

REF: SHA/21088

Arena Point
Merrion Way
Leeds
LS2 8PA

APPEAL AGAINST NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO GRANT AN APPLICATION BY ACKERS CHEMISTS LTD FOR A RELOCATION THAT DOES NOT RESULT IN A SIGNIFICANT CHANGE TO PHARMACEUTICAL SERVICES PROVISION UNDER REGULATION 24 FROM 90-94 CHURCH ROAD, SWANSCOMBE, KENT, DA10 0HF, TO NEW RETAIL DEVELOPMENT, CASTLE HILL LOCAL CENTRE, EBBSFLEET GARDEN CITY

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1 Outcome

- 1.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, The Committee quashes the decision of NHS England and redetermines the application.
- 1.2 The Committee has determined that the application does not comply with paragraph 1(7)(a) of Schedule 2 of the Regulations.
- 1.3 The application is refused.

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- 1 A summary of the application, decision, appeal, representations and observations are attached at Annex A.
- 2 **Preliminary Observations 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 took place on 1st October 2019 to determine the appeal. This was held at the Hilton Hotel, Dartford. The Committee comprised of Mr A Tomlinson, chair, Mr M Beaman and Ms K Limm. The Applicant was represented by Mr N Wardle accompanied by Mr R Patel, Ms Sharon Waghorn and Mr John O'Sullivan. The Appellant was represented by Mr C Daly accompanied by Mr Clinton Bubb.
 - 2.4 Before the hearing started the Committee undertook a site visit. The following is a brief summary of the visit but further observations appear below.
 - 2.5 The Committee drove eastward from the hearing venue along London Road to Swanscombe passing the Greentithe and Ivy Bower surgeries. The Committee drove down the High Street in Swanscombe passing the station and observing the shops, car park and other facilities there before entering Church Road and parking close to the Applicant's pharmacy.
 - 2.6 There are double yellow lines outside the pharmacy and Church Road was congested with cars parked on both sides of the road but there are a number of side streets where parking is possible. The pharmacy is a double fronted shop premises with ramps leading up to the front door and many signs on the windows advertising the services that are available there.

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- 2.7 The Committee entered the pharmacy in order to obtain a practice leaflet. Although there were no customers in the pharmacy at that time, there were several members of staff in the extensive rooms which included a consultation room and preparation (staff only) area towards the rear. The room to the left of the entrance seemed to be undergoing renovation and was not open to visitors.
- 2.8 From the pharmacy the Committee walked to the proposed location at Castle Hill. Although the Committee intended to follow the routes suggested by the Applicant, it proved difficult to identify the various paths and other routes shown on the map and the routes taken on the outgoing and return journeys were not necessarily the quickest or most direct routes.
- 2.9 The Committee walked south down Church Road noting that the bus stops there were no longer in use. The houses were seen to be mainly old terraced properties with no driveways and the pavements were narrow and uneven in places. The Committee turned left into Gunn Road then right onto the B259 before entering the grounds of the Ebbsfleet Academy. Within the grounds are the Swan Valley pharmacy and Swanscombe Health Centre with their own dedicated car park which was full at the time of the visit.
- 2.10 The Committee carried on walking south down the B259 a short distance before turning right into Whitecliffe Road, the entrance to the new housing development at Ebbsfleet Valley. The character of the housing changed considerably at this point, with the housing there being newly constructed and mostly with garages or driveways. The pavements were seen to be wider and of good quality.
- 2.11 There is a gradual incline up along Whitecliffe Road and there are bus stops on both sides of the road. Near the crest of the incline the Committee turned left along a paved footpath following a sign to the Village Centre. This lead through the houses but the Committee were unable to reach the Centre itself owing to the positioning of barriers close to the Centre across the footpath.
- 2.12 The Committee then walked back up to Whitecliffe Road noting that there was a significant incline. From there the Committee followed a footpath sign to Swanscombe. The footpath had been newly constructed but was unlit and was bounded by untended vegetation in parts. There is a viewpoint marker close to the path from where the extensive building work in the area can be seen with very many houses being constructed by a variety of builders and other infrastructure works being undertaken.
- 2.13 The path linked the older housing in Swanscombe with the newer housing at Castle Hill/Ebbsfleet Valley and it brought the Committee to Leonard Avenue from where they made their way through the housing back to Church Road.
- 2.14 From there the Committee drove back to the Village Centre at Ebbsfleet. It was seen to be an approximately square multi storey building in the course of construction served by its own car park which has been completed. There is a completed Community Centre and Primary School adjacent to the car park.
- 2.15 It was possible to see that the Village Centre included a number of empty retail units at ground floor level with one large unit which the Committee assumed would be a supermarket.
- 2.16 Around the Village Centre there was a great deal of building work taking place on a number of projects and many of the local roads were either closed off or in the course of being finished. Although all the nearby houses appeared to be occupied very few residents were observed in the area.
- 2.17 The Committee then returned to Swanscombe and observed the bus stops on the High 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 indicated that there was a noticeable contrast in the condition of the roads, housing and pavements between Swanscombe and Castle Hill, that the area had been seen to be hilly and that the incline leading up from the Village Centre to Whitecliffe Road was particularly significant. He also stated that the footpath linking Castle Hill and Swanscombe was not considered to be suitable for general use by local residents.

4 Oral Hearing Submissions – Preliminary Matters

The Chair advised the parties that the Committee would welcome comments on two preliminary issues that had been raised in written submissions before the hearing of the main appeal commenced although it was likely that the Committee would publish their decision on such issues at a later date. The two issues were (1) whether or not Delmergate had a right of appeal against the decision of NHS England (“Third Party Rights of Appeal”) and (2) whether the address specified by the Applicant as being the address to which the pharmacy would relocate was sufficiently specific for the purposes of the Regulations (“Best Estimate Address”).

Third Party Rights of Appeal

4.1 Mr N Wardle (for the Applicant)

- 4.1.1 He accepted that there was no provision for an appeal against the decision of NHS England to grant a right of appeal unlike the provision to appeal against a failure to grant a right of appeal but it was a matter that NHS Resolution had a general power to consider and decide upon.
- 4.1.2 The starting point was paragraph 19 of schedule 2 of the regulations. It was not clear why Delmergate had been notified of the application. It could have been under 19(1)(c) but it was more likely that it was under 19(2).
- 4.1.3 It seems to have been accepted by all parties that 19(2) applied as Delmergate had a significant interest in the outcome of the application as it had an application relating to the property the subject of his client’s application that had not been determined at that time.
- 4.1.4 For the purposes of 19(1)(c) there must be interests that are “significantly affected” but Delmergate’s pharmacies were some distance from Swanscombe (although within the area of the relevant HWB).
- 4.1.5 He pointed out that page 24 of the case papers confirmed that the notification was sent to Rushport on behalf of Delmergate and not to any specific office of the company suggesting that they were not notified as a contractor but rather as a party to an application. He also highlighted the wording of the response from NHS England to the invitation to make comments concerning this issue at 6.1.21 on page 152 of the case papers: “Delmergate Limited, due to its number of applications made under the ...Regulations was to be considered an interested party with a significant interest in the outcome of the application”.
- 4.1.6 He asked if there was a right of appeal if the notification was given under 19(2). He referred to 28(3)(b) and then 30(2)(b). He pointed out that in paragraph 30(3) all the three subparagraphs (a) to (c) had to apply and the words “significantly affected” in (a) referred back to 19(1)(c) and not 19(2).
- 4.1.7 Not all registered pharmacies would be significantly affected by an application.
- 4.1.8 In any event at the time of the appeal, Delmergate’s application had been rejected and the outcome of the decision relating to his client’s application was of little consequence to Delmergate.

- 4.1.9 The combined effect of paragraphs 19, 28 and 30 was that Delmergate had no right of appeal. As the company did not fall within the provisions of 30(3)(a) paragraphs (b) and (c) did not need to be considered.
- 4.1.10 If there was no right of appeal provided for in the Regulations NHS England could not create one. NHS Resolution needed to consider if Delmergate had a lawful right and therefore if a valid notice of appeal had been given.
- 4.1.11 He stressed that NHS Resolution must deal with the issue given its failure to indicate months ago that the Applicant should take some other action.
- 4.1.12 He pointed out that all contractors did not have a right of appeal: There had to be an element of being “significantly affected” as well.
- 4.1.13 He urged the Committee to read the whole of the letter from NHS England at page 151 and stressed again that Delmergate had been notified originally under 19(2).

4.2 Mr C Daly (representing Delmergate Limited)

- 4.2.1 He pointed out that there was no power to appeal the grant of rights of appeal and questioned whether NHS Resolution had the implied power to consider it.
- 4.2.2 He pointed out that existing contractors had appeal rights under 19(1)(c). It was not relevant that Rushport had been notified rather than Delmergate: It was quite common for a contractor’s representative to receive papers for its client.
- 4.2.3 He pointed out that in 6.1.16 on page 152 NHS England had used the words “significantly affected” when referring to Delmergate. These words referred back to 19(1)(c) and Delmergate was not just notified under 19(2) which required only a “significant interest”. The wording was similar and a party could fall within both paragraphs.
- 4.2.4 He referred to schedule 3 Part 1 and submitted that neither of the two paragraphs applied.
- 4.2.5 There was no power to remove third party appeal rights granted under paragraph 30. Given that there was no such power the Applicant should have sought a judicial review of the decision.
- 4.2.6 He highlighted that 30(3)(a) refers to “the opinion of the NHSCB” and stressed that such an opinion had been given in this case. It had not stated what its opinion was which made it difficult to challenge.
- 4.2.7 Delmergate fell within all 3 subparagraphs of 30(3).
- 4.2.8 He pointed out that the only appeal rights arose under 30(6) which referred to an absence of appeal rights being given.
- 4.2.9 Delmergate had been notified as a contractor via Rushport under 19(1)(c). The regulations did not say that an application had to be ongoing and Delmergate’s interest did not cease at the time its applications was refused.
- 4.2.10 He pointed out that Delmergate had agreed terms for a lease of a unit at the Village Centre and had submitted a new regulation 18 application.
- 4.2.11 To deny a party a right to be heard would be contrary to natural justice.

4.2.12 Following questions he confirmed that all Delmergate's applications had been dealt with at the time of the appeal.

4.2.13 The company had 12 other pharmacies within the area of the HWB.

Best Estimate Address

4.3 Mr C Daly (representing Delmergate Limited)

4.3.1 This issue had been raised at an early stage. The application was an excepted application so a best estimate could not be provided and he referred to guidance notes confirming that.

4.3.2 It was important as without an accurate address an application could not be determined and there was no power to change an address once a decision had been made. He compared it to a distance selling application in which a precise address had to be given.

4.3.3 The application referred to the "New Retail Development" but the Applicant could have been more specific.

4.3.4 He accepted that wherever the Applicant actually opened a pharmacy within the building might not affect the decision but it was not permitted within the Regulations.

4.3.5 If this application was allowed it could permit applications for "High Street" or "Westfield Shopping Centre".

4.3.6 The reality was that the Applicant had not been able to negotiate a lease of a unit.

4.3.7 He invited the Committee to make a decision on the application even if it was agreed that the address was not sufficient.

4.3.8 The application should be declared invalid.

4.4 Mr N Wardle (for the Applicant)

4.4.1 This issue fell within the remit of NHS England and there was no right of appeal against the decision to accept the address provided under Schedule 2, Part 1 paragraph 1(7). NHS England could have requested more information under their powers under paragraph 11 but chose not to do so.

4.4.2 For the purposes of the appeal the address had been accepted and there was no right of appeal.

4.4.3 He provided an assurance that the Applicant would operate from a unit on the ground floor.

4.4.4 He stressed that the appeal was a de novo hearing of the application but not of the preliminary processing work and NHS Resolution could always refer the matter back to NHS England if appropriate.

5 Oral Hearing Submissions

5.1 Mr N Wardle (for the Applicant)

5.1.1 The Ebbsfleet Garden City development comprised 15,000 homes in total almost encircling Swanscombe.

- 5.1.2 For the purposes of regulation 24 the patient groups were as described in written submissions. He referred to the decision of Mr Justice Langstaff and asked that if the Committee had any thoughts of other patient groups they should be made known to him and that the purpose of a patient group was to assess access.
- 5.1.3 The Applicant's was not a busy pharmacy. It was on its own surrounded by houses and did not attract many walk-ins. It had a big collection and delivery service.
- 5.1.4 In June 2019 it dispensed 6,347 items. 75% of prescriptions arrived electronically. 31% of prescriptions came from the St Werburgh practice which was some distance away in Rochester and the patients of that practice did not attend the pharmacy.
- 5.1.5 Of the remaining 4,000 items one half formed part of the collection and delivery work including patients in the nearby care home so the remaining 2,000 items were the basis of the only patient group to be considered.
- 5.1.6 Most of the prescriptions for these items came from the Swanscombe Health Centre. He listed other surgeries which produced some prescriptions but not individually exceeding 6% of the total.
- 5.1.7 Very few patients came to the pharmacy after a visit to the surgery owing to the distance and the fact that the Swanscombe Health Centre had a co-located pharmacy.
- 5.1.8 Most patients who walked to the pharmacy came from their home.
- 5.1.9 He referred to the maps at pages 49 and 50 showing where patients lived. The information for plotting the maps had been assessed at December 2018.
- 5.1.10 The Applicant was now attracting a few prescriptions from the new housing.
- 5.1.11 The maps showed that patients were widely scattered.
- 5.1.12 The pharmacy was not near other services so nobody visited it whilst using other facilities. Those who did come mainly came for dispensing.
- 5.1.13 MURs and NMS were offered and there were 7 supervised consumption patients details of whom were given in the written evidence. The pharmacy was commissioned to provide other services but this attracted few patients. No patients had attended in August for any other services.
- 5.1.14 There were some OTC sales which lead to a certain amount of signposting.
- 5.1.15 With regards to transport 60% of patients drove to the pharmacy and 40% walked. No patients used the bus service. Car ownership in the area was 75%. Parking was not easy at the current location.
- 5.1.16 Health in the local area was slightly better than the national average. 82% said they enjoyed good health compared with 81% nationally and 85% said they had no limitation to their mobility compared with 82% nationally. The mean age in the area of residents was 34.3 compared with 39.4 nationally and 11% were aged over 65 compared with 16.5% nationally.
- 5.1.17 Access to the new location by car would be better as the roads were easier to use and there was good parking. No patients would go by bus.

