

12 March 2021

Arena Point
Merrion Way
Leeds
LS2 8PA

REF: SHA/23349

APPEAL AGAINST NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY HEALTHRITE UK LTD FOR INCLUSION IN THE PHARMACEUTICAL LIST OFFERING UNFORESEEN BENEFITS UNDER REGULATION 18 AT MICK FURY HOUSE, LOWEN ROAD, RAINHAM, RM13 8HT

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1 Outcome

- 1.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, quashes the decision of NHS England and redetermines the application.
- 1.2 The Committee determined that the application should be granted on the amended basis that the application is for core hours from 8am to 8pm Monday to Saturday with supplementary hours of 8pm to 12 midnight from Monday to Saturday.

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- 1 A summary of the application, decision, appeal and representations are attached at Annex A.
- 2 **Site Visit**
 - 2.1 All the members of the Committee (Mr I.Crookall, Mr M.Beaman and Mr S.Neale) attended to undertake a site visit on Tuesday 3 November 2020 between 11.30am and 2.15pm starting at the application site at Mick Fury House. There were 2 shops to let in the building at ground floor level. There were offices above, including a food bank on the first floor which appeared to be closed on the occasion of the visit. There was a Costcutter convenience store facing a small square where there were parking spaces. It was a relatively large convenience store selling a wide range of goods, including fresh and frozen food, cleaning materials, confectionery, alcohol and packaged and tinned goods. It was the only shop serving the immediate area and had a regular stream of customers. It was open from 7am to 9pm Mondays to Saturdays and between 8am and 8pm on Sundays.
 - 2.2 The Committee noted that opposite the shop was a bus stop, a post box and facilities for securing bicycles. There was a cashpoint next to the store. The immediate area had been recently re-developed and was known as Orchard Village, previously having been called the Mardyke estate. There were several modern blocks of flats; some were of 5 storeys as well as terraced housing, all of which appeared to be managed by a Housing Association. There was external parking in dedicated parking spaces, as well as underground parking in some of the larger blocks of flats. Most of the parking spaces were occupied, suggesting a high level of car ownership in Orchard Village. The pavements and driveways were recently constructed with street lighting and level with ample room for pedestrians. There was parking available for visitors to the area without parking restrictions.
 - 2.3 The Committee noted in particular the bus frequency of the 365 which was the bus serving the area. This bus service operated 24 hours a day, with one bus every 12 minutes between 8am and 7pm with between 2/3 buses per hour from 9pm to 6am. This service provided access to and from the Day Lewis pharmacy at Rainham Road, a journey which was scheduled to take 14 minutes by bus. The bus carried on to Romford town centre. The 365 could take passengers to the stops in New Road (A1306) where other services operated in the direction of other pharmacies. Reference is made to these later on in the site visit.
 - 2.4 The Committee left the square on foot to walk past Newtons Primary School which was across Perry Close to the east of the application site. The Committee then walked along Frederick Road in the direction of Dr M Fateh's surgery. The character of the housing on this road was very different to Orchard Village. There were detached and semi-detached houses and bungalows, which were considerably older than the modern

developments in Orchard Village. There was also a nursery and a Praise Chapel in what appeared to be converted residential premises. Frederick Road was a relatively wide thoroughfare compared to adjacent streets (it was the route of the 365 bus), it had street lighting, many houses had places to park cars and pavements with dropped kerbs at junctions. The surgery was seen at 39 Frederick Road. The Committee noted that it was called the Frederick Road Medical Centre. It was closed on the occasion of the visit but it was noted that a telephone was answered Monday to Friday between 08.00 and 18.30 hours.

- 2.5 The Committee then retraced its steps down Frederick Road to Orchard village. The Committee noted the playground and open land to the rear of Frederick Road, before turning into Roman Close, leading into Broadis Way where the larger 5 storey blocks of Orchard Village were located. An NHS Walk-in Centre which had been located in this vicinity had closed. Having walked past Diversity Avenue, the Committee reached Lower Mardyke Avenue. Towards the northern end of this avenue, there was open ground and a footpath leading to a bridge which crossed the River Beam and led into the adjoining Borough of Barking and Dagenham and the surgeries and pharmacies in that borough which served the Orchard Village area. The footpath led to an area known as Beam Parklands which was an open space crossed by footpaths, although they were not lit and muddy in parts at the time of the visit.
- 2.6 The Committee then retraced its steps to return to Lowen Road, noting the Abbs Cross Day Nursery on Lower Mardyke Avenue and the Mardyke Community Centre on South Street. The Committee saw the well-established housing developments along the streets leading to New Road (A1306). Many of these streets were quite narrow, although level, lighted and with footpaths. It was a feature of South Hornchurch that cars tended to be parked on the pavements in order to maximise the amount of the carriageway for vehicles. Throughout this part of the visit the pedestrians were mainly young people and a few young families with small children and prams who appeared to have no difficulty in walking along the pavements and crossing roads.
- 2.7 The Committee then proceeded by car along Walden Avenue to the New Road (A1306). Walden Avenue was very typical of the surrounding communities in the area with a range of established housing which had been there for some time. There was parking on the road and partly on footpaths, which were seen to be being used by pedestrians, including mothers with young children at the time of the visit. There was street lighting. On the southern side of Walden Avenue, at its junction with the A1306, was the development of Beam Park where a significant development of multi storied housing accommodation was in course of construction.
- 2.8 On the A1306 there were bus routes 174 and 287. Route 287 went in both an easterly and westerly direction serving Tesco Express and Asda, both of which had pharmacies. The 287 had a frequency of 4 buses per hour in the morning with an increased frequency between 1pm and 11pm on weekdays. The Route 174 left CEME Campus to the south of New Road and went in a westerly direction only towards the Asda store.
- 2.9 The A1306 itself was a busy dual carriageway road with many traffic lights and pedestrian crossings. However, the features of the road were the number of business and commercial premises which faced the road on both the southerly and northerly sides. It is not possible to give a comprehensive description of the nature of all the activities, although they were largely motor related with car washes, battery and tyre replacement businesses, car repair and MOT testing facilities. There were also shops such as hairdressers, cafes, takeaways and a dance studio, whilst to the south of this road were industrial estates and business parks. There was residential housing at the eastern end of this road closer to Tesco. The Committee noted a timber wholesaler and an outreach location of Havering College. The footpath was wide and easily negotiable, although the front of commercial premises, with parked cars outside, and side roads needed to be crossed. The road had street lighting and was level.

- 2.10 The Committee then visited and entered Tesco Express Super store (assessed to be 1.4 miles from the application site and 5 minutes by car) which had a pharmacy at the rear of the store. There was extensive parking and the pharmacy was advertised to be open from 8am to 8pm Mondays to Saturdays and 10am to 4pm on Sundays. The store was busy at about 12.30pm at the time of the visit but there were no problems accessing the pharmacy which was located at the back of the Tesco store. The Committee noted that there were dedicated bus bays at the store where buses pulled in so that customers could gain easy access to the store. There were disabled and toilet facilities and a private consulting room.
- 2.11 The Committee then left Tesco and proceeded along the A125 Rainham Road to the junction of this road with Cherry Tree Lane and South End Road. This was a traffic light-controlled junction, with pedestrian crossings, and local car parking facilities, which were blocked off on the occasion of the visit. The Day Lewis pharmacy was located in modern shop front premises between 2 restaurants/takeaways and opposite the bus stop for the 103 service. The pharmacy opened from 9am to 6 pm, Monday to Friday, 9am to 1pm on Saturdays and was closed on Sundays (it was closed for lunch from 1pm to 2pm). The Committee assessed that, following the most direct route from the application site, the distance was 1.4 miles, a journey of 6 minutes by car, a journey which the Committee later undertook and is referred to below. There was limited parking outside the pharmacy and in the adjoining street. The 365 service from the application site had a stop on Cherry Tree Road. This area was a local centre with a wide range of shops and facilities, including a KFC, Tesco, another convenience store, takeaways, launderette, funeral director, hairdresser and car supply units. At the time of the visit about midday, the area was very busy with a range of pedestrians and the Committee encountered delays at the traffic lights with traffic build up.
- 2.12 The Committee then proceeded by car along Rainham Road past South Hornchurch Library along a mainly residential road crossing the river Beam into the Borough of Barking and Dagenham and to the junction with Ballards Lane. The Committee then drove along Ballards Lane past Old Dagenham Park and the Leys to the junction of Oval Road to view the Surgery at the junction. However, this surgery had closed some time ago.
- 2.13 The Committee then walked along School Road past Dagenham Park School and Leisure Centre to Broad Street to visit the Day Lewis pharmacy on Broad Street. School Road was typical of an established residential area with mainly terraced houses without parking, and with cars parked on the pavement. The Day Lewis pharmacy was in a shop fronting the street where there was on street parking. This pharmacy was open from 9am to 6pm Monday to Friday, 9am to 1pm on Saturdays and closed on Sundays (the pharmacy was closed for lunch from 1pm to 2pm.) The shop was located in an area where there was a wide range of retail outlets, including cafes and food shops. The Committee visited at about 1.20pm when the pharmacy was closed for lunch. There was on street pay and display parking outside the pharmacy and street lighting, but this road was not served by a bus. This pharmacy was recorded as being 2.6 miles from the application site and 9 minutes away by car. To the rear of the pharmacy was the Broad Street Medical Practice which was in a modern building, with adjacent mental health services. Thereafter the Committee proceeded to the Asda store and pharmacy, noting the medical practice of Dr Fateh at the junction of First Avenue and Crosby Road. This practice was located in what appeared to be former residential premises and was similar to the associated surgery at Frederick Road referred to above. The Asda pharmacy was located in a large superstore at the busy road junction of the A13 and the A1306. The pharmacy was located at the front of the store and the Committee noted its advertised opening hours were: Monday to Friday 8am to 1pm and 2pm to 10pm, Saturday 9am to 1pm and 2pm to 8pm, Sunday 11am to 5pm.
- 2.14 The Committee recorded that the distance from the application site to this pharmacy was 2.4 miles and 8 minutes by car. There was extensive parking, although pedestrian access was a little more challenging. The 287 stops for buses on the A1306 were

opposite the Merriellands Retail Park, a short distance from the Asda store and pharmacy.

2.15 Finally, the Committee retraced its steps back to the application site. The final task undertaken by the Committee was to follow the shortest route from the application site to the nearest pharmacy (Day Lewis at 113 Rainham Road, Rainham). The Committee have previously recorded the estimated time and distance to this pharmacy. This journey was undertaken to assess the route for pedestrians and car drivers from the application site and largely followed the route of the 365 bus. This route followed well established level residential streets, all of which had street lighting, pavements and dropped kerbs. However, the carriageways were relatively narrow and cars were parked on the road. Again, the number of parked cars meant that the Committee had to wait on some occasions to pass through.

2.16 The site visit concluded at 2.15pm.

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.

3.1 No such comments or observations were made.

4 Oral Hearing Submissions (which took place via MS Teams on 13 November)

4.1 Mr Daly, on behalf of the applicant, applied to amend the application. Mr Daly stated that he had the opportunity to discuss the application with his client shortly before the hearing commenced. It had become clear to him that the applicant may not be able to meet some of the commitments and the undertaking which she would be required to give based on the application being for 96 core hours from 8am to 12midnight - Monday to Saturday each week. The Applicant lived in Orchard Village, she wanted to establish the pharmacy as a registered pharmacist herself to meet a gap in the provision needed for her community and she would be managing the pharmacy personally. Mr Daly pointed out that the commitment required of his client to meet her obligations, both to the NHS and in relation to the financing of the pharmacy if the application were to be granted, had perhaps not been fully appreciated.

4.2 In the circumstances he made an application to amend and reduce the core hours applied for as follows, namely that the core hours should be 8am to 8pm Monday to Saturday and that the supplementary hours should be 8pm to 12 midnight on the same days. It was likely that the applicant would apply to reduce the supplementary hours. Mr Daly submitted that the relevant provisions to which the Committee should have regard were contained in in Schedule 2, Part 1, Para 9 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations") which provide that;

(1) An applicant (A) must provide the following undertakings—

(a) an undertaking to notify the NHSCB within 7 days of any material changes to the information provided in the application that occur before—

(i) the application is withdrawn,

(ii) while the application remains the subject of proceedings, the proceedings relating to the application reach their final outcome and any appeal through the courts has been disposed of, or

(iii) if the application is granted, A commences the provision of the services to which the application relates,

whichever is the latest of these events to take place

- 4.3 Mr Daly stated that the undertakings in relation to the core hours were material information which his client had already given in the application. Mr Daly was giving notice at this stage in the proceedings, having become aware of the issues within 7 days (i.e. immediately before the hearing commenced). It was his submission that, given the material change in the core hours, he was entitled to give notice of the proposed change in the undertaking whilst the application was still the subject of the current appeal and before the Committee reached its final determination.
- 4.4 The Committee adjourned to determine whether it was appropriate to vary the application by reducing the core hours by the amendment proposed by Mr Daly or whether the application in its revised form should be remitted back to NHS England. During the course of the adjournment, the Committee sought advice on the issues which arose, based on previous practice and the advice given in relation to previous cases. The advice was that the regulations were silent on the issue of whether an applicant can change the proposed opening hours in its application at any stage of the application process. The Committee exercised its own judgement on the matter.
- 4.5 The Committee decided that this was an unusual set of circumstances which had only been brought to the attention of Mr Daly on the morning of the hearing and he was obliged to raise these issues with the Committee when it became clear that the undertakings which had previously been given may not be capable of being followed. The Committee noted that this was not a case where there were competing applications where the amendment might have prejudiced another applicant. Furthermore it was material that the amendment proposed was not one to increase but rather one which represented a reduction in the core hours. NHS England has refused the application based on 96 core hours. The proposed reduction meant that access to the pharmacy would be less than that which had been refused and that this was not such a material change that required the case to be referred back for re-consideration. In the circumstances Mr Daly had sought to vary the application and the undertakings to be given as soon as he was aware of the situation. Given that the regulations were silent on the issue, the Committee considered that it was fair and reasonable in all the circumstances to agree to the amendment on the basis that there was no increase in the hours of the proposed pharmacy and there was no prejudice in permitting the amendment. The Committee proceeded on the basis that the application subject to appeal was for the establishment of a pharmacy with core hours of 8am to 8pm and supplementary hours from 8pm to 12 midnight, Monday to Saturday. However, further representations from the other parties that were entitled to make representations on the appeal were subsequently invited on this issue following the oral hearing, as set out from paragraph 4.17 below.
- 4.6 Mr Daly outlined the substantive grounds for the appeal. His key points were that the application provided improvements or better access, that there was not a reasonable choice of pharmacies in the South Hornchurch area and that it was difficult for people who share a protected characteristic to access services. He stated that this was a community driven application by a pharmacist who lived on the Orchard Village estate and would confer significant benefits on persons in the area. It was an area where many residents did not have access to a car, there was a high level of deprivation based on national indices, there were deficiencies in public transport and it was over a mile for local people to access the existing pharmacies. He did not propose to rehearse the detailed arguments set out in the appeal papers which the Committee had read but he proposed to call evidence from the applicant and local residents.
- 4.7 The applicant, stated that she is a pharmacist who had practised in the area for 15 years. She lived in Orchard Village, having previously lived on the Mardyke estate before it was re-developed. She stated that there were a lot of old and young people in the area and there was a strong desire for a community pharmacy, especially since the NHS Walk-in Centre which had existed in the Mardyke estate had closed. She considered that it was not easy for residents to get to existing pharmacies. Her

motivation was to provide the full range of pharmaceutical services to assist local people consistent with the aim of the NHS to promote self care.

