

22 October 2009

**REF: SHA/15300**

**APPEALS AGAINST CENTRAL LANCASHIRE PCT  
DECISION TO GRANT MR P MIDDLETON'S  
APPLICATION FOR A CHANGE OF LOCATION OF  
PREMISES FROM THE PREVIOUSLY GRANTED  
PRELIMINARY CONSENT IN THE VICINITY OF 112  
WIGAN ROAD, ORMSKIRK, L39 2BA TO 22 WIGAN  
ROAD, ORMSKIRK, L39 2AP**

**REPORT OF AN ORAL HEARING HELD AT THE WEST  
LANCASHIRE INVESTMENT CENTRE  
SKELMERSDALE ON DECEMBER 16TH 2009**

**1 The Application**

By application dated 29 April 2009, Mr P Middleton ("the Applicant") applied to Central Lancashire Primary Care Trust ("the PCT") for a change of location of premises from the previously granted preliminary consent in the vicinity of 112 Wigan Road, Ormskirk, L39 2BA to 22 Wigan Road, Ormskirk, L39 2AP.

**2 The PCT Decision**

The PCT considered and decided to grant the application. The decision letter dated 21 July 2009 states:

- 2.1 I write to advise you of the decision reached by Central Lancashire Primary Care Trust (PCT) regarding your application to convert a preliminary Consent grant at the location, in the vicinity of 112 Wigan Road Ormskirk L39 2BA, to a full consent grant at the premises of 22 Wigan Road Ormskirk L39 2AP. The PCT has since received confirmation that the correct postcode for the premises is L39 2AU.
- 2.2 The application fell to be determined in line with regulation 41 of the NHS (Pharmaceutical Services) Regulations 2005 (as amended).
- 2.3 In line with regulation 41 (1) the application satisfied two of the three necessary criteria required in order the grant the application, namely:
  - 2.3.1 The application was submitted within the required period from the date the preliminary consent was granted (regulation 41(1) (a))
  - 2.3.2 The pharmaceutical services proposed are the same as those in the preliminary consent application (regulation 41(1) (b))
- 2.4 Regulation 41(1) (c) also required that for the application to be granted, the premises specified in the application must be within the location in respect of which preliminary consent application was granted.
- 2.5 The PCT gave detailed consideration as to whether the premises specified were "in the vicinity of 112 Wigan Road" and therefore within the location originally granted following your appeal at the preliminary consent stage. It was noted that the premises specified were within the neighbourhood boundary proposed by the PCT and

accepted by the Appeals Unit Panel. However, the PCT concluded that the premises at 22 Wigan Road were not within the same location.

- 2.6 It was determined therefore that the application did not satisfy the criteria of regulation 41(1) (c) in that the premises specified in the application were not within the location in respect of which the preliminary consent was granted. In light of this decision, the application then fell to be determined in line with regulation 41 (2) and treated as though it were for a minor relocation under 500 metres.
- 2.7 As you will be aware, regulation 41(2) states that where a change of premises has been identified, the PCT should treat the application as though it were an application under regulation 5(1) (b) (ii) (i.e. change in premises from which to provide pharmaceutical services) and that information should be provided as set out in Part I of Schedule 4 of the regulations.
- 2.8 The PCT considered whether the relocation could be considered as minor in relation to the distance between the two locations and populations to be served. A site visit had determined that the distance measured between the preliminary consent grant address of "In the vicinity of 112 Wigan Road, Ormskirk L39 2BA" and the identified premises address in the application to convert to a full grant as "22 Wigan Road" was approximately 480 metres. The PCT was of the view that this made the application borderline.
- 2.9 Consideration was also given to the judgement of Thorpe LJ, when referring to the meaning of a minor relocation - see R v Yorkshire Regional Health Authority ex parte Sun and Gompels (1995) in which the judge had highlighted that in his opinion, distance and topography should not be the only considerations when deliberating whether a relocation is minor and that whilst it should be the primary consideration, regard should be given to the significance and consequence of the effect on users of the pharmaceutical services.
- 2.10 After much deliberation of all documentation, professional advice and site visit reports, the PCT was of the opinion that the application did, although borderline, satisfy the criteria of regulation 6 (3) for that of a minor relocation under 500metres and therefore the application was granted.

#### Decision

- 2.11 That the application by P Middleton to convert from Preliminary to Full Consent in relation to premises at 22 Wigan Road Ormskirk L39 2AU be approved in accordance with regulation 6 (3) of the NHS (Pharmaceutical Services) Regulations 2005 (as amended).
- 2.12 Pharmaceutical services under the NHS (Pharmaceutical Services) Regulations 2005 (as amended) may now be provided from the premise of 22 Wigan Road Ormskirk L39 2AU. This provision should commence within 6 months of the date of this letter, i.e. before 20 January 2010 and notification should be made to the PCT of your intended opening date, no later than 14 days prior to the expiry date of 20 January 2010.