- 5.1.18 With regards to patients who walked he referred to the maps showing where patients lived. The distance from the current location was not in dispute and was about 1 mile but few patients would start at the current location. The footpath cut 5-6 minutes from the journey time.
- 5.1.19 In terms of terrain, there was a slope down to the new location but it was not a significant barrier.
- 5.1.20 The footpaths within the new houses were in good condition and any patients walking to the new location would be used to walking on pavements in far worse condition.
- 5.1.21 There were no patients at present who attended the pharmacy as they were in the area for other reasons but at the new location there would be other shops and a Co-Operative supermarket.
- 5.1.22 No pharmaceutical services were provided to any other patients who would experience access difficulties.
- 5.1.23 For patients who needed it there was an hourly bus service from Swanscombe to the new location and also a dial a ride service.
- 5.1.24 The demographics suggested that the population was mobile and that no patient group would be affected by access difficulties. NHS England had made the correct decision.
- 5.1.25 There would be no "significant change" as referred to in regulation 24. Indeed the opposite would be the case as the PNA had suggested that an existing pharmacy should relocate. The character of the area around the new location was different but only patients should be considered, not buildings or neighbourhoods.
- 5.1.26 He accepted that there might be social housing in the ward but 30 % of the new houses were designed to be affordable. It was likely that most of the residents of the new housing would be commuters.
- 5.1.27 There would be no detriment to planning caused by the application. He was not aware of any plans and in any event the PNA had envisaged the relocation of a local pharmacy.
- 5.1.28 Following questions he confirmed that the Applicant did not charge for deliveries and offered all patients a delivery service.
- 5.1.29 There were two patients who visited the pharmacy on mobility scooters. They left the scooter outside the pharmacy. There were other patients who had mobility problems but no statistics were available.
- 5.1.30 Ramps at the front entrance were installed to comply with DDA when the pharmacy was renovated.
- 5.1.31 Swanscombe Health Centre served patients from a wide area hence the wide range of dots on the maps showing where patients lived. Fewer than two thirds of patients lived in Swanscombe.
- 5.1.32 A single dot on the maps referred to a postcode so could represent more than one patient. It did not record density.
- 5.1.33 Local patients used the pharmacy because of the quality of patient care that they received.

- 5.1.34 The pharmacy received referrals from the 111 service but the pilot scheme was coming to an end.
- 5.1.35 The pharmacy opened on Saturday morning mainly for the OTC sales it attracted then.
- 5.1.36 He accepted that the cost of a bus to the new location from the Swanscombe station would be £5.40 return, £4.10 for children.
- 5.1.37 There was a free car park just off the High Street.
- 5.1.38 It was not known what percentage of patients visited the pharmacy, probably about one third (2,249 items)
- 5.1.39 There were very few EHC patients.
- 5.1.40 The care home referred to in the papers was in Gravesend and no patients from there attended the pharmacy.
- 5.1.41 In closing he confirmed that the NUMSAS pilot scheme was closing soon. In any event the scheme only attracted 5-7 patients per month and most of these could not be classed as being “accustomed” to visit the pharmacy in person.
- 5.1.42 He stressed that what was convenient for patients was not relevant nor were the levels of deprivation in Swancombe. No link between deprivation and ill health had been established.
- 5.1.43 The footpath between Swanscombe and Castle Hill had been shown as an official link in development plans. No firm evidence had been provided of drinkers or drug taking there. The footpath cut 500 metres off the journey.
- 5.1.44 A lot of emphasis had been placed on Saturday opening but the Applicant mainly opened to increase OTC sales. There might be some element of pharmaceutical services provided but he could not say.
- 5.1.45 Car ownership in the area was not low.
- 5.1.46 There was a group of patients using mobility scooters but they fell within other groups that had been considered. Patients with reduced mobility had not been clearly defined and were not mentioned in the regulations. He stressed that only groups should be considered, not individual patients.
- 5.1.47 The Applicant had provided evidence of patient groups and there had been no real dispute about them. Patients attending the pharmacy on Saturday were in other groups and did not form a group of their own. Hypothetical patients should be avoided.
- 5.1.48 NHS England had granted the application and the PNA supported it. He invited the Committee to grant the application.

5.2 Mr C Daly (representing Delmergate Limited)

- 5.2.1 There were three issues to consider, patient groups, access and whether the move from one area to another caused detriment or was a significant change.
- 5.2.2 The information relating to patient groups presented by the Applicant was not compelling and should be given little weight.

- 5.2.3 He challenged the likelihood that in August 2019 not a single patient had accessed any service in the pharmacy other than dispensing.
- 5.2.4 It was surprising that 50% of the patients drove to the pharmacy as parking was so difficult.
- 5.2.5 A lot of information had been provided about patients who were not relevant to the application.
- 5.2.6 He defined the patient groups as patients coming from the Swanscombe Health Centre, patients registered there who did not attend the Health Centre first, patients living in close proximity to Church Road, patients in the vicinity such as shoppers, supervised consumption patients, self-care patients, NUMSAS scheme patients and patients with impaired mobility.
- 5.2.7 There had been several applications for the site. 7,200 new homes were being built by 8 different developers and the area was as different to Swanscombe as could be imagined.
- 5.2.8 The new development was inward looking in contrast to Swanscombe which the PNA described as one of the most deprived wards.
- 5.2.9 23% of households had a person with a long term disability and 26% lived in social rented property. This type of housing had no link to affordable homes. A high percentage of the population walked around the area with no access to a car.
- 5.2.10 Residents from the garden village will not shop in Swanscombe and the people in Swanscombe will not go to Castle Hill for services.
- 5.2.11 Swanscombe had 2 pharmacies both of which were owned by the Applicant. The pharmacy in Church Road served patients who had not been to the Health Centre first and it was a large and well fitted pharmacy.
- 5.2.12 The pharmacy served a number of patients referred from 111 for an emergency supply (NUMSAS) but the pilot scheme was coming to an end. Patients were given a choice of pharmacies for the supply of emergency drugs.
- 5.2.13 The pharmacy administered 63 flu jabs last year.
- 5.2.14 It was not a quiet pharmacy and it had a sizeable sales area.
- 5.2.15 All the supervised consumption patients would be further away from the new location.
- 5.2.16 Patients attended the pharmacy at present as it was centrally located and close to where they lived.
- 5.2.17 It was not permissible within the regulations to say that patients could use other pharmacies if the Applicant moved.
- 5.2.18 The pharmacy in Church Road was the only one open on Saturday morning. If it moved there would be no pharmacy open on Saturday. This was a "big deal" leaving a deprived area with no pharmacy on Saturday morning.
- 5.2.19 This would breach both 24(1)(b) and 24(1)(c).
- 5.2.20 With regards to access there was no lighting on the footpath linking Swanscombe and Castle Hill and one of the paths had a metal stile.

- 5.2.21 He showed pictures of beer cans and syringes at the side of the footpath.
- 5.2.22 He described a recent visit to Church Road when he had seen two patients on mobility scooters within a period of 5 minutes. He suggested that the Applicant's evidence of such patients was flawed.
- 5.2.23 The only bus service that could be used during the day only ran hourly. There were no bus shelters and the cost of a return ticket, £5.40, was significant.
- 5.2.24 Many more patients would need to use a bus if the pharmacy moved but a return journey could take over 2 hours.
- 5.2.25 The Applicant had not undertaken any consultation exercise and had provided no feedback from patients.
- 5.2.26 There had been insufficient evidence about patient groups. The only advantage of the new location was better parking.
- 5.2.27 He quoted from Mr Justice Langstaff and the PNA. Social grouping was a relevant consideration but physical access was a more important issue in this case.
- 5.2.28 Looking at the maps of where patients lived provided by the Applicant, over 95% would find it further to travel in order to access the new location.
- 5.2.29 No details had been given of patients living in the new houses or evidence of patients travelling to the new location.

6 Consideration

- 6.1 The Committee had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations").
- 6.2 The Committee firstly considered the two preliminary issues raised by the parties relating to third party rights of appeal and the provision of a "best estimate" address by the Applicant.

Third Party Rights of Appeal

- 6.3 The Committee considered the issue of appeal rights taking into account all correspondence and comments made in writing and at the oral hearing on the matter.
- 6.4 The Committee noted the comments indicated by Mr Daly questioning whether NHS Resolution had implied power to decide this point. The Committee however noted that, in accordance with NHS Resolution's "Guidance Note for Parties Involved in Pharmacy Appeals" published on its website, NHS Resolution considers, prior to the invitation to submit representations, whether appellants have a right of appeal against the original decision.
- 6.5 The Committee considered that the most appropriate way to consider the issue was to first decide whether it was satisfied or not that Delmergate Limited fell within those persons set out in the Regulations that have appeal rights.
- 6.6 The Committee had regard to paragraph 30 of Schedule 2 which sets out the test for whether a person has appeal rights. Paragraph 30 states:

"30.— Third party rights of appeal to the Secretary of State where an application is granted

(1) A person with third party rights (as provided for in this paragraph) may appeal to the Secretary of State against a decision of the NHSCB to grant a notifiable application, or an application to which regulation 26(1), 27 or 28 applies, provided that the person notifies the Secretary of State with a valid notice of appeal within 30 days of the date on which that person was notified of the NHSCB's decision under paragraph 28.

(2) For the purposes of this Schedule, a person (P1) is a person with third party rights if—
(a) P1 is a person to whom sub-paragraph (3) applies; or
(b) P1 was entitled to receive notification of the decision to grant the application by virtue of paragraph 28(5).

(3) P1 is a person to whom this sub-paragraph applies if—
(a) P1 was a person whom the NHSCB was required to notify about the decision on the application by virtue of P1 being a person whose interests might, in the opinion of the NHSCB, be significantly affected by the decision, and also being—
(i) included in a pharmaceutical list,
(ii) entitled to be included in a pharmaceutical list because of the grant of a routine or excepted application but who is not (yet) included,
(iii) an LPS chemist, or
(iv) either—
(aa) a provider of primary medical services, or
(bb) another person on the dispensing doctor list for the area of the relevant HWB if there is one (P1 being a performer but not a provider of primary medical services),
but only if the application is in respect of premises in a controlled locality and it was granted partly on the basis that, having regard to regulation 44(3), in the opinion of the NHSCB granting the application would not prejudice the proper provision of relevant NHS services in the area of the relevant HWB or of a neighbouring HWB of the relevant HWB;
(b) in the case of a notifiable application, P1 made representations in writing about the application under paragraph 19(4); and
(c) in the case of a notifiable application but subject to sub-paragraph (6), the NHSCB is satisfied, having regard to those representations in writing and any oral representations made in accordance with paragraph 25, that P1—
(i) made a reasonable attempt to express P1's grounds for opposing the application adequately in P1's representations, and
(ii) has grounds for opposing the application, which—
(aa) do not amount to a challenge to the legality or reasonableness of a pharmaceutical needs assessment, or to the fairness of the process by which a HWB or Primary Care Trust undertook that assessment, and
(bb) are not vexatious or frivolous.

(4) If the NHSCB considers that a person notified under paragraph 28 is a person with third party appeal rights, it must notify that person of that fact when it notifies that person of the determination.

(5) A notice of appeal under sub-paragraph (1) is only valid if it includes a concise and reasoned statement of the grounds of appeal.

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

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

(b) includes within that notification concise and reasoned statements of P2's grounds of appeal against both D1 and D2, and if the appeal against D1 is successful, P2 is a

person with third party appeal rights in relation to D2 for the purposes of this Schedule."

6.7 The Committee considered that the issue centred on whether Delmergate Limited constituted, pursuant to paragraph 30(3)(a), a person whom NHS England was required to notify about the decision on the application by virtue of that person being a person whose interests might, in the opinion of the NHSCB, be significantly affected by the decision.

6.8 The Committee considered there were two parts to this provision:

6.8.1 that NHS England was required to notify that person about the decision on the application; and

6.8.2 that person was being notified about the decision on the application by virtue of that person being a person whose interests might, in the opinion of the NHSCB, be significantly affected by the decision.

6.9 In relation to the first part, the Committee noted that requirements for notification of a decision on an application were set out in paragraph 28 of Schedule 2.

6.10 The Committee noted that paragraph 28(1) expressly states that it relates to routine applications and paragraph 28(3) expressly states that it relates to excepted applications.

6.11 The Committee noted that Regulation 12 expressly states that a routine application is any application other than an excepted application. The definition of an excepted application at Regulation 2(1) is:

"an application to which section 129(2A) of the 2006 Act (regulations as to pharmaceutical services) does not apply by virtue of any provision of Part 4 or a consolidation application to which regulation 26A(2) does not apply"

6.12 Part 4 of the Regulations includes Regulations 23 to 29.

6.13 The Applicant's application was made under Regulation 24. The Committee considered that it was an excepted application and therefore paragraph 28(3) of Schedule 2 was relevant.

6.14 Paragraph 28(3)(b) relates to applications made under Regulation 24 and states:

"(3) As regards any excepted application, once it has determined the application, the NHSCB must, as soon as is practicable, give notice of its decision to—

...

(b) in the case of an application pursuant to regulation 24, 25 or 26(2) or 26A:

(i) the applicant,

(ii) any Local Pharmaceutical Committee whose area includes the premises or location to which the application relates,

(iii) any Local Medical Committee whose area includes the premises or location to which the application relates,

(iv) the relevant HWB, and if the applicant is relocating to different premises in the area of another HWB, the other HWB, and

(v) any (other) person whom the NHSCB notified under paragraph 19 and who made representations in writing about the application under paragraph 19(4);"

6.15 The Committee noted that paragraph 28(3)(b)(v) was relevant and so considered whether NHS England had notified Delmergate Limited under paragraph 19 of Schedule 2 and whether Delmergate had made representatives in writing about the application under paragraph 19(4).

6.16 The Committee noted that Delmergate Limited, via its representatives, had been notified under paragraph 19 and that Delmergate had made representations in writing about the application under paragraph 19(4).

6.17 The Committee agreed that it was not relevant that Rushport (Delmergate's representative) had been notified rather than Delmergate itself. The Committee noted that it was common for a contractor's representative to receive papers for its client.

6.18 On the second part of the test in paragraph 30(3)(a), the Committee noted the Applicant's comments that although Delmergate was notified of the decision, that does not mean that at the time that a decision was taken as to whether third party appeals rights were to be given, that it was a person whose interests might be significantly affected by the decision.

6.19 The Committee noted that the wording in paragraph 30(3)(a): "*a person whose interests might, in the opinion of the NHSCB, be significantly affected by the decision*" was similar to the wording in paragraph 19(1)(c) which lists a specific type of person(s) that NHS England must give notice to about an application.

