was least viable.
- 4.1.25 Everest Pharmacy had high overheads because of the hours it was open, the government cuts and wage costs but it could remain open if the appeal was refused. There were several other 100 hour pharmacies in the area.
- 4.1.26 It was most unlikely that the two businesses would form a partnership.
- 4.1.27 If the appeal was allowed there was no guarantee that the two business owners could agree terms.
- 4.1.28 It was likely that the name would change from Everest but no new name had been decided.
- 4.1.29 Some local residents used the Asda pharmacy but they were not within the Applicant's patient groups.
- 4.1.30 The Applicant's pharmacy had been established after the control of entry regulations were introduced but the exact date was not known.
- 4.1.31 The surgery next to the Applicant's pharmacy had two doctors and there was a single doctor on duty each day. Some patients of the practice lived some way from the surgery as at one time this had been the only surgery in the area that accepted new patients.

- 4.1.32 No residential or care homes were served by the Applicant.
- 4.1.33 No information was available as to how patients arrived at the pharmacy, by foot or using private or public transport.
- 4.1.34 There was no useful data showing where patients lived.
- 4.1.35 There were no “methadone dispensing” patients.
- 4.1.36 Of the 20% of prescriptions that did not originate from the neighbouring surgery, most of these came from the Range Medical Practice.
- 4.1.37 There had been no discussion about staff at the proposed pharmacy nor any discussion with the landlord at the new premises.

5 Consideration

- 5.1 The Committee had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”).
- 5.2 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).*
- 5.3 The Committee noted that the application had been refused by NHS England partly as this regulation had not been satisfied: It was obvious to the Committee from an inspection of the premises to which the Applicant intended to relocate that it was currently used as a pharmacy (Everest Pharmacy) and accordingly regulation 31(2)(a) would apply to the application. With regards to regulation 31(2)(b) the Applicant had submitted inaccurate information as to the ownership of Everest Pharmacy which had lead to NHS England’s decision.
- 5.4 On appeal the Applicant had submitted an explanation as to the reason for the initial submission of inaccurate information as to ownership of the pharmacy which the Committee accepted. The Applicant had also submitted

further evidence both in writing and at the hearing to establish that there was no common control of the Applicant's business and Everest Pharmacy, indeed they were competitors.

- 5.5 The Committee noted that there was no formal agreement in place between the Applicant and the owner of Everest pharmacy establishing what would happen should the application be granted and that it was possible that no agreement would ever be reached. The Committee also noted that it was likely that if the application was granted and the proposed relocation took place there would be a payment made by the Applicant to Everest Pharmacy as consideration for the vacation of the pharmacy premises on Withington Road.
- 5.6 Evidence had been given as to the respective viability of the two pharmacies which the Committee did not find conclusive but it considered that this was not essential for the purposes of regulation 31. Evidence had also been given of a notice of closure served in respect of Everest Pharmacy and which was due to take effect on 26th May 2019 although the Committee accepted that such notice could be withdrawn at any time until it took effect.
- 5.7 The Committee also considered the judicial guidance referred to by the Applicant and set out in full at 1.7 in Annex A above (the Pharmacy Care Plus case).
- 5.8 The Committee had asked a number of questions of the Applicant at the hearing in order to satisfy itself as to the links (if any) between the Applicant and Everest Pharmacy. Based on the answers to those questions and the other written and oral evidence the Committee was satisfied that it was highly unlikely that both pharmacies would operate from the same premises but that in any event there was no shared ownership or control and the two pharmacies were distinct and separate legal entities.
- 5.9 Taking into account all the evidence provided, the Committee was of the view that for the purposes of regulation 31 (2) (b) the services that the Applicant intended to provide from the premises on Withington Road should not be treated as part of the same services currently provided by the existing contractor there.
- 5.10 The Committee was not required to refuse the application under the provisions of Regulation 31.
- 5.11 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).*
- 5.12 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:
- 5.12.1 confirm NHS England's decision;
 - 5.12.2 quash NHS England's decision and redetermine the application;
 - 5.12.3 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 24(1)(a)

- 5.13 In relation to condition (a), the Committee considered the map 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.
- 5.14 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.
- 5.15 In this case, the Applicant has identified the patient groups as:
- 5.15.1 Patients receiving a delivery service;
 - 5.15.2 Patients living within the vicinity of the pharmacy who use it because it is close to home;
 - 5.15.3 Patients who visit the area to access other amenities;
 - 5.15.4 Patients who travel to the pharmacy immediately following an appointment at Whitswood Medical Centre;

- 5.15.5 Patients who travel to the pharmacy immediately following an appointment at another medical centre;
 - 5.15.6 Patients accessing the pharmacy to receive services other than pharmaceutical services and
 - 5.15.7 Patients who share protected characteristics that affect their mobility
- 5.16 The Committee concludes that the patient groups who are accustomed to accessing pharmaceutical services from the existing premises are those set-out below.

Patients registered with Whitswood Medical Centre

- 5.17 The Committee considered that the definition of this patient group as those registered with this GP practice does not easily allow an assessment of the impact of the relocation on the accessibility of the new premises by this patient group.
- 5.18 The Committee considered that for the purposes of condition (a), it is necessary to break down this patient group into two distinct groups:
- 5.18.1 A patient group that accesses pharmaceutical services at the same time as accessing services from the GP practice; and
 - 5.18.2 A patient group that accesses pharmaceutical services otherwise than in connection with accessing services from the GP practice.
- 5.19 For the patient group that accesses pharmaceutical services at the same time as accessing services from the GP practice, the Committee noted that the relocated pharmacy premises would be approximately 420 metres from the practice in a westerly direction as compared with the current premises which were adjacent to the practice.
- 5.20 The Committee considered that this patient group will access the new premises on foot, by car or by public transport and it was necessary to consider the accessibility of the new premises in the light of each method of transport for this patient group.
- 5.21 For those patients driving to the practice using private transport it would be a short and easy journey for them to access the new premises. Parking at both premises was reasonably easy and free with side street parking readily available close to both premises.
- 5.22 The Committee noted the absence of public transport linking the two premises with most services in the area running north/south to and from the city centre rather than east/west. It also noted that a bus service had run for a short time which patients could have used but this had been discontinued as it had not been used by sufficient numbers of customers to make it viable. The Applicant had pointed out that the distance between the locations was so short that if there was a bus service, the same stop would serve both locations.
- 5.23 The Committee concluded that the absence of public transport was not a significant consideration for patients visiting the Whitwood Medical Centre in

view of the comments made below concerning the walk between the two sites.

- 5.24 The Committee also noted that patients using public transport in order to access the pharmacy at its current location or the Whitswood Medical Centre could be using a service running along Withington Road with a stop close to the proposed location for the pharmacy.
- 5.25 The Committee had noted on the site visit that the walk between the two sites was short and level along reasonably surfaced and well illuminated pavements with no obstacles, taking less than five minutes.
- 5.26 The Committee therefore concluded that for the patient group comprised of patients who visited the Whitswood Medical Centre before visiting the pharmacy, the new location would not be significantly less accessible, whether they accessed the pharmacy by private transport, public transport or on foot.
- 5.27 The Committee next considered the patient group registered at Whitswood Medical Centre accessing services otherwise than in connection with a visit to the GP surgery, e.g. where registered patients are in possession of a repeat prescription or require essential services other than the dispensing of a prescription.
- 5.28 Whether such patients travelled from home or some other location prior to visiting the pharmacy the Committee concluded that the additional distance to be travelled would at most be 420 metres, for those patients travelling from due east of the pharmacy at its current location. In the light of the conclusions above relating to the ease of access between the two locations the Committee did not consider that this patient group would find the new location to be significantly less accessible. It also noted that the Applicant had suggested that most of the patients of the practice did not live due east of the current premises although no conclusive evidence had been provided as to where patients lived and the Committee assumed from the evidence that some patients would live in the housing to the north of Claremont Road.
- 5.29 The Committee next considered accessibility for the elderly and those with physical impairments or any others. The Committee noted that this patient group (i.e. the elderly and those with physical impairments) may access pharmaceutical services. The Committee noted that age and disability were 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 this patient group and persons who do not share a protected characteristic
- 5.30 The Applicant had suggested that many of the patients within this group used the collection and delivery service offered by the Applicant and those that had the use of private transport would easily be able to access the pharmacy at the new location. The Applicant had also stated that there were no patients currently visiting the pharmacy with severe mobility difficulties.
- 5.31 The Committee was satisfied that for the above reasons the elderly patients and those with physical impairments who currently visited or used the Applicant's pharmacy would not find the new location to be significantly less accessible.

- 5.32 The Committee therefore concluded that for the patient group that accesses pharmaceutical services otherwise than in connection with accessing service from Whitswood Medical Centre, the new location would not be significantly less accessible.

Patients registered with other Surgeries

- 5.33 The Committee noted that 80% of the prescriptions received at the Applicant's pharmacy originated from the neighbouring Whitswood Medical Centre and that of the remaining 20%, most of these came from the Range Medical Centre.

- 5.34 The Committee accepted that patients travelling from the Range Medical Centre on Withington Road would find the pharmacy's new location to be more convenient as it was much nearer. The few patients of other practices who visited their surgery before visiting the pharmacy would at most have another 420 metres to travel and the Committee noted that because of the location of other nearby surgeries it was likely that such patients would travel by car rather than on foot.

Other groups

- 5.35 The Committee considered those patients who used the pharmacy for services other than dispensing and those who might use the pharmacy as it was close to their home or other amenities.

- 5.36 The Committee accepted from the evidence that the number of patients within this group would be small as there were few other facilities or amenities within the immediate vicinity of the pharmacy and there were few patients who called in to the pharmacy at present for services other than dispensing.

- 5.37 The Committee also accepted that many of the local residents visited the facilities on Withington Road and to that extent would find the pharmacy at its new location to be more convenient for them.

- 5.38 The Committee again concluded that the greatest additional distance that such patients would travel would be 420 metres and for the reasons given above such patients would not find the pharmacy at the new location to be significantly less accessible.