- 4.8 Councillor Natasha Summers is the local councillor for the area of the Orchard Village and the surrounding area on Havering London Borough Council. She is a resident of Stanley Road and her daughter attended Newton Primary School. She did a lot of constituency work at the Community Centre and she outlined the activities which took place there. She spoke of the active Residents' Association which supported the proposal. In particular, she highlighted that the closure of the NHS Walk-in Centre and the retirement of local doctors at the practice in the area which had been located in the area, meant that the community did not have readily available medical services. There had been promise that the NHS Walk-in Centre would be re-instated but this had not materialised; the community were still fighting hard to have a new doctor's surgery.
- 4.9 Councillor Summers pointed out that there was poor infrastructure in the area and a new pharmacy would be the first port of call for some health related items. There were a lot of people in the community on state benefits and the local food bank was providing resources for residents in need, including a lot of one parent families. Bus services were limited and not very convenient for visiting GP practices or local pharmacies and, whilst people with disabilities or older people, could travel with bus passes, for other residents the cost of bus travel was high. Orchard Village was not a rich area and most people rented accommodation, although there were some part rent and part buy properties, but even these presented financial challenges for the residents. She gave an example of many local residents who could not afford a telephone or internet connections and who used the Community Centre for these facilities. There were a number of residents with mental health problems and there were long waiting times to see a GP. Many residents supported each other in getting prescriptions for those who could not get to the nearest pharmacy. Councillor Summers gave an example of residents picking up prescriptions for each other during monthly shops from Aldi or one of the other supermarket pharmacies. She was unable to drive and it was a difficult walk to her nearest pharmacy. In answer to a question from the Committee she said that she tended to walk to the Day Lewis pharmacy in Rainham Road, although one problem was that it was closed for lunch. Councillor Summers referred to the relative isolation of the estate and the fact that some people were unable to get out and local services on the estate were needed for them. The local Costcutter was an important facility for these people as other shops were some distance away. She also referred to the fact that the area was a growing one with many new houses and flats being developed in South Hornchurch.
- 4.10 Daniel Beal is the representative of the Residents Association and he lived in Orchard Village. He was an IT Engineer and he travelled to his work, although his work was about to end. In this connection he stated that the unemployment rate in the area was 3 times the national average. He referred to the fact that the NHS Walk-in Centre had not been replaced and whilst a new pharmacy would not be a replacement for medical services, it would be a source of information on medical matters and could supply local residents and others with pharmaceutical products. Mr Beal referred to car ownership in the area which he stated was lower than the national average. In addition, quite a number of residents used their car for work so that there was no vehicle for use by their families during the day. He also pointed out the problems of having to change buses to access GP surgeries and pharmacies. As a driver he commented on parking and congestion in the area and that it was not easy to travel quickly by car in the built up area. There was a lot of provision for bike racks but in his experience they were rarely seen to be used.
- 4.11 Mr Beal assisted the Committee in some details about the area where he had lived for many years. He referred to the Beam River which formed the barrier to the area to the west and the disused land to the north. The footpaths over the river and into Beam Parklands was often muddy and not much used, although it was an attractive area of open land and water. The disused land was fenced off but there had been incidents of violence on the area. He also referred to the fact that the Beam Park development to

the south side of New Road (A1306) was well advanced and there was going to be a large increase in population in the near future as the flats started to be occupied. He also pointed out that the pharmacies in Tesco and Asda were not typical community pharmacies serving a local area. When asked which pharmacies he used, he stated that he had prescriptions delivered in the current crisis.

- 4.12 Mr Castell appeared on behalf of the North East London Pharmaceutical Committee. He stated that he neither opposed nor supported the application. His role was to provide a perspective of the area. He confirmed that he fully supported and agreed with the comments made by the local residents who had given evidence to the Committee. They had painted a fair picture of the area. He himself lived in the adjoining community of Rainham and knew the area well, having practised in the South Hornchurch area. He drew the Committee's attention to the criteria set out in Regulation 18 and the manner in which the Committee should approach the issues in relation to access to services. He referred to the information in the Pharmaceutical Needs Assessment for Havering and the data which it contained, including the fact that it broke down some information by specific areas. He commented that he did not think that the Committee should take account of the new developments at Beam Park which had not yet been occupied. Mr Castell had no concluding submissions to make as he felt that he had fulfilled his role in providing information about the area and local pharmaceutical services.
- 4.13 There were no representatives from NHS England who had made the initial decision and none from the local medical committee. Members of the Committee asked questions of Mr Daly and the local representatives and the answers to those questions are set out in the comments of each person above.
- 4.14 Mr Daly was invited to make any concluding remarks on behalf of the applicant. He referred firstly to the question of people with protected characteristics. He submitted that most people fell into at least 5 of the characteristics but the question he posed was that, given the make-up of the population of this area, there were a large number of disabled, elderly and young people who would benefit from the improved access which the proposed pharmacy would provide. He summarised some of the points which had emerged in evidence about the need for health related services in this area, given the loss of the NHS Walk-in Centre and the fact that there seemed to be no immediate likelihood of facilities being provided in the near future. He particularly highlighted the issue of the distance to the nearest pharmacies, the problems of access by bus, the difficulties of pedestrian travel to any of the existing pharmacies, both in terms of distance and difficulty, and the nature of car travel in narrow streets with parked cars. Mr Daly commented that the number of cars parked in the area of the blocks of flats gave a misleading impression of greater car ownership and compared it to the statistical data of 35% not having access to a car.
- 4.15 Mr Daly commented that there was no evidence that NHS England in refusing the application had visited the site to see the accessibility issues for themselves; much of the reasoning related to statistical information about relative provision within the Borough and London, rather than being focussed on the site itself. The characteristics of the area and the difficulties in accessing existing pharmacies appeared not to have been assessed on the ground. Finally he did not agree with the comments made by Mr Castell that the Committee should not take account of new developments; it was the needs of the areas, both now and in the future which the Committee could legitimately address. The fact was that changes do occur and it was appropriate to take account of those changes, especially the change in the population of the area. He asked the Committee to take into account the submissions made on behalf of the applicant and he drew attention to the summary of his arguments at the conclusion of the submission. He asked the Committee to read the letters from the local MP and other supporters of the pharmacy as well as the experience of the local residents who had given evidence to the Committee about the difficulties in accessing pharmaceutical services.
- 4.16 There were no further issues to raise and the hearing concluded with the Chair stating that the members of the Committee would now retire to make a decision and that this

would be communicated in writing in the next 4 weeks. The Chair thanked all concerned for their contributions.

Further representations following oral hearing

- 4.17 Following the oral hearing, given due regard to fairness to all parties, the Committee considered it appropriate to invite the other parties who were entitled to make representations on the appeal to make further representations on the Applicant's application during the oral hearing to amend and reduce the core opening hours being offered.
- 4.18 This decision to invite further representations was taken pursuant to the broad powers available to determine appeals as is seen fit. It was made on the basis of the unusual circumstances of this appeal, in that the Applicant's decision to apply to reduce the core opening hours being offered had only been made by the Applicant on the day of the oral hearing, and the application was subsequently made at the oral hearing. Given the circumstances, it had not been possible to give prior notice of this application to the other parties and, although the other parties did not attend the oral hearing, they had not been given the opportunity to make representations on the amended application. Although the oral hearing had proceeded on the basis of the amended core hours being offered, it was considered that the other parties should be given an opportunity to make representations on the amended application and whether or not this made an impact on the previous representations they had made on the application.
- 4.19 The parties who were entitled to make representations on the appeal were therefore invited to make further representations, as follows:
- 4.19.1 whether the application to reduce the core opening hours being offered by the applicant from 96 to 72 impacted their view on whether or not the application should be granted; and
- 4.19.2 whether the Committee should be entitled to make a determination on an amended application without remitting the matter to NHS England to redetermine the application as amended.
- 4.20 Mr Daly responded on behalf of the Applicant by letter dated 16 January 2021, as follows:
- 4.20.1 My client is very concerned about your letter and the implications of it.
- 4.20.2 As you correctly state, at the hearing on 13 November 2020 I made an application to change the core opening hours being offered by the applicant. The decision to request this change was not made until approximately 7.30am on the morning of the hearing.
- 4.20.3 One party, the LPC, was represented at the hearing and their representative stated that they in fact agreed with the submission as they did not believe the longer original core hours would allow any proposed pharmacy to be profitable.
- 4.20.4 The panel decided to adjourn the hearing and when they reconvened the Chair informed all parties that the Panel had spoken to PCA in Leeds to seek guidance and that there was authority for such a change being allowed. The Chair then informed all parties that the request had been approved and that the substantive hearing would continue on the basis of the amended hours.
- 4.20.5 Given the content of your letter it appears likely that the Panel chose to approve the application based on these amended hours and the remainder of this letter is written on that assumption.

- 4.20.6 My client reserves their position on your letter, but we must be clear that we do not accept that your proposal is either proper or lawful.
- 4.20.7 We are very concerned that your invitation to parties will simply allow them to try to delay the opening of my client's pharmacy and we address the two questions posed in your letter below.
- 4.20.8 **1. Whether the application to reduce the core opening hours being offered by the applicant from 96 to 72 impacts their view on whether or not the application should be granted;**
- 4.20.9 Given that all interested parties objected to the application, it appears highly unlikely that they would now change their opposition to the application.
- 4.20.10 **2. Whether the Committee should be entitled to make a determination on an amended application without remitting the matter to NHS England to re-determine the application as amended.**
- 4.20.11 Whilst there may be cases where such an approach could be the proper one this cannot be one of those cases. The oral hearing panel approved the application to reduce hours and informed my client that the hearing would proceed on the basis of those amended hours.
- 4.20.12 Remitting the application to NHSE would serve no purpose. NHSE refused the initial application. They will clearly not change their mind with reduced core hours. Remitting the application to NHSE would cause considerably [sic] delay and would prejudice both my client and patients and simply produce the same result.
- 4.20.13 Your letter to interested parties essentially gives them "another go" at making arguments that clearly failed first time round. Interested parties are likely to jump at the chance to remit the application to NHSE simply because they will see it as another chance and a considerable delay. If PCA were to remit the matter to NHSE then this would no doubt necessitate another oral hearing even though a panel has already considered whether the application meets the test under regulation 18.
- 4.20.14 The oral hearing panel were able to consider the application based on the amended hours. The evidence for the need of the pharmacy during those hours was compelling, with witnesses giving up their time to argue forcefully that the pharmacy was required for Rainham.
- 4.20.15 We further ask the Committee to note that no interested party has been prejudiced by the decision of the panel to accept the amended hours. Neither Boots nor Day Lewis chose to attend the oral hearing. Parties must accept the consequences of their own choices. It is quite clear that if the application were approved on the original stated hours it would be no different an impact on interested parties from it being approved on the amended hours. If anything the impact commercially would be less.
- 4.20.16 In contrast, a decision to remit the application back to NHSE would be extremely prejudicial to my client who has already waited 17 months to get to this stage in proceedings and to the local community who have argued so passionately to have the application approved. My client (and Rushport) has received communications from the landlord of the proposed premises seeking updates as they have other parties interested in the same unit for other purposes. A further delay to proceedings of many months may well simply kill this application and deprive patients from receiving care that they clearly need.

- 4.20.17 The decision to request a change to the core hours was not made lightly. I felt an ethical obligation to make the application given my discussions with my client. There were no “tactics” employed. There was no strategy. My client understood that, if anything, offering shorter hours might prejudice their chances as it made the application “weaker” but they and I believed that the evidence of need during the re-stated hours was still compelling. We still believe this to be the case.
- 4.20.18 We fully appreciate the need to be seen to act fairly, but that need must also extend to all parties including my client and patients. We have not seen the draft decision, but can only imagine that it accepts the need for accessible pharmaceutical services for this very deprived community. We ask that PCA keeps this fully in mind when considering any legal obligations as we can see no legal requirement to remit the application. The Regulations permit an Applicant to make changes. Schedule 2 Part 1 para 9 places an obligation on the Applicant to notify those changes to the decision maker. [The Applicant then quotes paragraph 9(1) of Schedule 2].
- 4.20.19 There is no legal obligation on PCA to remit the application to NHSE and in this case we strongly believe that doing so would serve no purpose but would deny patients the pharmacy they need. To answer the question you pose in your letter – PCA is perfectly entitled to make a decision without remitting back to NHSE.
- 4.20.20 Surely the Committee must ask itself – what difference would remitting the application to NHSE make? If the answer is clearly “none” (or more likely that it would prejudice the Applicant and patients rather than any other party) then it cannot be right or just to remit the case. We can see that the matter might well be different if NHSE had approved the application originally, especially if they had referenced the longer core hours as part of their rationale for approval, but they did not and there is no new point as a result of the change in hours that would influence the NHSE decision.
- 4.21 Ms Reid responded on behalf of Day Lewis with further representations by letter dated 22 January 2021, as follows:
- 4.21.1 We note you are seeking comments on the request by the applicant to amend the original application by reducing the core opening hours being offered.
- 4.21.2 As a preliminary matter we note the explanation provided by the applicant’s representative that the applicant had failed to appreciate the implications of offering 96 core opening hours at the time the application was submitted. This explanation is hard to accept. Even if the applicant was unfamiliar with the requirements in respect of core hours, it was represented by a very experienced advisor who managed the application and would have been in no doubt of the implications of committing to 96 core hours.
- 4.21.3 Had there been a change of circumstances that could not have been reasonably foreseen by the applicant, we may have had more sympathy to the request. In this case, however, the obligations were clear at the outset and we ask the Committee to be mindful of this when considering this request.
- 4.21.4 In respect of the two questions asked in your letter, we respond as follows:
- 4.21.5 We have already objected to the application when 96 core hours were being offered so our position is that the application has even less merit if the hours are to be reduced. We provided our reasons for objection to NHS England previously and these comments still stand. Furthermore, the core hours now proposed are the same as those offered by Tesco Pharmacy on Bridge Road

from Monday to Saturday so the applicant offers no benefits by way of extended opening hours compared to existing pharmacies.