6.20 Paragraph 19(1)(c) states:

"(1) As soon as is practicable (having regard to its functions under Part 2), the NHSCB must give notice of a notifiable application to—

(c) any person—

(i) included in a pharmaceutical list for the area of the relevant HWB, or

(ii) who is entitled to be included in that pharmaceutical list because of the

grant of a routine or excepted application but who is not (yet) included,

whose interests might, in the opinion of the NHSCB, be significantly affected if the application were granted"

6.21 The Committee noted the parties submissions with regard to which paragraph applied in relation to the notification given to Delmergate and noted that the Applicant initially submitted that Delmergate would have been notified under paragraph 19(1)(c) but at the oral hearing the Applicant stated that it is more likely that Delmergate would have been notified under paragraph 19(2). The Appellant submits that it would have been notified under paragraph 19(1)(c).

6.22 Paragraph 19(2) states:

"The NHSCB may also give notice of the notifiable application to any other person who, in the opinion of the NHSCB, has a significant interest in the outcome of the application."

6.23 The Committee noted the comments made by NHS England in its letter of 26 June 2019 in which NHS England explains that Delmergate was given appeal rights as it had:

“previously been notified as an interested party due to its applications in that same area and so its interest will be significantly affected by any such decision”.

- 6.24 The Committee noted the use of the words *“interest will be significantly affected by any such decision”* and that this is more similar to the wording used in paragraph 19(1)(c) than the wording used in paragraph 19(2).
- 6.25 The Committee further noted NHS England’s closing paragraph in the letter of 26 June 2019 which stated *“according to Regulation 19(2) the NHSCB may also give notice of the notifiable application to any other person who, in the opinion of the NHSCB, has a significant interest in the outcome of the application”* and that Delmergate could therefore also be considered an interested party with a significant interest in the outcome of the application. The Committee noted the use of the words *“may also give notice”*. The Committee considered that this indicates that in NHS England’s judgement, there was a notification provision that could apply to Delmergate in addition the notification made under paragraph 19(1)(c).
- 6.26 The Committee therefore considered that Delmergate was notified of the application because it was a person whose interests might, in the opinion of NHS England, be significantly affected if the application were granted.
- 6.27 If Delmergate was notified of the application because it was a person whose interests might, in the opinion of NHS England, be significantly affected if the application were granted, this would appear to suggest that Delmergate was a person that was notified about the decision on the application by virtue of being a person whose interests might, in the opinion of NHS England, be significantly affected by the decision.
- 6.28 The Committee noted that NHS England has expressly stated in its letter of 26 June 2019 that Delmergate was given third party appeal rights as Delmergate’s interests will be significantly affected by the decision.
- 6.29 The Committee understood the Applicant’s position to be that the test of *“being a person whose interests might be significantly affected by the decision”* must be revisited at the time that a decision to grant third party appeal rights is taken.
- 6.30 The Committee noted the Applicant’s comments that, at the time that a decision as to whether to grant rights of appeal was taken, Delmergate could not have been a person whose interests might be significantly affected, because Delmergate’s own application in relation to the retail development had already been rejected.
- 6.31 The Committee noted in particular that NHS England indicated that it was satisfied that Delmergate will be significantly affected by the decision. The Committee noted that the wording in paragraph 30(3)(a) specifically referred to it being NHS England’s opinion as to whether a person might be significantly affected by the decision. The Committee considered that it was possible that a person might no longer be significantly affected by a decision. For example, that person might indicate to NHS England in response to the refusal of their own application that they no longer had an interest in the other application. The Committee did not consider that, simply because of a refusal of an application, a person notified of the application should have their status downgraded on notification of the decision to the extent they were unable to gain appeal rights. NHS England was clear in its opinion that, at the time it was notified of the Applicant’s decision, Delmergate’s interests will be significantly affected by the decision.
- 6.32 For the reasons given above, the Committee considered that Delmergate was a person whom the NHS England was required to notify about the decision on the application by virtue of it being a person whose interests might, in the opinion of NHS England, be significantly affected by the decision.

- 6.33 The Committee considered that the provisions of paragraph 30(3)(a) to (c) are cumulative and all must be satisfied in order for a person to be considered as a person with third party rights of appeal.
- 6.34 The Committee noted that there is no dispute that paragraphs 30(3)(b) and 30(3)(c) apply.
- 6.35 The Committee therefore considered that Delmergate had a right to appeal the decision of NHS England pursuant to paragraph 30 of the Regulations.

Best Estimate

- 6.36 As set out in paragraphs 6.10 to 6.13 above, the Committee considers that the application is an excepted application.
- 6.37 The Committee noted that paragraph 1 of Schedule 2 refers to information that must be included in routine and/or excepted applications. Paragraph 1(7)(a) states:
- “If A is seeking the listing of the premises not already listed in relation to A (whether or not A is already listed) -*
- (a) either:*
- (i) the address of the premises, or*
- (ii) if the address is not known and it is a routine application, A’s best estimate of where the proposed premises will be.”*
- 6.38 The Committee considered that the Regulations are clear that both routine and excepted applications must include the address for the proposed relocation, however in the case of a routine application, a best estimate of the address may be provided instead.
- 6.39 As stated above the application in this matter is not a routine application. The Regulations require that an address is provided. As the application is not a routine application, a best estimate cannot be provided.
- 6.40 The Committee went on to consider whether the address provided in the application is an “address” or a “best estimate” of an address.
- 6.41 The Committee noted that there is no definition of “address” in the Regulations therefore the Committee considered that “address” must be interpreted in accordance with its plain and straightforward meaning.
- 6.42 The Committee noted the Appellant’s submissions that the address provided in the application is a best estimate and that providing “New Retail Development, Castle Hill Local Centre” as the “address” is not clear enough.
- 6.43 The Committee noted the Appellant’s comments that the Applicant was unable to secure the lease on the premises.
- 6.44 The Committee also noted that NHS England, in the course of dealing with the application, appeared to be of the opinion that the address provided was a best estimate as is evident by the written statement on the original application form, which states *“A full address must be provided – best estimates are not acceptable”* and the comment made in the decision to grant the application, that *“the committee accepts this working approximation until a definite and specified location by the applicant is given”*.
- 6.45 During its site visit, the Committee noted that the New Retail Development had a number of units and one large unit which the Committee assumed was a site for a supermarket. The Committee considered that although the site of the proposed relocation would be

somewhere in the New Retail Development, the Committee could not definitively identify the unit within the New Retail Development to which the application relates.

- 6.46 As such the Committee considered that the proposed relocation of the pharmacy could be at any one of those units and therefore not clearly identifiable as the proposed site for the relocated pharmacy. The Committee therefore considered that the address provided is a best estimate of where the proposed pharmacy premises would be, i.e. somewhere within the New Retail Development.
- 6.47 The Committee noted that the Applicant had not confirmed that the address provided is an “address” pursuant to paragraph 1 of Schedule 2 of the Regulations, neither did the Applicant provide comments on why it considers that the address provided in the application is not a “best estimate”.
- 6.48 The Committee noted the Applicant’s submission that NHS England accepted the address provided in the application and that the initial review of the application (presumably in order to determine whether it should progress to the determination) is a procedural process and is the responsibility of NHS England. The Appellant states that there was no right of appeal against the decision by NHS England to accept the address.
- 6.49 The Committee considered that the Applicant is suggesting that the procedural requirement set out in the Regulations in respect of the application is not capable of scrutiny in the course of the appeal as it is not expressly stated to be a grounds of appeal in the Regulations.
- 6.50 The Committee considered that whether or not the initial application submitted by the Applicant was submitted in accordance with paragraph 1(7)(a)(i) of Schedule 2 is intrinsically linked to the right of appeal under paragraph 30(1) of Schedule 2 of the Regulations; the right of appeal being against a decision of NHS England to grant an application.
- 6.51 The Committee considered that assessing whether the application was submitted in accordance with the Regulations forms part of the overall decision to grant or refuse the application. The Committee considered that the assessment of the application form for compliance with the Regulations may well be undertaken as part of certain initial steps in the process of managing an application but it is still a fundamental part of the decision to grant or refuse the application.
- 6.52 The Committee therefore considered that an assessment of whether or not the address provided in the application is an “address” or a “best estimate” forms part of the overall decision that is the subject of this appeal.
- 6.53 It was not explained to the Committee why NHS England appeared to initially consider that the address was a best estimate but then continued with the determination of the application. It appeared that NHS England were aware that the Regulations only allowed a best estimate to be provided in relation to a routine application but it proceeded with the determination anyway. It was clear that the Applicant had provided a best estimate.
- 6.54 For the reasons given above, the Committee did not consider that, for the purpose of an appeal, it had to ignore the fact that an application had not been made in accordance with the Regulations.
- 6.55 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:
- 6.55.1 confirm NHS England's decision;
 - 6.55.2 quash NHS England's decision and redetermine the application;

- 6.55.3 quash NHS England's decision and, if it considers that there should be a further notification to the parties to make representations, remit the matter to NHS England.
- 6.56 The Committee determined that, given it had determined that an address had not been provided and therefore the application had not been made in accordance with the Regulations, the decision of NHS England must be quashed.
- 6.57 The Committee went on to consider whether there should be a further notification to the parties to make representations or whether it was preferable for the Committee to redetermine the application.
- 6.58 The Committee noted that the parties had been given the chance to provide representations, observations and attendance at an oral hearing on the appeal and the application.
- 6.59 The Committee considered whether it was required to enable the Applicant to change its application from a best estimate to a specific address. It noted that that the Regulations did not contain such an express obligation. The Committee considered that by remitting and allowing further representations, this could not extend to remaking the application by replacing the best estimate with a specific address.
- 6.60 The Committee considered therefore that it was not appropriate to enable an applicant to improve its application in this way as part of the appeal process. The Committee considered that it was not required to, and was not appropriate for it to, remit the application to NHS England.
- 6.61 The Committee therefore redetermined the application.
- 6.62 As the Committee had determined that the application had not been submitted in accordance with the Regulations, the Committee considered that it had to refuse the application.

7 Decision

- 7.1 The Committee quashes the decision of NHS England and redetermines the application.
- 7.2 The Committee has determined that the application does not comply with paragraph 1(7)(a) of Schedule 2 of the Regulations.
- 7.3 The application is refused.

Committee Chair

Dated this 29 day of October, 2019

A copy of this decision is being sent to:

Charles Russell LLP representing Ackers Ltd
Rushport Advisory LLP representing Delmergate Ltd
NHS England
Kent LPC

ANNEX A

REF: SHA/21088

1 Trevelyan Square
Boar Lane
Leeds
LS1 6AE

APPEAL AGAINST NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO GRANT AN APPLICATION BY ACKERS CHEMISTS LTD FOR A RELOCATION THAT DOES NOT RESULT IN A SIGNIFICANT CHANGE TO PHARMACEUTICAL SERVICES PROVISION UNDER REGULATION 24 FROM 90-94 CHURCH ROAD, SWANSCOMBE, KENT, DA10 0HF, TO NEW RETAIL DEVELOPMENT, CASTLE HILL LOCAL CENTRE, EBBSFLEET GARDEN CITY

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

1 The Application

By application dated 26 July 2018, Ackers Chemists 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 90-94 Church Road, Swanscombe, Kent, DA10 0HF, to New Retail Development, Castle Hill Local Centre, Ebbsfleet Garden City. 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 are no pharmacy premises adjacent to, or in close proximity of the proposed site

Information in support of all no significant change applications:

1.2 Please explain why you consider that the new premises are not significantly less accessible for the patient groups that are accustomed to accessing pharmaceutical services at the existing premises.

1.3 Ackers Chemists Limited currently owns Ackers Chemists at 90-94 Church Road, Swanscombe, Kent, DA10 0HF.

1.4 The majority of the patients that Ackers Chemists serves, approximately 42%, are from the nearby Swanscombe Health Centre. The pharmacy is 0.3 miles from this surgery but wishes to relocate to new built premises in the New Retail Development at Castle Hill Local Centre, Ebbsfleet Garden City (where it will be a similar distance away.)

1.5 The route from the existing location to the proposed location would be a distance of 1.1 kms and the route would be as follows:- a pedestrian would walk along Herbert Road and then turn right to walk south down Stanhope Road to turn right into Castle Hill Road and then continue along that road, turning left at Mercer Avenue. The route is flat and well lit. Alternatively there are bus services from the vicinity of the existing premises to the proposed premise which go from the bus stop opposite the church on Swanscombe Street.

Advise / Resolve / Learn

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- 1.6 The patient group with prescriptions from Swanscombe Health Centre can be further divided into those who have prescriptions collected (either physically or by EPS) and delivered and therefore do not come to the pharmacy for dispensing services. This is just over half of the 42%. These patients will be unaffected by the move.
- 1.7 For the remaining, approximately, 20% of patients as described above, the route between the two sites is a level walk without geographical barriers. There is public transport and for those who own a motor vehicle the applicant will ensure there is parking at the proposed site.
- 1.8 The next largest patient group is those from the collection and delivery arrangement that the pharmacy has with St. Werburgh Medical Practice, 98 Bells Lane Hoo, Rochester ME3 9HU and its branch surgery at Mallard Way, Lower Stoke, Rochester, ME3 9ST. For all the patients in this group, the pharmacy collects prescriptions from the surgeries and delivers them either to local collection points or directly to their homes. MURs are provided via telephone or a domiciliary visit. These patients would be unaffected by the change in location. Approximately 36% of the pharmacy's prescriptions come from these surgeries.
- 1.9 The other large patient group that the pharmacy deals with is patients from an integrated residential and nursing care home. The home offers a significant amount of respite care so there are a number of different prescribers but the applicant offers a collection and delivery arrangement to this care home. The care home patients would be unaffected by the change.
- 1.10 The remainder of patients attend the range of local surgeries or live locally. It is likely that some of these patients would live either closer to the new site or equidistant between the two sites and the relocation would be more convenient for them. For others, the travel by foot, public transport and car have already been described and the pharmacy would not be significantly less accessible.

Please explain why you consider that granting the application will not result in a significant change to the arrangements that are in place for the provision of local pharmaceutical services or pharmaceutical services (other than those provided by dispensing doctors) in any part of the HWB's area or any controlled locality within 1.6 kilometres of the new premises.

- 1.11 Granting the application would not result in a significant change to the arrangements that are in place for the provision of local services because the move by the pharmacy will enable a more rational distribution of pharmacies across Swanscombe and the Ebbsfleet Garden City area without increasing the number of pharmacies in the area. The patient groups served by the pharmacy will be largely unaffected by the move.

Please explain why you consider granting the application will not cause significant detriment to the proper planning in respect of the provision of pharmaceutical services in the HWB's area.