### 3 The Appeals

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit"), dated 30 July 2009, Wm Morrison Supermarkets plc appealed against the PCT's decision. The grounds of appeal are:

- 3.1 I have recently received a letter from Mr Kenneth John (copy enclosed) detailing the process that Central Lancashire PCT have followed to grant the Full Consent application for the above granted preliminary consent application.

- 3.2 Morrison Pharmacy wishes to appeal against this decision for the following reasons:
- 3.3 NHS Regulations 2005 (Pharmaceutical) Part 2, 5 (5) clearly states that:
- “Where an application has been granted under regulation 6 or 7, no further application may be granted under regulation 6 or 7 in relation to those new premises for a period of 12 months beginning with the date on which the applicant commenced the provision of pharmaceutical services from the new premises”*
- 3.4 Considering this regulation the PCT has failed to take note that the pharmacy has not commenced trading nor has done so for a period of 12 months.
- 3.5 In the Oral Hearing undertaken before granting the Preliminary consent, Mr Wardle clearly stated that the new pharmacy premises would be in the small parade of shops close to 122 Wigan Road. Additionally Mr Wardle made great emphasis about the benefit the new pharmacy would bring to population visiting the planned future Darzi Centre to be sited on the Ormskirk Hospital Site, visitors to the hospital, students attending the university and resident at that end of the neighbourhood. Clearly these arguments do not stand when the new site at 22 Wigan Road is considered.
- 3.6 The PCT state that the re-location is approximately 480 metres and therefore qualifies the relocation as minor. Our calculations determine that this distance is 560 metres clearly making this relocation over 500 metres. The NHS Regulations clearly state that an application for relocation over 500 metres must be considered as a new application subject to Part 2 11 -20. (Necessary and Desirable test).
- 3.7 The new premises although judged to be within the same neighbourhood, are merely 50 metres from an existing contractor Rowlands Pharmacy. If this was a new contract application the PCT would be minded to take note existing Pharmaceutical Services in adjacent neighbourhoods. Morrisons believe that in this case residents already have and adequate service provided by Rowlands Pharmacy and therefore the application would have failed.
- 3.8 Morrisons Pharmacy therefore conclude that the PCT has failed to consider the application in accordance with the guidance and NHS 2005 Regulations (Pharmaceutical) and respectfully request that the NHS Litigation Authority uphold our appeal and reject this application.

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority (“the Appeal Unit”), dated 4 August 2009, L Rowland & Co (Retail) Ltd appealed against the PCT’s decision. The grounds of appeal are:

- 3.9 You will be aware that the above preliminary consent application was subject to appeal by the authority ref: SHA/14731. An application has now been received and approved by Central Lancashire PCT for full consent at premises situated at 22 Wigan Road, Ormskirk.
- 3.10 Rowlands Pharmacy would like to appeal the decision of Central Lancashire PCT for the following reasons:
- 3.11 NHSLA granted the application based upon two assumptions; that services were inadequate and that with the opening of the new Darzi centre there would be a need for pharmaceutical services in its vicinity. While we understand that the situation regarding services has improved since the hearing, the major cause for our concern is that the proposed location for full consent is not in the vicinity of the Darzi centre. Indeed, the PCT refer to this in their decision letter commenting that “the PCT concluded that the premises at 22 Wigan Road were not within the same location”.
- 3.12 The applicant, in their submission to the oral hearing (paragraph 11.1.6), states that the nearest pharmacy is “8 or 9 minutes [ from the 112 Wigan Rd site] for a fit

person". Clearly, something similar now applies to the 22 Wigan Rd site since it is situated within approximately 150m of our pharmacy on Beaconsfield Corner.

- 3.13 Paragraph 11.1.8 of the oral hearing minute states that "the proposed site, at the local parade or vicinity was located at the centre of the neighbourhood and would provide good access, including those cutting through from Ruff Lane and the University". Clearly, this no-longer applies to the 22 Wigan Rd site since the population served will be vastly different to that which was believed to be the case at the oral hearing. We believe that the application should be completely reconsidered as a consequence. We also draw paragraph 13.11 of the oral hearing minute to the Authority's attention.
- 3.14 The PCT have measured the distance between 112 Wigan Road and 22 Wigan Road to be 480m. We believe that had the preliminary consent application been made for 22 Wigan Road then it is unlikely that the contract would have been granted since a pharmacy in this location would not significantly improve pharmaceutical services in Ormskirk and are not in the vicinity of the proposed Darzi centre as stated above.
- 3.15 Central Lancashire PCT have chosen to consider the application under the minor relocation exemption criteria (regulation 6(3)). We believe that this is a breach of process since the pharmacy is not on the pharmaceutical list and is not currently trading as required under regulation 6(3) ("existing premises"). We seek clarification from NHSLA on this point.
- 3.16 We look forward to receiving your response in due course.