- 4.21.6 We do not believe the Committee should be entitled to make a determination on the amended application. In our opinion, either the request to amend the application should be refused (in which case the Committee can reasonably determine the original application), or the matter should be remitted back to NHS England to re-determine it, including circulating the application for comments from interested parties.
- 4.21.7 The applicant relies upon Schedule 2, Part 1, Paragraph 9 of the Regulations but we respectfully submit that this is not intended to be an invitation to applicants to submit changes to their application at their convenience.
- 4.21.8 Given the extensive information that must be submitted with any application, it is reasonable that the Regulations place an obligation on an applicant to notify the NHSCB if this information changes. This may include matters such as changes to an applicant's registered address or information submitted in respect of fitness to practise. However, paragraph 9 is silent on the actions that are to be taken when the decision-making body is notified of changes.
- 4.21.9 Given the range of changes to information that could be notified, some of which may have a material impact on the determination and some which may not, the only reasonable course of action, in our opinion, is to remit the matter back to NHS England to allow full consultation in the usual manner.
- 4.21.10 Where there is a fundamental change to the application it is even more important to start the process from the beginning again. If, for example, the applicant had decided to change the address of the proposed location to an alternative site 2 miles away, it could not be reasonable or fair for the Committee to make a determination in respect of the new location without remitting the matter back for full consultation with the usual timescales for comments.
- 4.21.11 The same applies to opening hours. This is a fundamental change to an application, and we do not believe it is for the Committee to decide the impact of the proposed change without full scrutiny.
- 4.21.12 To give a further example, it is often the case with competing applications, that one of the key factors which may decide in one application being preferred over another, is the core hours offered.
- 4.21.13 If applicants are able to change the hours offered at any stage in the process, including at an oral hearing, this could result in a farcical situation where applicants seek to have a 'core hour bidding war' at an oral hearing in an attempt to gain an advantage over other applicants.
- 4.21.14 It cannot, therefore, be a reasonable interpretation of Schedule 2, Part 1, Paragraph 9 that an applicant can simply fundamentally change an application at any stage in the process without the process starting again.
- 4.22 Boots UK Ltd stated by letter dated 22 January 2021 that it had no further comments to make and NHS England made no further representations.
- 4.23 Mr Daly responded on behalf of the Applicant to the further representations received from Day Lewis by letter dated 29 January 2021, as follows:
- 4.23.1 We note that Boots has no further comment to make and their position is as it was.

- 4.23.2 We note that Day Lewis answers the first question that you posed by confirming that their objection is no different from what it was originally and they reference opening hours of Tesco which were already known to NHSE. The appeal documents (which Day Lewis did not make any reply to) also highlighted Tesco's location (1.6 miles from the application site).
- 4.23.3 Day Lewis then states that Primary Care Appeals "should [not] be entitled to make a determination on the amended application". No legal authority is provided to support this position and none exists. PCA is entitled to make a determination on the application without remitting it to NHSE and in our submission it should do so.
- 4.23.4 Having confirmed that they have no different argument to make Day Lewis then claims that the application should be remitted to NHSE to re-determine it again. This is exactly what we suggested would happen. Despite having no new argument to make and there being absolutely no prospect of NHSE reaching a different decision from that which was originally reached, Day Lewis seek to have the matter remitted for a fresh determination.
- 4.23.5 This position makes no sense. In fact it is farcical to suggest that remitting the application would serve any legitimate purpose. Day Lewis cannot and does not identify any good reason to remit the application and simply wants to have "another go" at objecting and delay the opening of a much needed pharmacy, presumably because they may lose some business (as they operate the closest pharmacies to the application site).
- 4.23.6 Day Lewis then states that Schedule 2, Part 1, Paragraph 9 should not be "an invitation to applicants to submit changes to their application at their convenience.". It is not clear what is meant by this, but the submission (which was accepted by the oral hearing panel) was not a "convenient" submission to have to make and was taken very seriously. Schedule 2, Part 1, Paragraph 9 exists and was properly identified and the application properly made.
- 4.23.7 Day Lewis then makes a point which is key to this determination and shows exactly why their submission is without merit. They say;
- 4.23.8 *Given the range of changes to information that could be notified, some of which may have a material impact on the determination and some which may not, the only reasonable course of action, in our opinion, is to remit the matter back to NHS England to allow full consultation in the usual manner.*
- 4.23.9 We submit that this is an (almost) perfectly argued point which unfortunately shows exactly why Day Lewis' own submission must fail.
- 4.23.10 Day Lewis is correct when they say that there are a range of changes that could be notified. Most importantly they are correct to say that some (but not all) of these "**may** have a material impact on the determination **and some which may not**". However, in their answer to your first question Day Lewis confirmed that they "provided our reasons for objection to NHS England previously and these comments still stand". In other words, there is clearly no material impact by their own admission.
- 4.23.11 Similarly, there is nothing about the amendment that could possibly change the decision issued by NHSE.
- 4.23.12 Day Lewis then compares the (approved) change in hours to either a change of address 2 miles away or to circumstances where there are competing applications. Neither of these scenarios is in any way similar and it may well be that in those completely different scenarios a different approach might be taken. Indeed, unlike in this case where Day Lewis confirms they have no new

submissions to make, they would likely wish to make very different submissions if a new location 2 miles distant were to be applied for.

4.23.13 Day Lewis final paragraph shows a misunderstanding of administrative law and Regulations generally. As a basic principle of administrative law, an action by a person or company which is not prohibited by Regulations is permitted, or as it is more commonly expressed “everything which is not forbidden is allowed”. This contrasts with actions taken by public bodies which must be permitted by law to be allowed. The Regulations in this case specifically permit changes to be made to information contained within an application and my client properly made and notified the change. There is no obligation to remit an application to NHSE after such a change and where such remission would serve no purpose there can be no good reason to make such a decision especially when neither Day Lewis no Boots allege or can show any prejudice to their position.

5 Consideration

- 5.1 The Pharmacy Appeals Committee (“Committee”) appointed by NHS Resolution had before it the papers considered by NHS England, together with a plan of the area showing existing pharmacies and doctors’ surgeries and the location of the proposed pharmacy.
- 5.2 It also had before it the responses to NHS Resolution’s own statutory consultations and the further representations received on the application to reduce the core opening hours being offered by the Applicant.
- 5.3 The Committee had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”).

Application to amend core opening hours being offered

- 5.4 The Committee first considered whether there should be a further notification to the parties detailed at paragraph 19 of Schedule 2 of the Regulations to allow them to make representations if they so wished (in which case it would be appropriate to remit the matter to NHS England) or whether it was preferable for the Committee to redetermine the application.
- 5.5 The Committee noted that representations on Regulation 18 had been sought from parties by NHS England and representations had already been made by parties to NHS England in response. These had been circulated and seen by all parties as part of the processing of the application by NHS England. The Committee further noted that when the appeal was circulated representations had been sought from parties on Regulation 18. The Committee also noted that the parties that had made representations on the application had been invited to make further representations on the amendment to the core opening hours being offered by the Applicant.
- 5.6 The Committee noted the Applicant’s reservations about the approach taken in inviting further representations from the other parties following the oral hearing. However, it was satisfied that the decision to invite further representations was within the scope of the broad powers available to determine appeals as is seen fit. The Committee also noted the Applicant’s comments that inviting further representations from interested parties essentially gives them “another go” at making arguments that clearly failed first time round. The Committee disagreed that this was the case as the parties were only invited to make further representations on the specific issues of: (a) the application to change the core opening hours being offered; and (b) whether a determination should be made on the amended application without remitting the matter to NHS England to redetermine the application as amended. The other parties were not invited to make further representations on any other issues.

- 5.7 The Committee also noted the Applicant's comments that no interested party had been prejudiced by the decision of the Committee to proceed with the oral hearing on the basis of the amended core opening hours being offered, and that as they had chosen not to attend the oral hearing, they must accept the consequences of their own choices. The Committee considered that any decision not to attend the oral hearing could only have been made on the status of the application and representations made to that date. The Applicant itself asserts that the decision to make the application to change the core opening hours offered was only made on the day of the oral hearing, so clearly the other parties could not have known that the Applicant was to make such an application at the oral hearing. If further representations had not been invited, the other parties would have been denied an opportunity to make any representations on the Applicant's application to change the core opening hours being offered.
- 5.8 The Committee noted Day Lewis's representations that it found it hard to accept the explanation provided by the Applicant's representative that the Applicant had failed to appreciate the implications of offering 96 core opening hours at the time the original application was submitted. However, there is no suggestion from Day Lewis that this affects the validity of the application to change the core opening hours, or that this was a valid basis for the Committee to refuse the application or remit the matter to NHS England for redetermination.
- 5.9 The Committee noted that Day Lewis objected to the original application on the basis of 96 core opening hours being offered and that Day Lewis considers the application to have even less merit if the core opening hours are to be reduced. The Committee noted that Day Lewis referred to its original reasons for objecting to the application, and that the reduced core opening hours now proposed by the Applicant are the same as those offered by Tesco Pharmacy on Bridge Road from Monday to Saturday so the applicant offers no benefits by way of extended opening hours compared to existing pharmacies. The Committee's consideration of Regulation 18(2)(b) and whether the application would confer significant benefits on persons in the area of the HWB which were not foreseen when the PNA was published is set out in paragraphs 5.32 to 5.47 below, and this consideration takes into account the amended core opening hours being offered by the Applicant and the opening hours offered by Tesco Pharmacy. The Committee was therefore satisfied that the reduced core opening hours now proposed by the Applicant being the same as those offered by Tesco Pharmacy had been properly taken into account.
- 5.10 The Committee noted Day Lewis's representations that the Committee should not be entitled to make a determination on an amended application and that the matter should be remitted to NHS England to redetermine it. This is on the basis that it considers that Schedule 2, Part 1, Paragraph 9 of the Regulations is not intended to be an invitation to applicants to submit changes to applications at their convenience, but that this should be limited to matters that are not fundamental changes that do not have a material impact on the determination. Day Lewis asserts that the Applicant's application to change the core opening hours represents a fundamental change and therefore the matter should be remitted to NHS England to redetermine it. Day Lewis asserts that it cannot, therefore, be a reasonable interpretation of Schedule 2, Part 1, Paragraph 9 that an applicant can simply fundamentally change an application at any stage in the process without the process starting again.
- 5.11 The Committee noted that it is only entitled to remit the matter to NHS England to be redetermined where it considers that there should be a (further) notification under Paragraph 19 of Schedule 2, subject to such directions as it considers appropriate. The Committee agreed with Day Lewis that it may be appropriate to do so if there is a fundamental or material change made to the application. The Committee did not agree with Day Lewis, however, that Schedule 2, Part 1, Paragraph 9 should not be used to allow fundamental or material changes to be made to an application. Paragraph 9(1)(a) of Schedule 2 specifically refers to applicants undertaking to notify NHS England of "material changes to the information provided in the application". There is nothing in

the Regulations that states that, if such a material change is made, the application process should start again.

- 5.12 The Committee also did not agree with Day Lewis that the nature of the change to the core opening hours being offered here was such that the matter should be remitted to NHS England for redetermination. While it is possible that, where an application to change core opening hours is made during the course of an appeal, it may be appropriate for there to be a (further) notification under Paragraph 19 of Schedule 2 and for the matter to be remitted to NHS England for redetermination. However, this will not necessarily always be the case and the change in question will need to be considered in the context of the rest of the application and in particular whether or not it is considered appropriate in the circumstances that a further notification under Paragraph 19 of Schedule 2 should be made.
- 5.13 The Committee agreed with the Applicant that Day Lewis's arguments on this point are contradictory: on the one hand it argues that the application to amend the core opening hours being offered represents a fundamental and material change to the application, and therefore the application should be remitted to NHS England for redetermination; on the other hand it has not put forward any substantive further representations as to why the reduction in core opening hours being offered means that the application should be refused. If the application to change the core opening hours were a fundamental or a material change to the overall application, the Committee would expect Day Lewis to be able to explain why that is the case with further representations as to why the reduction in core opening hours means that the application should be refused. Day Lewis has not done so and has effectively relied upon previous representations and information relating to the application. This raises the question of what purpose remitting the application to NHS England for redetermination would serve.
- 5.14 The Committee agreed with the Applicant that remitting the application to NHS England would serve little purpose in the present circumstances. NHS England refused the application initially and there is no suggestion that it would change its decision on the basis of the reduction in core opening hours being offered by the Applicant. Indeed, NHS England was invited to make further representations on the reduction in core opening hours being offered but no comments were received. Other interested parties have also been invited as part of this appeal to make further representations on the reduction in core opening hours being offered and no substantive further representations on this issue have been received. The Committee also agreed with the Applicant that such a decision to remit the application to NHS England for redetermination would be prejudicial to the Applicant as this would delay the determination of the application. The Applicant is also correct that the oral hearing proceeded on the basis of the amended core opening hours offered by the Applicant and the Committee did consider the appeal on the basis of these amended hours at the oral hearing.
- 5.15 The Committee was therefore satisfied that it was appropriate to make a determination on the application notwithstanding the application to reduce the core opening hours being offered by the Applicant from 96 to 72, and that further notification under paragraph 19 of Schedule 2 would not be helpful in this case and that it would not be appropriate to remit the matter to NHS England to redetermine the application as amended.

Regulation 31

- 5.16 The Committee then considered Regulation 31 of the regulations which states:
- (1) A routine or excepted application, other than a consolidation application, must be refused where paragraph (2) applies.*
- (2) This paragraph applies where –*

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

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

(ii) adjacent premises; and

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

- 5.17 The Committee noted that NHS England has stated "there are no pharmacies in the immediate vicinity of this application so regulation 31 is not engaged" which had not been disputed by any party. Accordingly the Committee was not required to refuse the application under the provisions of Regulation 31.

