

REPORT FROM AN ORAL HEARING HELD ON 11 DECEMBER 2009 AT PORTSMOUTH HILTON HOTEL, FARLINGTON IN CONNECTION WITH APPEALS AGAINST PORTSMOUTH CITY PCT'S DECISION TO GRANT AN APPLICATION BY MORRISONS SUPERMARKETS PLC FOR INCLUSION IN THE PHARMACEUTICAL LIST AT MORRISON'S PHARMACY, COMMERCIAL CENTRE, ANCHORAGE PARK, PORTSMOUTH PO3 5UH

REF: SHA/15304

1 Background

- 1.1 By application dated 10 February 2009, Morrisons Supermarkets plc ("the Applicant") applied to Portsmouth City Primary Care Trust ("the PCT") for inclusion in the pharmaceutical list at Morrisons Commercial Centre, Anchorage Park, Portsmouth PO3 5UH. The application and associated documentation is in the paginated bundle (Appendix 1) between pages 1 and 15.
- 1.2 Following circulation of the application and receipt of representations, the PCT considered and decided to grant the application. The decision letter dated 16 July 2009 is at pages 39 to 40b of the bundle and the background reports considered are at pages 16 to 38.
- 1.3 In a letter (at pages 41-42 of the bundle) to the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit"), dated 7 August 2009, Charles Russell LLP on behalf of Quality Pharmacies Ltd (trading as Copnor Pharmacy) appealed against the PCT's decision.
- 1.4 In a letter (at page 43 of the bundle) to the Appeal Unit dated 27 July 2009, Sainsbury's Supermarkets Ltd appealed against the PCT's decision.

2 Preliminary Consideration

- 2.1 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. It also had before it the responses to the Authority's own statutory consultations.
- 2.2 On the basis of this information, the Committee considered it was necessary to hold an Oral Hearing, before determining the appeal. The Committee requested the Panel to recommend with reasons, the most appropriate neighbourhood for the proposed pharmacy and whether the application should be granted in order to satisfy the test in Regulation 12(1).
- 2.3 The Panel was appointed and sat at Portsmouth Hilton Hotel on 11 December 2009. A list of those present is attached at Appendix 2. On the morning of the hearing, it conducted a site visit. Its findings are set out below. It collected two practice leaflets which are at Appendix 3.

3 Site Visit

- 3.1 The Panel inspected the Morrisons Centre. It comprises a large supermarket with about 200 car parking spaces including 15 disabled parking spaces. Adjoining it are a branch of National Westminster Bank, a fish and chip shop and a public house.
- 3.2 Immediately to the north-west of the Centre is a compact area of housing on the eastern boundary of which is a bus stop and a branch of Kirklands Surgery. The latter is presently open only one hour per week. The Panel were driven around this estate noting that the housing was built in the 1980s and that the area was entirely built out. There were few pedestrians in the area, little traffic and many houses had parking spaces as part of their land.
- 3.3 The Panel members understood that the two nearest pharmacies were Copnor Pharmacy and Sainsburys. The Panel set out to walk to Copnor Pharmacy. Instead of crossing over the railway on Norway Road, involving a considerable gradient, the Panel walked south down

Williams Road through the wholly industrial area of Voyager Park. This was partly built up and partly derelict.

- 3.4 The object of the Panel was to cross the footbridge over the railway via an estate road but it turned out that the footbridge had been locked closed in January 1987. Accordingly we walked back to join Dundas Lane and down it towards Burrfields Road, passing a pre-school playgroup and the large newbuilt Admiral Lord Nelson School. We noted an extensive retail park at Ocean Retail Park on the junction of Dundas Lane and Burrfields Road.
- 3.5 The Panel then walked west along Burrfields road and north up Copnor Road to Copnor Pharmacy. We noted the hours were 9-1 on Mondays to Saturdays and 2-6pm on Mondays to Fridays. We were informed by our taxi driver that the clocked distance from Morrisons to Copnor Pharmacy by the most direct road route was 1.6 miles and this was confirmed by the parties. Copnor Road contains a large number of shops and facilities including leisure and professional services.
- 3.6 We were then driven through the remaining industrial parts of the larger neighbourhood noting that building-out was not complete and that several units were empty. There was no more housing in the larger neighbourhood.
- 3.7 We were driven up and down Eastern Road, noting sparse leisure facilities including a golf course and a site for building holiday homes on the sea-side of Eastern Road.
- 3.8 Lastly the Panel was driven to Sainsburys where we noted opening hours for the pharmacy of 0800-2200 on Monday to Friday, 0730-2100 on Saturdays and 1000-1600 on Sundays. A person walking from Anchorage Park to Sainsburys would have to use the rising pavement of Eastern Road along a very busy dual carriageway, over the M27 motorway and up a very busy dual carriageway to the commercial estate where Sainsburys is situated. The clocked distance by this route is 1.5 miles according to our taxi driver and confirmed by the parties.