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

This is a summary of representations received on the appeal. A summary of those representations made to the PCT are only included in so far as they are relevant and add to those received on the appeal.

##### **4.1 PCT**

4.1.1 Thank you for your letter dated 26 August 2009 and the opportunity to make representations regarding case number SHA/15300. On behalf of NHS Central Lancashire I would like to respond to the comments referring to the regulatory adherence by the Primary Care Trust (PCT) in relation to the representations received from Wm Morrison Supermarkets PLC (Morrisons) and L Rowland & Co (retail) Ltd (Rowlands).

4.1.2 Morrisons have suggested that the PCT did not determine the application in line with the regulations or guidance to the regulations on a number of points. The PCT would like to comment on the representation.

4.1.3 Bullet point 1 - Time period for permitting a minor relocation Regulation 5 (5) states:

'Where an application has been granted under regulation 6 or 7, no further application may be granted under regulation 6 or 7 in relation to those new premises for a period of 12 months beginning with the date on which the applicant commenced the provision of pharmaceutical services from the new premises unless the Primary Care Trust for good cause allows him to make an application before the end of that period.'

4.1.4 This provision serves to prohibit applications for further minor relocations on the part of pharmacies which have undertaken a minor relocation during the 12 months preceding the date of their application. In the case of the current applicant, the application to relocate from 112 Wigan Road to 22 Wigan Road

represents their first request for a minor relocation in respect of this pharmacy and Regulation 5(5) is therefore inapplicable.

- 4.1.5 Further, the guidance to the regulations (paragraph 3.3) clearly highlights the fact that the applicant must trade from the new premises for a minimum 12 months before any further minor relocation may be sought. However, in this instance, the applicant did not start trading at 112 Wigan Road and then apply to relocate at 22 Wigan Road and so was not precluded from applying to trade from different premises.
- 4.1.6 Bullet point 3
- 4.1.7 The distance of 480 metres was measured from the door of the proposed new premises at 22 Wigan Road to the originally referenced premises of 112 Wigan Road. The distance was measured using a metre stick and walking by what was considered to be the most practical route.
- 4.1.8 Bullet point 4
- 4.1.9 The PCT determined the application in line with regulation 6(3) because the distance involved between the proposed new premises of 22 Wigan Road and original premises of 112 Wigan Road was measured at less than 500 metres and within the same neighbourhood. Regulation 6 does not permit the PCT to carry out a further evaluation of whether to grant the minor relocation to the new premises would be “necessary or desirable” in accordance with the test under Regulation 12 and, as part of this process, to take into account the proximity of neighbouring pharmacies to the new premises (i.e. 22 Wigan Road). As such, the fact that the proposed location of the premises was within a 3 minute walk away (including waiting for the traffic lights before crossing the road) was not a relevant factor for the purposes of determining the application and could not properly be taken into account by the PCT.
- 4.1.10 Rowlands have stated that they believe the PCT has breached the regulations by considering the application in line with regulation 6(3) and in their opinion, the PCT should not have determined the application in line with regulation 6 as the applicant was not already on the pharmaceutical list.
- 4.1.11 Regulation 41(2) states:
- ‘Where sub-paragraphs (a) and (b) of paragraph (1) are satisfied, but the premises specified in the application are in a different location from that in respect of which preliminary consent was granted, the Primary Care Trust shall treat the application as though it were an application under regulation 5(1) (b) (ii) to change the location of the premises, and the determination of such an application shall be subject to regulations 19, 21, 25 and 26.’
- 4.1.12 The PCT is therefore instructed to “treat the application as though it were an application under regulation 5( b) (ii) which states:
- “Subject to paragraph (4), a person, other than a doctor or dentist - who is already included in a pharmaceutical list but wishes to change the premises from which he provides pharmaceutical services to other premises within that area from which he wishes to provide the same or different pharmaceutical services
- 4.1.13 In this respect NHS Central Lancashire believes in line with regulation 41(2) that it followed due process in that it treated the application as though it were an application from an applicant “who is already included in a pharmaceutical list” irrespective of the fact that that was not the case.

4.1.14 The PCT hopes that the above submissions are of some assistance to the Appeal Unit in determining this appeal and would be happy to assist further if required.

#### 4.2 CHARLES RUSSELL ON BEHALF OF MR P MIDDLETON

4.2.1 I act for Mr Paul Middleton. On behalf of my client I write to respond to appeals received by the Authority and sent to my client under cover of your letter of 26 August 2009.

4.2.2 As a preliminary matter, my client has identified premises (22 Wigan Road) from which he wishes to provide pharmaceutical services and has reached agreement with the current owner of those premises. Any delay in the determination of this appeal is likely to cause difficulties for Mr Middleton in relation to those premises and I should therefore be grateful if the Authority would kindly proceed to determine the appeals on receipt of this letter and without delay, rather than waiting until the end of the circulation period (which is the 25 September 2009).