Regulation 18

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

"(1) If—

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

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

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

(2) Those matters are—

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

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

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

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

- (i) *there being a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB (taking into account also the NHSCB's duties under sections 13I and 13P of the 2006 Act (duty as to patient choice and duty as respects variation in provision of health services)),*
- (ii) *people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that, in the area of the relevant HWB, are difficult for them to access (taking into account also the NHSCB's duties under section 13G of the 2006 Act (duty as to reducing inequalities)), or*
- (iii) *there being innovative approaches taken with regard to the delivery of pharmaceutical services (taking into account also the NHSCB's duties under section 13K of the 2006 Act (duty to promote innovation)),*

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

- (c) *whether it is satisfied that it would be desirable to consider, at the same time as the applicant's application, applications from other persons offering to secure the improvements or better access that the applicant is offering to secure;*
 - (d) *whether it is satisfied that another application offering to secure the improvements or better access has been submitted to it, and it would be desirable to consider, at the same time as the applicant's application, that other application;*
 - (e) *whether it is satisfied that an appeal relating to another application offering to secure the improvements or better access is pending, and it would be desirable to await the outcome of that appeal before considering the applicant's application;*
 - (f) *whether the application needs to be deferred or refused by virtue of any provision of Part 5 to 7.*
 - (g) *whether it is satisfied that the application presupposes that a gap in pharmaceutical services provision has been or is to be created—*
 - (i) *by the removal of chemist premises from a pharmaceutical list as a consequence of the grant of a consolidation application, and*
 - (ii) *since the last revision of the relevant HWB's pharmaceutical needs assessment other than by way of a supplementary statement.*
- (3) *The NHSCB need only consider whether it is satisfied in accordance with paragraphs (2)(c) to (e) if it has reached at least a preliminary view (although this may change) that it is satisfied in accordance with paragraph (2)(b)."*

5.19 The Committee went on to consider whether Regulation 18(1)(b) was satisfied, i.e. whether the improvements or better access that would be secured if the application was granted were or was included in the PNA in accordance with paragraph 4 of Schedule 1 of the Regulations. The Committee noted that NHS England stated that with regard to 18(1)(a) & (b) the granting of the application could secure a significant

improvement or better access in relation to pharmaceutical services and that the proposal was not included in the PNA

- 5.20 Paragraph 4 of Schedule 1 requires the PNA to include: “a *statement of the pharmaceutical services that the HWB had identified (if it has) as services that are not provided in the area of the HWB but which the HWB is satisfied (a) would if they were provided...secure improvements or better access, to pharmaceutical services... (b) would if in specified future circumstances they were provided...secure future improvements or better access to pharmaceutical services...*” (emphasis added).
- 5.21 The Committee considered the Pharmaceutical Needs Assessment (“the PNA”) prepared by Havering Health and Wellbeing Board, conscious that the document provides an analysis of the situation as it was assessed at the date of publication. The Committee bears in mind that, under regulation 6(2), the body responsible for the PNA must make a revised assessment as soon as reasonably practicable (after identifying changes that have occurred that are relevant to the granting of applications) unless to do so appears to be a disproportionate response to those changes. Where it appears disproportionate, the responsible body may, but is not obliged to, issue a Supplementary Statement under regulation 6(3). Such a statement then forms part of the PNA. The Committee noted that the PNA was dated March 2018 for the period 2018 to 2021 and that no supplementary statements had been issued.
- 5.22 The Committee noted that the Applicant seeks to provide unforeseen benefits to the residents of South Hornchurch in the area of and immediately surrounding the Orchard Village development.
- 5.23 The Committee noted that the improvements or better access that the Applicant was claiming would be secured by its application were not included in the relevant pharmaceutical needs assessment in accordance with paragraph 4 of Schedule 1.
- 5.24 In order to be satisfied in accordance with Regulation 18(1), regard is to be had to those matters set out at 18(2). The Committee’s consideration of the issues is set out below.

Regulation 18(2)(a)(i)

- 5.25 The Committee had regard to
- “(a) *whether it is satisfied that granting the application would cause significant detriment to—*
- (i) *proper planning in respect of the provision of pharmaceutical services in the area of the relevant HWB*”
- 5.26 The Committee noted that NHS England determined that “granting the application may lead to an over provision of essential services in the area of the proposed site. However, granting the application would NOT (sic) cause significant detriment to the proper planning or arrangements for the provision of pharmaceutical services” with regard to Regulation 18 (2)(a).
- 5.27 On the basis of the information available, the Committee was not satisfied that, if the application were to be granted and the pharmacy to open, the ability of the NHS England thereafter to plan for the provision of services would be affected in a significant way.
- 5.28 The Committee was therefore not satisfied that significant detriment to the proper planning of pharmaceutical services would result from a grant of the application.

Regulation 18(2)(a)(ii)

- 5.29 The Committee had regard to

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

(ii) the arrangements the NHSCB has in place for the provision of pharmaceutical services in that area"

5.30 The Committee was not satisfied that significant detriment to the arrangements currently in place for the provision of pharmaceutical services would result from a grant of the application taking into account the comments of NHS England set out above.

5.31 In the absence of any significant detriment as described in Regulation 18(2)(a), the Committee was not obliged to refuse the application and went on to consider Regulation 18(2)(b).

Regulation 18(2)(b)

5.32 The Committee had regard to

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

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

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

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

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

Regulation 18(2)(b)(i) to (iii)

5.33 In considering Regulation 18(2)(b)(i) the Committee took careful account of the reasons for refusal of the application. NHS England were not present at the hearing but it appeared from the papers that, although it was accepted that the application would secure better access for services, it was stated that there were "10 pharmacies within a 2km radius of the proposed premises". The Committee also noted that in relation to the Day Lewis pharmacy in Rainham Road, it was stated to be 1.1 miles distant and that the Day Lewis pharmacy in Broad Street was 1.3 miles distant. Finally it was stated that 8 other pharmacies were a "little bit further away but within 2 kms". It was acknowledged that additional housing had been built or was to be built in the area but this had been taken into account when the PNA determined that there were no gaps in services and reliance appeared to be placed on the PNA statement that there were no gaps in services. Reference was made to bus services 365 and 174 which served the Day Lewis pharmacies. One issue which was not clear to the Committee was whether NHS England had undertaken a site visit. The calculations of distance to pharmacies

and the number of pharmacies within a 2 km radius made by NHS England were not consistent with the information submitted by the applicant or the experience and distances which the Committee recorded when it undertook its own site visit.

- 5.34 The Committee, when it visited the site noted that Orchard Village and the surrounding houses were built on the Western edge of Havering Borough and bounded to the west by the River Beam and Beam Parklands, to the north by disused land and the south by the A1306. Access to the area was constrained by these physical features and equally those features were a constraint on the ability of residents to leave the area and access local amenities. It was noticeable to the Committee that a strong and supportive community association had developed with a community hall which provided for a wide range of locally based and community related activities. Costcutter was a substantial and apparently successful convenience store and a local primary school served the area. These features of local community life suggested to the Committee that, because of the relative isolation arising from the physical characteristics of the area, residents created their own community facilities rather than travel to other parts of the Borough or the adjoining Borough of Barking and Dagenham. Local representatives were continuing in their efforts to encourage services, particularly health services, to be located in the area. The local residents who gave evidence were consistent in their opinion that the existing pharmacies were difficult to access. The local MP referred to the area as “the forgotten part of the Borough”. In the Committee’s opinion, the location of Orchard Village area meant that it did not have the access to and choice of facilities which were available to other parts of the Borough of Havering.
- 5.35 The Committee considered the broader social structure of the area around the application site. It was acknowledged to be an area of deprivation, being amongst the most 20% deprived locations in England. The food bank located in Mick Fury house was evidence of this and it was stated to be heavily used. 38.5% of households had no member in employment; 50.9% of households lived in social housing; 34.9% of households had no car or van available to them; 11.8% of households had a member with a physical disability; and 11% of the population is over 65. The Committee heard evidence from residents which confirmed these figures and the manner in which the community assisted each other to address the problems which arose e.g. how neighbours would collect prescriptions for each other. There was evidence from a local resident with a disabled child that she would welcome a local pharmacy. The significance of these figures is that many residents could not easily drive to a local pharmacy, but would have to walk. The Committee heard first hand evidence to this effect. Furthermore for those who were out of work or on benefit the cost of the bus fare to visit a pharmacy would discourage them from visiting the existing pharmacies.
- 5.36 One further factor about the character of the area which the Committee noted was the significant change which had taken place during recent years. The number of people who had lived in the former Mardyke Estate before its re-development had increased as a result of the Orchard Village development. It is also anticipated that 2179 additional people will be accommodated in South Hornchurch and the development at Beam Park which was in course of construction adjacent to the A1306 was evidence of this increase. In this connection the Committee noted that in the PNA for the area of South Hornchurch as a whole there were 18.47 pharmacies per 100,000 population compared to a London wide and national average of 21. The significance of this population growth in the area is that there will be a larger number of residents in the area for whom the proposed application site will provide improvements and better access than the existing pharmacies.
- 5.37 The Committee then considered the issue of access to the existing pharmacies, firstly by pedestrians. The Committee’s own calculations of distance based on their own experience of travelling to the pharmacies in question is that the Day Lewis and Tesco pharmacies were 1.4 miles from the application site by car and there were no pharmacies within 2km of the application site. On the site visit, the Committee noted the condition of the roads and footpaths in the area. It was an established urban area with street lighting, footpaths useable by pedestrians and the terrain was flat without

any steep gradients. Although there were footpaths and pedestrian crossings along the A1306, the nature of the business premises fronting the road meant that there were cars and vans crossing and standing on parts of the footpath. It was a feature of the area that due to the relatively narrow width of the streets in the area (apart from the Orchard Village development) cars tended to park partly on the road and partly on the footpaths. However, the pedestrians whom the Committee saw walking along the footpaths, some with prams, did not appear to encounter any difficulties in using them. However, the journey to the Day Lewis pharmacy in Rainham Road was not simple and required users to make a number of turnings and use several roads to get there. The Tesco and Asda pharmacies in superstores were more difficult for pedestrians as access was largely orientated to car and bus users and would involve walking along an extremely busy and exposed main road (A1306). The Committee also considered the access for pedestrians to the Day Lewis pharmacy at Broad Street. In theory the shortest access was across the footbridge over Beam River and Parklands but this was not a made up footway and not suitable for all people at all times. In practice it was little used. The access on foot to Broad Street was 2.4 miles which was an unreasonably long journey on foot. All other pharmacies in Havering or Barking and Dagenham were a much further distance on foot.

- 5.38 The Committee also examined the availability of public transport. The bus serving the area was the 365 which was a 24 hour service, every 12 minutes during the day. This bus served the Day Lewis pharmacy at Rainham Road, but not the Tesco pharmacy. Although this might appear to be a regular frequency, the bus ran on a circular route along Frederick Road, Lowen Road and onto the A1306 which was its terminus. It then returned towards the Day Lewis pharmacy along a different route namely the A1306 via Cherry Tree Road. It was not a service which followed the same route in both directions. This meant that the journey to the Day Lewis pharmacy and the return (for example after a visit to the doctor's surgery in Frederick Road) was both inconvenient and extended. So far as other pharmacies were concerned, residents would have to either catch the 365 towards the A1306 (or walk there) and then change to either the 174 or 287 to visit either Tesco, Asda or the Day Lewis pharmacy in Broad Street. The need to change buses meant a longer journey. The Committee noted that the bus service in this area had been classified by Transport for London using the Public Transport Accessibility Levels as category 2 in a spectrum 0 to 6 where 0 is poor and 6 is excellent.
- 5.39 The Committee then examined the issue of accessibility by car. Access to the Tesco and Asda sites by car are easy and quick with ample parking. That is not the case with the two Day Lewis sites where there are a limited number of parking spaces in relatively congested areas. As the Committee has alluded to previously, access along the narrow streets for car drivers is not particularly easy given the number of parked vehicles. The application site, being situated in the recently developed Orchard Village has adequate parking near to the site.
- 5.40 For the reasons set out above, the Committee considered that the existing pharmacies do not provide a reasonable choice for residents given the physical characteristics and the social profile of the residents, of the area in light of the distance to travel and the character of the routes, whether on foot, public transport or by car.
- 5.41 The Committee was therefore not satisfied that there is currently a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant Health and Well-being Board. The better access to Pharmaceutical Services which the application will provide would confer significant benefits on persons in the South Hornchurch area for the above reasons.
- 5.42 In considering Regulation 18(2)(b)(ii) the Committee reminded itself that it was required to address itself to people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that are difficult for them to access. The Committee was also aware of its duties under the Equality Act 2010 which include considering the elimination of discrimination and advancement of equality

between patients who share protected characteristics and those without such characteristics.

- 5.43 The Committee was satisfied that, having regard to the desirability of people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that are difficult for them to access, granting the application would confer significant benefits on such persons.
- 5.44 The Committee's reasons for making this determination relate to the characteristics of the population of this area. There are a significant number of physically disabled people for whom access on foot or by bus would be difficult and there are a high proportion of elderly residents for whom similar considerations apply. This is particularly so in view of the low level of car ownership in the area. Overall the characteristics of the area with high levels of disability, deprivation, unemployment, people on benefits and those using a food bank would ensure that there are a significant number of people who fall within the protected characteristic definition.
- 5.45 In considering Regulation 18(2)(b)(iii) the Committee had regard to the desirability of innovative approaches to the delivery of pharmaceutical services. In doing so, the Committee would consider whether there was something more over and above the usual delivery of pharmaceutical services that might be expected from all pharmacies, some 'added value' on offer at the location. The Applicant confirmed that there were no innovative approaches being proposed in the application.
- 5.46 The Committee was not satisfied that, having regard to the desirability of there being innovative approaches taken with regard to the deliverability of pharmaceutical services, granting the application would confer significant benefits on persons.

Regulation 18(2)(b) generally

- 5.47 The Committee was of the view that in accordance with Regulation 18(2)(b) the granting of this application would confer significant benefits on persons in the area of the HWB which were not foreseen when the PNA was published. The Committee's reasons for this determination are set out above but the improved access, including the proposed amended hours, and increased choice for this community are significant improvements in pharmaceutical provision bearing in mind the developments which have taken place in the South Hornchurch area since the 2018 PNA.