Patients who currently use the collection and delivery service from the current site

- 5.39 The Committee noted the Applicant's statement that between 40% and 50% of patients have their prescription delivered to their home. The Committee was of the view that if patients were not accustomed to accessing pharmaceutical services at the premises, then they were not subject to the test under condition (a). The Committee also noted that the Applicant had provided an assurance that the delivery service would remain following the relocation.

Overall assessment

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

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

Regulation 24(1)(b)

5.42 The Committee noted the decision of NHS England in respect of condition (b), that the granting of this application would not result in a significant change to the arrangements that are in place, and that this had not been disputed by any party. The Committee also noted that in a letter dated 18th April, 2018 addressed to PCSE Enquiries, Greater Manchester LPC had suggested that the application should be refused as “granting the application would result in a significant change to the arrangements that are already in place for the provision of local pharmaceutical services”. The Committee also noted that no evidence or reasoning had been submitted in support of this assertion. On the information provided 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 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)

5.43 The Committee noted the decision of NHS England in respect of condition (c) that the granting of the relocation would not lead to significant detriment to proper planning in respect of the pharmaceutical services in the area. The Committee noted that this had not been disputed by any party either on appeal or in subsequent representations. 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)

5.44 The Committee noted that the applicant had given an undertaking, in their original application form, that the same services will be provided at the proposed site. On the information provided, the Committee determined that condition (d) is met.

Regulation 24(1)(e)

5.45 In relation to condition (e), the Committee noted the applicant had confirmed in their application, and subsequent representations, that there will be no interruption to service provision. On the information provided the Committee determined that condition (e) is met.

Overall

5.46 In those circumstances and as the Committee had reached a different decision, the Committee determined that the decision of NHS England must be quashed.

5.47 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.

5.48 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.

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

6 Decision

6.1 The Committee concluded that it was not required to refuse the application under the provisions of Regulation 31

6.2 The Committee quashes the decision of NHS England and redetermines the application.

6.3 The Committee has determined that conditions (a), (b), (c), (d) and (e) of Regulation 24 are satisfied.

6.4 The application is granted.

Alan Tomlinson
Committee Chair

Dated this 28th day of February, 2019

A copy of this decision is being sent to:

Pharmacy Sales & Consultancy on behalf of the Applicant
NHS England
Boots UK Ltd

ANNEX A

REF: SHA/19964

1 Trevelyan Square
Boar Lane
Leeds
LS1 6AETel: 0113 86 65500
Fax: 0207 821 0029
Email: appeals@resolution.nhs.uk**APPEAL AGAINST NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY SHARIEF HEALTHCARE LIMITED FOR A RELOCATION THAT DOES NOT RESULT IN A SIGNIFICANT CHANGE TO PHARMACEUTICAL SERVICES PROVISION UNDER REGULATION 24 FROM 2 WHITSWOOD CLOSE, MOSS SIDE, MANCHESTER, M16 7AW TO 117B WITHINGTON ROAD, MANCHESTER, M16 8EE****1 The Application**

By application dated 20 March 2018, Sharief Healthcare Limited ("the Applicant") applied to NHS Commissioning Board (NHS England) for a relocation that does not result in a significant change to pharmaceutical services provision under Regulation 24 from 2 Whitswood Close, Moss Side, Manchester, M16 7AW to 117B Withington Road, Manchester, M16 8EE. In support of the application it was stated:

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

- 1.1 There is a pharmacy currently trading from the proposed premises which is owned and operated by Everest Pharmacy Limited.
- 1.2 It is intended that this pharmacy will close before the relocation takes effect.
- 1.3 Regardless of the presence of this existing pharmacy, this application should not be refused pursuant to Regulation 31 for the following reasons.
- 1.4 Regulation 31 states: [quoted]
- 1.5 For an application to be refused pursuant to Regulation 31, both 31 (2)(a) and (b) must apply.
- 1.6 Judicial guidance in respect of 31(2)(b) is available in the case of R (on the application of Pharmacy Care Plus Ltd) v Family Health Services Appeals Unit [2013] EWHC 824 (Admin).
- 1.7 In that court case, one company submitted an application to open a pharmacy adjacent to an existing pharmacy run by a separate company. Judge Stephen Davies accepted at paragraphs 34 and 35 that:
 - 1.7.1 *"it will almost always be an extremely relevant consideration to know whether or not there is any connection in terms of ownership and control between the entities who carry on the existing business and*

who propose to carry on the proposed new business. So, for example, if an existing business was owned by Company A and the proposed new business was owned by Company B, and there was absolutely no connection at all in terms of ownership and control between the two of them, it would be difficult to see how they could be regarded as providing the same service, even if the services which they were going to provide were complementary to each other. In contrast, if they were both to be provided by exactly the same company, then that would also be an extremely relevant consideration going the other way.

1.7.2 *But also I can well accept that there may be intermediate positions; so, for example, there may be a commonality of ownership but the owners may not be exactly the same, and it may very well be that in such cases one would have to consider things such as the nature of the respective businesses; whether or not they are going to be physically separate or separate from a business point of view; whether or not the employees would be working in both businesses, and any other relevant matters. That conclusion seems to me to be consistent with the guidance given in 2009 by the Department of Health, to which I have been referred, whereby in short, the question is said to be whether or not the primary care trust is satisfied that the Applicant has a sufficiency distinct identity and will be providing a distinct service from the already listed contractor."*

- 1.8 It is clear from the judicial guidance that, regardless of whether the applicant proposes to open from premises that are currently occupied by a pharmacy or adjacent to those premises, where the applicant is not connected to the existing pharmacy owner, Regulation 31 does not apply.
- 1.9 In this case it can confirm that there is absolutely no connection in terms of ownership or control between the applicant, Sharief Healthcare Limited, and the existing occupier, Everest Pharmacy Limited. The companies have no shared directors, shareholders, employees, premises or any other features that might lead to the conclusion they are connected.
- 1.10 Whilst it is the intention that the relocation will not take effect before the existing pharmacy closes (so in practice there will not be two pharmacies operating from these premises), this is not a matter NHS England needs to take into account.
- 1.11 If Regulation 31 is not applicable (and it is clear for the reasons provided above it is not), then the application cannot be refused pursuant to Regulation 31 regardless of the intentions of Everest Pharmacy Limited.

Information in support of all no significant change applications

Background

- 1.12 Sharief Healthcare limited owns a pharmacy which trades from premises at 2 Whitswood Close, Moss Side. This pharmacy was acquired from Lloyds pharmacy earlier this year who disposed of it as part of a wider programme of sales and closures of unprofitable stores.

- 1.13 The pharmacy currently occupies a poor trading position (hence its weak performance) so the Applicant wishes to relocate the business to a better position to ensure its ongoing viability.
- 1.14 The proposed location is occupied by an existing pharmacy which is owned by Everest Pharmacy limited. This is a 100-hour pharmacy and is therefore subject to high operating costs which place a significant burden on the owners in the current challenging funding environment.
- 1.15 If this application is approved, it is intended that the 100 hour pharmacy will close (after providing the requisite notice) and the Applicant will relocate their pharmacy to the premises.

Local Area

- 1.16 Both the existing and the proposed sites are within the Moss Side area of Manchester approximately 2 miles south of the city centre. The area is essentially residential in nature with shops and other amenities located along Withington Road to the west and Princess Road to the east.
- 1.17 The distance between the two sites is approximately 420m. The local terrain is flat with wide pavements and street lighting. Walking between the two sites is very straightforward and involves crossing only very minor roads through the residential area. Dropped kerbs are provided at all crossing points.
- 1.18 The map below shows the route between the existing and proposed sites for those who would be required to make this journey following the relocation. This shows several possible routes, all of which are a similar length and take between 5 and 6 minutes to walk.
- 1.19 [Map provided to the Committee at Appendix A.]

Existing location

- 1.20 The pharmacy is currently located in a small, purpose-built, singly story building on the same site as the Whitswood Medical Centre. This is a relatively small practice with a patient list size of around 4,000.
- 1.21 With the exception of a 'community development trust' building immediately to the north of the pharmacy / medical centre site and a primary school 200m to the north west, the immediate area surrounding the site is residential in nature. There are no shops or other facilities that the local population would use in their day-to-day lives.
- 1.22 There is a car park at the medical centre site which is available for staff and patients attending the medical centre and pharmacy.
- 1.23 As the area is residential in nature, people travel from their homes to the pharmacy from all directions. However, fewer live to the east of the existing location due to the presence of a large green space (Alexandra Park) to the south east of the pharmacy. Residents living further east typically access Cohens Chemist on Princess Road.

Proposed location

- 1.24 The proposed location is on Withington Road within a busy shopping area serving the local community. Shops in this area include several large convenience stores/supermarkets (such as Tesco Express and Co-Op), a post office, two pharmacies (including one at the proposed site), a medical centre, a launderette, various fast-food restaurants/takeaways, hairdressers/beauty salons, a dental practice and a bookmaker.
- 1.25 There is free & unrestricted parking on Yarburgh Street close to the proposed site and free short-stay parking Withington Road immediately outside the Everest pharmacy premises.
- 1.26 It is clear, therefore, that there is a significantly wider range of amenities close to the proposed site than the existing site. Many residents living close to the existing site and within the residential area between the two sites will use the amenities on Withington Road on a regular basis when going about their daily business.