#### Background

4.2.3 On 14<sup>th</sup> April 2008, my client applied to the PCT for preliminary consent prior to inclusion in the PCT's pharmaceutical list for premises in the vicinity of 112 Wigan Road, Ormskirk, L39 2BA.

4.2.4 My client's application was finally determined by the National Health Service Litigation Authority on 12<sup>th</sup> March 2009, when the application was approved (following an oral hearing which took place on 27 January 2009). In recommending that my client's application be granted, the Panel made the following recommendations, which were adopted by the Pharmacy Appeals Committee:

4.2.4.1 That the neighbourhood of the proposed pharmacy should be open land to the north and east, the railway line as it bisects Ormskirk to the west and St Helens Road to the south west (paragraph 13.3 or the oral hearing minute);

4.2.4.2 That the new Darzi centre, for which there were concrete plans, would 'generate significant demand for pharmaceutical services within the neighbourhood (emphasis added) (paragraph 13.10);

4.2.4.3 There were traffic problems for those trying to get into the town centre, including traffic jams with long delays (particularly on market days) which would restrict access to town centre pharmacies from the east of the town; there was an inadequate bus service for the neighbourhood (the service did not serve Ruff Lane) (paragraph 13.11);

4.2.4.4 There were 'Significant gaps in the provision of services provided by existing pharmacies (paragraph 13.12);

4.2.4.5 There was a limited choice of services and service providers (paragraph 13.13).

4.2.5 In accordance with Regulation 41 of the National Health Service (Pharmaceutical Services) Regulations 2005 ("the Regulations"), my client submitted his application for full consent on 30th April 2009 for premises at 22 Wigan Road, there no longer being premises available at 112 Wigan Road.

- 4.2.6 In accordance with regulation 41(2), the PCT considered that the premises specified in the full consent application (22 Wigan Road) were not in the same location as the premises specified in the preliminary consent application (112 Wigan Road) and proceeded to determine the change of location as if it were an application for minor relocation (pursuant to regulation 5(1)(b)(ii)).
- 4.2.7 The PCT considered that the change of location did satisfy the criteria for minor relocation and granted the full consent application. Rowlands and Morrisons have appealed that decision.

#### Appeals

- 4.2.8 In relation to each of the appeals received, I comment as follows:

#### MORRISONS

- 4.2.9 Unfortunately, Morrisons have misstated the regulations in several places within their letter of appeal. Taking each of the matters raised by Morrisons in turn, I comment as follows:
- 4.2.10 Regulation 5(5) only applies where there has been a previous application for minor relocation (that is, where a pharmacy relocates, it cannot apply for a further relocation for a period of one year). That is clearly not the case in relation to this application and, indeed, regulation 41(2) specifically permits a change of location when a full consent application is lodged following a preliminary grant.
- 4.2.11 Whilst representations may have been made at the appeal hearing, it is the Panel's conclusions which are relevant to the determination of this appeal. It is evident from the Panel minutes that the Panel had no regard to the student population or visitors to the hospital when finding that current service provision was not wholly adequate. Those factors are therefore not relevant to the consideration of this appeal.
- 4.2.12 Mr Middleton agrees the distance as measured by the PCT between the two sites (480 metres). In any event, as the Authority will be aware, Morrisons are incorrect that an application for minor relocation over 500 metres must be considered under the necessary or desirable test. This is evident from regulation 6(1).
- 4.2.13 Morrisons state that the change of location should not be granted because had the new contract application been made for 22 Wigan Road, it would have been refused owing to the distance between 22 Wigan Road and the nearest pharmacy (Morrisons give an inaccurate measurement of that distance in their letter: my client's proposed site at 22 Wigan Road is significantly more than 50 metres from the Rowlands Pharmacy).
- 4.2.14 In fact, regulation 41(2) makes it clear that the only relevant factor is whether the change satisfies the criteria for a minor relocation: it is irrelevant whether it would meet the criteria under regulation 12.
- 4.2.15 In any event given the Oral Hearing Panel's findings in relation to adequacy (increased demand in the neighbourhood (not just at the proposed site), difficulties getting into the town centre, inadequate provision of enhanced services and lack of reasonable choice), it is evident that the reasons for granting my client's application would apply equally to 22 Wigan Road as they did to 112 Wigan Road.