Other considerations

- 5.48 Having determined that Regulation 18(2)(b) had been satisfied, the Committee needed to have regard to Regulation 18(2)(c) to (e) and found that there were no other applications from other persons that it would be desirable to consider nor were there any such applications (Regulation 18(2)(c) & (d)). There were no appeals against applications pending (Regulation 18(2)(e)).
- 5.49 No deferral or refusal under Regulation 18(2)(f) was required in this case.
- 5.50 The Committee had regard to Regulation 18(2)(g) and considered whether there were any further factors to be taken into account and concluded that there were not on the basis that application does not presuppose that a gap in pharmaceutical services provision has been or is to be created by the removal of chemist premises from a pharmaceutical list as a consequence of the grant of a consolidation application.
- 5.51 The Committee was satisfied that the information provided demonstrates that there is difficulty in accessing current pharmaceutical services such that a pharmacy at the proposed site would provide better access to pharmaceutical services. The nature of the better access confers significant benefits on persons in the area of the Health and Wellbeing Board, especially in the light of the characteristics of the area and people who live in this disadvantaged area.

- 5.52 The Committee had regard to Regulation 19(6) which states:
- (6) If the NHSCB is satisfied as mentioned in regulation 18(2)(b), it may grant the application notwithstanding that the improvements or better access were or was not included in the relevant pharmaceutical needs assessment.*
- 5.53 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:
- 5.53.1 confirm NHS England's decision;
- 5.53.2 quash NHS England's decision and redetermine the application; or
- 5.53.3 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.
- 5.54 In those circumstances, the Committee determined that the decision of NHS England should be quashed. The basis for doing so was because the decision to approve the application was inconsistent with the findings by NHS England that there were no significant benefits in terms of reasonable choice or benefits for persons with a protected characteristic. The Committee agrees that the application should be redetermined on the basis that the better access which the application affords and the manner in which it addresses the needs of a protected group will confer significant benefits and that the application should be granted.

6 DECISION

- 6.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, quashes the decision of NHS England, for the reasons given above, and redetermines the application on the amended basis that the application is for core hours from 8am to 8pm Monday to Saturday with supplementary hours of 8pm to 12 midnight from Monday to Saturday.
- 6.2 The Committee concluded that it was not required to refuse the application under the provisions of Regulation 31.
- 6.3 The Committee has considered whether the granting of the application would cause significant detriment to proper planning in respect of the provision of pharmaceutical services in the area covered by the HWB, or the arrangements in place for the provision of pharmaceutical services in that area and is not satisfied that it would;
- 6.4 The Committee determined that the application should be granted on the following basis:
- 6.4.1 In considering whether the granting of the application would confer significant benefits, the Committee determined that –
- 6.4.1.1 there is not already a reasonable choice with regard to obtaining pharmaceutical services;
- 6.4.1.2 there is evidence of people sharing a protected characteristic having difficulty in accessing pharmaceutical services; and
- 6.4.1.3 there is no evidence that innovative approaches would be taken with regard to the delivery of pharmaceutical services;
- 6.4.2 Having taken these matters into account, the Committee is satisfied that granting the application as amended would confer significant benefits as

outlined above that would secure improvements or better access to pharmaceutical services.

Committee Chair

A copy of this decision is being sent to:

Rushport Advisory LLP, on behalf of the Applicant
Primary Care Support England, on behalf of NHS England
North East London LPC

ANNEX A

Arena Point
Merrion Way
Leeds
LS2 8PA

REF: SHA/23349

Tel: 0203 928 2000
Fax: 0207 821 0029
Email: appeals@resolution.nhs.uk

APPEAL AGAINST NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY HEALTHRITE UK LTD FOR INCLUSION IN THE PHARMACEUTICAL LIST OFFERING UNFORESEEN BENEFITS UNDER REGULATION 18 AT MICK FURY HOUSE, LOWEN ROAD, RAINHAM, RM13 8HT

1 The Application

By application dated 21 August 2019, Healthrite UK Ltd ("the Applicant") applied to NHS Commissioning Board ("NHS England") for inclusion in the pharmaceutical list offering unforeseen benefits under Regulation 18 at Mick Fury House, Lowen Road, Rainham, RM13 8HT. In support of the application it was stated:

- 1.1 In response to why the application should not be refused pursuant to Regulation 31 the Applicant stated:
- 1.2 N/A there is no pharmacy provider adjacent or in close proximity therefore Regulation 31 is NOT in play with this application.
- 1.3 Information in support of the application:
- 1.4 The area is densely populated with no immediate access to pharmaceutical services. The nearest pharmacies to the application site are all in excess of 1 mile away.
- 1.5 The pharmacy is to be available to the substantial local population by way of 96 core hours facilitating extended hours access to pharmaceutical services over 6 full days provision per week. Full pharmaceutical services will be available from 8am until midnight Monday to Saturday conferring significantly better/improved access which is currently unavailable to the local population - an unforeseen benefit.
- 1.6 People both in the immediate area of the application and those further afield will be able to secure better/improved access to pharmaceutical services whilst satisfying reasonable choice - there is NO pharmacy operator offering pharmaceutical services for such extended hours in the HWB and surrounding areas therefore the population benefitting is immense. Supermarket contractors do not provide such extensive availability in a densely populated area with indices of deprivation.
- 1.7 The pharmacy will provide the full scope of essential, advanced and enhanced/commissioned pharmaceutical services - allowing reasonable choice to be satisfied.
- 1.8 The Applicant notes GP surgeries in the area operate between 8am and 6pm/7pm/8pm and the local community type pharmacies operate 9am to 6pm. This pharmacy will fill this gap in provision of pharmaceutical services.

- 1.9 The benefits are substantial in relation to the people in the area of the application and further afield in their ability to secure better/improved access.
- 1.10 On this basis this application affords better/improved access to pharmaceutical services and therefore satisfies the requirements for a Regulation 18 unforeseen benefits application.
- 1.11 The granting of this application will significantly improve access resulting in significantly improved availability of pharmacy services.
- 1.12 The application site is easily accessible by all the local population; the pharmacy will be operational for 96 hours weekly providing adequate cover and improved access for the whole area.
- 1.13 Services out with those commissioned but important from a strategy point of view and to be provided include:
 - 1.13.1 Diabetes screening
 - 1.13.2 Cholesterol testing
 - 1.13.3 Blood pressure testing
 - 1.13.4 Weight management services
 - 1.13.5 Alcohol FAST interventions
 - 1.13.6 Health checks

2 The Decision

NHS England considered and decided to refuse the application. The decision letter dated 20 January 2020 states:

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

Decision report

2.2 Regulation 31

- 2.3 There are no pharmacies in the immediate vicinity of this application so regulation 31 is not engaged.

2.4 Regulation 32

- 2.5 There are currently no LPS designations in this area therefore regulation 32 is not engaged.

2.6 General Comments

- 2.7 Regulation 65. The applicant has offered to provide more than 40 core hours within their application, their offer is that all their 96 hours are core hours. If this application is approved, this offer will be accepted, and a direction issued to that effect at the point that a pharmacy is opened. The opening hours in the application are: Mon to Sat: 8am to 12 Midnight.
- 2.8 It is noted that only three of the pharmacies within 2 kms are within Havering HWBB, the remaining seven are within Barking and Dagenham HWBB and are therefore near

to the border between the two HWBBs. The Barking and Dagenham PNA similarly did not identify any gaps in provision of services.

2.9 Day Lewis comments

2.10 Day Lewis would like to object to this application for the following reasons:

2.11 The application is in a location which has a mixture of new and established housing. However, it is not a particularly densely populated area as there are lots of industrial/commercial units along the A1306 which is located to the south of the proposed location, open space to the north and Beam Parklands to the west.

2.12 The actual location appears to be under a block of offices adjacent to a Costcutter convenience store but there are very limited other retail units in the area. That means that local residents are used to travelling from the immediate location to cater for their everyday needs and are likely, for example, to visit the Tesco store, Bridge Road (located less than 2km from the site to the south east) where they can get their weekly shopping whilst accessing pharmaceutical services 7 days/week. Whilst visiting Tesco residents can also access a variety and comprehensive selection of shops including banks etc. on Upminster Road South a few metres from the Tesco store itself.

2.13 Other local parades of shops can be found at the junction of Cherry Tree Lane/Rainham Road where residents can easily access a branch of Day Lewis at 113 Rainham Road whilst going about their daily business.

2.14 Interestingly, whilst the applicant is offering extended hours, they are closed on Sundays so if people do require services on that day, they will have to travel to access them.

2.15 The applicant is proposing opening until midnight Monday-Saturday but has produced no evidence that there is a demand for services during those extended hours.

2.16 Including the Tesco pharmacy there are already 5 existing pharmacy contractors located within a 1-mile radius of the proposed location plus numerous others slightly further distant (source NHS Choices) offering residents a choice of pharmaceutical services within easy access. These pharmacies are located in all directions surrounding the proposed site and are not generally clustered together.

2.17 As far as GP's are concerned, with the exception of a small branch surgery on Frederick Road, the main practices are some distance from the proposed site and there are existing pharmacies close to those surgeries. Therefore, once again patients will be used to travelling to visit their GP.

2.18 Taking all of the above into account it is clear that residents residing in the vicinity of the proposed location do have reasonable access to pharmaceutical services along with a choice of provider. Therefore, in Day Lewis's view this application should be refused as it does not offer significant improvement or better access to pharmaceutical services.

2.19 Boots Comments

2.20 Whilst Boots accept that the application is based on benefits not foreseen when drafting the PNA, it is unclear from the information provided what elements of this application were 'unforeseen' during the preparation of the PNA.

2.21 Based on the latest information on the projected changes in population of the HWB area within its geographical area over the next three years, alongside the latest information regarding building plans and expected additional population increases during this time, the HWB has concluded that the current pharmacy services are adequate and have a good geographical spread, particularly covering those areas of higher population density.

- 2.22 The detailed conclusions are as follows (key types of pharmacy services are specifically detailed below).
- 2.23 The PNA produced by Havering Health and Wellbeing board, clearly states in its executive summary:
- 2.23.1 No gaps have been identified in necessary services (essential services) that if provided either now or over the next three years would secure improvements, or better access, to essential services across the whole borough.
- 2.23.2 There is no gap in the provision of necessary services (essential services) during normal working hours across the whole borough.
- 2.23.3 There are no gaps in the provision of necessary services (essential services) outside of normal working hours across the whole borough.
- 2.24 Boots believe that there are 4 pharmacies within 1 mile of the proposed location and whilst they may be operated by one contractor, patients are still offered choice.
- 2.25 The applicant has not identified any patient groups that may wish to access a pharmacy at the proposed location and basing their application on there being no pharmacy in the immediate area. The applicant states that patients further afield could also benefit from a pharmacy offering extended hours but fail to mention the Asda 1.1 miles away opening until 10pm Monday to Friday. They do however state that Supermarket contractors do not provide such extensive availability in a densely populated area. Boots do not believe this to be true and that the 2 supermarket pharmacies in the area clearly serve many patients in the locality.
- 2.26 Boots believe that this offers reasonable access to patients in the area should they be required. If the applicant suggests that a patient from further afield could travel to their proposed pharmacy, would it not be reasonable to think that those patients living in close proximity could also travel to a pharmacy?
- 2.27 For these reasons Boots respectfully urge NHS England to refuse this application.
- 2.28 **Applicant's response**
- 2.29 The information provided below is by way of rebuttal of the representations made by Boots and Day Lewis.
- 2.30 Boots quote the PNA in their representations following the 45-day consultation period in relation to the overall geography of the HWB area. The PNA however, also points to areas within the HWB area where there is fewer pharmacy operators which impacts on the population's ability to access pharmaceutical services.
- 2.31 The statement below identifies provision is 'generally good' which in itself points to areas where access is less than generally good and confirms the average number of community pharmacies per 100,000 population is lower than England and London averages across the HWB area.
- 2.32 *Since the last Havering PNA was published in 2015, no major changes to pharmaceutical provision have been observed and provision is generally good. There are 46 community pharmacies in the Havering HWB area for a population of 249,085, an average of 18.5 pharmacies per 100,000 population. The England and London averages are 21.3 and 21.4 respectively. The number of pharmacies in each locality varies across the borough with the south having a slightly greater number of pharmacies per head of population than the rest of the borough.*
- 2.33 The applicant has identified that the application site for this application is located in an area where provision is less than generally good and where the number of pharmacies

falls way below the average for the HWB area as a whole. Therefore, an unforeseen benefit is realised on the approval of this pharmacy application.