Profile of local residents

- 1.27 In terms of the local demographic profile, key data from the 2011 census (for the Moss Side Ward in which both the existing and proposed locations are situated) is as follows:
 - 1.27.1 Car ownership is significantly lower than average with 60.2% of homes having no car compared to the national average of 25.8%.
 - 1.27.2 The number of residents over the age of 65 is lower than average being 6.6% compared to 16.4% nationally.
 - 1.27.3 The area has higher than average levels of ethnic diversity with 25.7% of residents describing themselves as White / British compared to the national average of 79.8%.
 - 1.27.4 Home ownership is low with 44.2% of residents living in social housing compared to 17.7% in England.
 - 1.27.5 14.4% of residents find their day to day activities limited by illness or disability compared to the national average of 17.6%.
- 1.28 In terms of deprivation, the 2015 index of multiple deprivation ranked the area at 1,236 out of 32,844 in terms of the most deprived areas in England i.e. within the top 4% most deprived areas.
- 1.29 Residents living in areas with this profile are typically very reliant on amenities which are local to them. They do not travel far to access services as low levels of car ownership leave them reliant on walking or using public transport. However, the relatively low levels of residents over the age of 65 and low levels of limiting disability mean that most residents have little difficulty travelling moderate distances on foot.
- 1.30 The terrain of the area is such that it is very easy for pedestrians to walk around. Many people live in the residential area between the existing and proposed sites so their journey to the proposed site, if walking from home, will be slightly longer for some and slightly shorter for others. The furthest additional distance any resident may need to travel (if their journey takes

them past the existing premises first) is 420m. This would take no more than 6 minutes on foot.

Part 8 of the application form

- 1.31 Regulation 24(1)(a) requires NHS England to consider whether:
- 1.32 *“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”*
- 1.33 The Applicant is required, therefore, to consider the patient groups who use the existing pharmacy and the impact of the relocation on each of them to ensure that the proposed location is not significantly less accessible.
- 1.34 [NHS Resolution] has produced a guidance note for use by its committees in respect of applications made under Regulation 24. This note gives specific consideration to the matter of patient groups and accessibility.
- 1.35 In a recent judicial review of an application made under this regulation, Mr Justice Langstaff stated that he was broadly in agreement with the approach set out in this guidance note.
- 1.36 Furthermore he stated that patient groups should be defined in such a way that the decision maker can assess the impact of the proposed relocation on accessibility for those patient groups. For that reason patient groups should not be defined arbitrarily but according to how and why people access pharmaceutical services.
- 1.37 Whilst the guidance note is not prescriptive in respect of patient groups, the following are provided as illustrations of matters that may be taken into account when defining them:
 - 1.37.1 local GP practices;
 - 1.37.2 methods of travel (on foot, by car, or public transport);
 - 1.37.3 types of pharmaceutical services accessed (dispensing/collection and delivery);
 - 1.37.4 the location of the patient group's geographic starting point of the journey to the pharmacy;
 - 1.37.5 demography;
 - 1.37.6 care homes; and/or
 - 1.37.7 areas of deprivation
- 1.38 Taking these factors into account the Applicant's proposed patient groups are as follows:
 - 1.38.1 Patients receiving a delivery service.
 - 1.38.2 Patients living within the vicinity of the pharmacy who use it because it is close to home.

- 1.38.3 Patients who visit the area to access other amenities.
- 1.38.4 Patients who travel to the pharmacy immediately following an appointment at Whitswood medical centre.
- 1.38.5 Patients who travel to the pharmacy immediately following an appointment at another medical centre.
- 1.38.6 Patients who access the pharmacy to receive services other than pharmaceutical services.
- 1.38.7 Patients who share protected characteristics that affect their mobility.
- 1.39 For each of these patient groups it has considered the implications of the proposed relocation. These comments apply whether people from these patient groups are attending a pharmacy to receive a prescription, access another pharmaceutical services or to purchase 'over the counter' medicines.
- Patients receiving a delivery service.
- 1.40 Approximately 40-50% of the pharmacy's patients receive dispensed medication via a longstanding delivery service. This includes patients whose repeat prescriptions are physically collected from the surgery and those whose prescriptions are issued via EPS. For these people the service will remain the same regardless of where they live. The delivery service will remain unchanged as a result of this relocation.
- 1.41 It is clear, therefore, that for this patient group pharmaceutical services will remain as accessible as they are currently following the relocation.
- Patients living within the vicinity of the pharmacy who use it because it is close to home.
- 1.42 Residents of the area, for the purposes of this patient group typically comprise those living within a radius of around 500m of the existing site. This is essentially a single, largely homogenous, residential area whose residents access the amenities it has discussed above close to the proposed site. Both the existing and proposed sites are within this residential area. Regardless of where live [sic] within this residential area they would have to travel either to Withington Road or beyond to access many of the shops and other amenities they need when going about their day-to-day lives.
- 1.43 Those who are able to leave their homes to access other amenities are clearly able to access the proposed site as it is close to the shops that many of them will use on a regular basis. Other shops are located further away than Withington Road so residents who are able to make longer journeys to the shops will not be troubled by the relatively short distance to the proposed site.
- 1.44 Residents who are housebound as a result of severely limited mobility will be no more able to access the existing site than the proposed site so it cannot be said for these people that the proposed location is less accessible.
- 1.45 As it has discussed already, those who travel around the area on foot will find their journey straightforward. The distance between the existing and proposed

sites is less than 450m. The terrain is level, pavements are wide and there are dropped kerbs throughout with only minor roads and junctions to cross.

- 1.46 Many of the residents of this part of Moss Side live in the area between the two locations so their journey will not be materially further. For many people the proposed site will either be closer to home or the additional distance to get to the proposed location will only be marginally greater than it is at present.
- 1.47 In the very worst case, for residents who have to pass the existing pharmacy location to get to the new site the maximum additional distance they will have to travel is 420m on easy terrain. This journey takes no more than 5-6 minutes at an average walking pace. For residents who are accustomed to travelling around the area on foot (because many do not own cars) this distance is not significant, particularly as they are likely to access other amenities while they are there.
- 1.48 Those who do have access to cars will be able to park their car easily near the proposed location so access will be no more difficult for these people.
- 1.49 In its opinion it is clear that, overall, this patient group will not find the proposed location *significantly* less accessible.

Patients who visit the area to access other amenities

- 1.50 As it has already discussed, many of the local amenities are located closer to the proposed location than the existing one. The local shops and other amenities for residents are located on and around Withington Road. The nature of the existing location is that it does not really attract any passing trade as it is not visible from any main roads and there are no shops nearby.
- 1.51 Regardless of their means of travel to use these amenities, patients in this group will find the proposed location more accessible from these amenities than the existing location.
- 1.52 This patient group find the proposed location significantly *more* accessible.

Patients who travel to the pharmacy immediately following an appointment Whitswood medical centre.

- 1.53 As discussed earlier this medical centre is relatively small so the number of people visiting on a daily basis is not excessive, particularly given that most medication is prescribed on a repeat basis and therefore patients are not required to visit the medical centre in advance of going to the pharmacy. However, this patient group still needs to be considered.
- 1.54 Whilst clearly the distance from the medical centre to the proposed site is longer than the distance to the existing site, NHS England must consider whether this distance alone renders the proposed site significantly less accessible.
- 1.55 As it has described above, walking from the medical centre to the proposed site takes no more than 5 to 6 minutes along easy terrain. The vast majority of people accessing the medical centre will have no difficulty making this journey should they need to.

- 1.56 As relatively few people live in the immediate proximity of the medical centre, many will find that the proposed location is closer to their home than the existing one anyway therefore the incremental journey for these patients is not material.
- 1.57 Those who are less mobile are more likely to have travel to the medical centre by car and will therefore have no difficulty accessing the proposed location given the ease of parking nearby.
- 1.58 So whilst the journey from Whitswood medical centre to the proposed site will clearly be longer than it is to the current site, the relatively short distance, the nature of the journey and the fact people will have to travel to their homes anyway (or possibly to the shops after visiting the surgery) means that the proposed location is not significantly less accessible.

Patients who travel to the pharmacy immediately following an appointment at another medical centre.

- 1.59 The next nearest surgery to the existing site is the Range Medical Centre. This is significantly larger than Whitswood Medical Centre so is used by more patients. This medical centre is only 50m from the proposed site, so patients attending this medical centre will find the proposed site more accessible than the existing one.
- 1.60 Other medical centres are located further afield and are roughly equidistant from the existing and proposed sites. Patients accessing the existing premises having started their journeys at other surgeries will find there is no material difference in the nature or length of the journey to the proposed site.
- 1.61 It is clear, therefore, that this patient group will not find the proposed location significantly less accessible.

Patients who access the pharmacy to receive services other than pharmaceutical services.

- 1.62 Patients in this group include those who access the pharmacy for locally commissioned services or to purchase OTC medicines.
- 1.63 In respect of pharmacy services, volumes of service provision are relatively modest. The nature of the location is that people receiving these 'other services' are likely to do so because they belong to one of the other patient groups i.e. they live in the area or they have travelled from the adjacent medical centre.
- 1.64 That being the case the Applicant has dealt with accessibility for these patients when discussing other patient groups. Both premises are located a short distance apart and the proposed premises is much more visible to passing pedestrians & traffic so there is no reason to believe that patients will find the proposed location any less accessible for the reasons it has already discussed.

Patients who share protected characteristics that affect their mobility.

- 1.65 Every person shares at least one protected characteristic, i.e. they belong to a group that distinguishes them by age, race or any other characteristic. More

commonly, however, this relates to those who may be elderly, infirm or disabled as these impact on accessibility.

- 1.66 As it has discussed already, many of the patients who use the pharmacy at its existing location receive a delivery service, particularly if they have mobility difficulties. This service will be unchanged.
- 1.67 The Applicant is not aware of any patients who currently visit the pharmacy in person who have severe mobility difficulties that would prevent them accessing the proposed site.
- 1.68 Given that that proposed site is easily accessible by car, for those reliant on this form of transport because their mobility is limited, it is clear that this patient group will not find the proposed location is *significantly* less accessible.
- 1.69 So, in summary, in respect of Regulation 24(1)(a) there should be no reason for NHS England to find that the patient groups it has discussed above (and any others it may choose to define) would find the proposed location significantly less accessible.
- 1.70 Regulation 24(1)(b) & (c) require NHS England to consider whether:

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

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

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

- 1.71 and whether

“the NHSCB is satisfied that granting the application would not cause significant detriment to proper planning in respect of the provision of pharmaceutical services in the area of HWB3”

- 1.72 In terms of plans for the provision of pharmaceutical services in the area [the Applicant cannot] find reference to any plans by NHS England or any other relevant body that will be affected if this application is granted.
- 1.73 In respect of the risk of detriment to the provision of pharmaceutical services, this application will actually have the benefit of protecting pharmaceutical services provision. The acquisition of the Lloyds pharmacy branch by the Applicant has secured its future at a time when Lloyds have closed many similar pharmacies. Relocating it to a more prominent location to replace a 100 hour pharmacy in the current challenging economic climate will result in a more secure future for pharmaceutical services provision in this area overall.