- 1.12 The relocation arrangement proposed is specifically suggested in the Kent PNA and the Dartford/Gravesend/Swanley and surrounding areas co-terminus with Dartford, Gravesham and Swanley CCG area location specific PNA at page 15 where the need for a pharmacy as Ebbsfleet Garden City develops is identified and it is suggested that relocation may be the appropriate way of providing pharmaceutical services in this area.
- 1.13 The services that are provided at the current location will be provided at the proposed location. In addition, it would be proposed to introduce new services at the new location in line with NHS England's plans for Ebbsfleet Garden City as a healthy new town.
- 1.14 The Applicant also proposes to offer additional core hours

NHS England considered and decided to grant the application. The decision letter dated 4 March 2019 states:

- 2.1 NHS England has considered the above application and is writing to confirm that it has been granted. Please find attached a document detailing the approval of the application.
- 2.2 Also enclosed is a template of the notice of commencement which [the Applicant is] required to submit to [NHS England]. Please note this may not be submitted until the end of the 30 day appeal at the earliest.

Decision Report

- 2.3 The regulations referred to in these minutes are in all cases the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 and later amendments, and will be referred to as “the Regulations”.
- 2.4 For the purposes of these minutes the NHS England – South East (Kent, Surrey, Sussex) Pharmaceutical Regulation Services Committee will be referred to as “the Committee”. The Committee is authorised to deal with all relevant applications and other relevant matters arising from the provisions of the Regulations on behalf of the NHS England – South East (Kent, Surrey, Sussex).
- 2.5 The case to be considered was as follows:-
- 2.6 An application for a relocation that does not result in a significant change in pharmaceutical provision made under Regulation 24 from Ackers Chemist Ltd, 90-94 Church Road, Swanscombe, Kent, DA10 0HF, to New Retail Development, Castle Hill Local Centre, Ebbsfleet Garden City
- 2.7 There were no declarations of interest.
- 2.8 On the basis of the information before the members, it was agreed that it was not necessary to hold an oral hearing.
- 2.9 The statutory notification exercise was carried out by Primary Care Support England and comments were received from the parties below:

Comment by Rushport Advisory, on behalf of Delmergate Ltd

- 2.10 Rushport Advisory (RA) was of the view that the application should be refused for the following reasons:
 - 2.10.1 The distance between the existing and proposed locations was incorrectly stated on the application, and the best estimate location is incorrect.
 - 2.10.2 The distance between Swanscombe Health Centre and the proposed location is not the same as the distance between the Health Centre and the existing location. The route to the proposed location from the Health Centre is not easy for those on foot.
 - 2.10.3 There is no bus service between the Health Centre and the proposed location.
 - 2.10.4 Collection and delivery service is relevant for existing patients who currently access the pharmacy, not prospective new patients.
 - 2.10.5 RA asked for confirmation that NHS England had provided permission for the applicant to carry out MURS in a domiciliary setting or over the phone.

Subsequent to the meeting, it was confirmed that permission had been provided for telephone MURs to be carried out.

2.10.6 RA stated that no information had been provided regarding proposed enhanced services, and asked that NHS England take into account the impact of the move on existing patients with regard to these services. The Committee noted that the locally commissioned services would be commissioned either by the local CCG or public health team. NHS England does not commission any locally commissioned services in this area.

2.10.7 Lack of evidence regarding local patient groups

2.10.8 Lack of clarity regarding PNA comments

Comment by Kent Health and Wellbeing Board

2.11 The HWB had no comments regarding this application.

Kent Local Pharmaceutical Committee

2.12 The LPC initially had no comments regarding this application, apart from noting that there had been two applications by the same contractor, one for No Significant Change Relocation, and one for Identified Future Needs, both for the same area. The LPC then sent in a subsequent letter in which they noted that 42% of the pharmacy's patients would not be affected by the move, either due to the patients' close proximity to the pharmacy, the use of the electronic prescription service or the collection and delivery service. Other patients are in nursing or residential homes, served by collection and delivery services.

Consideration

2.13 The Committee considered whether or not to approve the application for a proposed relocation of the existing pharmacy resulting in no significant change, and took into account the relevant Regulation(s) and a range of other factors including those set out in the Department of Health's publication "NHS Pharmaceutical Services: Assessing Applications" published in November 2013, providing guidance to NHS England.

Locality

2.14 The area had previously been determined as a non-controlled locality and, in the absence of any proposal from either the LPC or LMC that this classification should be changed, the Committee agreed that it should remain a non-controlled locality within the meaning Regulations 36 of the 2013 Regulations.

Initial Discussion

2.15 The Committee noted that this application had originally been on the agenda for the November 2018 PSRC meeting, but it had been deferred until the IFN application from the same applicant had completed the notification period, so that both applications could be reviewed at the same meeting.

2.16 The Committee noted that the 2018 Kent PNA recommended that it would be preferable for an already existing local pharmacy contractor to relocate into the Ebbsfleet area rather than have a new pharmacy approved, as the wider area already had sufficient pharmacy provision.

Regulation 31

2.17 The Committee first considered Regulation 31 of the regulations which states:

- 2.18 [Quotes Regulation 31]
- 2.19 From the information before it, the Committee agreed that it was not required to refuse the applications under the provisions of Regulation 31 provided that any pharmacy subsequently opening as a result of these applications would neither be within, nor next door to, any premises occupied by an existing pharmacy contractor.
- 2.20 Based on the information before it, the Committee was not required to refuse the application under the provisions of Regulation 31.

Regulation 24(1)

- 2.21 The Committee then considered Regulation 24(1) which reads as follows:
- 2.22 [Quotes Regulation 24(1)]
- 2.23 Regulation 24(1)(a) – for patient groups that are accustomed to accessing pharmaceutical services at the existing premises, the location of the new premises is not significantly less accessible.
- 2.24 The committee was mindful that, in assessing this criterion, it should review the location and distance of the existing and proposed pharmacies, the current patients groups, where they access their required pharmaceutical services; and then, only after that assessment, it decides whether the new premises would be significantly less accessible.
- 2.25 Distance to the proposed relocation site
- 2.26 The application states, in section 8, that the proposed pharmacy location is 1.1kms from the existing Church Road pharmacy. This is qualified later (Letter 5/12/18) to 1.0 miles with the route as:” Ackers chemist > Church Road > Swanscombe Street > Castle Hill Road > Cherry Orchard > Relocation Site + 1.0 miles”.
- 2.27 This distance between the two points given by the applicant is similar to the 1.1 miles stated by Rushport Advisory (12/11/18). The committee accepts this working approximation of distance until a definite and specified location by the applicant can be given.
- 2.28 NHS England notes (see below) that the Swanscombe Health Centre (not named) is co-terminus with the Swan Valley Pharmacy (named) on Swanscombe Road. The Ebbsfleet Academy, Swanscombe Children’s Centre and the Manor Community Primary School are nearby. There is a bus stop (blue icon) to the left of Coopers Road, which gives access to the Health Centre and the Swan Valley Pharmacy.
- 2.29 [Photograph available]
- 2.30 The snapshot below shows the location of the nearest bus stop to the Swan Valley Pharmacy and its 3 bus routes (including the 484 which travels on to Castle Hill). The orange block shows the pharmacy and the health centre.
- 2.31 [Screen shot of Bus stops in Swanscombe for services 306 and 481]
- 2.32 With the proposed closure of the Church Road Pharmacy patients could access the Swan Valley Pharmacy, which is the next nearest, or one of the other five pharmacies in the vicinity.
- 2.33 Table 1: Local Pharmacies close to Ackers Chemist Ltd, Church Road, Swanscombe

Local Pharmacies	Core Opening Times	Postcode	Minutes by Car/ Train/Walk
Swan Valley Pharmacy	09:00-13:00; 14:00-18:00 M-F	DA10 0BF	3min (1.6km)/19min/ 22min (1.6km)
Williams Chemist	09:00-13:00; 14:15-18:15 M-F 09:00-13:00; 14:15-16:00 Sat	DA11 8BS	7min (3.2km)/1hr2min/ 44min (3.2km)
Hill Pharmacy	09:00-13:00; 14:00-18:00 M-F	DA11 9EU	8min (4.8km)/40min/ 49min (3.9km)
Lloyds Pharmacy	08:00-20:00 M-Sun	DA11 8BZ	7min (3.9km)/45min/ 49min (3.9km)
Penders Pharmacy	09:00-13:00; 14:00-17:30 M-F 09:00-13:00; 14:00-16:00 Sat	DA11 8LG	7min (4.2km)/56min/ 52min (4km)
Boots Pharmacy	10:00-14:00; 15:00-17:00 M-S 10:00-16:00 Sun	DA9 9SJ	9min (4.2km)/37min/ 54min (4.1km)

2.34 Using Google maps the suggested distance and routes from the Church Road pharmacy to Swan Valley pharmacy (and to the Swanscombe Health Centre) comprise 10 minute walk of 0.5 miles distance. NHS England notes that others have given the lesser distance of 0.3 miles (LPC letter 27/9/18).

2.35 [see screen shot – aerial view from Ackers Chemists Ltd to Swan Valley Pharmacy]

2.36 Patients wishing to use the proposed relocated pharmacy would travel a mile (as advised by the applicant), if starting from the Church Road pharmacy and would travel past the Swan Valley Pharmacy to reach the Castle Hill Local Centre vicinity.

Access to relocation site

2.37 Location

2.38 Table 1 (above on previous page) shows the respective distances to local pharmacies and General Practitioner surgeries. Patients accessing pharmaceutical services from Swanscombe by foot will have a choice of the Swan Valley Pharmacy in Swanscombe, the proposed relocation pharmacy at DA10 0DF at Castle Hill or the 4 pharmacies to the east and across the B259, or Boots across the B255 to the west in Bluewater.

2.39 The five pharmacies are not of immediate access by foot although the Swan Valley Pharmacy is situated by the Swanscombe Health Centre and near the two local schools. The vast number of residents would not be significantly inconvenienced though, as starting from Church Road there would be a further 0.5 mile to reach Swan Valley Pharmacy, were Church Road Pharmacy to close.

2.40 In accessing the new location, the applicant describes two routes: the first is set out in the application and the second in a subsequent letter (already mentioned in section above – Distance to proposed relocation site). A route for pedestrians is also mentioned and deemed even shorter (than the 1.0 miles) if a footpath is followed.

- 2.41 The route set out in the application from Church Road to Mercer Avenue is stated as “flat and well lit”. NHS England notes that in later correspondence an alternate route was given (see above) and cited as 1.0 mile length; the first route was stated as 1.1 kms.

Travelling by bus

- 2.42 [See screen shot bus route]
- 2.43 The picture above shows the googlemap graphic and timetable for the 484 bus route between the existing pharmacy and the proposed relocation post code. The journey comprises 4 minutes’ walk and 3 minutes travel. (Please see the link below).
- 2.44 <https://www.arrivabus.co.uk/kent-and-surrey/services/484---ebbsfleet-international-station-to-bluewater/>
- 2.45 In the letter dated 5 December 2018 the applicant submitted the timetable for the 485 and 485a services which run from Monday to Saturday.

Travelling by car

- 2.46 No party referred to car ownership or usage with reference to reduction or change of access to services. NHS England has no evidence to suggest that the proposed relocation would make services for exiting patient groups significantly less accessible.

Patient Groups

- 2.47 The applicant states that almost half, 42%, of patients currently using Ackers Pharmacy will be unaffected by the proposed relocation as these patients are registered at Swanscombe Health Centre. Consequently they will be unaffected as the next nearest pharmacy (Swan Valley Pharmacy) is next to that Health Centre and is itself 0.5 miles from Church Road. Moreover part of that patient group also benefits from having EPS or prescriptions physically collected and delivered.
- 2.48 The next largest group is registered at the St Werburgh Medical Practice, Rochester and its branch surgery at Mallard Way, Rochester. Ackers collects prescriptions from the surgeries and delivers the medications to patient homes or to local collection points. The prescriptions from these two surgeries comprise approximately 36% of Ackers prescriptions. This patient group will, therefore, not be significantly affected by the relocation.
- 2.49 The local integrated residential and nursing care home make up another substantial patient group which the pharmacy serves. The applicant offers collection and delivery arrangements. This patient group will, therefore, not be significantly affected by the relocation.
- 2.50 Additionally, MUR services are provided over the telephone.
- 2.51 For each of the four patient groups above, the applicant argues that they would be little affected.
- 2.52 The applicant advised that the majority of supervised consumption and needle exchange service users’ come from outside Swanscombe and necessarily already travel some distance for their pharmaceutical needs. Five patients are Swanscombe residents, two of whom live north of Ackers Chemist and so will have to travel further for their care.
- 2.53 For the residual percentage of patients who attend other local surgeries, the applicant states, that some “would live either closer to the new site or equidistant between the two sites and the relocation would be more convenient for them”.

- 2.54 Two maps were submitted by the applicant showing the distribution of patients who have had Ackers Chemist dispense their prescriptions over 3 months. It was found that “there were very few patients who attended the pharmacy to access pharmaceutical services who were not also receiving dispensed medication”.
- 2.55 NHS England accepts that access to pharmaceutical services would not be significantly less accessible for the majority of patients receiving services from the applicant’s pharmacy. Although as with all relocations there might be some for whom such a change might be less accessible than the current provision.
- 2.56 The Committee was of the view that the proposed relocation would mean that patients accustomed to accessing services at the existing premises would not find the proposed premises significantly less accessible, therefore found that the requirements of Regulation 24(1)(a) were satisfied.
- 2.57 Regulation 24(1)(b) - Granting the application would not result in significant change to arrangements that are in place for LPS or pharmaceutical services in the HWB’s area
- 2.58 The Committee was of the view that granting the application would not result in significant change to existing arrangements as there was already a number of providers within the proposed locality - and therefore found that the requirements of Regulation 24(1)(b) was satisfied.
- 2.59 Regulation 24(1)(c) - Granting the application would not cause significant detriment to NHS England’s planning for pharmaceutical services in the HWB’s area
- 2.60 The Committee was of the view that granting the application would not cause significant detriment to NHS England’s planning for pharmaceutical services in the HWB’s area, therefore the requirements of Regulation 24(1)(c) were satisfied.
- 2.61 Regulation 24(1)(d) - The same services will be provided
- 2.62 The applicant had stated that the services would be the same as existing therefore the Committee found that the requirements of Regulation 24(1)(d) were satisfied.
- 2.63 Regulation 24(1)(e) - No interruption, unless for good cause
- 2.64 The applicant stated that there would be no interruption in service therefore the Committee found that the requirements of Regulation 24(1)(e) were satisfied.

Decision

- 2.65 The Committee carefully considered the various factors against which applications made under Regulation 24(1) of the Regulations must be determined. Having taken those factors into account, and for the reasons given above, the Committee was satisfied that, for the patient groups that are accustomed to accessing pharmaceutical services at the existing premises, the relocation to the new premises would not be significantly less accessible, and as such that the criteria set out in Regulation 24(1) were met, and accordingly agreed the application.