- 2.34 *Overall access is good. Over 98% of residents are within one mile of a pharmacy, and for 98% of residents, the closest pharmacy is within the borough. There are four 100-hour pharmacies across the borough providing Sunday opening. Demand for community pharmacies is likely to increase due to national policy and population growth. Current national policies highlight the potential of community pharmacy to deliver enhanced community-based healthcare access thereby reducing demand on urgent and primary care services.*
- 2.35 Again, the PNA identifies over 98% of residents are within one mile of a pharmacy. However, the applicant has identified that this is not the case in relation to this application site. Therefore, an unforeseen benefit is realised by granting this application.
- 2.36 NHS Choices show that the nearest pharmacies are located c. 1 mile from the application site which is contrary to the statement in the PNA that 98% of residents are within 1 mile of a pharmacy.
- 2.37 It should be noted that each pharmacy is operated by the same body corporate and therefore not only is there a lack of access to pharmaceutical services there is a lack of reasonable choice in the area.
- 2.38 Again, it is noted that these pharmacies open minimal hours and therefore do not secure reasonable choice to pharmaceutical services in the mornings and evenings. As NHS England will appreciate on their site visit there are schools and businesses in the area of the application in addition to new housing which was mentioned by Boots. These are the people who require access to pharmaceutical services and who are unable to gain reasonable access at present.
- 2.39 The Applicant notes the actual distance and route results in a 1.4-mile distance to pharmacy which is even further removed from the PNA published standard:
- 2.40 This application again identifies an unforeseen benefit which is not recognised within the PNA.
- 2.41 Day Lewis mention the local convenience Cost Cutter store but fail to appreciate that this store has become a relatively recent focal point for the population, the range of products and services offered contrary to Day Lewis assumption does indeed provide for the day to day needs of the local population.
- 2.42 Day Lewis refer to the location of GP services around the wider area but fail to make the link that the growing local population deserve access to pharmaceutical services when they are not accessing a GP surgery. Excluding access to a GP for an acute appointment the vast majority of health need is in relation to repeat/chronic medication needs and access to none dispensing essential pharmaceutical services - this is lacking in the area of the application. Again, the applicant has identified an unforeseen need.
- 2.43 It is people sharing a protected characteristic namely age over 60's and young children and those with disabilities who require access to pharmaceutical services by way of this application. These people currently don't have local GP or pharmacy access. As NHS England is aware there are significant numbers of people who fall into these categories as per Census 2011 data.
- 2.44 It is clear that the Regulatory test re: Regulation 18 is satisfied and as such NHS England must approve this application.
- 2.45 18. (1) (a) —

whether it is satisfied that granting the application, or granting it in respect of some only of the services specified in it, would secure improvements, or better access to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB; and

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

- 2.46 The applicant's unforeseen benefit is that a pharmacy being open in the premises listed in the application for the 96 hours that the applicant has listed as core hours would secure improvements or better access to patients in that area as currently they have to travel a longer distance than in other parts of the HWBB. The applicant noted that patients would need to travel for approx. 0.9 miles from the application site to reach a pharmacy, this being the nearest one. This pharmacy, a branch of Day Lewis opened on weekdays 9am to 6pm and 9am to 1pm on Saturdays. The proposed pharmacy would be open Mon to Fri 8am to 12 Midnight.
- 2.47 The Havering PNA has not identified any gaps in services, there have been no movements of pharmacies in this area.
- 2.48 **The PSRC have determined that if the application were granted this could secure improvements and better access to pharmaceutical services that were not identified in the 2018 PNA.**
- 2.49 (2)
(a) whether it is satisfied that granting the application would cause significant detriment to —
(i) proper planning in respect of the provision of pharmaceutical services in its area, or
(ii) the arrangements it has in place for the provision of pharmaceutical services in its area;
- 2.50 There are 10 pharmacies within 2 kms of the application site, as the crow flies as per NHS Choices website. Granting a new pharmacy application could cause detriment to proper planning or the arrangement in place for pharmaceutical services. However, at present there is no evidence that this will be significant.
- 2.51 **The PSRC have determined that granting this application may result in the over provision of essential services in the area. This may also cause detriment to proper planning of pharmaceutical services or the arrangements in place for the provision of pharmaceutical services in this area. However, at present there is no evidence that this would be significant. Therefore, PSRC are not satisfied that granting the application would cause significant detriment to proper planning or the arrangements for provision of pharmaceutical services.**
- 2.52 (b) whether, notwithstanding that the improvements or better access were not included in the relevant pharmaceutical needs assessment, it is satisfied that, having regard in particular to the desirability of—
(i) there being a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB (taking into account also the NHSCB's duties under sections 13I and 13P of the 2006 Act(b) (duty as to patient choice and duty as respects variation in provision of health services)),
- 2.53 There are 10 pharmacies within a 2 km radius of the proposed premises. There have been no movements of pharmacies since the PNA was published. Whilst there may have been additional housing built, this was something that the PNA had taken into account when this was published. The PNA determined that there were no gaps in services and that there were no gaps in future services.

- 2.54 The walking distance between the proposed site and one of the nearest pharmacies Day Lewis in Rainham Road is slightly longer than the straight line distances noted from NHS UK, at 1.1 miles, however, for the majority of this distance there is a regular bus service (no 365) that runs every 12 minutes, the total journey including the walking to and from the bus stops takes approx. 12 minutes. The other nearest pharmacy, Day Lewis in Broad Street, which is in the opposite direction is also slightly longer than the straight line distances noted from NHS UK, at 1.3 miles, however, for the majority of this distance there is a regular bus service (no 174) that runs every 8 minutes, the total journey including the walking to and from the bus stops takes approx. 17 minutes.
- 2.55 There are 8 other pharmacies a little bit further away but within 2 kms. Whilst they are predominately owned by one provider, there are others within that 2kms radius.
- 2.56 **The PSRC have determined that NHS England is satisfied that residents of this part of Havering have a reasonable choice of pharmacies. Therefore, if the application were granted this would not secure improvements and better access to pharmaceutical services.**
- 2.57 (ii) people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that, in the area of the relevant HWB, are difficult for them to access (taking into account also the NHSCB's duties under section 13G of the 2006 Act(c) (duty as to reducing inequalities)),
- 2.58 There is nothing within the application regarding people who share protected characteristics. The applicant has however mentioned in their response that *"people sharing a protected characteristic namely age over 60's and young children and those with disabilities who require access to pharmaceutical services by way of this application. These people currently don't have local GP or pharmacy access."*
- 2.59 However, there has been no evidence provided to suggest that these individuals are having issues accessing services.
- 2.60 (iii) there being innovative approaches taken with regard to the delivery of pharmaceutical services (taking into account also the NHSCB's duties under section 13K of the 2006 Act(a) (duty to promote innovation)), granting the application would confer significant benefits on persons in the area of the relevant HWB which were not foreseen when the relevant pharmaceutical needs assessment was published;
- 2.61 There is nothing within the application regarding innovative approaches.
- 2.62 Regulation 19 – Deferral
- 2.63 N/A as not deferred.
- 2.64 **Decision**
- 2.65 The PSRC have determined that there is enough information within the papers to decide the application without an oral hearing.
- 2.66 There are no pharmacies within the immediate vicinity of the application, so regulation 31 is not engaged.
- 2.67 With regard to 18(1)(a) & (b) the granting of the application could secure a significant improvement or better access in relation to pharmaceutical services, that was not included in the PNA.
- 2.68 With regard to 18(2)(a) the PSRC have determined that granting the application may lead to an over provision of essential services in the area of the proposed site.

- 2.69 However, granting the application would NOT cause significant detriment to the proper planning or arrangements for the provision of pharmaceutical services.
- 2.70 With regard to 18(2)(b)(i) the applicant's main unforeseen benefit is significant improvement to access in pharmaceutical services. NHS England is satisfied that residents of this part of Havering have a reasonable choice of pharmacies. Therefore if the application were granted this would not secure improvements and better access to pharmaceutical services.
- 2.71 With regard to 18(2)(b)(ii) the PSRC have determined that the applicant has not provided any evidence regarding people with protected characteristics not being able to access services therefore this criteria has not been met.
- 2.72 With regard to 18(2)(b)(iii) the PSRC have determined that the applicant has not provided any information regarding innovation, therefore this criteria has not been met.
- 2.73 The PSRC have determined is that the applicant has not fulfilled the criteria as required in regulation 18(1) & 2(b) and therefore the Pharmaceutical Services Regulations Committee has refused this application.

3 **The Appeal**

In a letter dated 17 February 2020 addressed to NHS Resolution, Rushport Advisory, on behalf of the Applicant, appealed against NHS England's decision. The grounds of appeal are:

- 3.1 The attached report forms the basis of the Applicant's appeal.
- 3.2 In addition to the report the Applicant would be grateful if the Pharmacy Appeals Committee ("the Committee") would note the inclusion of the attached letter and email received from John Cruddas MP who has been the Member of Parliament for Dagenham and Rainham since 2010 and Fay Hough who is a Havering Caseworker.
- 3.3 The Committee is asked to note that the letter from Mr Cruddas is not simply a letter saying that "this is a good idea", but is from the representative for the relevant area who has been deeply involved in the regeneration of the Mardyke Estate in to what is now Orchard Village and Mr Cruddas is writing with knowledge of the issues facing local people and as their representative.
- 3.4 Similarly, Ms Hough's email provides further context and detail about the challenges faced by local residents around Orchard Village and highlights issues with deprivation and difficulties in accessing existing pharmacies.
- 3.5 The email from Mr McKeever provides context from someone who works within the local community and understands the needs of those who use the Community Centre.
- 3.6 Finally the email from Ms Lyons provides a view from a local resident.
- 3.7 The issues raised echo each other and are well known. The Applicant has not simply tried to obtain support from residents, but sought and received support from all levels within the community and from those who both work for, in and live in that community.
- 3.8 The emails and letter are from persons who represent the views of the local community. They provide powerful evidence that the Committee should give the appropriate weight to.

Pharmacy Needs Report

3.9 **Introduction**

- 3.10 An application has been submitted for a new pharmacy for premises at Mick Fury House, Lowen Road, Rainham. This application site at the heart of a major redevelopment area in London.
- 3.11 This report is submitted on behalf of the Applicant Healthrite UK Limited. The Applicant has reviewed the decision of London Region Pharmaceutical Services Regulation Committee (PSRC) and notes that this application has been refused at the first instance but that the PSRC took their decision based on the papers and did not hold a hearing into the application. It is unclear from the decision whether PSRC undertook a site visit of the application site, however, the Applicant considers it is fundamental in this application to make a site visit to this proposal site and the other GP Surgeries and the nearest pharmacies. Much of the information submitted claims that the provision of pharmacies predominantly operated by Day Lewis provide reasonable choice and that this proposal would not secure improvements and better access to pharmaceutical services.
- 3.12 The Applicant considers this to be an irregular, if not an irrational conclusion given the circumstances of this case particularly having regard to the site specific needs at Lowen Road, the growth in population, the distribution of health care services in this area of Rainham and Dagenham and the access issues relating to the existing pharmacies in the wider area.
- 3.13 **Statutory Considerations**
- 3.14 The statutory tests are set out under "*The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013*" (the "Regulations"). In particular the application should be assessed under Regulation 18.
- 3.15 The first test is whether an application for Lowen Road has been considered under the Pharmaceutical Needs Assessment for Havering (the "PNA"). A review of the PNA confirms that no mention of Lowen Road is made and no aspect of the proposal is countenanced in the PNA. As such the application is an 'unforeseen' application and Regulation 18 applies to its assessment. The Applicant discusses the PNA further below.
- 3.16 Other aspects of the Regulations are Regulation 18(2)(a)(i) whether significant detriment to proper planning in respect of the provision of pharmaceutical services in the area of the relevant HWB would occur and Regulation 18(2)(a)(ii) whether significant detriment to the arrangements the NHSCB has in place for the provision of pharmaceutical services in that area would occur. The PSRC have found that there is no evidence that granting the application would cause significant detriment to proper planning or the arrangements for provision of pharmaceutical services. As such neither grounds arise in this application.
- 3.17 The other aspects that an applicant can ground their application on includes Regulation 18(2)(b) (ii) and (iii) being that a proposal will support the needs of people who share a protected characteristic and innovative approaches are being taken. Innovation is not be relied upon in this case. Protected characteristic is justification for this application as shown later, but it can be noted that the proposal is the ground floor of Mick Fury House where permission has been granted for a food bank and counselling services at the first floor.
- 3.18 The Regulations have been in place for 7 years and are well understood. They have been distilled into the central issue of whether a proposal will provide better access to pharmaceutical services (Regulation 18(1)(a)) and whether there is reasonable choice of pharmaceutical services (Regulation 18(2)(b)(i)). The Regulations provide no guidance as to what is "better access" or "reasonable choice", such matters are determined by the facts of the case.

- 3.19 Better access and reasonable choice cannot be met by arbitrary figures provided in documents such as the PNA of being able to drive to a pharmacy within a radius of 1 mile or a drive time of 2-3 minutes. Such an arbitrary approach does not reflect the characteristics of an area where car ownership may be very restricted. Deprivation is a significant issue and the daily travel patterns of local people is directed to the focal point around the application site. However it must be a relevant consideration if an area has experienced significant population growth in recent years and has a number of surgeries close by without correspondingly close pharmacies. This must be a significant factor in favour of a new contract.
- 3.20 **Orchard Village**
- 3.21 The proposal site is located in South Hornchurch in London. It is an area of recently regenerated housing situated northwest of central Rainham and southeast of Dagenham. More specifically it is about 450m north of the A1306 New Road/Marsh Way junction, and south and east of the Beam Parklands and the River Beam. New Road links Rainham with Dagenham.
- 3.22 It is a corner of medium density residential development that sits as a notch into tradition post war housing that extends along Frederick Road (which runs parallel with the A1306) and along residential roads of Lower Mardyke Avenue; South Street; Walden Avenue; Queens Gardens; Askwith Road; Manser Road and Bettlerton Road.
- 3.23 The area is relatively well defined as bounded by the large areas of open space north at Beam Parklands and the large industrial and warehouse areas south of the A1306. These two large land uses curtail patterns of movement of the area and results in a linear form of development that runs along the north side of the A1306.
- 3.24 Former Mardyke Estate
- 3.25 The Mardyke Estate was a 1960s development of tower blocks providing about 550 flats and houses. These tower blocks were in significant disrepair in 2010 and fell below decent housing standards.
- 3.26 The Mardyke Estate had been identified by the London Borough of Havering Core Strategy 2008 as being amongst the 20% most deprived areas in England. This is shown below. [Extract from Havering Core Strategy 2008 provided]
- 3.27 The Core Strategy notes below that the area of Mardyke has worse than average health as shown [Extract from Havering Core Strategy 2008 provided]
- 3.28 The area of Mardyke needs to have improved local services as part of the redevelopment of the estate. The Roman Close Minor Local Centre has been replaced with the shops at Mick Fury House, which is the location of the proposal. [Extract from Havering Core Strategy 2008 provided]
- 3.29 **Orchard Village**
- 3.30 In November 2009 outline planning permission ref: P2058.08 was granted to Old Ford Housing Association for:- *"Redevelopment to provide for up to 555 residential units, with associated car parking, alterations to existing access and provision of new access arrangements, provision of associated landscape and amenity space, together with up to 900 m2 of Class A1, A2, A3, A4 A5, and/or D2 accommodation, and up to 600 m2 of Class B1 (a) offices"*. This resulted in the development of Orchard Village.
- 3.31 Orchard Village is a 5ha major regeneration development project of housing and mixed use that has been constructed in the last 10 years which has involved the demolition and replacement of the Mardyke Estate. It has resulted in the demolition of 512 flats and construction of 555 replacement flats and refurbishment of 41 existing homes to

provide a new balanced mix of housing and the retention of key community facilities of a nursery, community centre and local shops.

3.32 The masterplan layout showed the redevelopment of the estate in 14 blocks. This is shown below where block K is the Mick Fury House which is non-residential. [“Masterplan of Orchard Village” provided]

3.33 The dwelling split between the blocks is set out below where it can be seen that there is a broad mix of dwellings from 1 bed 2 person to 3 bed 5 person dwellings. Overall 555 dwellings have been provided on the site. [“Orchard Village Dwelling and Residential Block Mix” provided]

3.34 The population of Orchard Village has been estimated as part of the planning process. The estimates made to the Council for the application suggest that there would be 152 private homes, 64 intermediate homes and 339 social rented homes, with a population of 1,180 people living in Orchard Village. A site visit will show that the majority of Orchard Village is now complete.