#### ROWLANDS

- 4.2.16 Taking each of the matters raised by Rowlands Pharmacy in turn, I comment as follows:
- 4.2.17 The fact that Rowlands may or may not now be offering additional services is irrelevant for the purposes of determining an application pursuant to regulation 6(1) (minor relocation)
- 4.2.18 The Panel did not find that it was necessary or desirable to have a pharmacy in close proximity to the Darzi centre. Paragraph 13.10 clearly states that the Darzi centre would increase demand for pharmaceutical services in the neighbourhood as a whole. Since there appears to be no dispute that 112 Wigan Road and 22 Wigan Road are in the same neighbourhood, the proposed site would be in a position to meet that demand in the neighbourhood.
- 4.2.19 In relation to submissions made at the hearing, as stated above, it is the Panel's findings which are relevant, not submissions made. The Panel made no finding on walking distances and whether they were reasonable or not - it is clear that the distance by foot to existing pharmacies from 112 Wigan Road was not a factor which the Panel considered caused an inadequacy in service provision,
- 4.2.20 Paragraph 11.1.8 is a summary of submissions made at the hearing, not findings of fact made by the Panel. The Panel made no finding that it was necessary or desirable to have an application at the parade of shops at 112 Wigan Road, but instead considered that it was desirable to grant the application in order to secure in the neighbourhood the adequate provision of pharmaceutical services.
- 4.2.21 I have already responded to the remaining matters raised by Rowlands.
- 4.2.22 There is nothing within either letter of appeal which should cause the Authority to form a view different to that formed by the PCT (which had all of this information before it when reaching its decision). On behalf of my client I invite the authority to uphold the PCT decision and dismiss the appeals.
- 4.3 **BOOTS UK LTD**
- 4.3.1 Unfortunately we do not appear to have received a copy of the decision letter from Mr John as mentioned in the appeal letter from Morrisons. However, should the PCT have determined to treat the application for full consent and change of proposed location as a minor relocation, then the application would have to meet the required criteria of such.
- 4.3.2 Paragraphs 9.8 and 13.11 of the oral hearing report relating to the original application for preliminary consent (NHSLA Case Ref SHA/14731) would suggest that barriers to movement exist between 112 Wigan Road and the Rowlands Pharmacy.
- 4.3.3 Given that the proposed location is now only a short distance from the Rowlands Pharmacy, the journey and barriers to access between the location of preliminary consent and full consent application will now compare with the journey between 112 Wigan Road and Rowlands; a journey considered by the oral hearing panel to be problematic and a key factor for granting the original application.
- 4.3.4 We therefore submit that barriers to access exist between the location of the full consent application and that specified in the original application.

- 4.3.5 The new location would also not appear to be within the vicinity of the location of the Darzi centre, again a key consideration of the oral hearing panel. We therefore agree with the view of the appellants that the population to be served at the new location will differ from that of the original location.
- 4.3.6 When considering the application the oral hearing panel was of the view that the provision of pharmaceutical services within the neighbourhood was neither wholly adequate nor wholly inadequate, concluding therefore that the application was desirable but not necessary.
- 4.3.7 Physical access to the existing Rowlands Pharmacy, the proposed pharmacy and the proposed Darzi Centre, would appear to be key reasons for the panel reaching this decision. We submit that had the panel had to determine the application based on the new location of 22 Wigan Road, then it is quite possible that a different conclusion would have been reached.
- 4.3.8 In conclusion, we submit that the above application does not meet the required criteria of a minor relocation, and respectfully urge the Appeal Authority to uphold these appeals accordingly.

#### 4.4 CENTRAL LANCASHIRE LPC

- 4.4.1 Central Lancashire LPC would like to make the following comments:
- 4.4.2 It was noted that the PCT rejected the original preliminary consent application. The application was subsequently granted by the Litigation Authority following a hearing. The panel was of the view *that that the granting of the current application will secure adequacy of provision by virtue of its current location*. On applying to the PCT for full consent, the applicant has now given an address for the premises outside of the original location.
- 4.4.3 With regards to the above, does the Appeal Committee, need to have regard to its previous decision with respect to a location close to the proposed Darzi Centre?

### 5 Observations on Representations

#### 5.1 CHARLES RUSSELL ON BEHALF OF MR P MIDDLETON

- 5.1.1 I have already responded to the points raised by Boots and the LPC (regarding the Darzi Centre) in my letter of 3 September 2009. as a result, on behalf of my client, I have nothing further to add to the representations already made.
- 5.1.2 I should be grateful if this appeal could be determined as soon as possible given Mr Middleton's time constraints to commence the provision of pharmaceutical services.

### 6 Preliminary Consideration

- 6.1 The Pharmacy Appeals Committee appointed by the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Committee") had before it the papers considered by the PCT, together with a plan of the area showing existing pharmacies and doctors' surgeries and the site of the proposed pharmacy.
- 6.2 It also had before it the responses to the Authority's own statutory consultations.
- 6.3 The Committee noted that Mr Middleton has applied for full consent following the granting of preliminary consent under regulation 41(1) however, under 41(2), the PCT

have not considered this application site to be the same location. The PCT had gone on to consider the application under regulation 5(1)(b)(ii) and to treat it as if it were a minor relocation under regulation 6. The Committee noted points of appeal in relation to process and the PCT's response in representations. The Committee took no view on this.