Notification Exercise – Right of Appeal

- 2.66 The statutory notification exercise was carried out by Primary Care Support England and comments were received from the parties below. It was decided that the right of appeal should be given to parties indicated:

2.66.1 Delmergate Ltd

In a letter dated 13 March 2019 addressed to NHS Resolution, Delmergate Limited represented by Rushport Advisory LLP (the Appellant) appealed against NHS England's decision. The grounds of appeal are:

- 3.1 Rushport Advisory LLP act for Delmergate Limited (the Appellant) and has been instructed by the Appellant to submit this appeal against the decision of NHSE to approve the above application. The Appellant was notified of this approval by letter dated 4 March 2019 (enclosed).
- 3.2 Whilst this appeal is a re-hearing of the application it is worthwhile noting the errors made by NHS England when considering this application as it demonstrates that the decision reached was manifestly the wrong one and that NHS England has ignored legal authority and guidance as well as the legal test itself.
- 3.3 The Appellant's Representative notes the following errors in the decision report provided by NHS England;
- 3.4 NHS England failed to note the Appellant's objection based on the Applicant having provided a "best estimate" for their proposed premises when such best estimates are not permitted in applications under regulation 24. Page 5 of the NHS England decision states;
 - 3.4.1 *"This distance between the two points given by the applicant is similar to the 1.1 miles stated by Rushport Advisory (12/11/18). The committee accepts this working approximation of distance until a definite and specified location by the applicant can be given."*
- 3.5 NHS England has therefore acknowledged that the Applicant provided a "best estimate" of their proposed address, but then ignored the fact that this is not permitted under regulation 24.
- 3.6 NHS England failed to properly list or consider the content of the Appellant's objection to this application. Whilst NHS England purports to have listed the comments made, they failed do so accurately, or simply missed parts of the objection altogether. A copy of that letter of objection dated 12 November 2018 is attached for reference.
- 3.7 NHS England wrongly considered the location of other pharmacies due to *"the proposed closure of the Church Road Pharmacy"* and find that *"patients could access the Swan Valley Pharmacy, which is the next nearest, or one of the other five pharmacies in the vicinity."*
- 3.8 It is unclear what area has been defined as the "vicinity" (which the High Court has previously determined to mean the same as a "neighbourhood"), how such a definition was made, or what the relevance of this was to NHS England.
- 3.9 NHS England was wrong to approach the application in this way and should have considered whether the specific patient groups defined would find the relocated pharmacy significantly less accessible or not as required by regulation 24(1)(a).
- 3.10 Even with this error NHS England notes as follows;
 - 3.10.1 *"The five pharmacies are not of immediate access by foot [sic] although the Swan Valley Pharmacy is situated by the Swanscombe Health Centre and near the two local schools."*
- 3.11 It is therefore clear that NHS England felt that the proposed relocation *would make the pharmacy significantly less accessible* for patients "in the vicinity" who accessed it on foot but felt that this was not relevant due to the location of other pharmacies. This is the wrong approach in law.

- 3.12 Under the heading of “Access to relocation site” NHS England again fails to apply the correct legal test and instead considers access to other pharmacies and GP surgeries. It is not clear why NHS England did this but assuming (as the Appellant must) that they found the information to be relevant to their decision making process, then it is clear that NHS England has taken into account irrelevant considerations and failed to properly apply the legal test.
- 3.13 NHS England appears to accept the information provided by the Applicant that the route on foot between the current and proposed location was “flat and well lit”. In response the Appellant provided the following comments;
- 3.13.1 *Swanscombe Health Centre is 0.9 miles from the Castle Hill Local Centre. Even the most basic glance at a map would show that this is not “a similar distance”. It is three times the distance, with much of the walk proposed by the Applicant being along an unpleasant section of the B259 with a narrow footpath on one side only (shown below) and which is clearly not “flat” as claimed by the Applicant.*
- 3.14 [Photograph available]
- 3.15 NHS England has simply ignored evidence that did not agree with the claims made by the Applicant.
- 3.16 Bus Services – It appears from the NHS England decision report that NHS England has accepted details from the Applicant about bus routes without even checking them. For example, the 484 bus route referred to only operates hourly between 10.10am and 5.30pm and the 485 and 485A bus routes referred to do not serve the proposed site for most of the day (ie no buses between 9am and 7pm). Timetables are attached to confirm this. What this shows is that the Applicant relied on the existence of bus services that do not even operate during their opening hours and NHS England accepted this information as relevant to the issue of access even though the bus does not run when the pharmacy is open.

Patient Groups

- 3.17 The NHS England findings in respect of patient groups are muddled and completely ignore the legal test. NHS England quotes from the Applicant’s evidence and then completely fails to consider the evidence provided by the Appellant. No explanation is provided for ignoring evidence that has been submitted. Instead, NHS England simply finds as follows;
- 3.17.1 *“NHS England accepts that access to pharmaceutical services would not be significantly less accessible for the majority of patients receiving services from the applicant’s pharmacy. Although as with all relocations there might be some for whom such a change might be less accessible than the current provision.”*
- 3.18 Despite the use of “catch all” phrases that claim that NHS England has applied the legal test correctly and considered all relevant evidence, it is perfectly clear from reading the decision letter that have failed to do so. The NHS England decision considers “pharmaceutical services” generally rather than the Applicant’s pharmacy and fails to consider access for even a single patient group that was defined.
- 3.19 In respect of this appeal the Appellant relies on the content of their letter of objection dated 12 November 2018 (copy attached).
- 3.20 In addition, the Appellant’s Representative asks that the Committee notes the following points; Swanscombe and Ebbsfleet Garden Village are two distinct and entirely different communities, with different shopping provision, schools etc.

- 3.21 Swanscombe is a deprived area, especially in relation to health and disability. The PNA (Kent, March 2018) states;
- 3.21.1 *“The most deprived wards in the DGS area are Singlewell, Riverside, Northfleet North, Westcourt, Coldharbour and Pelham in Gravesend, Joyce Green, Littlebrook, **Swanscombe**, Princes and Town in Dartford and Swanley St Mary’s in the Swanley area.” [emphasis added]*
- 3.22 The 2011 Census shows that the Ward in which the pharmacy is currently located has the following relevant characteristics;
- 3.22.1 **All usual residents 7,561**
- 3.22.2 **One person in household with a long-term health problem or disability 23%**
- 3.22.3 **Social Rented Housing 26.5%**
- 3.22.4 **No Car or Van Available 26.5%**
- 3.23 It is notable that the same percentage of residents live in social housing as do not have access to a car. Whilst the appellant does not claim that the two groups are made up of the same people, it seems likely that those who are in need of social housing would be least likely to be able to afford their own car. It is commonly accepted that those who are more deprived will suffer from higher levels of illness. In this case there is compelling evidence that those who would rely on the pharmacy the most are those who live in the area immediately surrounding it and that the same people are more deprived, have higher need for pharmaceutical services and have the lowest instance of car ownership.
- 3.24 The Appellant’s Representative asks the Committee to further note that it is not even possible to compare the figures quoted above for disability and car ownership with figures for the proposed new pharmacy location as the Castle Hill area has only developed since the previous census was published. However, it is helpful to note that the typical housing style around the proposed site is show below and the typical housing style around the current site is below. Castle Hill would be considered an relatively affluent neighbourhood compared to Swanscombe.
- 3.25 People who live in one area would not say that they in fact lived in the other area. The duplication of facilities shows that, from a planning perspective, the facilities in Swanscombe were not considered sufficient for those moving in to the Castle Hill area. People living in Castle Hill and Swanscombe are not expected to use the facilities or the other location on a day to day basis.
- 3.26 [Photograph of proposed location new housing]
- 3.27 [Photograph of proposed current location (houses / flats)]
- 3.28 Where health and disability are noted in the PNA as being factors affecting a particular area, any decision on whether or not the relocation of a pharmacy would make it significantly less accessible to patient groups must take into account that there is evidence that shows that current users suffer from high levels of deprivation and / or poor mobility.
- 3.29 To require persons with a long term health problem or disability who can currently access Ackers Chemist as they live close to it, to instead rely on a bus service because the walk would be over 1 mile (with the return journey mainly uphill) and for that bus service to only operate on an hourly basis after walking to a bus stop that is not at the current Ackers site, clearly shows that any reasonable person would consider the proposed premises to be significantly less accessible for this patient group.

- 3.30 The Appellant's Representative also asks the Committee to note that the NHS England decision report makes reference to maps provided by the Applicant, that claim to show where their patients come from, but these were not provided to the Appellant to comment on and the Appellant's Representative requests sight of any such additional material that was provided by the Applicant but not sent to the Appellant.

Relevant Case Law

- 3.31 As the Committee will be aware, Langstaff J, in R (On the application of Community Pharmacies (UK) Ltd) [2016] EWHC 1595 (QB) held that;
- 3.32 *31. If, then, in context, the purpose of grouping is to facilitate a decision as to the accessibility of the new premises, the starting point is considering what makes a relocated pharmacy less easy to go to physically, mentally or socially, and "groups" must have their identities determined with that in mind.*
- 3.33 ...
- 3.34 *The same need remains in those areas, however, to ensure that if pharmacy premises are relocated they are, in practical terms, not significantly less easy to go to for those who had been in the habit of going to the pharmacy at the site it occupied before relocation.*
- 3.35 *34. However, the guidance note issued by the NHSLA more helpfully suggests that patient groups might be identified in relation to (a) local GP practices; (b) methods of travel (on foot, by car or public transport); (c) types of pharmaceutical services assessed (dispensing/collection and delivery); (d) the geographic location of the patient group's starting point of the journey to the pharmacy; (e) demography; (f) care homes and/or (g) areas of deprivation. **Broadly, this accords with what I regard as the correct approach in law, which is to see the decision in the context of assessing accessibility for existing users of a pharmacy due for relocation, and doing so not by posing a general question – are the new premises significantly less accessible to those who use the existing pharmacy? – which would invite an assessment of the overall picture, but to assess accessibility group by group. This has the implication that if any one group is significantly affected adversely the statutory test will not be met: and this gives another reason, in my view, for seeing "patient groups" as a tool for assessment of accessibility, the boundaries of which which need to be drawn broadly. Mr. Patel's argument that an application for relocation is an "exceptional" one, whereas "routine" applications determine the broad needs of the community as a whole, is relevant here since what is in question is the degree of disturbance to existing arrangements, viewed by reference to accessibility for those who currently make use of the premises which are potentially to be moved. [emphasis added]***
- 3.36 *36. Finally, it makes sense in the broader context of arranging the accessibility of pharmaceutical services so as to meet the assessed needs of those in the area that, once appropriate provision is established, a proposed change of location of any pharmacy whose services are part of that provision should be scrutinised to ensure it does not significantly diminish the accessibility of those services for those whose needs have been assessed. Accessibility will vary from area to area; it is rational to assess this by reference to particular groups, whose identity is always likely to depend upon particular local circumstances.*
- 3.37 It is submitted that this proposed relocation fails to meet the legal test under regulation 24(1)(a) as there are clearly defined groups of patients, such as those with impaired mobility, or even more generally, those who live in Swanscombe, who would find the relocated pharmacy significantly less accessible. Indeed, it is difficult to define **any** patient group that would not find the relocated pharmacy significantly less accessible, except perhaps those who use a car to access the pharmacy or those who do not live in Swanscombe (and these will be a small minority).

- 3.38 [see map]
- 3.39 The map above shows the current site of the pharmacy which lies over 100 ft above sea level, whereas the proposed location is approximately 10 ft **below** sea level. This is because the Castle Hill development is within an area that known as “Ebbsfleet Valley”. The walk from the proposed location to the current location is almost entirely uphill. NHS England simply accepted the comments from the Applicant that the walk was “flat”. It is not clear why the Applicant or their representative made this statement as it is clearly not true. The topographic and photographic evidence we have provided clearly demonstrates that the submission from the Applicant was false.
- 3.40 Google shows the distance between the current and proposed site as being over 1 mile (1.1 miles) and taking 22 minutes to walk (see image below).
- 3.41 [Aerial shot]
- 3.42 The Applicant originally claimed that the distance between the current and proposed premises was 1000 metres and (according to NHS England) only accepted that the distance was in fact over 1800 metres (1.1 mile) after the Appellant’s Representative challenged their distance calculation in its letter of objection (attached). The NHS England decision report suggests that the Applicant highlighted a shorter route that could be used, but the Committee is asked to note that any patient using this route would be walking along an unpaved and unlit dirt path (shown below).
- 3.43 Whilst a relocation of 1.1 miles may not be impossible, it would be very rare to see applications of this distance approved. In the context of the current application the Appellant’s Representative submit that the change, topography, distance and effect on patient groups is so significant that this cannot meet the legal test under regulation 24.
- 3.44 [See photograph]
- 3.45 The Applicant appears to suggest that there is a route would reduce the walk from 1.1 miles to “under 1 mile”. The Appellant disputes this as the only path it has identified (pictured above) requires a patient to walk further to the west and away from both the current and proposed site, before doubling back.
- 3.46 It is simply not credible for the Applicant to suggest that the patient groups that currently access the pharmacy on foot would not find the proposed premises significantly less accessible. All the evidence shows that the opposite is true.
- 3.47 On behalf of the Appellant, the Appellants Representative asks the Committee to allow this appeal.
- 3.48 **The Appellant’s Representative would further suggest that an oral hearing is appropriate in this case as a site visit will enable the panel to see for themselves the difficulties that it has tried to explain and describe in this letter of appeal.**

Letter to NHS England regarding the application

- 3.49 Thank you for your letter of 31 October 2018 enclosing a copy of the above application. Rushport Advisory LLP act for Delmergate Limited and have been instructed to submit this objection to the application from Ackers Chemists Limited (“Ackers”).
- 3.50 Delmergate Limited objects to this application and submits that it must be refused by NHS England for the following reasons.
- 3.51 **1. Proposed Location**
- 3.52 The maps provided with the application fail to identify either the current premises or the proposed premises. As NHS England will be aware (and as it states clearly on the

Applicant's own application form), best estimate addresses are **not permitted** when making an application under regulation 24 as NHS England must know the exact address of the property that is being considered.

3.53 **The application must be refused for this reason.**

3.54 **2. Distance**

3.55 Despite not providing the address of the proposed premises, Ackers state that the distance between the current and proposed location is 1.1km. This is incorrect. The actual distance is approximately 1.1 **miles** rather than 1.1 km as claimed by the applicant. However, this can only be an estimated distance as the Applicant has not provided the address of the proposed premises and has instead used a "best estimate" of the "Castle Hill Local Centre".