3.35 **Wider Area**

3.36 Looking at the wider area the post war housing around this part of South Hornchurch would look to the local shops and services that cluster around Orchard Village. They would use the Mardyke Community Centre, Abbs Cross Day Nursery (which in 2018 has 59 children registered between the ages of 0-4 years old), Rainham Day Nursery, Newtown’s Primary School (with 374 children attending in 2019) and the services at Mick Fury House as well as the Rainham Medical Centre. Across the parklands is Beam County Primary School (which has 606 children aged between 3-11 in 2019). People will also visit the area to use the open space around Beam Parklands.

3.37 It is notable that the Community Centre has a variety of community groups that use it. It has a large hall suitable to accommodate 150 people, a smaller hall, and a committee room for up to 12 people. Among the groups listed on its website as using the Centre includes physiotherapy services, fitness class Orchard Village 40+ Club, after schools club, Bowls Club, Bingo night, Babies & Toddlers and a drama Youth Group.

3.38 **Beam Park**

3.39 It is also important to note that there is a further substantial new development proposal located immediately south of the Orchard Village area is under construction. This development is known as Beam Park and would be served by this proposed pharmacy.

3.40 In September 2018 planning permission was granted for phase 1 of the development of Beam Park (an area of land located south of the A1306 and north of the A13). Beam Park seeks to deliver in 3,000 new homes (50% or 1513 affordable homes) creating a mixed community with significant infrastructure investment including a new railway station, public square, medical centre that serves the new residents.

3.41 In addition it will seek to provide two schools, retail spaces, gym, nursery, community facilities and multi faith space. This development over time will increase the demands for healthcare services in this area of South Hornchurch.

3.42 **Mick Fury House**

3.43 The proposal site forms part of the local shopping parade provided at the ground floor of Mick Fury House. The plans of the premises are below. [Plan “Ground Floor of Mick Fury House” provided]

3.44 It can be noted that the Costcutter Lowen Road Store is 249 sq. m (2,680 sq. ft.) in size. It provides a broad range of everyday convenience goods and has an ATM

machine and bicycle parking spaces in the public square in front. This shop is designed to meet the day to day needs of the surrounding local community without the need to resort away from the area to other shopping centres and is of significant size. The Council define it in its Core Strategy above as a Minor Local Centre.

3.45 The Food Bank as Evidence of Significant Deprivation

3.46 The first floor of Mick Fury House has been granted planning permission under approval P1263.19 for a mixed use development including a food bank, worship centre, skills and counselling services and networking services centre. The Food Bank is a long established charity in the area having been previously located on the Beam Park lands. The foodbank is run by Rainham Foodbank. Information submitted to the Council to support the planning application notes that the Foodbank have supported over 18,000 local people in crisis since 2011. Their primary aim is to revive hope, restore dignity, promoting integration whilst managing isolation and loneliness, and engagement with ex-offenders giving them the opportunity to make a positive contribution to society. Its advisory services seeks to help people break the cycle of poverty and dependency, it works alongside GP surgeries, schools, charities and statutory bodies to support people. The foodbank is proposed to open 7 days a week 8am to 8pm with main uses during the week and on Saturday and Sunday being the food bank and counselling and a place of worship on Wednesday night and Sunday morning.

3.47 It is envisaged by the food bank that the majority of the visitors to the centre will be walking, with users drawn from the immediate vicinity, and the majority of users falling within the 23% of households with low income who cannot afford a car as they are mostly on job seekers allowance or low-income groups.

3.48 The Shelved GP Proposal

3.49 It is also notable that NHS England had proposed to open a new GP Surgery as part of the Orchard Village regeneration scheme, and in 2015 had said that Orchard Village was in a unique situation as there are currently no main surgeries within one mile of the site and the only surgery within walking distance is a small branch surgery; and that the Orchard Village regeneration scheme is recognised as being the area of the highest priority and greatest need within the borough. A business case was prepared to consider the need for a new surgery to meet the needs of 5,000-6,000 registered patients, and that the surgery was to meet the full range of primary health care services. However, despite the clear and unequivocal need for the improvement of health care services in Orchard Village, the NHS England have not proceeded with the surgery. Whilst the surgery may not have been delivered, the needs of the community have not been addressed. Indeed, if people are again living in unsatisfactory accommodation, there continues to be a clear need that they should have a medical professional in their community to support them. This pharmacy proposal provides a level of medical service that is currently missing and one which NHS England has clearly acknowledged is needed.

3.50 Public Transport

3.51 Transport for London assess public transport accessibility levels (PTALs) and grade locations, where 0 is the poorest accessibility and 6 is excellent. The PTAL for Lowen Road is below where it can be seen that Lowen Road has a PTAL of 2 which is poor. This is clear evidence of poor public transport and is discussed further later in this report. [Diagram provided]

3.52 The Proposal

3.53 Details of the proposal are set out in the application forms. It can be noted that the proposal will open 8am to midnight every day of the week. It will provide 112 core opening hours. Given the scale of demand in this area from the highly deprived

local population and the demand of people that will resort to the area for the various services, this level of service is significant and a major improvement over anything provided in the wider area particularly given the issues of limited accessibility.

- 3.54 These opening hours are significant and the Applicant recognises the need for later opening in the area.
- 3.55 HEALTHCARE PROVISION IN THE AREA
- 3.56 **There are no pharmacies in the immediate area of Orchard Village.**
- 3.57 **Dr M Fateh's branch surgery, 39 Frederick Road** is located about 0.3 miles (480m) east of the proposal site. It has 5,694 registered patients and opens 8:00 to 18:30 pm Monday to Friday and is closed Saturday and Sunday. This is a branch surgery for the **Dr M Fateh's Practice** which is located at 2 First Avenue, about 0.9miles (1.44km) west of the proposal site. The main practice operates the same hours and is closed on Saturday and Sunday. As such between the main surgery and the branch surgery there is a distance of about 1.2 miles (1.9km) where there is no pharmacy available. The proposal site is well located between these two health care services to meet the needs of patients from Orchard Village and this part of South Hornchurch whether they visit the main surgery or the branch surgery.
- 3.58 Looking further west it is notable that the **Oval Road Practice** is located on the far side of Beam Parklands, some 0.9miles (144km) from the proposal site. This surgery is located in a residential area, but again has no pharmacy close by. It has 3,186 register patients and is open 08:00 to 18:30 Monday, Thursday and Friday, 08:00 to 19:00 on Tuesday and Wednesday and 10-10:30 on Saturday.
- 3.59 **Harlow Road Surgery** is located 1 mile (1.6km) northeast of the proposal site. Like the others there is no pharmacy close or on the route to this surgery from the proposal site. This surgery has 2,172 registered patients and opens 08:00 to 18:30 Monday to Friday and is closed on Saturday and Sunday.
- 3.60 In total there is over 11,000 registered patients at 4 separate surgery locations in this area of South Hornchurch and Dagenham that surround the Orchard Village area and which have no pharmacy close by and have no health care provided available at the weekend other than a 30 minute slot at Oval practice on a Saturday morning. It is clearly unsurprising that NHS England had identified Orchard Village as a location suitable for a new GP surgery. The fact that it is not coming forward means the need for the delivery of a pharmacy in this area is even more acute.
- 3.61 THE PNA
- 3.62 The London Borough of Havering PNA 2018 considers pharmacy provision in localities of the borough and includes consideration of South Hornchurch in the southern locality. The PSRC has not found the proposal to be already identified in the PNA, and none of the objectors have made the case that the proposal is not unforeseen. As such the proposal does satisfy the Regulations in that it is unforeseen in the PNA.
- 3.63 Having established this it is notable that as shown above in the references from the Council's Core Strategy, there are pockets of deprivation around the South Hornchurch area. The wider affluence of Havering can disguise pockets of deprivation. However, the map below taken from the PNA clearly confirms that the south Hornchurch area is on one of the most deprived areas in England. [Map "Extract of PNA Figure 6" provided]
- 3.64 The PNA notes (section 3.10) that current plans indicate that there will be a considerable population increase in the borough and that the proposed Local Plan is looking to meet a minimum target of 17,550 new homes between 2016 and 2031, with the focus of growth within the decade between 2016 and 2026 seeking to accommodate a growth in population of 22,000 people. Within this population growth

the PNA includes the table below which predicts that just under half of this population (i.e. 9,310 of the 22,000) will come into the Borough by 2022 with 2,179 people being accommodated in the area of South Hornchurch (i.e. the south west of the southern locality). [Table "Extract of PNA Table 12" provided]

- 3.65 The PNA also notes that in comparison to London and England, Havering has a lower number of pharmacies per 100,000 population. The PNA shows that Havering has only 18.47 pharmacies per 100,000 people compared to 21 in London and England generally. It is noted that the southern locality has a below average number of pharmacies of 20 per 100,000. This level of provision will be exacerbated with the increased population in the southern locality and the growth around the Orchard Village and Beam Park developments.
- 3.66 The PNA also looks at the number of 100 hour pharmacies in the area. The table below shows that south Havering has one 100 hour pharmacy, which is well below the England average. The significant opening hours that are proposed in this application will give the local South Hornchurch population access to a pharmacy that opens hours throughout the entire week. [Table "Extract of PNA Table 12" provided]
- 3.67 The PNA sets out where existing pharmacies are located in the southern locality. It shows the unbalanced distribution of pharmacies being located to the southeast of the locality and no pharmacy located to the southwest. It can also be noted as shown that the two areas of major housing development are also located to the southwest. While it is noted that South Hornchurch is on the edge of the Havering boundary, it is noted that the geographical gap in pharmacy provision continues to the west of Orchard Village in Dagenham as shown below. [Maps "Annotated Extracts of Barking and Dagenham PNA Figure 8 and Havering PNA Figure 15" provided]
- 3.68 Figure 17 in the PNA shows the mismatch between the area of greatest deprivation and the complete absence of pharmacy care. Again, the historic clustering of pharmacies to the southeast does nothing to address the deprivation in the Orchard Village area. [Map "Annotated Extract of Figure 17 of Havering PNA" provided]
- 3.69 Figure 19 shows that for the area around Orchard Village it is quicker to visit a pharmacy outside Havering than it is to visit a pharmacy in Havering. This provides objective evidence that rebuts those objectors that suggest that the Day Lewis and Tesco stores in Havering are accessible to the people of Orchard Village. The facts are that the people that live around the proposal site are quicker to drive (if they have access to a car) outside of Havering to pharmacies elsewhere. [Map "Extract of PNA Figure 19" provided]
- 3.70 Figure 21 of the PNA shows the distance to homes from pharmacies and shows that 82% of the Havering population have a pharmacy within 0.5miles. What is important from these figures is that the population of Orchard Village fall into the 17% of people that have no pharmacy within a mile of their homes. While the Applicant disputes the actual distance of a mile (as all pharmacies are in fact in excess of a mile from the proposal site), this again illustrates the inaccessibility of the existing pharmacy network to the population of Orchard Village. [Map provided]
- 3.71 The images from the PNA Appendices below show the pharmacies that open [Images provided]:-
- 3.71.1 **Weekday evenings** - which shows that the Orchard Village area is among the 13.4% of people that live between 1-1.5miles from their nearest night-time pharmacy at Tesco. The actual distance is 1.6miles and so the population of Orchard Village probably falls into the 3.9% of people that are 1.5-2 miles from their nearest pharmacy.
- 3.71.2 **Saturday nights** – which is again Tesco about 1.6miles from Orchard Village.

- 3.71.3 **100 hours** – which is Mayland Pharmacy Elm Park which located 2 miles north of Orchard Village.
- 3.72 The PNA undertook a resident survey. Only 9 residents completed it (Section 5.2) but it is notable that when asked what pharmacies could do better 56% requested longer opening hours.
- 3.73 There is nothing in the PNA that predicts this proposal and as such the proposal is unforeseen.
- 3.74 There is abundant information in the PNA that objectively supports a new pharmacy contract at Orchard Village.
- 3.75 PROXIMITY AND ACCESSIBILITY OF EXISTING PHARMACIES
- 3.76 The geographical lay out of this part of South Hornchurch is below. There are physical features that curtail the flow of people into and out of the area. The parklands and river are barriers to movement to the north and west. To the east people have to walk from the proposal site past their nearest GP (0.3 miles/480m away), to continue on to their nearest pharmacy which is Day Lewis which is 1.1 miles (1760m) (22 minutes' walk) away to the east. It is 3.6 times the distance to the nearest pharmacy than it is to the nearest surgery in this direction. [Map provided]
- 3.77 The route to Day Lewis is shown below. [Map provided]
- 3.78 Tesco to the south east is 1.6 miles (2560m) to the southeast and a walk of 31 minutes. The walking route is shown below. [Map provided]
- 3.79 This walk is along the New Road (shown below) which is a dual carriage way and an urban traffic route that has no shelter and would be an undesirable walking environment for the public from Orchard Village. [Photograph provided]
- 3.80 New Road provides the only access to the pharmacies to the west which is Dagenham. It remains a dual carriageway towards Dagenham and has very little shelter or areas of refuge should weather be inclement. The area is unattractive to walk as it is an industrial peripheral area and a vehicular dominated environment. Few, if any residents would walk to the pharmacies to the west, even though the PNA finds these to be the closest pharmacies to the area of Orchard Village.
- 3.81 It can be seen on the maps above and below that the nearest pharmacy to the west is Day Lewis which is 1.3 miles (2,000m) (24 minutes) walk through different urban settings and well beyond what people of Orchard Village would consider to be their local area.
- 3.82 The routes to this pharmacy are below which would either be through the parkland which would not be feasible for many people during the dark winter days and evenings, or along the dual carriageway, which is equally undesirable. [Map provided]
- 3.83 Day Lewis' objection raises the location of other pharmacies but these are even less accessible to the population of Orchard Village. They require even longer walks along the busy dual carriageway or longer walks through the large unlit parkland to the north.
- 3.84 **Given the forgoing all pharmacies are well beyond a reasonable walking distance.**
- 3.85 Car travel in this part of London is discouraged and of limited weight in this case as the Applicant shows below that 35% of households in this part of South Hornchurch have no access to a car.
- 3.86 Even if patients had a car, the parking at Day Lewis, Rainham Road is limited to about 3 spaces. And parking at Broad Street is on street and shared with the other shops in

the parade. Only Tesco, which is a massive superstore and unattractive to many of the deprived people that visit the proposal site and the services in Orchard Village would not be visitors to this store, has car parking spaces. Of course, none of these three pharmacies are even remotely close to the three local GP surgeries and require patients to travel further away from their area to have a prescription dispensed having visited their GP.