- 6.4 On the basis of the information before it, the Committee considered that it was necessary to hold an Oral Hearing, before determining the appeals.
- 6.5 The Committee does not wish to inhibit the Oral Hearing Panel's consideration of this case, but requests the Panel to particularly look at the following:
- 6.5.1 The Panel are requested to recommend with reasons, the most appropriate neighbourhood for the proposed pharmacy.
- 6.5.2 The Panel are requested to advise the distance between the proposed and original premises.
- 6.5.3 The Panel are requested to advise if the proposed move is a minor relocation in accordance with the Regulations.

## 7 Decision

Defer pending receipt of the oral hearing report.

## 8. The Hearing

I was appointed to conduct an Oral Hearing, to take evidence and to make recommendations to the Appeal Committee. The Hearing was held at the West Lancashire Investment Centre, Skelmersdale, on Wednesday 16<sup>th</sup> December 2009. A list of those in attendance is attached at Appendix 1,

### Site Inspection

8.1 Prior to the Hearing, I carried out a site inspection. I had the advantage of having previously read the site description as carried out by the Oral Hearing Panel which had recommended the application for 112 Wigan Road (ref: SHA/14731) and this I found very helpful. This neighbourhood is shown on the plan enclosed with the papers

8.2 I drove around the boundaries of the previously agreed neighbourhood and found the description very accurate. If I had any reservation about the neighbourhood as defined, it would have been the western boundary, as Knowsley Road/Stanley Street were very busy and crossing at the junction with Wigan Road was not easy as, whilst there were traffic lights, there was no pedestrian phase or lights built in.

8.3 However, this possible distinction did not appear to have a major impact on the current appeal, in that both the approved site and the appeal site would be within the same neighbourhood whichever boundary was accepted.. An examination of Wigan Road and its immediate surrounds was obviously more essential.

8.4 . I parked in Tower Hill, opposite the small parade of shops which included 112 Wigan Road, and walked to the proposed site at 22 Wigan Road, measuring the distance by a measuring wheel.

8.5 Insofar as distance was an issue, I found this slightly difficult, having regard to the lack of a precise definition at 112, and a little confusion over 22. Number 112 Wigan Road was one of a block of three commercial premises, being a general store, off-licence and newsagent. It had a ramp access. The adjacent premises comprised a take-away and a launderette.

8.6 All the businesses were in use and there was no evidence of a vacancy. Therefore, for the purposes of this appeal, I walked along Wigan Road to No. 22, commencing at the bottom of the access ramp to No 112, and I measured this distance at 497 metres (the reverse journey was measured at 496 metres) and at a leisurely pace, it took between 7-8 minutes. Wigan Road was mostly flat, although there was a very slight gradient up to and beyond No. 112 to the east.

8.7 I found another problem at No. 22 Wigan Road, which was a small premises with a front door and a window. This premises was immediately adjacent to a Funeral Director (numbered 22C) to the right, and a similar looking property to the left which was numbered 22A. There did not appear to be a 22B. Both 22 and 22A had identical UPVC front doors, which appeared to be fairly new. Both appeared to be residential properties and there were two domestic wheelie bins outside, both containing bags of rubbish.

8.8 Next to 22A was a large empty cafe premises (which I was told by a local resident had closed relatively recently). In fact, further enquiries of an office worker and a postman, revealed that the whole block could be regarded as Number 22, as apart from 22, 22A and 22C, there was a 22D at the rear. Nos. 22 and 22A were confirmed as student lets.

8.9 The cafe might have been 22B, although it was unnumbered. As this might have been the intended location, I also measured the distance from what had been an entrance to the cafe, to the ramp at 112, and this came to 481 metres, The walk took about 5 minutes at a fairly steady pace..

8.10 Wigan Road itself is a busy main road (the A577 ) and is a bus route leading into Ormskirk Centre. Ormskirk centre is pedestrianised, and the buses stop at a bus station on the edge of town. There is also a reasonably sized car park serving the town centre (and opposite which was Rowland's Pharmacy) but these areas were outside the previously defined neighbourhood. I mention these, however, because there was a significant amount of pedestrian traffic to and from the town centre along Wigan Road. I also noted that there appeared to be noticeable amount of young people in this area – perhaps reflecting the presence of the University and High School to the east - but I also saw some young mothers with pushchairs going towards the town centre, as well as some older people..

8.11 The properties on Wigan Road were also of interest – the properties fronting the road were in the main, older terraced houses (some dated from the latter part of the 18<sup>th</sup> C) and quite a few of which appeared to be let as student accommodation. Either side of Wigan Road were a number of newer properties, including an estate known as “Nightingale Walk” which is still being developed and there are other small estates of recent construction.