3.56 The Applicant's estimate of the distance involved in this move is wrong by approximately 65% (over 700 metres).

3.57 **3. Swanscombe Health Centre**

3.58 The Applicant states;

3.59 *"The majority of the patients that Ackers Chemists serve, approximately 42%, are from the nearby Swanscombe Health Centre. The pharmacy is 0.3 miles from this surgery but wishes to relocate to a new built premises in the New Retail Development at Castle Hill Local Centre, Ebbsfleet Garden Village (where it will be a similar distance away)."*

3.60 Almost all of this paragraph is incorrect, but most importantly, the Applicant claims to be 0.3 miles from Swanscombe Health Centre (which is correct), but then says that Swanscombe Health Centre is a "similar distance" from the Castle Hill Local Centre. This is entirely incorrect.

3.61 Swanscombe Health Centre is 0.9 miles from the Castle Hill Local Centre. Even the most basic glance at a map would show that this is not "a similar distance". It is three times the distance, with much of the walk proposed by the Applicant being along an unpleasant section of the B259 with a narrow footpath on one side only (shown below) and which is clearly not "flat" as claimed by the Applicant.

3.62 **4. Bus Services**

3.63 The Applicant states that there are "bus services from the vicinity of the existing premises to the proposed premises". No such bus service exists as far as Delmergate Limited's representative can tell and the Applicant has not even provided the number of the bus service they are relying on.

3.64 **5. Collection and Delivery Services**

3.65 The Applicant mentions several collection and delivery "patient groups" (including care home patients). As NHS England will be aware, the only patient groups that are relevant for the purposes of regulation 24 comprise patients who are accustomed to accessing the pharmacy in its current location. The Applicant is required to focus on these patients and not claim that the test is met by patients who do not even access the pharmacy.

3.66 **6. MURs**

3.67 The Applicant claims that MURs are provided by "telephone or domiciliary visit". Delmergate Limited requests that NHS England confirms if the Area Team has provided approval for MURs to be carried out in this way and when such approval was given to Ackers.

3.68 **7. Lack of Information on other Services**

3.69 The Applicant lists 20 services that the pharmacy provides, but provides no detail about any of them (and who uses them) other than in respect of MURs which they say are done by telephone or by home visit.

3.70 Delmergate Limited asks NHS England to consider in particular the impact of the proposed move on the patient group that uses the pharmacy for supervised consumption and / needle exchange services. No detail has been provided about these patients.

3.71 **8. Relevant Patient Groups**

3.72 The Applicant only mentions their local patients in the final paragraph of their information on page 10 of the application form, but then claims that it is “likely” that some will live closer to the proposed site. This is simply not credible and no evidence has been provided to support this statement. The reality is that the Applicant wishes to move their pharmacy out of Swanscombe, to a completely different and new development called Ebbsfleet Garden Village and leave their local patients behind.

3.73 The relevant patient groups for the purposes of this application should include;

3.73.1 1. Patients of Swanscombe Health Centre

3.73.2 2. Patients of St Werburgh Medical Practice

3.73.3 3. Patients who use supervised consumption or needle exchange services

3.73.4 4. Patients who live in Swanscombe

3.73.5 5. Patients who access the current pharmacy by

3.73.5.1a. Bus

3.73.5.2b. On foot

3.73.5.3c. By car

3.74 **9. PNA**

3.75 Delmergate Limited’s Representative notes that the Applicant relies on a statement in the PNA which purports to support a relocation of an existing pharmacy to meet any need that may be identified in the PNA in future in Ebbsfleet Garden Village. With respect, it is clear that the authors of the PNA simply did not understand the Regulations that govern the opening or relocation of community pharmacies and the PNA comments should not be considered relevant in this case.

3.76 **Conclusions**

3.77 The Applicant has entirely underestimated the distance between their current an proposed site. The journey is over 1 mile and would have a massive impact on the patient group that accesses the current pharmacy on foot. Even basic analysis of the journey shows that this patient group would find the proposed site significantly less accessible.

3.78 Local Swanscombe people do not live in Ebbsfleet Garden Village. They are two distinct and entirely different communities, with different shopping provision, schools etc.

- 3.79 Swanscombe is a deprived area, especially in relation to health and disability. The PNA (Kent, March 2018) states;
- 3.80 *“The most deprived wards in the DGS area are Singlewell, Riverside, Northfleet North, Westcourt, Coldharbour and Pelham in Gravesend, Joyce Green, Littlebrook, **Swanscombe**, Princes and Town in Dartford and Swanley St Mary’s in the Swanley area.” [emphasis added]*
- 3.81 The Applicant has ignored this, but NHS England must consider the impact of the proposed relocation and the significant change in arrangements that it would mean for the local area.
- 3.82 In the event that an oral hearing is required Delmergate Limited would wish to attend and be represented.

4 **Summary of Representations**

This is a summary of representations received on the appeal.

4.1 ACKERS CHEMISTS LTD (THE APPLICANT) REPRESENTED BY CHARLES RUSSELL SPEECHLYS LLP

4.1.1 Charles Russell Speechlys LLP act for Ackers Chemists Limited (the Applicant). The Applicant’s Representative is instructed to make representations on the appeal by Delmergate Limited (“Delmergate”). The Applicant’s position is that the determination made by NHS England was correct in that the relocation does not result in a significant change in pharmaceutical provision.

4.1.2 As a preliminary point, the Applicant’s Representative wish to challenge Delmergate’s right to be given third party appeal rights.

THIRD PARTY APPEAL RIGHTS

4.1.3 Delmergate would have been notified of the Applicant’s application for a no significant change relocation pursuant to paragraph 19(1)(c), Schedule 2 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, which provides as follows:

4.1.4 *“(1) the NHSCB must give notice of a notifiable application to-*

(c) any person-

(i) included in a pharmaceutical list for the area of the relevant HWB, or

(ii) who is entitled to be included in the pharmaceutical list because of the grant of a routine or excepted application but who is not (yet) included,

Whose interests might, in the opinion of the NHSCB, be significantly affected if the application were granted.”

4.1.5 Paragraph 30 provides for third party rights of appeal. Paragraph 30(3) relevantly provides as follows:

4.1.6 *“(2) For the purposes of this Schedule, a person (P1) is a person with third party rights if-*

(a) P1 is a person to whom sub-paragraph (3) applies; or

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

(a) P1 was a person whom the NHSCB was required to notify about the decision on the application by virtue of P1 being a person whose interests might, in the opinion of the NHSCB, be significantly affected by the decision, and also being-

(i) included in a pharmaceutical list,

(ii) entitled to be included in a pharmaceutical list because of the grant of a routine or excepted application but who is not (yet) included.

- 4.1.7 NHS England's obligation to notify persons of a decision for the purposes of paragraph 30(3)(a) is contained within paragraph 28 (3)(b)(v): -
- 4.1.8 "any (other) person whom the NHSCB notified under paragraph 19 and who made representations in writing about the application under paragraph 19(4)"
- 4.1.9 For the purposes of paragraph 30(3)(a), the only person with third party rights of appeal in the circumstances of this matter is a person whom NHS England was required to notify about the decision by virtue of being a person whose interests might be significantly affected by the decision. That is not a person who is notified of the decision merely because they fell within the criteria to receive notice of the application in the first place.
- 4.1.10 For the avoidance of doubt, a person notified of an application by reason of paragraph 19(2) and notified of the decision by reason of paragraph 28(3) is not automatically a person notified by virtue of being a person whose interests might be significantly affected by the decision.
- 4.1.11 The timeline of the decision making process in these applications is of assistance:-
- 4.1.12 31/1/19 - The Delmergate application under regulation 18 is refused by PCA 4/3/19 - the Ackers application for a no significant change relocation is granted by NHSCB
- 4.1.13 Therefore at the time the Ackers application was made there was a "live" Delmergate application. By the time the Ackers decision was notified the Delmergate application had been finally disposed of. It would be expected that there would be a provision to notify those that had made representations on a decision.
- 4.1.14 However if those statutory consultees were not "a person whose interest might, in the opinion of the NHSCB, be significantly affected by the decision" then they would not acquire third party rights of appeal. At the time the Ackers decision was made Delmergate was not a person significantly affected by the decision and therefore they did not acquire third party appeal rights.
- 4.1.15 The Applicant's Representative should be grateful if this point could be considered as a preliminary issue. Delmergate is the only appellant against this decision and if the Applicant's Representative is right then the appeal against this decision falls away.

THE APPEAL

- 4.1.16 Notwithstanding the preliminary issue above, the Applicant's Representative comments on the Delmergate appeal are set out below.

Background

- 4.1.17 The Applicant has made two applications for inclusion in the pharmaceutical list at the retail development, Castle Hill Local Centre, Ebbsfleet Garden City; this application and an application offering to meet an identified future need. The Applicant has appealed against the decision to refuse the application to meet an identified future need.
- 4.1.18 The Applicant's Representative is aware that, pursuant to Schedule 3, paragraph 7, sub-paragraph 3, of the Regulations NHS Resolution can consider two or more appeals together and in relation to each other. The Applicant's Representative should be grateful if NHS Resolution would consider this appeal, together with its appeal against the refusal of its application offering to meet an identified future need at the retail development, Castle Hill Local Centre. The Applicant's Representative considers there will be overlap in the facts under discussion and hearing the matters together will result in a saving of committee time.

The NHS decision

- 4.1.19 Rushport's submission on behalf of Delmergate criticises the NHS England decision in some detail. As the appeal is re-hearing the application, the Applicant's Representative does not propose to address the detail of Rushport's discussion of the NHS England decision making process. However, it is fair to note that the comment in the Rushport letter that "it is therefore clear that NHS England **felt** that the proposed relocation *would make the pharmacy significantly less accessible* for patients "in the vicinity" who accessed it on foot but felt this was not relevant due to the location of other pharmacies" is an extrapolation from the NHS decision that is completely unsupported by the decision itself.
- 4.1.20 The Committee set out the correct considerations for the regulatory test at page 5 and stated at page 11
- 4.1.21 *"The Committee was satisfied that, for the patient groups that are accustomed to accessing pharmaceutical services at the existing premises, the relocation to the new premises would not be significantly less accessible",*
- 4.1.22 This was a determination that they were entitled to make. There is therefore no evidence that the NHS England actually "felt" something different as suggested by Delmergate.
- 4.1.23 Dealing with the points raised by the Appellant that relate to the application itself, the Applicant's comments are as follows:

The Premises

- 4.1.24 NHS England check the application for incomplete information on receipt. Had there been any uncertainty about where the pharmacy was relocating to they would have asked for further information. (Schedule 2, part 2, paragraph 11 of the Regulations). At the point the Applicant made his application, the retail area had not been built but it was identified on a map outlined in red.

Patient Groups

- 4.1.25 The majority of the patients that Ackers Chemists serves, approximately 42%, are from the nearby Swanscombe Health Centre. The patient group with prescriptions from Swanscombe Health Centre can be further divided into those who have prescriptions collected (either physically or by EPS) and delivered and therefore do not come to the pharmacy for dispensing services. This is 21% of all prescriptions. These patients will be unaffected by the move.

- 4.1.26 The next largest patient group is those from the collection and delivery arrangement that the pharmacy has with St. Werburgh Medical Practice, 98 Bells Lane Hoo, Rochester ME3 9HU and its branch surgery at Mallard Way, Lower Stoke, Rochester, ME3 9ST. For all the patients in this group, the pharmacy collects prescriptions from the surgeries and delivers them either to local collection points or directly to their homes. MURs are provided via telephone or a domiciliary visit which has been approved by NHS England. These patients would be unaffected by the change in location. Approximately 36% of the pharmacy's prescriptions come from these surgeries.
- 4.1.27 Another patient group that the pharmacy deals with are patients from an integrated residential and nursing care home. (This fluctuates but the prescriptions generally account for approximately 5% of the total prescriptions.) These patients have medicines delivered to them.
- 4.1.28 In summary the significant majority, 62%, of the people receiving pharmaceutical services from Ackers will be unaffected by the relocation because they receive pharmaceutical services outside the pharmacy.
- 4.1.29 The Applicant's Representative attach maps showing the distribution of patients who have used Ackers Chemists to have their prescriptions dispensed over the last three months of 2018. The map marked 1 represents all the patients receiving dispensed medication. The map marked 2 shows an enlargement of the area around Swanscombe. The patients whose prescriptions are delivered to them are marked in blue and those who attend the pharmacy or a collection point are marked in red. Patients to the east of Rochester will generally collect their prescriptions from a collection point at the local surgery. Although there are a small number of patients to the north of Swanscombe who may have a longer journey to the relocated site, the staff at the pharmacy are not aware of any current patients who have long term health problems or disability who would have difficulty in getting to Castle Hill. The Applicant's Representative understands many patients, including those living in Swanscombe, drive to Ackers Chemists at its current location; as stated above, the move will be more convenient as parking will be more readily available.
- 4.1.30 For patients that use the supervised consumption and needle exchange services will be largely unaffected by the move. The majority of clients that use this service come from outside Swanscombe and will already be travelling some distance to access the service. The move will have very little impact on the. [sic] Five patients come from Swanscombe itself. Of these, two live at the extreme south of Swanscombe, so the new location will be more convenient; another lives in the middle of Swanscombe, so will be slightly closer to the old site. Two live just to the north of Ackers Chemists, so will have further to travel (but do not have any sort of disability).
- 4.1.31 The pharmacy has very few customers who receive essential services but do not have a prescription dispensed. There is a recent group of patients who attend the pharmacy for health checks and are referred by a third party but these patients are not receiving support for self-care as an essential service and are not usually Swanscombe residents so the relocation will have no impact on them.
- 4.1.32 For the majority of the patient groups accessing the services at Ackers Chemists, the move is either neutral or the pharmacy in its new location will be closer.

Access

4.1.33 Looking in detail at the access arrangements for the minority of patients who will travel from an area in Swanscombe to the new site there are the following options.

For pedestrians:

4.1.34 The Applicant's estimations of distance from the current site to the proposed site are set out in the letter of 5 December 2018 but for completeness, the Applicant's Representative sets them out here. Using a route, Ackers Chemist to Church Road to Swanscombe Street to Castle Hill Road to Cherry Orchard to the relocation site is 1.0 miles, measured by car odometer. By Google maps, it is 1.1 miles (the Applicant's original position based on Google maps was that the measurement from Ackers Chemist to Mercer Avenue was 1.1 k (0.68 miles)). The Applicant's Representative notes that Rushport says that the route from the relocation site to Ackers Chemists' current location is uphill the whole way; however, the Applicant's Representative again attach a copy of streetmap.co.uk, which takes mapping data from Ordnance Survey. It will be noted that contour lines and two spot height measurements are shown on the map, the location of Ackers Chemists is very close to the 27m mark on the north of Swanscombe and the main road linking the two sites is also adjacent to a 27m marker. The Applicant's Representative also attaches a contour map of the route to Ackers from the proposed site.