- 3.87 In terms of public transport as shown above the area of Orchard Village is classed as poor in terms of public transport accessibility levels. It has a single bus route No 365 that runs through the Orchard Village area one way. It is the penultimate stop on the route with the service terminating at New Road. This service then travels north back through South Hornchurch. The service runs every 10-14 minutes. The fact that it is one way means that to visit the GP surgery at Frederick Road would require a bus trip towards Rainham Road, and get off the bus and get a return bus to the GP surgery. To then collect a prescription, would require the same journey again. This is a double loop of the route, and wholly inconvenient.
- 3.88 To get a bus to the GP surgery at First Avenue would require a patient to take the 365 to New Road, then the 287 west bound, and change and get the 287 east bound and change again to get the 145 north bound on Ballards Road. This is only to reach a GP. It does not get patients to a pharmacy which would require further bus trips away and the same journey in reverse to get home.
- 3.89 To get a bus to Tesco would take 30 minutes and two bus rides to get there. Assuming the 365 comes only every 14 minutes the time would more likely take 45 minutes. The return journey would take 32 minutes and involves a 16 minute walk from Tesco to Hulbert Road to catch the bus. This does not allow for time in the pharmacy and waiting on the bus. A return journey could easily take two hours and that excludes any visit to a GP surgery.
- 3.90 Given the foregoing, it is not surprising that accessibility in this area is rated as poor. Indeed the proximity to pharmaceutical services is significantly below any reasonable standard, which is made worse given
- 3.90.1 the level of deprivation in the Orchard Village area; and
- 3.90.2 the fact that Orchard Village is a focal point for community services in the area and the proposals to open the Foodbank at Mick Fury House will increase demands for pharmaceutical services further.
- 3.91 MATTERS RELEVANT TO NEED
- 3.92 **Locally Provided Services**
- 3.93 Refusal of this application will leave the entire growing population of Orchard Village and this part of Rainham and South Hornchurch without a pharmacy. It is a key concern of the Council that the Minor Local Centre in Orchard Village is a success and provide services for the local population. As part of a major regeneration project, provision of services such as a pharmacy will be a major boost for the area and the local population.
- 3.94 A local pharmacy can have a significant positive impact on community spirit and community identity. It provides a local meeting place for people to stop and meet their neighbours.
- 3.95 It is contrary to the aims of good planning and sustainable living to require the entire population of an urban village like Orchard Village to travel unnecessarily to a neighbouring community to use their local services in order to obtain pharmacy services. Such an approach undermines the viability of the local shops in the regeneration project, undermines the sense of community spirit in Orchard Village and increases the sense of isolation and deprivation. For those few that have access to

cars it increases traffic congestion on roads. In planning terms there are no good grounds to require the population of Orchard Village to leave their community to travel elsewhere for a pharmacy.

3.96 On the contrary, good planning would actively encourage a pharmacy in Orchard Village as it would maintain the services in the Minor Local Centre, support the needs of the local community, make access to a pharmacy easier and more sustainable encouraging people to walk to local shops, and combining a visit to the pharmacy as part of their day to day activity. It would give people that visit the local branch GP surgery a pharmacy close to their home without needing to make additional journeys to more distant pharmacies.

3.97 Given the cross-cutting nature of the NHS Regulations with national policy in terms of retailing, services, sustainability and seeking to improve access and give reasonable choice to people to a pharmacy, it must follow that should planning policy encourage a pharmacy on these grounds, it would be wholly consistent for the NHS to accept this principle also.

3.98 **Benefits of Locally Accessible Healthcare in Orchard Village**

3.99 The Department for Health has the objective of pharmacies providing a wider range of services and to have a stronger role in the local community. It would encourage the provision of NHS services from a pharmacy to complement peoples currently lifestyles and needs, where prevention of medical conditions can be achieved and where people can become educated in medical conditions so that they are better engaged in taking care of their own health and well-being.

3.100 With the closest pharmacy located outside the Orchard Village, and over a 2 mile return trip away from many living in this area, a material consideration is the benefits of having a pharmacy in Orchard Village. The fact that Orchard Village was identified as a location for a new NHS GP surgery is clear objective evidence of the need for additional healthcare in this area.

3.101 While it is plainly not a replacement for the would-be surgery that was previously proposed, the provision of a pharmacy does provide a locally accessible healthcare professional that residents and people resorting to the area to visit the shops and community services and schools will be able to benefit from.

3.102 A pharmacy can provide a private consultation room and provide immediate access to a pharmacist who can help diagnose health conditions, prescribe medication and sign post patients to GP and other health services. It is a fundamental aspect of the health services provided throughout the UK. It is the frontline of health care and has the clear benefits of relieving pressure on GPs.

3.103 Being located in a highly deprived area such as Orchard Village will be of fundamental importance in achieving early intervention in patient conditions. The immediate proximity of the proposal site close to the local Costcutter, near the Community Centre and in the same building as the foodbank and counselling service will encourage people to call in with the pharmacist rather than delay seeking treatment because existing pharmacies are out of sight or inconveniently located elsewhere in Rainham or Dagenham and are inaccessible and are outside the daily travel patterns of the population. The very fact that this proposal site is in the heart of the community means for many people, a pharmacy will be located as part of their daily patterns of movement.

3.104 **Accessibility on Foot**

3.105 In order to discuss accessibility on foot objectively, it is important to understand what an acceptable walking distance is. Two documents are of guidance. The "Manual for Streets" (produced by the Communities and Local Government and

Department for Transport) advises (para 4.41) that *'Walkable neighbourhoods are typically characterised by having a range of facilities within 10 minutes (up to 800m) walking distance of residential areas which residents may access comfortably on foot'*. The Institution of Highways & Transportation provides "Guidelines on Providing for Journeys on Foot". It states (para 3.30) that *'Approximately 80% of walk journeys and walk stages in urban areas are less than one mile. The average length of a walk journey is one kilometre (0.6miles). This differs little by age or sex and has remained constant since 1975/76'*. It suggests that an acceptable walking distances in an area such as the Orchard Village would be 800m, though 400m would be desirable and the preferred maximum would be 1200m.

- 3.106 With both guidelines identifying 800m to be acceptable it is a reasonable position to adopted 800m/10 minute walk as a guide for this report. Based on this guidance as shown below neither the Blackthorn Pharmacy, Pharmacy Direct and Hamble Pharmacy are accessible on foot. [Table "Walking Distance Analysis" provided]
- 3.107 **Population of Orchard Village**
- 3.108 The population of the area around Orchard Village in 2011 was 1594. This is shown below. [Map and table provided]
- 3.109 Taking the area west of Beam Park there are two areas around the Oval that can be considered in the population. These are shown below which have populations of 1584 and 1666. [Maps and tables provided]
- 3.110 The combined population under consideration in this linear area of Rainham and Dagenham is about **4844**.
- 3.111 With ongoing housing development in the area as shown earlier the population has will quickly grow (sic) with the development of Beam Park. The PNA predicts that southwest South Hornchurch will grow in population by 2197 by 2022. This will boost the population to **7,041**.
- 3.112 Of course the reliant population in the wider area that are registered with the local GP surgeries exceeds 11,000 patients. Bearing in mind that the average in England is one pharmacy per 4545 people means that the area of Orchard Village and its surrounding is comfortably large enough to support 1.5 pharmacies.
- 3.113 **Characteristics of the Population**
- 3.114 Focusing on the core area around the proposal site the table below shows the amount of people in the area aged under 16 and over 65. There are 395 (24.7%) children in the area and 175 (11%) people over 65. This is about 35% or 1 in 3 of the population. These people will benefit from having a pharmacy in Orchard Village. [Table provided]
- 3.115 The table below shows home ownership is 39% and social rented occupancy is 51%. While these figures may have altered with the regeneration of Orchard Village the regeneration was designed to replace the dilapidated flats and was undertaken by a social housing company, and as such it is unlikely the figures will have dramatically changed. As such the area will continue to have a high level of social housing. [Table provided]
- 3.116 The table below confirms that 34.9% of households have no access to a car. This would equate to over 600 people living in 243 households. During the day there would be a further 309 households where the car has been driven to work. This could mean that a further 463 people are at home with no car. In total about 1,000 people in the Orchard Village area have no access to a car during the working day. That equates to almost 62% of the population. [Table provided]

- 3.117 The table below shows there are over 291 people (18.2%) in Orchard Village area who have their day to day activities limited by ill health. These people will benefit from having a local Pharmacy. [Table provided]
- 3.118 The table below shows that of 696 household in this area 38.5% of households had no adults in employment. This demonstrates the significant level of deprivation in the area. [Table provided]
- 3.119 The table below sets out the level of unemployment in the area. It shows that the area has an unemployment level of 12% which is triple the average in England. [Table provided]
- 3.120 In summary, as outlined by the PNA and the Council's Core Strategy and borne out by the above statistics the Orchard Village area displays all the characteristics of an area that has unequivocal needs and demands for a pharmacy.
- 3.121 **Protected Characteristics**
- 3.122 The proposal will cater for people of protected characteristics, namely those people of a particular age, disability and as well as expectant mothers and mothers with very young children.
- 3.123 As shown above the population of Orchard Village has a high level of unemployed, it has high levels of deprivation. It also attracts people into the area for counselling and services and with the opening of the foodbank will attract people that have for a variety of reasons being suffering from personal crisis. The Foodbank also works with ex-offenders.
- 3.124 Looking at the normal groups there 1039 children attending school and nursery in the area and 175 elderly people, which are groups of protected characteristics. These people have no access to a pharmacy within the Orchard Village area. The provision of pharmacy services in this area ensures the needs and rights of these groups are protected.
- 3.125 **Reasonable Choice – Relevant Factors**
- 3.126 The Applicant asks the Committee to note that the Regulations restrict the consideration of "reasonable choice" to pharmacies within the same Health and Wellbeing Board. The nearest pharmacies (Day Lewis) within the Havering HWB are between 1.1 miles and 2 miles from the proposal site and pharmacies and the nearest pharmacy in the adjoining HWB (Barking and Dagenham) is also owned by Day Lewis.
- 3.127 The nearest pharmacies are all well beyond reasonable walking distance, especially for the sick, elderly and infirm.
- 3.128 The nearest pharmacies all suffer from poor access via public transport.
- 3.129 The population is deprived and has low car ownership.
- 3.130 The Applicant submits that there is a compelling case in terms of access and reasonable choice to grant this application.
- 3.131 **NEED FOR A NEW PHARMACY**
- 3.132 The need for a new pharmacy arises because:
- 3.133 The area of Orchard Village is a major area of regeneration;

- 3.134 This area has been identified by the Council as being among the 20% most deprived areas in England;
- 3.135 The area has worse than average poor health;
- 3.136 There is a need to improve local services in the area as part of the regeneration of the local community;
- 3.137 The area supports two schools and a day nursery with over 1000 children in the area;
- 3.138 The community centre is a focus for community need and supports young and old people beside the proposal site;
- 3.139 The wider area will see the development of Beam Park and the delivery of 3,000 new homes (1513 of which will be affordable homes) south of the area;
- 3.140 The application site is beside the local supermarket which is the main shop for the daily needs of the local community;
- 3.141 Mick Fury House is the proposed location for a Foodbank, counselling and network services centre which will open 7 days a week;
- 3.142 The food bank is clear evidence of deprivation within the area.
- 3.143 The proposal will open more than 100 hours a week and will be available during the same hours as the foodbank and the local shops and services. It will be on hand when the community needs it;
- 3.144 Despite this being a densely populated area with significant new housing, high deprivation, low car ownership and poor public transport there is no pharmacy within 1 mile.
- 3.145 The NHS acknowledge that there is a clear need for increased health care in this area and had clear intension to open a surgery in the area, only for it to be shelved. The proposal is an important investment in this area to make up for this decision;
- 3.146 Residents in the area have a low car ownership;
- 3.147 There are no pharmacies in the local area. All pharmacies are too far to walk and are well beyond the nearest GP surgeries, meaning accessing a pharmacy is more difficult than visiting the doctor;
- 3.148 The area suffers from poor public transport accessibility;
- 3.149 The PNA does not foresee this proposal. However it provides abundant evidence about the deprivation and geographical gap in services in this area;
- 3.150 The PNA confirms that the area around the proposal is predicted to increase in population by 2179 by 2022;
- 3.151 The area of Havering has below the England average of pharmacies per 100,000 population. The scale of population in the area would support a pharmacy based of average population figure;
- 3.152 The proposal will provide for the needs of the community should they need a pharmacy in the evenings during the week, all day Saturday and Sunday. None of the nearest pharmacies are meeting this need at present;

- 3.153 There are no other pharmacies that are **reasonably accessible** to the population of Orchard Village;
- 3.154 There are no pharmacies that offer the population of Orchard Village a **choice** of pharmaceutical services;
- 3.155 There are groups that share protected characteristics that will benefit from this proposal.
- 3.156 To contend that the 4,844 residents of Orchard Village have reasonable access to a pharmacy located in Day Lewis is nothing short of taking an overly optimistic view of this area. It would pay no attention to the requirements of proximity that are inherent in the concept of reasonable choice and better access.
- 3.157 The need to provide choice to the residents is equally clear.
- 3.158 The opportunity to satisfy that need is matched by the accessibility of the Minor Local Centre which is the hub of the local community. The better accessibility to, and choice of, pharmacy services that a pharmacy located at Mick Fury House will provide is unquestionable.
- 3.159 CONCLUSION
- 3.160 Orchard Village is an area that does not have a reasonable choice of pharmacy services and is clearly in need of better access to pharmacy services. Following a critical assessment of the circumstances of Orchard Village the applicant contends that the application is an unforeseen proposal that will satisfy the requirements of Regulation 18.
- 3.161 **The Applicant requests that the Committee proceeds with this application by way of an oral hearing.**

4 **Summary of Representations**

This is a summary of representations received on the appeal.

4.1 NHS ENGLAND AND NHS IMPROVEMENT

- 4.1.1 Unfortunately, during the current pandemic, we have been unable to devote the necessary time to read the very detailed appeal and be in a position to comment on this information.
- 4.1.2 NHS England is of the opinion that the applicant has not fulfilled the criteria as required in regulation 18(1) & 2(b) and therefore the application should be refused.

5 **Observations**

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