Regulation 31

- 1.74 It has addressed this matter on the application form but would be happy to provide any additional information as required.

Conclusion

- 1.75 In conclusion there is clear evidence that this application meets the requirements of a 'no significant change' relocation as set out in Regulation 24.

- 1.76 It urges NHS England to grant this application accordingly.

2 The Decision

NHS England considered and decided to refuse the application. The decision letter dated 25 July 2018 states:

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

- 2.2 Please find attached decision report for reasons behind the decision.

Extract from decision report dated 2 July 2018

Regulation 31

- 2.3 The proposed site is on the same site as an existing pharmacy business; the location identified as being 117b Withington Road, Manchester M16 8EE.

- 2.4 The applicant contends that judicial guidance supports the principle on which they base their application, in that;

2.4.1 regardless of whether the applicant proposes to open from premises that are currently occupied by a pharmacy, or adjacent to those premises; where the applicant is not connected to the existing pharmacy owner, Regulation 31 does not apply; and

2.4.2 as there is absolutely no connection in terms of ownership or control between the applicant (Sharief Healthcare Ltd) and the existing occupier (named by the applicant as Everest Pharmacy Limited), the application therefore cannot be refused pursuant to Regulation 31.

- 2.5 The PSRC gave careful consideration to the statements made by the applicant and the judicial guidance of Judge Stephen Davies referenced to in the application. However the PSRC noted that there was a fundamental inaccuracy in the information provided by the applicant relating to the identity of the current contractor lawfully providing pharmaceutical services from 117b Withington Road, Manchester, M16 8EE.

- 2.6 According to the NHS England Pharmaceutical List, Muhammed Mian (Sole Trader) is the person lawfully conducting a retail pharmacy business at this address ("the listed contractor"). The applicant however has stated under section 6 that *Everest Pharmacy Limited* intends to close before the relocation takes effect, and regardless of the existing pharmacy business being on the same premises, the application should not be refused pursuant to Regulation 31. This is based on judicial guidance handed down by Judge

Stephen Davies in respect of the Pharmacy Care Plus v Family Health Services Appeals Unit ruling on an application to relocate a pharmacy to premises adjacent to an existing pharmacy business.

- 2.7 The PSRC noted the conclusion of Judge Stephen Davies and his reference to Department of Health Guidance (2009) that the deciding body i.e. PSRC is said to be satisfied the applicant *“has a sufficiency distinct identity and will be providing a distinct service”* from the already listed contractor.
- 2.8 Having considered the above information, the PSRC was not satisfied that the applicant had demonstrated that Regulation 31 does not apply in this case, as it had incorrectly identified the current contractor at 117b Withington Road as being Everest Pharmacy Limited. The applicant’s assurances around Regulation 31 were therefore erroneously based on demonstrating that there was no business link or connection between the applicant and Everest Pharmacy Limited. As Everest Pharmacy Limited is not the listed contractor at 117b Withington Road, and the applicant has not provided any information addressing whether there is any business link or connection with Muhammed Mian (the listed contractor), the PSRC could not be satisfied that the applicant is not intending to relocate into premises that are the same or adjacent premises to persons included in the pharmaceutical list that could be deemed to be providing the same service.
- 2.9 The PSRC was therefore of the view that Regulation 31 is not met.

Regulation 24 – does the need on which the applicant based its application satisfy the elements of Regulation 24?

- 2.10 ***Consideration 1 - Is the location of the new premises significantly less accessible than the current premises, and if so why? Regulation 24(1)(a)***
- 2.11 The applicant is offering 47.5 overall opening hours (09:00-12:30 – 14-00-18:30) over five days i.e. Monday to Friday. The PSRC also noted that the current premises are co-located with Alexandra Park Health Centre, which is nestled within a large Local Authority housing estate. The pharmacy was established at this site in the mid-1980s specifically to provide pharmaceutical services to the resident patient population in the surrounding area, and to those attending the co-located medical practices. According to recent dispensing data - source: NHS Business Services Authority (NHSBSA), the pharmacy receives 80% of its prescription items from the co-located GP practices, which are open between 08:30 – 18:00, Monday – Friday.
- 2.12 The applicant is proposing to relocate to a unit on the outer edge of the large Local Authority housing estate, spanning between Princess Road to the east, Moss Lane to the north, Yarburgh Street/Claremont Road to the south and Withington Road to the west. The proposed location is on Withington Road, which is a busy through-road for traffic heading into and out of Manchester city centre, especially at peak times during the day. There are limited parking spaces available to people visiting any of the amenities in the vicinity via private transport. A site visit was undertaken by members of the NHS England Greater Manchester team on 19 June 2018.
- 2.13 The PSRC noted the patient groups as described by the applicant, and how the relocation would affect these groups. The applicant listed affected patient groups as:-

- 2.13.1 patients receiving a delivery service
 - 2.13.2 patients living in the vicinity of the pharmacy who use it because it is close to home
 - 2.13.3 patients attending the adjacent medical centre and subsequently seeking pharmaceutical services
 - 2.13.4 patients attending a different medical centre and subsequently seeking pharmaceutical services
 - 2.13.5 patients attending the pharmacy who do not live within the immediate area and who have not attended a medical centre before visiting the pharmacy
 - 2.13.6 patients who wish to access advanced or locally commissioned services from the pharmacy
 - 2.13.7 patients who share protected characteristics that affect their mobility.
- 2.14 The applicant states that 40% - 50% of its patients receive their medicines via their own delivery service and therefore the relocation will not have a significant impact on these patients. However the same statistics conversely imply that 50% - 60%, which is the majority of their overall patients, must therefore collect their medicines via other means, which have not been identified or assessed by the applicant. The applicant also suggests that due to the relative short distance involved, most other patients should not have a problem accessing services from the proposed new location.
- 2.15 The applicant was heavily reliant on the relatively short distance of the relocation, and appeared to make an assumption that all patients visiting the pharmacy in its current location could easily manage to travel (on foot) the additional 5 – 6 minutes plus the return journey to their destination, with minimal impact. Whilst the applicant had taken account of the patients living between the two sites, it did not appear to have undertaken an impact assessment on those patients residing between Quinney Crescent and Alexandra Road (to the east of the current site, with further to travel to reach the proposed site) that are accustomed to using the pharmacy. The PSRC recognised that it is much more convenient and easily accessible for patients of Whitswood Medical Practice to visit Whitswood Pharmacy, which they would pass on their way to and from the health centre entrance.
- 2.16 The applicant contends that the number of patients visiting the Whitswood Medical Practice on a daily basis is relatively low, however dispensing information available from the NHSBSA shows that 80% of the prescription items dispensed originate from this GP practice; this will include those patients who access the pharmacy immediately following a GP appointment. Although it could be considered a relatively straight-forward journey between the current and proposed premises during good weather conditions, this would not be the case during adverse weather conditions, particularly as there is no public transport available between the two sites. The site visit undertaken by NHS England officers on 19 June 2018 observed that the public pathway along Yarbrough Street was in a poor state of repair with undulating and uneven surfaces, which would make the journey between the two sites for some patients (particularly those with impaired mobility)

problematic. The current premises have fully integrated disabled access in the form of a ramp enabling access to the premises for patients using mobility/walking aids. The applicant states that they are not aware of any of their current patients having severe mobility issues which would prevent them accessing services at the proposed site. However during the site visit, a patient was observed travelling towards the premises in a mobility scooter. Therefore this group of patients could be adversely impacted by the relocation and their needs have not been assessed in relation to accessibility to the proposed new location.

- 2.17 The PSRC was left in some difficulty because, while it had some information about patient groups, the information available to it clearly referenced the existence of other groups whose access the PSRC was not able to assess. The PSRC was able to draw limited conclusions regarding access for the identified patient groups but only in particular circumstances.
- 2.18 In the circumstances, the PSRC was unable to be satisfied that the applicant had provided adequate assurances that the needs of all their existing patients had been impact assessed; as it had not been explained how the relocation would not adversely impact the needs of the 50-60% of patients who do not have their medication delivered. The PSRC also determined that the location of the proposed new premises, where access is restricted by virtue of the location and access into the pharmacy premises, makes the proposed location significantly less accessible than the current premises for some patient groups. It was therefore not adequately demonstrated to the PSRC that there would be no adverse impact on all patient groups, should the pharmacy relocate.
- 2.19 The Committee was therefore of the view that condition (a) is not met.
- 2.20 ***Consideration 2 - In the opinion of the NHSCB, would granting the application 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?