4.1.35 It can be seen the route is described as "mostly flat". The heat map attached to the Rushport appeal letter is undated and it is possible that there has been some infilling as the building works progress as the photographs of the new housing show level roads.

4.1.36 The Rushport appeal letter assumes that there is no other means of transport to the proposed site other than on foot. The Applicant's Representative reiterates that there are bus services which serve Swanscombe and Castle Hill. Timetables are as follows: -

Bus number	Route	Times
481	Bluewater - Swanscombe - Northfleet - Gravesend - Riverview Park	On weekdays: Starts - 05.46 Ends - 21.20 Approx. every 40 minutes Stops through part of Swanscombe - ie. the Church Swanscombe and The Sun Swanscombe; and Candy Dene Ebbsfleet and Ebbsfleet International Railway Station
484	Ebbsfleet Station - Castle Hill - Swanscombe- Greenhithe- Bluewater	On weekdays: Starts - 09.25 Ends- 16.35 And until 18.50 on Saturdays. (See service below for morning and evening provision)
485/485A	Castle Hill to Ebbsfleet International This is the service that Rushport referred to. Railway Station (485A calling at Swanscombe Rail Station)	This is the service that Rushport referred to. It should be noted that it dovetails with the 484 and provides an early morning (from 0603) and evening (to 2250) Service.

4.1.37 The Applicant's Representative attaches the bus timetables to this letter and it can be seen that there are services that link the current and proposed sites. It

is not correct to say that the buses run only outside the hours of the pharmacy. It appears that Rushport were referring to the 485/485A service only and not the other services.

4.1.38 As discussed in the Applicant's Representative correspondence to NHS England, there are also dial-a-ride services and on demand services:

4.1.38.1 The North West volunteer transport service is available in the Dartford and Gravesham district which includes Swanscombe. Volunteer drivers use their own cars to take members to medical appointments, to visit friends and relatives, to daycare centres or to wellbeing classes and to get essential shopping.

4.1.38.2 The Kent Karrier is a dial-a-ride service. It would pick up residents with mobility issues, over 85 or living 500 metres from a bus-stop from their home to set locations such as the nearest town centre or a supermarket. This would include to the nearest pharmacy.

4.1.39 Clearly for those with cars, accessibility would not be an issue as there will be greater availability of parking spaces at the proposed location than at the existing location. This may be particularly important for the patient group that live outside Swanscombe. As can be seen from the attached maps, this is a considerable proportion of the overall patient group.

The Proposed Location

4.1.40 Rushport state that Swanscombe and Ebbsfleet Garden Village as two distinct and entirely different communities with different shopping, schools and other facilities. This is not correct as there are no shops at all in Ebbsfleet Garden Village and the residents turn to Swanscombe for their everyday needs. Relevantly, there are no healthcare providers in Ebbsfleet Garden Village and therefore the residents of Ebbsfleet Garden Village will be travelling to Swanscombe to see doctors, dentists and obtain healthcare advice.

4.1.41 It is artificial to use figures from the 2011 census to make a point about the social differences between the areas as, as Rushport themselves are aware, the Castle Hill area has only been developed since the previous census was published. Rushport provide photographs of proposed new location housing and current location and it is notable that, although clip 1 is clearly new builds and clip 2 is older housing, the properties in the new location are not significantly larger. There is nothing about the houses to substantiate the proposition made by Rushport that Castle Hill would be considered a relatively affluent neighbourhood compared to Swanscombe. In fact, the position is that Swanscombe has mixed housing which varies in size, age and affordability. Rushport say people living in Castle Hill and Swanscombe are not expected to use the facilities of the other location on a day to day basis. It is simply not correct as, in fact, the people living in Castle Hill do use the facilities in Swanscombe on a day to day basis. Rushport make hypothetical statements about an individual with a disability who could walk to Ackers, having to get a bus if it relocates. This is to ignore the actual facts of this relocation application that the majority of the patients who use Ackers Chemists have their medicines delivered to them and/or live outside Swanscombe in any event.

Deprivation and health needs

4.1.42 Much has been said about deprivation in the Rushport letter. The bald statements about health and disability and deprivation are not accepted. A general statement is made about people who live in deprived area having higher health needs is made without any context. In fact the Dartford local plan shows that when comparing people with limiting long term illness fewer of the

people in Swanscombe have their day to day activities limited than in Kent as a whole.

4.1.43 [see table "Population with limiting long term illness, 2011, Swanscombe, Dartford"]

4.1.44 In summary, the Applicant is proposing a more rational distribution of pharmacies in the Ebbsfleet area and will relocate his pharmacy to an area of development which is not significantly less accessible for his existing patient groups.

4.1.45 Accordingly, the Applicant's Representative would ask that the appeal by Rushport is refused. The Applicant's Representative does not agree with Rushport's contention that an oral hearing is appropriate in this case but, should an oral hearing be arranged, the Applicant's Representative would wish to attend and represent the Applicant.

4.1.46 [Supporting documents available]

5 Observations on representations

NHS Resolution informed the parties to this appeal that it would consider this appeal and the appeal in SHA/21104 together and in relation to each other. SHA/21104 was an appeal by Ackers Limited's in respect of NHS England's refusal of Ackers Limited's application submitted under Regulation 15.

NHS Resolution proceeded to request representations and observations on both appeals together. NHS Resolution subsequently decided not to hear the appeals together and in relation to each other. NHS Resolution has therefore not included in this Annex A any representations or observations that refer solely to SHA/21104. Any representations and observations that make any reference to this appeal have been set out below. A party may have referred to both appeals in the same sentence or paragraph and so the wording below may include references to SHA/21104.

5.1 RUSHPORT ADVISORY LLP REPRESENTING DELMERGATE LIMITED

5.1.1 Rushport Advisory LLP act for Delmergate Limited and have been instructed by Delmergate Limited to submit these final comments in relation to the response received in the above appeal from Ackers Chemists Ltd represented by Charles Russell Speechly ("the Applicant's representative") in relation to SHA/21088.

Third Party Appeal Rights

5.1.2 The submission from the Applicant's representative in relation to third party appeal rights is flawed and simply ignores the fact that Schedule 2 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, provides as follows:

5.1.2.1 *Third part rights of appeal where an application is granted*

30(3)

(b) in the case of a notifiable application, P1 made representations in writing about the application under paragraph 19(4); and

(c) in the case of a notifiable application but subject to sub-paragraph (6), the NHSCB is satisfied, having regard to those representations in writing and any oral representations made in accordance with paragraph 25, that P1—

(i) made a reasonable attempt to express P1's grounds for opposing the application adequately in P1's representations, and

(ii) has grounds for opposing the application, which—

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

(bb) are not vexatious or frivolous.

5.1.3 Delmergate Limited made representations under paragraph 19 (and therefore para 19(4)) and the Applicant's representative does not dispute this. It is therefore clear that paragraph 30(3)(b) applies. Whether or not Delmergate Limited own application had been considered at the time is not a relevant consideration under para 30(3)(b). No party is suggesting that the requirements of 30(3)(c) are not met by Delmergate Limited.

5.1.4 the Applicant's representative states;

5.1.5 *"For the purposes of paragraph 30(3)(a), the only person with third party rights of appeal in the circumstances of this matter is a person whom NHS England was required to notify about the decision by virtue of being a person whose interests might be significantly affected by the decision."*

5.1.6 Delmergate Limited's representative does not disagree with this statement in any way, but it is irrelevant as Delmergate Limited has third party appeal rights under paragraph 30(3)(b) which the Applicant's representative simply does not consider or address.

5.1.7 In any event, Delmergate Limited has resubmitted an additional application for the retail development as Castle Hill Local Centre to NHS England and even if one were to ignore para 30(3)(b) (which one cannot) then Delmergate Limited would also be a person whose interests might be significantly affected by the decision.

The Premises

5.1.8 The Applicant's representative is unable to provide a satisfactory response to the indisputable fact that their client made an application under regulation 24, but failed to provide the address of the premises and only provided a "best estimate"

5.1.9 The NHS England decision states;

5.1.10 *"This distance between the two points given by the applicant is similar to the 1.1 miles stated by Rushport Advisory (12/11/18). The committee accepts this working approximation of distance **until a definite and specified location by the applicant can be given.**" [emphasis added]*

5.1.11 The Applicant's representative appears to blame NHS England for not requesting further information under Schedule 2, part 2, paragraph 11 of the Regulations, but it is the responsibility of the Applicant to provide the required information.

5.1.12 Put simply, the application cannot be approved as it provides a best estimate and does not meet the requirements of the Regulations.

- 5.1.13 Sch 2 Part 1 sets out the information that must be provided with routine and excepted applications
- 5.1.14 Paragraph 1(7) deal with the address of the premises and states;
- (7) If A is seeking the listing of premises not already listed in relation to A (whether or not A is already listed)—
- (a) either—
- (i) the address of the premises, or
- (ii) if the address is not known **and it is a routine application**, A's best estimate of where the proposed premises will be; [emphasis added]
- 5.1.15 This application is not a routine application. A best estimate is therefore not permitted and the application cannot be granted. Were the Committee to find that a best estimate was acceptable in this application it would not only be acting ultra vires, but setting a precedent for future applications.

Patient Groups

- 5.1.16 The Applicant's representative goes into some detail about patient who do not access the current pharmacy premises. Delmergate Limited's representative makes no further comment on these patients as they are not relevant to the legal test.
- 5.1.17 The Applicant's representative states in relation to patients that are accustomed to accessing the pharmacy in its current location that;
- 5.1.18 *"the staff at the pharmacy are not aware of any current patients who have long term health problems or disability who would have difficulty in getting to Castle Hill. We understand many patients, including those living in Swanscombe, drive to Ackers Chemists at its current location; as stated above, the move will be more convenient as parking will be more readily available."*
- 5.1.19 With respect, to the extent that such statements can be considered as evidence, they are of almost no probative value and should carry little or no weight.
- 5.1.20 The Applicant's representative then states;
- 5.1.21 *"The pharmacy has very few customers who receive essential services but do not have a prescription dispensed."*
- 5.1.22 This is not credible and suggests that the pharmacy does not provide support for self-care, advice, signposting or any other essential service to patients who live nearby, when common sense suggests that the opposite would be true.
- 5.1.23 In any event, it is the difficulty with travelling between where Ackers patients currently live and proposed site that matters the most. The map provided by the Applicant's representative and labelled as "1" confirms Delmergate Limited's representative's previous submission that none of Ackers current patients live in the area they wish to relocate to, whereas the highest density of patients live around the current location of the pharmacy.
- 5.1.24 As Delmergate Limited representative has submitted in its letter of appeal dated 13 March 2019; Swanscombe is a deprived area, especially in relation to health and disability. The PNA (Kent, March 2018) states;

- 5.1.25 “The most deprived wards in the DGS area are Singlewell, Riverside, Northfleet North, Westcourt, Coldharbour and Pelham in Gravesend, Joyce Green, Littlebrook, **Swanscombe**, Princes and Town in Dartford and Swanley St Mary’s in the Swanley area.” [emphasis added]
- 5.1.26 The 2011 Census shows that the Ward in which the pharmacy is currently located has the following relevant characteristics;
- 5.1.26.1 All usual residents 7,561
- 5.1.26.2 One person in household with a long-term health problem or disability 23%
- 5.1.26.3 Social Rented Housing 26.5%
- 5.1.26.4 No Car or Van Available 26.5%
- 5.1.27 It is therefore not credible for the Applicant’s representative to state – *“the staff at the pharmacy are not aware of any current patients who have long term health problems or disability who would have difficulty in getting to Castle Hill.”*

ACCESS

- 5.1.28 It is simply not credible to rely on a Google screenshot statement that describes a route as “mostly flat” when the photographic evidence and topography clearly show that this is wrong. The Applicant’s representative wonder if there may have been “some infilling” to remove the gradients but cannot provide any evidence to support this quite remarkable claim. The Ordnance Survey map provided by the Applicant’s representative supports Delmergate Limited’s representative’s submission that there are significant gradients that must be negotiated and these are quite clear on the map (showing as contour lines).
- 5.1.29 [See photograph - **GRADIENT ALONG PART OF THE WALKING ROUTE**]
- 5.1.30 The Applicant’s representative provide details of the 481 bus route, but as this bus goes nowhere near the proposed location at Castle Hill it is unclear why this has been provided. The 481 bus does of course go to the Applicant’s current location and this means that all patients who use this bus route to access the pharmacy in its current location would no longer be able to do so and would have to catch a second bus that only operates on an hourly basis.
- 5.1.31 As Delmergate Limited’s representative has previously stated and is now confirmed by the Applicant’s representative, the 484 bus route referred to only operates hourly between 10.10am and 5.30pm and the 485 and 485A bus routes referred to do not serve the proposed site for most of the day (ie no buses between 9am and 7pm). The timetables provided by the Applicant’s representative confirm what Delmergate Limited’s representative has already provided as being correct.
- 5.1.32 To require persons with a long term health problem or disability who can currently access Ackers Chemist as they live close to it, to instead rely on a bus service because the walk would be over 1 mile (with the return journey mainly uphill) and for that bus service to only operate on an hourly basis after walking to a bus stop that is not at the current Ackers site, clearly shows that any reasonable person would consider the proposed premises to be significantly less accessible for this patient group.
- 5.1.33 Delmergate Limited’s representative submit that it should be clear that this application does not meet the test under regulation 24 and should be refused

as it not only fails to meet the legal test but is not valid as it uses a best estimate address.

5.2 KENT LPC

5.2.1 The LPC have no further comments to make, in addition to the correspondence that we have sent in the past, concerning these applications.

Kent LPC Comments to NHS England regarding the no significant change relocation application

5.2.2 The LPC note from these representations, that since the original application and documentation available at that time, there is now a query on the distances between the Swanscombe Health Centre and Swan Valley Pharmacy and the proposed site of the new pharmacy, and the LPC believe that these should be checked.

5.2.3 The LPC have no further comment to make about this application and wish to continue to be kept informed of any hearings or developments that may arise in this matter.

5.3 CHARLES RUSSELL SPEECHLYS LLP REPRESENTING ACKERS CHEMISTS LTD (THE APPLICANT)

5.3.1 Thank you for your letter of 29 May 2019 with enclosures. The Applicant's representative's comments are as follows: -

RUSHPORT ADVISORY [Representing Delmergate Limited]

5.3.2 The Applicant's representative's has set out its position regarding the Delmergate Limited representative's analysis on whether the comments within the PNA could amount to an identified future need in its appeal and will comment further below in relation to the NHS England response.