8.12 A major office building on Wigan Road/Nightingale Walk was the office complex of the Central Lancashire PCT, behind which was the Ormskirk District General Hospital. There were a small number of other commercial premises on this section of Wigan Road, several of which (including a public house) were closed.

8.13 As mentioned, I had read the previous site description and that Panel's view could be endorsed e.g. Ormskirk was a pleasant area and the housing in the surrounding streets and estates were of generally good quality and there were large areas of open land in the vicinity of the University and the High School.

## 9. The Evidence

9.1 **Mr. Wardle** appeared for Mr Middleton, the applicant. He confirmed that the proposed location was indeed the former cafe premises .

9.2 He referred to the legal argument and the regulations that applied. The position was that approval had been given for a preliminary consent but before trade had commenced, his client had applied to re-locate to premises at 22 Wigan Road. He referred to Regulation 41 and its subsections. He submitted that this premises was within the location of the first

premises, and if this was agreed then the current application had to be granted. He gave reasons why he thought the move would be within the location.

9.3 However if it was deemed to be not in the same location, then, in the alternative, the application could be dealt with as a minor relocation under Regulation 5 – and this was the approach taken by the PCT.

9.4 He referred to the information book given to PCT's (recently amended, but as far as minor relocations were concerned, in broadly the same format as the earlier information document) and the advice at pages 87-89.

9.5 In this case, the proposed move was within the same neighbourhood, the same services would be provided and the same population served. These were part of the tests to be applied and reference to necessity or desirability were irrelevant for the purposes of this application. In his submission, this relocation was "minor"

9.6 The PCT had referred to the case of **Suri** but there was the earlier case of **Cumbria** which gave some guidance on a move that might be regarded as minor. The latter case referred to the need to consider a physical barrier such as a motorway or river or railway, even if the geographic distance was short, but in the present case, the distance was short and there was no such barrier to consider.

9.7 This part of Wigan Road was in effect, as "suburb" of Ormskirk, with relatively low density housing and the population served at either site would not be significantly different – people walked into the town centre from the east, and therefore passed both sites.

9.8 The Appellant's concerns were related to the impact of the move but this was an irrelevant factor in this case.

9.10 Mr Wardle was questioned as to whether people from the east side of the neighbourhood would look to a pharmacy at No. 22. He was also asked if he agreed that those people from the east of the neighbourhood would have a significantly increased distance to travel and was there therefore a barrier to those people.

9.11 In answer, Mr. Wardle pointed out that people would walk past both premises and in cases such as this, it was inevitable that some people in a neighbourhood would have slightly further to walk and some would have less. There was no barrier, whether physical or psychological.

9.12 For the PCT, **Mr. Gough** pointed out that they had not approved the preliminary consent application, but having had it approved on appeal, they had to deal with the relocation application. They decided that the location was not the same, but in accordance with the guidance and the regulations they dealt with the application as minor, and approved it.

9.13 In answer to one question, the PCT representatives advised that approximately 150 people worked in the PCT offices in Wigan Road.

9.14 For Rowlands Pharmacy, **Mr. Thomas** submitted that the distance involved was over 500 metres, door to door. He pointed out that the application was specific to number 22, not 22A, 22B or 22C. However, if the distance was accepted at 480 metres, then it should be noted that the PCT had had concerns. He also referred to the Information to PCTs document, at pp. 86/7 – it is stated that if any of the answers to the key questions was "no" then the relocation would not be "minor" and at para 5(iii) reference is made to access. He submitted that access to patients would be affected by the move.

9.15 He drew attention to the earlier appeal report - para 5.1.7. - and the reference to the Darzi centre and this proposed relocation was significantly different as was the population served. There were problems of travelling and the proposed site was well away from the centre of the neighbourhood.

9.16 Mr Thomas was asked a number of questions by Mr. Wardle, particularly with reference to the Regulations and Information Document. He agreed that there was no physical barrier, and it was put to him that the paragraphs at Para. 5 on P. 87 were satisfied. He did not agree this, as there were communication factors, including the distance from the Darzi Centre.

9.17 **Mr. Tucker** said that he had little to add to his written submission and Mr. Thomas' evidence. Morrison's believed that there was difference between the sites and that a sector of the population will have a significant further distance to travel. He referred to the congestion on Wigan Road , particularly at some times of the day. It would be difficult to access services at the new site.

9.18 He answered questions from Mr. Wardle relating to (inter alia) physical barriers (pointing out that not all the junctions had dropped kerbs) and the evidence in the earlier appeal. He also made the point that some people would be further away.

9.19 He was asked about the proper test to be applied (not a necessity or desirability argument) and if he accepted that the relocation was minor.