Regulation 24(1)(b)

- 2.21 The PSRC noted that there is no controlled locality within 1.6km of the premises to which the applicant is seeking to relocate. On that basis the PSRC determined that the relocation would not cause significant detriment to proper planning in respect of the provision of pharmaceutical services in the area of Manchester Health & Wellbeing Board.
- 2.22 The Committee was therefore of the view that condition (b) had been met.
- 2.23 ***Consideration 3 – Is the NHSCB 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? Regulation 24(1)(c)

- 2.24 Taking into account all available information, the PSRC was 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 Manchester Health & Wellbeing Board area.
- 2.25 ***Consideration 4 – Are the services the applicant undertakes to provide at the new premises the same as the services the applicant has been providing at the existing premises (whether or not, in the case of enhanced services, the NHSCB chooses to commission them)? Regulation 24(1)(d)***
- 2.26 The applicant had indicated in its application that the services (including opening hours) would remain unchanged.
- 2.27 The PSRC was satisfied that the applicant was therefore undertaking to provide the same services (which includes opening hours) from the proposed premises, as it provides from the current premises, throughout the applicant's contracted 47.5 opening hours.
- 2.28 The Committee was therefore of the view that condition (c) had been met.
- 2.29 ***Consideration 5 – Will the provision of pharmaceutical services be interrupted (except for such period as the NHSCB may for good cause allow)? Regulation 24(1)(e)***
- 2.30 The applicant had specified that there would be no interruption in services.
- 2.31 The Committee was therefore of the view that condition (e) had been met.
- 2.32 ***Consideration 6 - If the application was originally granted for an approved retail area exemption is the applicant planning to leave the retail area? Regulation 24(3)(a)***
- 2.33 The PSRC was satisfied that the application had not been originally granted for an approved retail area exemption. Therefore a refusal under Regulation 24(3)(a) does not apply in this case.
- 2.34 ***Consideration 7 – Is the applicant seeking to relocate to premises that are the same, or adjacent to, premises which could be considered to be part of the same service as the existing services, and so should be treated as the same site? Regulation 31***
- 2.35 As per the reasoning stated under the section of this report entitled "Regulation 31", the PSRC could not be satisfied, based on the information available, that a refusal under Regulation 31 would not be appropriate. It was noted that there is an existing pharmacy contractor at the proposed premises (117b Withington Road), and as the assessment on the business links or connections had been undertaken by the applicant on Everest Pharmacy Ltd, and not the listed contractor Muhammed Mian, the PSRC had no assurances that the applicant and the current listed contractor are entirely unconnected businesses, and as such, cannot be considered to be part of the same services as the existing services.

- 2.36 **Interested parties notified of the application:**
- 2.37 All pharmacies within 2km of the applicant's proposed site were notified of this application.
- 2.38 The PSRC took account of the representations received from Greater Manchester LPC, Rowlands Pharmacy Head Office, Boots Head Office, Cohens Head Office and (on behalf of the branches named as interested parties).
- 2.38.1 Rowlands Pharmacy Representations received
- 2.38.2 Boots Representations received
- 2.38.3 Cohens Chemist Representations received
- 2.39 Other Interested parties notified were:-
- 2.39.1 Greater Manchester LPC Representations received
- 2.39.2 Manchester LMC
- 2.39.3 Healthwatch Manchester
- 2.39.4 Manchester Health & Wellbeing Board
- 2.40 The PSRC noted that interested parties did not raise any specific objections, but merely asked that NHS England had regards for the regulations when considering this application. GMLPC was of the view that granting the application may result in a significant change to the arrangements that are already in place for the provision of pharmaceutical services, and Rowlands stated that the applicant must explain why NHS England should not refuse the applicant by virtue of Regulations 31 (refusal for same or adjacent premises).
- 2.41 The PSRC took into account the applicant's response to the interested party comments, which essentially confirmed that the applicant had already addressed any such concerns relating to Regulations 24 and 31.
- 2.42 The PSRC further noted that the applicant states that the Everest Pharmacy Ltd has given notice to NHS England to close its pharmacy at 117b Withington Road. The PSRC was aware however that the listed contractor at this pharmacy premises is in fact Muhammed Mian, and it is Muhammed Mian who has given notice to close the listed premises at 117b Withington Road. The PSRC noted the applicant's comments in response to the interested party representations in this respect, and was mindful that a contractor's notice to permanently close its premises, and voluntarily withdraw those premises from the Pharmaceutical List, can be withdrawn at any time prior to the date given its notice. This could potentially either result in two pharmacies operating from the same premises at the same time, or the planned closure and relocation ultimately not going ahead.

Decision

- 2.43 Taking into account all available information, the PSRC decided to **refuse** Sharif Healthcare Ltd's application for a "no significant change" relocation.
- 2.44 The PSRC determined that the requirements of Regulation 24(1)(a) and Regulation 31 had not been met; therefore the application is **refused** due to failing to meet the requirements of Regulation.
- 2.44.1 The PSRC was not satisfied that the applicant had provided assurances that the needs of all their existing patient groups had been taken into account; as the potential impact on the 50-60% who are non-delivery patients had not been assessed. The PSRC also determined that the location of the new premises, where access is restricted by virtue of the location/access into the pharmacy premises, would be significantly less accessible than the current premises for some patient groups. It was therefore not adequately demonstrated to the PSRC that there would be no adverse impact on all patient groups should the pharmacy relocate, and
- 2.44.2 The PSRC could not be satisfied, based on the information available, that a refusal under Regulation 31 would not be appropriate. It was noted that there is an existing pharmacy contractor at the proposed premises (117b Withington Road), but as the applicant had not provided an assessment of whether there are any business links or connections with the listed contractor at 117b Withington Road (Muhammed Mian), it was not satisfied that the applicant and the current pharmacy contractor are entirely unconnected businesses, and as such, cannot be considered to be part of the same services as the existing services.
- 2.45 The PSRC awarded appeal rights to Sharief Healthcare Ltd (the applicant).

3 The Appeal

In a letter dated 14 August 2018 addressed to NHS Resolution, the Applicant, through its representative Pharmacy Sales & Consultancy ("PSC"), appealed against NHS England's decision. The grounds of appeal are:

- 3.1 NHS England concluded that it was required to refuse the application in accordance with Regulation 31 without having *reasonable* grounds to do so. It referred to information provided within the Applicant's application as being factually inaccurate (which it accepts, with hindsight, it was, though this information was provided in good faith), but disregarded other information it was in possession of from another source when making its decision.
- 3.2 The NHS England committee failed to have proper regard to the accessibility of the proposed premises to the majority of patient groups the Applicant described. Instead it appeared to 'lump' most of these patient groups together and, as a result, its decision was flawed.
- 3.3 It has provided further detail below in respect of its grounds for appeal as well as additional information to assist the Primary Care Appeals Committee in considering this matter.

Background

- 3.4 On behalf of the Applicant, PSC submitted an application for the above no significant change relocation early in March 2018. This was acknowledged by NHS England in a letter dated 26th March.
- 3.5 As set out within the application, the Applicant seeks to relocate its pharmacy to premises currently operated by another pharmacy contractor as a '100 hour' pharmacy. That contractor has notified NHS England that it intends to withdraw from the pharmaceutical list. The intention is that the Applicant will relocate its pharmacy to those premises with the relocation to take effect shortly after the existing contractor's pharmacy has closed.
- 3.6 In its decision letter, NHS England refers to a 'fundamental inaccuracy' in the information provided by the Applicant in respect of this other pharmacy contractor. It has therefore spoken to this contractor to seek clarification on the issue raised by NHS England. Its understanding of the position is as follows.
- 3.7 The premises to which it seeks to relocate currently trade as 'Everest Pharmacy' and have done so for a number of years. This pharmacy was opened as a 100 hour pharmacy in September 2009.
- 3.8 A limited company, Everest Pharmacy Limited ("EPL"), was incorporated in July 2009 and it was intended that this company would operate a 100-hour pharmacy from premises at 117b Withington Road, Manchester. However, for practical reasons, the application for inclusion in the pharmaceutical list at those premises was made by one of the directors of EPL, Mr Muhammad Mian in his own name as a sole trader.
- 3.9 Mr Mian resigned as a director of EPL in June 2010 and one of the other directors of the company contacted the PCT at the time, seeking advice in respect of transferring the 'pharmacy contract' to EPL when he realised Mr Mian's name continued to appear on NHS payment schedules. However, it appears, according to NHS England, that no formal application for change of ownership was made to the PCT. Therefore, the contractor listed by the PCT (and subsequently NHS England) remained as Mr Mian.
- 3.10 As time passed the directors of EPL, with limited knowledge of the regulatory requirements, continued to operate the pharmacy, assuming the 'contract' to be owned by EPL.
- 3.11 It was therefore the Applicant's understanding, at the time it made its application, that the relevant contractor trading from the proposed premises was EPL, hence its reference to there being no connection between its own company and EPL when considering Regulation 31.
- 3.12 It now understands, from one of the current directors of EPL, that when it submitted its closure notice for the 100 hour contract, it was notified of the discrepancy by NHS England and was informed that only Mr Mian was able to submit a closure notice. As the current director is still in contact with Mr Mian he was able to ask him to submit the necessary notification. This notice was subsequently submitted to NHS England and it was acknowledged by them that the pharmacy would close no sooner than 26th November 2018, taking into account the requirement to provide 6 months' notice.

- 3.13 This information is provided for background, solely to explain to Primary Care Appeals why the original comments were made in the application in respect of the pharmacy contractors concerned. Clearly the matter of whether the current contractor at the proposed premises is EPL or Mr Muhammed Mian is not a matter the committee will be concerned with when considering this appeal.
- 3.14 In its opinion, therefore, once it became aware of this issue, NHS England should have sought further information from the Applicant (in accordance with Schedule 2, to the Regulations – paragraph 11 – relevant information or documentation) as to whether there was any connection between it and Mr Mian bearing in mind the previous comments submitted by the Applicant confirming there was no relationship with EPL.
- 3.15 However, for the purpose of considering Regulation 31 (2)(b), it can unequivocally confirm that there is no business, financial or personal connection between the Applicant and Mr Mohammed Mian. Mr Mian is unknown to the Applicant and has never had any business relationship with it. Furthermore, Mr Mian will have no involvement whatsoever in the operation of its pharmacy once the relocation takes place.

NHS England decision

- 3.16 In a letter dated 25th July it was notified that the application had been refused. In summary, NHS England's findings in respect of the application were as follows:
- 3.16.1 The requirements of Regulation 24(1)(b),(c), (d) & (e) were met.
- 3.16.2 The requirements of Regulation 31 & 24(1)(a) were not met and therefore the application was refused.
- 3.17 As none of the contractors consulted suggested this application should be refused, it has assumed the other aspects of Regulation 24 are not contentious and has not provided any further information on these matters. However, it reserves the right to provide additional comments at a later stage in the appeal process should any party raise any further questions in respect of other parts of Regulation 24.