5.3.3 The Applicant's representative wishes to correct a serious factual error on page 3 of the Delmergate Limited representative's submissions. Delmergate Limited representative say in relation to application referenced SHA/21104 "the application which is subject to this appeal is not for the relocation of current premises." In fact, this is an application made under Regulation 12(b)(ii) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, which states

"a "routine application" is any application, other than an excepted application, by a person ...

(b) who is included in a pharmaceutical list and who is seeking ...

(ii) to relocate to different premises, and at those premises provide the same or different pharmaceutical services... "

5.3.4 The Applicant is making a routine application to relocate from his existing premises on Church Road to premises in the Castle Hill Local Centre. As it is a routine application, he is proposing to do this by satisfying the test under Regulation 15 for future needs, and to provide the enhanced services discussed in the application.

5.3.5 The Applicant's representative's note that the somewhat pejorative remarks made by Delmergate Limited's representative, in particular at paragraph 3 of page 3 of his letter, about the Applicant, the PNA and NHS England have no evidential basis and the Applicant's representative's therefore disregard them.

5.4 NHS ENGLAND

5.4.1 The response from NHS England refers to the NHS Resolution decision reference SHA/19996. In this the Pharmacy Appeals Committee specifically considered the Ebbsfleet PNA in the context of an application for unforeseen benefits.

5.4.2 The Applicant's representative's case is that this decision should not be followed. This is for three main reasons:

1. Relocation

5.4.3 Case reference SHA/19996 should be distinguished because NHS Resolution in that case was not considering a routine application which was a relocation. Had NHS Resolution been considering an application that was relocation, they would then have considered the wording in the PNA which states on page 17

5.4.4 *"We do not need any more providers in the area except (i) a need for pharmaceutical services in the area of Ebbsfleet within the life of this PNA. This should be met by relocation of some of the current services."*

5.4.5 The comment here specifies when the service is required: ie: "in the lifetime of the PNA" and what the service should be ie : a relocation of an existing provider. As the Applicant's representative's said in its appeal if the PNA requires a relocation of existing services as its preferred method of offering the pharmaceutical services it cannot then give more detail of specific services or it risks limiting the choice of relocating provider.

2. Level of specificity required

5.4.6 With respect, it is considered that the Committee read into the regulations requirements that are simply not there; for example at paragraph 6.28 of SHA/19996 it was commented that a reference to "within the life of the PNA" did not reach a level of certainty and specificity that paragraph 2(b) requires.

5.4.7 However, paragraph 2(b) of Schedule 1 states "will, in specified future circumstances need to be provided". There is no detail on the level of specificity required. The phrase "within the life of the PNA" gives an indication of duration, and therefore meets the requirement of paragraph 2(b).

5.4.8 This interpretation is supported by the guidance issued by the Department of Health. At Chapter 6 "Future Needs" the guidance explains that:

5.4.9 "Introduction

5.4.10 2. Within its PNA, a HWB may have identified future health needs in its area that will need to be met by the provision of *pharmaceutical services* (paragraph 2 of Schedule 1). These needs could be for:

5.4.11 • *essential services*, for example a housing development is due to start within the lifetime of the PNA; or

5.4.12 • a specific *directed service ...* " [emphasis as in the original]

5.4.13 The Dartford /Gravesham /Swanley CCG PNA therefore replicates the wording used in the guidance.

5.4.14 The guidance appears to envisage flexibility in relation to the level of description to be given in the PNA.

3. Option to impose conditions

5.4.15 The flexibility in the guidance ties in with the flexibility to impose conditions at schedule 2, paragraph 33 (2).

5.4.16 Paragraph 33(2) is in place to allow the NHSCB to grant an application subject to a condition.

5.4.17 Paragraph 33 states:

"Conditional grant in cases relating to future needs or future improvements or better access

(1) Where the NHSCB grants a routine application because doing so-

(a) will meet a future need for pharmaceutical services, or pharmaceutical services of a specified type in its area; ...

(2) Where this sub-paragraph applies, the NHSCB may grant the application subject to a condition that pharmaceutical services are not provided at the listed chemist premises to which the application relates (or at any premises to which the business relocates) until –

(a) Some or all of the future circumstances, as a consequence of which the application was granted, have arisen; or

(b) A specified date (having regard to when some or all of the future circumstances, as a consequence of which the application was granted, are likely to arise)."

5.4.18 This is a standalone provision which gives NHSCB an ability to set parameters for the application based on their own determination.

5.4.19 Finally, NHS England comments that there was a lack of information about the level of occupation of the new homes at Ebbsfleet in the appeal letter. The Applicant's representative wishes to clarify that the statement "ready to occupy by November 2019" related to the retail units not the homes.

5.4.20 The Ebbsfleet Development Corporation reports that the position regarding the new homes as at 17 April 2019 is that 1,464 homes are already completed, 3,658 homes have planning consent and 12,044 homes have outline planning consent. The Applicant's representative attaches a copy of the Ebbsfleet Development Corporation's housing delivery dashboard. The primary school adjacent to the proposed site opened in 2017 and has over 80 pupils.

5.4.21 In all the circumstances, the Applicant's representative considers this application could properly be granted as an application for future needs. However, the Applicant's representative is aware that NHS England have granted the Applicant's application for a no significant change relocation. Should the appeal in relation to this application (SHA/21088) be dismissed, the Applicant accepts that the application for future needs falls away as the future need will be satisfied by the grant of the no significant change relocation. Should the appeal on SHA/21088 be allowed the Applicant's representative asks that the Applicant's application offering to meet an identified future need at the Castle Hill local centre be granted. The Applicant's representative reiterates that should the matter go to an oral hearing, the Applicant would wish to attend and be represented.

NHS Resolution sought information from NHS England regarding the Right of Appeal matter and circulated an extract from Charles Russell LLP representing Ackers Chemist appeal and an extract from Rushport Advisory LLP representing Delmergate Ltd representations.

6.1 NHS ENGLAND

- 6.1.1 Thank you for your letter and enclosures of 20 June 2019 asking for additional information:
- 6.1.2 A copy of the notification letter sent to Delmergate Limited pursuant to paragraph 30(4) of schedule 2 of the Regulations and referred to, at paragraph 6.1 above;
- 6.1.3 and
- 6.1.4 A statement of reasons explaining on what basis NHS England granted third party appeal rights to Delmergate Limited.
- 6.1.5 A copy of the notification letter sent to Delmergate Limited pursuant to paragraph 30(4) of schedule 2 of the Regulations is enclosed as appendix 1. [as per paragraph 2 above]
- 6.1.6 With regards to the basis upon which NHS England granted third party appeal rights to Delmergate Limited., NHS England would like to refer to Schedule 2 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, which states as follows:
- 6.1.7 ***Third part rights of appeal where an application is granted***
- 6.1.8 ***30(3)***
- 6.1.9 ***(b) in the case of a notifiable application, P1 made representations in writing about the application under paragraph 19(4); and***
- 6.1.10 ***(c) in the case of a notifiable application but subject to sub-paragraph (6), the NHSCB is satisfied, having regard to those representations in writing and any oral representations made in accordance with paragraph 25, that P1—***
- 6.1.11 ***(i) made a reasonable attempt to express P1's grounds for opposing the application adequately in P1's representations, and***
- 6.1.12 ***(ii) has grounds for opposing the application, which—***
- 6.1.13 ***(aa) do not amount to a challenge to the legality or reasonableness of a pharmaceutical needs assessment, or to the fairness of the process by which a HWB or Primary Care Trust undertook that assessment, and***
- 6.1.14 ***(bb) are not vexatious or frivolous.***
- 6.1.15 When reviewing the representation made by Delmergate Limited under paragraph 19 (and therefore para 19(4)), NHS England was of the view that paragraph 30(3)(b and c) applied. Given this, NHS England did not view it as relevant under para 30(3)(b) whether or not Delmergate Limited's own application had been considered at the time, as historically, there have been several applications by Delmergate and Ackers Chemists respectively for the Retail Development, Ebbsfleet Garden City.

- 6.1.16 Ackers Chemists, by virtue of having an already established pharmacy in the proximity to this development, has a right to be included in any notification exercise concerning this area. Delmergate Limited, on the other hand, has previously been notified as an interested party due to its applications in that same area and so its interest will be significantly affected by any such decision. This being illustrated by the minutes of NHS Resolution of 31st January 2019 SHA/19996 which records NHS England's decision letter pursuant to that case as stating the following:
- 6.1.17 **"REF: SHA/19996**
- 6.1.18 **APPEAL AGAINST NHS ENGLAND SOUTH EAST AREA TEAM, NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY DELMERGATE LTD FOR INCLUSION IN THE PHARMACEUTICAL LIST OFFERING UNFORESEEN BENEFITS UNDER REGULATION 18 AT THE NEW RETAIL DEVELOPMENT, CASTLE HILL LOCAL CENTRE, EBBSFLEET GARDEN CITY**
- 6.1.19 ...
- 6.1.20 **2.14.6 Ackers has submitted two applications for the area which significantly affects Delmergate's interests. Rushport Advisory asked that Delmergate is included as an interested party and is included in the notification process."**
- 6.1.21 According to Regulation 19(2) the NHSCB may also give notice of the notifiable application to any other person who, in the opinion of the NHSCB, has a significant interest in the outcome of the application. In this case NHS England was of the view that Delmergate Limited, due to its number of applications made under the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, was to be considered an interested party with a significant interest in the outcome of the application and thus should be party to the notification exercise.

Parties were invited to make observations on NHS England's additional comments as follows:

6.2 CHARLES RUSSELL SPEECHLYS LLP

- 6.2.1 Thank you for your letter of 27 June 2019. We have the following comments on NHS England's response dated 26 June 2019 on the issue of third party appeal rights:
- 6.2.2 NHS England state "NHS England did not view it as relevant under paragraph 30(3)(b) whether or not Delmergate Limited's own application had been considered at the time " when referring to the grant of third party rights of appeal. It is at this point that we believe that NHS England fell into error.
- 6.2.3 Although it is agreed that Delmergate Limited were entitled to be notified, Delmergate did not acquire third party rights of appeal because at the point when the decision was taken as to whether third party rights of appeal were to be given, Delmergate did not fall within the regulatory criteria, i.e. they were not, for the purposes of paragraph 30(3)(a), a person whose interests might be significantly affected by the decision.
- 6.2.4 NHS England say in support of their decision to grant Delmergate third party rights of appeal that Rushport Advisory asked that Delmergate was included as an interested party. With respect, it is irrelevant for Delmergate to say they are an interested party. They only become an interested party if they fall within the regulatory criteria to do so.

- 6.2.5 NHS England state "NHS England was of the view Delmergate Limited, due to its number of applications made under the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulation 2013 was to be considered an interested party with a significant interest in the outcome of the application." We understand that Delmergate has in fact only made one application for the Ebbsfleet site. At the point at which there was a determination of who should be given third party appeal rights, that application had been decided and had been refused. There is no element of futurity for the decision making process, therefore it was not relevant that Delmergate at some point in the future made a further application.
- 6.2.6 In all the circumstances, we ask that NHS Resolution find that Delmergate has no third party rights of appeal and consequently their appeal is dismissed.

Unsolicited comments received in response to the circulation of observations:

6.3 RUSHPORT ADVISORY LLP REPRESENTING DELMERGATE LTD

- 6.3.1 Thank you for your letter of 8 July 2019. We note that the letter is for information purposes only, but we also note that Charles Russell Speechly ("CRS") has now changed their position in respect of this matter and my client believes it is only fair that we make the following reply and request that it is considered by the Committee.
- 6.3.2 **Third Party Appeal Rights**
- 6.3.3 Schedule 2 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, provides as follows
- 6.3.4 *Third part rights of appeal where an application is granted*
- 6.3.5 30(3)
- 6.3.6 (b) in the case of a notifiable application, P1 made representations in writing about the application under paragraph 19(4); and
- 6.3.7 (c) in the case of a notifiable application but subject to sub-paragraph (6), the NHSCB is satisfied, having regard to those representations in writing and any oral representations made in accordance with paragraph 25, that P1—
- 6.3.8 (i) made a reasonable attempt to express P1's grounds for opposing the application adequately in P1's representations, and
- 6.3.9 (ii) has grounds for opposing the application, which—
- 6.3.10 (aa) do not amount to a challenge to the legality or reasonableness of a pharmaceutical needs assessment, or to the fairness of the process by which a HWB or Primary Care Trust undertook that assessment, and
- 6.3.11 (bb) are not vexatious or frivolous.
- 6.3.12 Regulation 30(3) has not previously been dealt with by CRS. Now CRS accepts that my client "was entitled to be notified" but claims that they did not acquire third party appeal rights because;
- 6.3.13 "at the point when the decision was taken as to whether third party rights of appeal were to be given, Delmergate did not fall within the regulatory criteria."

6.3.14 This position finds no support within the Regulations. Regulation 30(3) is perfectly clear that the question of whether a party has third party appeal rights relates to whether that party made representations in writing about the application under paragraph 19(4) and not the date at which any other application was considered by NHS England.

6.3.15 No appeal allowed against a decision under para 30(3)

6.3.16 Not all of the decisions made by NHSE may be appealed to Primary Care Appeals and the Regulations clearly set out when rights of appeal apply. As an example, there is no right of appeal if NHSE determines that a person does not have a significant interest in the outcome of the application under paragraph 19(2) of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, nor would NHS Resolution entertain such an appeal. Likewise, there are no appeal rights against a decision of NHSE (or NHS Resolution) to grant third party appeal rights. Whilst a person who is notified about an application, but subsequently refused third party appeal rights by NHSE may appeal such a decision under paragraph 30(6), the reverse is not correct and the applicant has no right to appeal the grant of third party appeal rights. The submission from CRS is simply a way of attempting to appeal where no appeal is permitted under the Regulations.

6.3.17 In accordance with Primary Care Appeals "Guidance Note for Parties Involved in Pharmacy Appeals" published on its website, Primary Care Appeals will consider, prior to the invitation to submit representations, whether the appellants have a right of appeal against the original decision – ie the grant or refusal of the relevant application. This does not extend to allowing a party to appeal against the issuance of appeal rights where no legal mechanism exists to do this.

6.3.18 There would have to be compelling reasons to remove the right to a fair hearing and it would be a draconian and indeed unlawful step to take in this case.

7 Oral Hearing

The matter of whether Delmergate Ltd has rights of appeal in this case will be a point of consideration at an oral hearing. The Committee at the oral hearing will hear the issue but will likely reserve their determination on this point. The oral hearing will therefore very likely hear all other substantive points of the appeal in the usual way and the parties are strongly advised to prepare for the hearing accordingly.

**Alison McCafferty
Case Manager
Primary Care Appeals**