9.20 The Parties were given the opportunity to sum up, and Mr. Wardle reminded the hearing that it was not a case of looking back to the previous approval – the tests were different. The reasoning behind the decision for 112 were irrelevant. What was relevant was change to No. 22 – it had been agreed that the move was within the same neighbourhood. He referred to the previous advice that a distance of up to 800 metres might be accepted as minor, and whilst the distance had been reduced to 500 metres (he was unaware whilst this distance had been chosen) in the present case the distance was not significant, and in particular, it was the distance between the two premises which had to be considered, not the distance people had to travel.

## 10 CONSIDERATION

10.1 I have had regard to the written documentation, including the Regulations, the Guidance to PCTs and relevant case law, in particular the tests laid down in **Suri** and the comments in **Cumbria**, as well as the oral representation and what I found on the site visit., In some respects, the appellants appeared to be raising aspects of the original application, but of course, that has to be regarded as complete and not within the remit of this hearing.

10.2 A preliminary point was whether this was a move to a new location or a minor relocation. The aspect of new location appears to involve a very subjective analysis and I can understand the PCT approach in regarding this as an application under Regulation 6. Mr. Wardle accepted this as alternative approach and I have therefore dealt with the appeal as an application for a minor relocation,

10.3 My first consideration was the neighbourhood. There appeared to be very little dissension on the point. As I mentioned above, I had the benefit of the neighbourhood description as determined by the Appeal Panel in SHA/14731, and I see no reason to depart from that description (even if I had slight reservations over the western boundary, which would make no difference to the application before me). I have not therefore repeated the detailed description of the neighbourhood, since this did not appear to be an issue in the appeal before me

10.4 The application was for relocation to "22 Wigan Road" - I have identified the difficulty in ascertaining what precisely was to be the location, but in that the block of properties appeared to be all sub-numbers of "22", and the distances were under 500 metres, whichever property had been specified, I do not take issue on the precise number. In fact,

the Applicant's chosen property was the nearest to No. 112, being some 481 metres (the alternative to the residence with the specific number of 22 would be 497 metres).

10.5 In considering distances in the context of minor relocations, I have had regard to the decision of the Court in **Cumbria**, in which it is stated;

*"It might be that although the actual distance between the new and the old premises are small some physical barrier such as a river, railway, or motorway would mean that access to the new premises would be significantly more difficult to reach as far as the population served by the old premises are concerned"*

10.6 Having identified the property, my view is that it is within the same neighbourhood as No. 112. There were no barriers between Nos. 112 and 22 – the properties are on the same side of Wigan Road, and there is a pavement between them which is well lit and reasonably flat (although with a slight gradient to the eastern section). Wigan Road was a busy access road to the town centre for vehicles, but there was a reasonable amount of pedestrian traffic as well. The age group varied, as I saw younger people (both students and schoolchildren) as well as young mothers and older people walking to and from the town centre, and thus passing both Nos 112 and 22. I saw no evidence of a social factor which might also create a barrier.

10.7 Given these factual issues the consequence of the move on those reliant upon the pharmaceutical services needs to be considered. Firstly, there was no question raised as to the services to be provided – in essence, the applicant was taking with him all the services approved under the preliminary consent. Since he had not opened, there would be no interruption of service. The question is, will the current reliant population still reasonably have available to them the pharmaceutical services intended to be provided by the applicant, whether or not they will choose to use that provision. Given the information provided, I conclude that the consequence of the move on the reliant population as a whole will be minor in nature.

10.8 In **Suri and Gompels**, Sir Ralph Gibson said;

*"...Since the proper question is whether the proposed relocation is minor, having regard to the impact of the relocation on the provision of services to the population served in the existing location, it is necessary to ascertain whether there will be any significant change in the provision of services to that part of the population. If the new location is substantially as convenient to those persons as was the old, the move is a minor relocation...  
to ascertain whether there will be any significant change in the provision of services to that part of the population. If the new location is substantially as convenient to those persons as was the old, the move is a minor relocation..."*

10.9 From all of the above I conclude that the applicant will be as conveniently available at the application site to the substantial majority as he would have been at No. 112.

**RECOMMENDED THAT THE APPEALS BE DISMISSED AND THAT THE DECISION OF THE CENTRAL LANCASHIRE PCT BE UPHOLD**

Signed .....

Eric Richards,

Person Appointed

Dated .21<sup>st</sup> .December 2009

### **Appendix**

#### Attendance .List

Mr. Eric Richards,- Person Appointed

Mr. N. Wardle (representing)  
Mr. P. Middleton (Applicant)

Mr.S. Thomas)                      Rowlands Pharmacy  
Ms. H. Halliwell)

Mr. K. Tucker)                      Morrison's Supermarkets  
Mr. F. Frame)

Mrs. C. Martin)                      Central Lancashire PCT  
Mr. S. Gough)  
Mr. K. John)

(Note: Mrs. O'Brien, the LPC representative, was not present)