Regulation 31

- 3.18 As set out in the Applicant's application, in order to refuse an application in accordance with Regulation 31, NHS England must be satisfied (amongst other things) "that it is reasonable to treat the services that the applicant proposes to provide as part of the same service as the existing services". The Applicant provided an extract of previous judicial guidance on this matter by way of explanation why Regulation 31 did not apply in this case given the absence of any relationship between it and the existing contractor at the proposed premises.
- 3.19 In this case, NHS England became aware that there was a discrepancy in respect of the listed contractor at the proposed premises but did not then seek to confirm with the Applicant whether it wished to provide further information in respect of any connection between it and Mr Mian. NHS England went on, when making its decision, to conclude that it "had not

demonstrated that Regulation 31 does not apply in this case, as it had incorrectly identified the current contractor at 117b Withington Road as being ELP”.

- 3.20 Regulation 31 requires NHS England to reach a ‘reasonable’ conclusion in respect of 31(2)(b). In this case it simply concluded, in the absence of any information regarding Mr Mian, that there *might* be a connection and therefore it was required to refuse the application. In its opinion this was not a reasonable conclusion to reach and the question could have easily have been answered by a simple enquiry with the Applicant.
- 3.21 Mr Mian’s previous status as a director of EPL could have been considered to be reasonable grounds to assume (given the Applicant’s statement that there was no connection between it and EPL) that there was no relationship with Mr Mian either. However, NHS England did not provide the Applicant with the opportunity to clarify this matter (once the discrepancy with ELP and Mr Mian had come to light) so it was not in a position to address any concerns NHS England may have had.
- 3.22 However, regardless of the failings in process, it has confirmed that there is no relationship between it and Mr Mian and therefore, for the reasons set out in the application, Regulation 31 is not applicable.

Regulation 24(1)(a)

- 3.23 When considering 24(1)(a) it would like to start by addressing the findings on this matter set out by NHS England in its decision report.
- 3.24 In describing the location of the existing premises, NHS England state that it “is nestled within a large Local Authority housing estate” and later that it is “proposing to relocate to a unit on the outer edge of the large Local Authority housing estate spanning between Princess Road to the east, Moss Lane to the north, Yarburgh Street/Claremont Road to the south and Withington Road to the west”.
- 3.25 In describing the area in this way - very much along the lines of ‘neighbourhoods’ used in previous regulations - NHS England has then concluded that the proposed location is at the “outer edge” of this ‘neighbourhood’. This appears to have then influenced NHS England’s later conclusion that the proposed premises are in an area “where access is restricted by virtue of the location”.
- 3.26 The mistake made by NHS England is that it has effectively bypassed the requirement to consider all patient groups highlighted by the Applicant and has, instead, focused solely on the locations of the existing and proposed premises in the context of the housing estate whose boundaries have been described above. NHS England appears to have simply considered all patients not receiving a delivery service as receiving their pharmaceutical services in an identical manner and concluded (incorrectly in its opinion) that the proposed location is less accessible for these patients and found that the application should be refused in accordance with Regulation 24(1)(a).
- 3.27 This approach is, of course, legally flawed. Had NHS England considered each of these groups individually, and fully understood how and why patients currently receive pharmaceutical services from the Applicant’s pharmacy, it

may have reached a different conclusion. It discusses the nature of the area and these patient groups later.

- 3.28 NHS England describe Withington Road as “a busy through-road for traffic heading into and out of Manchester city centre, especially at peak times of the day”. It does not disagree with this comment but are unclear of its relevance to the regulatory tests. Where NHS England may have misled itself is that reference to it being a “through-road” implies that it is not an area where people have reason to spend any time. This would be an entirely inaccurate conclusion.
- 3.29 The area around the proposed site is a busy shopping area used by many members of the local community, including those living in the area around the existing location (where there are no shopping amenities whatsoever). Shops in this area include several large convenience stores/supermarkets (such as Tesco Express, a medium-sized Co-Op supermarket, Food Basket, Bargain World and Malik Super Store), a post office, two pharmacies (including one at the proposed site), a medical centre, a launderette, various fast-food restaurants / takeaways, cafes, hairdressers/beauty salons, a dental practice and a bookmaker. There is also a mosque, a car dealership, a church and a primary school in close proximity.
- 3.30 These amenities all cater for the local residential population and not, typically, those using Withington Road to travel into and out of Manchester city centre.
- 3.31 NHS England state that “there are limited parking spaces available”. It provides further information on parking later (demonstrating that parking is straightforward) but regardless of NHS England’s view on whether spaces were limited or not, this is not a concern in respect of accessibility as most local residents travel on foot due to low levels of car ownership.
- 3.32 On page 3 of its decision report, NHS England suggested that the Applicant “*was heavily reliant on the relatively short distance of the relocation, and appeared to make an assumption that all patients visiting the pharmacy in its current location could easily manage to travel (on foot) the additional 5 – 6 minutes plus the return journey to their destination, with minimal impact*”
- 3.33 Once again, NHS England have failed to have regard to the correct legal test in this case and have stated that the Applicant has made assumptions that it has not. The test is not whether all patients can easily travel (on foot) to the proposed location but whether “for the patient groups accustomed to accessing the existing premises, the proposed location is significantly less accessible”. There is also an assumption in the comment above that patients who have a reason to travel from the existing location to the proposed location would then return in the same direction. For the majority of patients this is unlikely to be the case.
- 3.34 Notwithstanding the fact that the Applicant did refer to patients living to the east of the current site within its application, the appeal committee will be aware it is ‘patient groups’ it needs to consider not ‘all patients’. It addresses this matter further below.
- 3.35 NHS England go on to discuss the convenience for patients of Whitswood Medical Practice when visiting Whitswood Pharmacy. They concede that the journey for patients requiring pharmaceutical services to the proposed

premises is “relatively straightforward” “during good weather conditions”.... but assume “this would not be the case during adverse weather conditions”.

- 3.36 Assuming NHS England are referring specifically to the Applicant’s patient group 4 (patients who travel to the pharmacy immediately following an appointment at Whitswood Medical Centre) this argument is flawed.
- 3.37 Nobody lives at the medical centre itself. A small number of homes are located close to the medical centre but most are not, so patients unable to travel around the area in adverse weather will not be able to get to the surgery either. Given that most people in this patient group would have to make a journey from home (or elsewhere) to the surgery in the first instance there is no reason to suggest they would find the journey to the proposed site difficult given the proximity of the two sites.
- 3.38 NHS England go on to discuss the journey between the existing and proposed site taking into account the local terrain (without having regard to the fact that regulation 24 does not discuss the distance or journey between the sites). Putting aside the fact that this journey matters only to people who travel from the existing site to the proposed site (it accepts that this applies to patient group 4), it disagrees with NHS England that there are any obstacles to free movement around this area.
- 3.39 It agrees with NHS England officers that parts of the public pathway along Yarburgh Street are not in good repair but only to the extent the surface is slightly broken up. This is shown in the image below.
- 3.40 Furthermore, the pavement undulates only to the extent that there are dropped kerbs which allow wheelchair / mobility scooter / buggy users to easily cross the roads. The area is entirely flat with no gradient whatsoever between the existing or proposed sites. This can also be seen in the photo of Yarburgh Street provided below.
- 3.41 [Photos provided to the Committee at Appendix B.]
- 3.42 The comments on the poor state of repair of the pavement also disregard the fact that there are several routes between the two sites (as shown on the map provided with the Applicant’s application), all of which are similarly short distances. The section of broken pavement is limited to a short stretch of Yarburgh Street and pavements elsewhere in the area are in excellent condition.
- 3.43 NHS England further state that the existing premises have “fully integrated disabled access in the form of a ramp enabling access to the premises for patients using mobility/walking aids”. However, they fail to mention that the existing premises have level access from the pavement (so no need for a ramp) and an electronic door which opens automatically on the push of a button. The proposed premises are highly accessible for disabled patients.
- 3.44 Finally, NHS England state that their officers observed a patient travelling towards the premises on a mobility scooter during their site visit. They have not explained how they know this was a patient of the pharmacy (and therefore relevant in the context of this application) but, in any event, surely this is evidence that people with mobility difficulties can travel around the area

without difficulty, not that they are unable to do so! It disagrees with the assessment that it has not considered accessibility for patients with reduced mobility but discuss this further below.

- 3.45 In conclusion, NHS England, without reference to most of the patient groups it discussed, conclude that the proposed location is significantly less accessible “by virtue of the location and access into the pharmacy premises”. It disagrees with this conclusion and provides further evidence below.

Local Area

- 3.46 NHS England refers, in their decision report, to the pharmacy currently ‘nestling’ within a large Local Authority Housing estate and describe the boundaries of this estate. The attached map shows this estate shaded in yellow, as well as the existing & proposed locations, shopping parades and the next nearest pharmacies (other than Everest), Range Pharmacy & Cohens.

- 3.47 This residential estate is known locally as the Alexandra Park estate. This was built in the 1970s and became notorious for crime, in part due to a ‘maze of walkways’ through the estate which harboured drug dealers and gangs. Riots in the early 1980s (in the Moss Side area including this estate) led the Local Authority to commit to a £400m investment into the area to renovate the housing stock and remodel the estate to help tackle crime and to provide a better living environment. Work on the houses was completed in the late 1990s but further work has continued since with £5.5m recently being spent on Alexandra Park itself.

- 3.48 As a result, despite remaining a relatively deprived area, crime levels have fallen dramatically, and the estate has become a much more popular area to live.

- 3.49 Deprivation data from 2015 (source Ministry of Housing, Communities and Local Government) shows the following for the lower layer super output area in which the pharmacy is currently located:

Index	Rank*	Rank (%)
Multiple Deprivation (combined)	1,236	4%
Income	381	1%
Crime	6,536	20%
Living environment	11,556	35%

- 3.50 So whilst the area is clearly still deprived (when looking at the multiple deprivation score which takes account of all other measures), this is largely due to extremely low income levels rather than crime and the living environment which have improved significantly over the years.

- 3.51 The information below (in respect of other demographic data) was provided by the Applicant with its application:

Profile of local residents

- 3.52 In terms of the local demographic profile, key data from the 2011 census (for the Moss Side Ward in which both the existing and proposed locations are situated) is as follows:
- 3.52.1 Car ownership is significantly lower than average with 60.2% of homes having no car compared to the national average of 25.8%.
 - 3.52.2 The number of residents over the age of 65 is lower than average being 6.6% compared to 16.4% nationally.
 - 3.52.3 The area has higher than average levels of ethnic diversity with 25.7% of residents describing themselves as White / British compared to the national average of 79.8%.
 - 3.52.4 Home ownership is low with 44.2% of residents living in social housing compared to 17.7% in England.
 - 3.52.5 14.4% of residents find their day to day activities limited by illness or disability compared to the national average of 17.6%.
- 3.53 This information reinforces the view that whilst poverty is clearly a significant issue, (leading to low levels of car ownership), residents are relatively healthy and mobile.
- 3.54 Residents living in areas with this profile are typically very reliant on amenities which are local to them. They do not travel far to access services as low levels of car ownership leave them reliant on walking or using public transport (which they may not be able to afford). However, the relatively low levels of residents over the age of 65 and low levels of limiting disability mean that most residents have little difficulty travelling moderate distances on foot.
- 3.55 Throughout the Alexandra Park estate, the terrain is flat, pavements are wide and street lighting is provided. This can be seen in the photographs provided above and the following images:
- 3.56 [Photos provided to the Committee at Appendix B.]
- 3.57 The site on which the pharmacy is currently located is shared with Whitswood Surgery though the pharmacy is not integrated into the medical centre but occupies a separate building.
- 3.58 There is no 'passing trade' at this location as both Westerling Way and Whitswood Close are cul-de-sacs (as can be seen from the map below) and the pharmacy is not visible or accessible from Alexandra Road to the east.
- 3.59 [Map provided to the Committee at Appendix B.]
- 3.60 As it has discussed previously there are no other amenities of note within close proximity to the existing site so people living in the area tend to gravitate west to access the shops on Withington Road.

- 3.61 As the map in [Appendix B] shows, contrary to the implications of NHS England's comments, the existing pharmacy location is not within the centre of the Alexandra Park estate but is towards the south west of the estate. This is one of the reasons residents here (and people visiting the medical centre) tend to use the shops close to the proposed location rather than the alternative parade on Princess Road.
- 3.62 The other reason residents of Alexandra Park tend to use shops to the west rather than those on Princess Road is that they are more accessible.
- 3.63 Princess Road is a very busy trunk road dual carriageway and, as the image below shows, there are barriers in the middle of the road preventing pedestrians from trying to cross, except at pedestrian-controlled crossings which are located at intervals of approximately 200m along Princess Road.
- 3.64 As all the shops are located on the eastern side of the road, this parade is not seen as being particularly accessible for residents of the Alexandra Park estate with the exception of those living at the eastern edge of the estate. It tends, instead to serve the more densely populated residential area to the east of Princess Road.
- 3.65 [Photo provided to the Committee at Appendix B.]
- 3.66 So, whether residents of the estate are travelling by foot or car, the amenities on Withington Road are generally more accessible so they tend to do their shopping there.
- 3.67 With regard to public transport, NHS England are correct in that there is no direct bus route between the existing and proposed sites. In fact, there was a bus service (known as the 85a) which was introduced in November 2016 and travelled along Yarburgh Street from Withington Road to Alexandra Road and a bus stop was located on Yarburgh Street (outside Everest Pharmacy).
- 3.68 However, this service was stopped after less than a year as it was little-used. The consensus amongst local residents (who are highly income deprived) was that there was little benefit in using this route when there are extensive services in a north / south direction along Withington Road, Alexandra Road and Princess Road for those people wishing to travel further afield. The distance from the stop outside Everest Pharmacy and the next nearest stop on Alexandra Road south is around 350m so given that many residents live in the area between the two stops, the new service offered little in terms of additional accessibility compared to existing bus stops.
- 3.69 It is clear, therefore, that residents of the area are prepared to walk this distance and, given there would be costs incurred, it is highly unlikely that there would be any meaningful demand from patients wishing to travel the 400m or so from the Whitswood Medical centre to the proposed location by bus.

Patient groups

- 3.70 The Applicant listed 7 patient groups within its application and maintains that these are the most relevant patient groups to consider in this case.

- 3.71 It does not intend to repeat all the information submitted with its application in respect of these patient groups but provide *additional* information below where it feels it would be helpful to the appeal committee.

Patients receiving a delivery service.

- 3.72 NHS England appeared to accept that this patient group (which accounts for 40-50% of all patients) would receive its pharmaceutical services in exactly the same way after relocation as it does currently.
- 3.73 As this does not appear to be controversial it has nothing further to add in respect of this patient group.
- 3.74 However it does take issue with NHS England's comment that "50%-60% of its patients, which is the majority of their overall patients, must therefore collect their medicines by other means, which have not been identified or assessed by the applicant."
- 3.75 The application discussed these other patients in detail by reference to 6 other patient groups which were ignored by NHS England.

Patients living within the vicinity of the pharmacy who use it because it is close to home.

- 3.76 Patients in this group will typically live within the Alexandra Park estate and the residential area between Withington Road and the B5218 to the west. Whilst the pharmacy does serve patients from further afield, these tend to belong to patient group 4 or 5 (see below).
- 3.77 These patients will travel to the pharmacy on foot, by car or, theoretically, by public transport.
- 3.78 For residents travelling on foot, as it has described earlier, they will find the area very easy to move around as the estate is flat, benefits from wide pavements with dropped kerbs and street lighting throughout. Regardless of NHS England's comments about undulating pavements, having carried out a site visit on 6th August, it maintains that there are no barriers to easy movement of residents throughout the entire estate or the wider area.
- 3.79 For residents living in the south west of the estate, the proposed location will be closer so will be more accessible. For those living between the two sites it will be equidistant and for those living close to the existing site it will be further away.
- 3.80 It accepts that there will be some patients who use the existing premises that will find the proposed premises are further away. However, it does not accept that it follows that this makes the location **significantly** less accessible for these people.
- 3.81 As the Applicant has discussed, the distance between the existing and proposed premises by the shortest route (along Yarburgh Street, turning left up Stanworth Close, right along Westerling Way and left into Whitswood Close) is 420m on level terrain. However, the local road network is such that there are several other routes pedestrians could take, all of which are less than 500m.

- 3.82 Any resident wishing to travel from home to the proposed location whose journey took them past the existing site on the way to the proposed site would find that their journey was extended by 420m in each direction. During its site visit this walk took less than 5 minutes.
- 3.83 In practice, given that the existing location is 'tucked away' in a cul-de-sac, there are very few people whose route to the proposed location would take them past the existing one. Therefore, the additional distance would be less than 420m for almost everyone as there would be a more direct route available.
- 3.84 Given that for many people the proposed location would be closer or equidistant and for those who it is further, the extra distance would be 420m in each direction at the most, and the pharmacy would be in a location they are accustomed to visiting for shopping anyway (overlapping with patient group 3), it does not believe patients in this group travelling around the area on foot would find the proposed location significantly less accessible.
- 3.85 As stated previously this is an area of low car ownership so most people travel on foot but it has considered those who do drive to the pharmacy. A car park is provided at the existing location (shared between staff and patients) so it is possible to park close to the existing site. However, it is also possible to park close to the proposed site.
- 3.86 As highlighted by NHS England in their report there is parking available (free of charge) outside the proposed premises on Withington Road (on both sides of the road). There is also parking within 20m of the entrance to the pharmacy on Yarburgh Street (limited to 30 minutes) and totally unrestricted on-road parking further up Yarburgh Street (50m from the premises) for the remainder of its length.
- 3.87 There are currently double yellow lines immediately outside the Everest premises on Yarburgh Street (on the same side of the road) but these were painted only when the new bus route was introduced as this is where the bus stop was located. As this stop is no longer in use these parking restrictions are not enforced (but the lines are yet to be removed). In any event, disabled patients can park here within 5 metres of the premises, closer than they can park to the existing premises.
- 3.88 It is clear, therefore, given the very short distance and the ease of parking that car users in this patient group will not find the proposed premises any less accessible.
- 3.89 In respect of public transport users, there is no evidence that people within this group use the bus as they live nearby and bus routes through the area are north / south along the major routes rather than through the estate. However, the nearest bus stop to the surgery site (and existing pharmacy site) is 175m away on foot as there is no direct access from Princess Road. The distance from this stop to the proposed site is 415m so the incremental distance for bus users would be no more than 240m, a walk of less than 3 minutes. In its opinion this additional distance is not significant in the context of the area.
- 3.90 So, for this patient group overall, taking into account the short distances, level terrain, the fact the proposed location will be closer for some and further for

others, ease of car parking at the proposed location and the minimal additional distance to walk for bus users (of who it believes there are very few), it is clear that this patient group will not find the proposed location significantly less accessible.

Patients who visit the area to access other amenities

- 3.91 For the reasons it has discussed above, the existing site is much closer to (and more easily accessible from) the amenities on Withington Road than those on Princess Road.
- 3.92 Patients who visit the existing site because they are shopping, or using other amenities on Withington Road, will clearly find the proposed location more accessible as it is within the same commercial area as these other amenities.
- 3.93 Whilst it believes there are very few, if any, patients who visit because they are shopping on Princess Road, the journey to the existing premises would be 650-700m whereas the journey to the proposed premises would be 850-900m.
- 3.94 Regardless of their means of travel (and mindful that there is no bus service from Princess Road or Withington Road to the existing site) the overall effect of the proposed relocation on this patient groups is negligible.
- 3.95 That being the case the proposed location is not significantly less accessible.

Patients who travel to the pharmacy immediately following an appointment Whitswood medical centre.

- 3.96 This appears to be the patient group that caused difficulties for NHS England as they focussed specifically on the journey between the pharmacy (adjacent to this medical centre) and the proposed location.
- 3.97 NHS England commented on the fact that 80% of the prescriptions dispensed by the Applicant's pharmacy originated from this medical centre. Whilst this is correct (and not a surprise given that other medical centres in the area are located either much further afield or much closer to other pharmacies) it is the case, of course, that many are repeat items where patients have no need to attend the surgery. Many of these prescriptions are delivered as patients have no reason to visit the pharmacy unless they have an appointment at the surgery.
- 3.98 For patients that do attend the surgery, however, many of the factors relating to patient group 2 apply to this patient group.
- 3.99 Firstly, they are likely to live in the area so there is a large overlap with patient group 2.
- 3.100 Secondly they are likely to have travelled to the surgery from home so will either have access to private transport or will be able to walk to the surgery premises. Nobody lives at the surgery itself so all patients attending will need to travel there by some means and travel either back home or to another destination afterwards. For the reasons it has discussed above, the incremental distance to the proposed location is, at the most, 420m, and for

those patients who live to west of the surgery, the proposed location will not be far out of their way when travelling home.

- 3.101 Any patients who travel to the surgery by bus from further afield will either use the closest bus stop (Alexandra Road) which is 175m away from the surgery or one further afield (possibly even on Withington Road close to Everest Pharmacy). For those using the Alexandra Road stop the incremental distance for them to the proposed site will be, at the most, 240m. For those using other stops it is likely that the proposed site will be closer or broadly the same distance from the bus stop.
- 3.102 Thirdly, given the residential nature of the area, it is also likely that most patients of the surgery would also belong to patient group 3 and use other amenities in the local area without difficulty, in particular those close to the proposed site.
- 3.103 Whilst clearly the distance from the medical centre to the proposed site is longer than the distance to the existing site, the appeals committee must consider whether this distance alone renders the proposed site significantly less accessible.
- 3.104 For all the reasons it has provided earlier in this appeal, it is the Applicant's opinion that the nature of the area and the minimal incremental distance involved are such that this patient group will not find the proposed location significantly less accessible.

Patients who travel to the pharmacy immediately following an appointment at another medical centre.

- 3.105 It has nothing further to add to the information supplied at the time of its application in respect of this patient group. As explained previously other medical centres are either closer to the proposed site than the existing site or are significantly further afield such that the maximum additional distance of 420m is immaterial.

Patients who access the pharmacy to receive services other than pharmaceutical services.

- 3.106 The Applicant stated previously that other services provided are minimal. To expand:
- 3.106.1 There are no patients receiving a supervised consumption service.
- 3.106.2 There is a needle exchange service used, on average once a day or once every other day. None of the users of the service has any apparent mobility difficulties and there is no reason to believe they will find the proposed location significantly less accessible.
- 3.106.3 A minor ailments service is provided approximately once a day. This service is under-used as patients are more likely to visit the adjacent medical centre on the whole. It is likely that the service would be more widely used at the proposed location.

- 3.106.4 OTC sales are minimal and tend to be limited to those patients attending to collect prescriptions.
- 3.107 The nature of the location is that people receiving these 'other services' are likely to do so because they belong to one of the other patient groups i.e. they live in the area or they have travelled from the adjacent medical centre.
- 3.108 That being the case it has dealt with accessibility for these patients when discussing other patient groups. Both premises are located a short distance apart and the proposed premises is much more visible to passing pedestrians & traffic so there is no reason to believe that patients will find the proposed location any less accessible for the reasons it has already discussed.

Patients who share protected characteristics that affect their mobility.

- 3.109 NHS England referred to the use of a mobility scooter by a patient when carrying out their site visit – it has addressed this point already. It also noticed a patient on a mobility scooter during its visit, so it is likely that these are reasonably common in the area.
- 3.110 It is not a surprise that patients with limited mobility use mobility scooters as the flat and wide nature of pavements, dropped kerbs and residential roads which are largely free of traffic make the area easy to travel around. The same would apply to wheelchair users.
- 3.111 Patients with severe mobility difficulties are likely to rely on either private transport, the pharmacy delivery service, community transport schemes or friends and family to get around. Given that very few people live in the immediate proximity of the pharmacy, patients with severe mobility difficulties will be no more able to access the existing premises than the proposed ones. They will access their pharmaceutical services in a different way. For that reason the proposed premises are not significantly less accessible.

Conclusion

- 3.112 In conclusion, for the reasons it has provided earlier, it believes NHS England's decision making process was flawed in this case.
- 3.113 In respect of Regulation 31, they have made assumptions which were incorrect and failed to make simple enquiries with the Applicant that would have resolved their query very easily.
- 3.114 In respect of Regulation 24 they have focussed on patients travelling between the two sites rather than on the patient groups defined and how they go about their daily lives.
- 3.115 They have given little regard to the proximity of the existing and proposed sites and appear to have looked for reasons to conclude that the journey is difficult (such as slightly broken pavements) rather than accepting the ease with which it is possible to travel around the area on foot.
- 3.116 They have over-focussed on the needs of specific patients (that they imagine exist) rather than take a broader view on patient groups as required by judicial guidance.

- 3.117 In its opinion, all the requirements of Regulations 24 & 31 have been met in this case.
- 3.118 It therefore urges [NHS Resolution] to overturn the decision of NHS England and grant this application accordingly.
- 3.119 [The Committee had regard to the Applicant's supporting information at Appendix B].

4 **Summary of Representations**

This is a summary of representations received on the appeal.

4.1 **BOOTS UK LTD**

4.1.1 Boots has no further comments to make.

Copy letter to NHS England dated 8 May 2018

4.1.2 Boots trust that NHS England will satisfy themselves that the criteria for a relocation not resulting in significant change will be met. The Applicant has identified many patient groups and we ask that the deciding committee are satisfied that all such groups have been considered.

4.2 **NHS ENGLAND**

4.2.1 To address the points raised relating to Regulation 31, and despite the lengthy explanation provided relating to the appellant's apparent confusion as to who the contractor is at the proposed site (117b Withington Road), NHS England's concerns remain that the appellant failed to provide accurate information in its application relating to this site. From NHS England's perspective there has never been any confusion regarding the identity of the listed contractor at 117b Withington Road. This particular 100 hour pharmacy contractor applied in the name of Mr Muhammad Mian (sole trader), and there has been no change of ownership since the pharmacy opened in 2009. When making an application to NHS England it is reasonable to expect that the applicant will have made all necessary enquiries and checks prior to populating and submitting the application form, to ensure its content is factually accurate. Notwithstanding the appellant's failure to provide accurate information in the application, NHS England believes that the issues surrounding Regulation 31 have already been adequately addressed in the PSRC's decision report.

4.2.2 The only additional observation NHS England wishes to make is that the collection and delivery service upon which 40% to 50% of the pharmacy's patients rely – and upon which a significant part of the application and subsequent appeal is based - is not an NHS service; therefore the pharmacy is not contractually obliged to provide it. There is therefore an ongoing risk to patients that the service could be withdrawn, or that a charge for the service could be implemented at any time.

- 4.2.3 In conclusion, NHS England believes that the PSRC's decision report gives robust reasoning for the refusal of this application, and awaits the outcome of this appeal in due course.

5 Observations on representations

5.1 PHARMACY SALES & CONSULTANCY (ON BEHALF OF THE APPLICANT)

- 5.1.1 On behalf of the Applicant it wishes to make the following final comments in response to the representations received.

Rowlands, Boots and GMLPC – letters dated 22nd August, 19th September and 20th September respectively

- 5.1.2 It notes that none of these parties has provided any new information in response to the Applicant's appeal so it has no further comments to make accordingly.

NHS England – letter dated 19th September

- 5.1.3 It notes the comment made by NHS England that, in their opinion, there "has never been any confusion regarding the identity of the listed contractor at 117b Withington Road".

- 5.1.4 It accepts that this may be the case but maintain that the Applicant's comments about this contractor being Everest Pharmacy Limited were made in good faith. NHS England state "it is reasonable to expect that the applicant will have made all necessary enquiries and checks prior to populating the application form". It can confirm that, at the time the application form was submitted:

5.1.4.1 The pharmacy at 117b Withington Road was listed on NHS Choices as "Everest Pharmacy".

5.1.4.2 The pharmacy was listed in the Manchester PNA as "Everest Pharmacy" and;

5.1.4.3 The premises were registered with the GPhC in the name of "Everest Pharmacy Limited" although it understands this has subsequently been changed since the issue came to light.

- 5.1.5 As the applicant does not have access to the pharmaceutical list (which is not, to its knowledge, published anywhere that is accessible to the public), it was not unreasonable for the Applicant to reach the conclusion, prior to submitting the application, that the 100 hour pharmacy was, in fact, owned by Everest Pharmacy Limited.

- 5.1.6 In any event, this point is academic when considering Regulation 31. As it has set out previously, where the pharmacy at the proposed address is owned by a contractor who is, in no way, connected to the applicant, they are not "providing the same services" for the purposes of considering Regulation 31(2)(b). It has confirmed previously that there is no connection between the applicant and *either* Muhammad Mian *or* Everest Pharmacy Limited and therefore Regulation 31 is not applicable.

- 5.1.7 It further notes that NHS England has reminded the Primary Care Appeals Committee that collection and delivery services are not contractual. It accepts this point but would make the point that if this service was withdrawn (even though the Applicant has no intention of doing so), the patients who currently receive this service would then fall into one of the other 6 patient groups identified. It has previously set out, in detail, how these patient groups will not find the proposed location significantly less accessible.
- 5.1.8 Finally it notes that neither NHS England nor any of the other respondents have provided any information to contradict the extensive information it has provided previously regarding the accessibility of the proposed site for the relevant patient groups.
- 5.1.9 In conclusion it is clear, in its opinion, that this application meets the requirements of Regulation 24.