4 **The Hearing**

4.1 MORRISONS SUPERMARKETS PLC

- 4.1.1 In addition to the matters raised in the application, the letter dated 11 May 2009 at pages 29-30 and the comments on appeal at pages 46-47, Mr. Evans made the following additional points in oral evidence.
- 4.1.2 The neighbourhood should include the industrial areas south of Norway Road because of the commercial activity contained therein that would produce demand for services provided in Anchorage Park. There was a greater proportion of dependent children in this neighbourhood than in the rest of Portsmouth. There is also an increasing proportion of residents in the age group 45-64.
- 4.1.3 The nearest pharmacies to the neighbourhood were agreed to be 1.6 and 1.5 miles respectively from the Morrisons premises. Morrisons had 7 years experience in smoking cessation services and provided a strong service. The company would also provide healthy living services, even if not commissioned by the PCT.
- 4.1.4 Mr Tucker told the Panel that the Council estimated the working population in the neighbourhood to be just under 3000 (in addition to the resident population of 1825 according to the unchallenged information provided by the PCT) to whom pharmaceutical services should be available, both prescriptions and additional services over 7 days per week. The company provided very successful 7-day supervised methadone services and emergency hormonal contraceptive services elsewhere both of which would add to the health of the neighbourhood. In addition a private travel health service would be offered.

- 4.1.5 In reply to the LPC Mr Tucker confirmed that the pharmacy would be open over lunchtime and that the store attracted 20,000 transactions (from an unknown number of customers) per week; nationally most customers travelled less than 1.5 miles to a Morrisons store but he had no special knowledge of the profile for this store.
- 4.1.6 In reply to Sainsburys Mr Tucker confirmed that the pharmacy would be open on Sundays: in the application form he had to stretch 40 core hours over the week and that explained the apparent closure on Sundays and over lunchtime. He would expect fewer prescriptions would be filled on Sundays but expected those customers might come from further afield.
- 4.1.7 Mr Tucker accepted there was no petition in support of the pharmacy and said he did not see the need for a 100-hour pharmacy on the site. The pharmacy would be sited in a side extension for which the company had planning consent and which could be built and fitted out in six months.
- 4.1.8 In reply to the Panel Mr Tucker confirmed that the store currently had 3 modules selling the usual medicines and that the pharmacy would have a separate external door to facilitate getting onto local out of hours rotas. The pharmacy was necessary (or at least highly desirable) because there was no other pharmacy in the neighbourhood.
- 4.1.9 The local GP surgery showed the need for a pharmacy, even more so while the surgery was only very briefly open. The neighbourhood had both an ageing population, a high proportion of children and a large worker population. Access to other neighbourhoods was restricted with a return journey to the nearest pharmacy of more than 3 miles and only 4 pharmacies within two travelling (as opposed “as the crow flies”) miles. These pharmacies mostly have restricted opening hours and inadequate parking facilities.
- 4.1.10 Morrisons would make enhanced services available, if necessary on a private basis, including travel, weight management, health screening and flu vaccination.

4.2 QUALITY PHARMACIES LTD

- 4.2.1 In addition to the matters raised in response to the application which is at pages 21-22, the letter of appeal, and further comments contained at page 52, Mrs. Felstead made the following additional points.
- 4.2.2 There was a bus service between Anchorage Park and the Copnor Pharmacy every 10 minutes on Monday to Saturday and every 20 minutes from Anchorage Park to the Sainsburys pharmacy on Monday to Saturday and every 30 minutes on Sundays. It was suggested by Morrisons that the service was, according to timetables on the bus stop, less frequent but Mrs Felstead a current timetable from the internet showing the times as she stated.
- 4.2.3 Copnor Pharmacy (and other pharmacies in Portsmouth) provide additional services: emergency hormonal contraception, needle exchange, supervised methadone consumption, weight management, smoking cessation, blood pressure monitoring, Medicines Use Reviews (“MURs”) and flu vaccination.
- 4.2.4 The premises had been refitted 3 years ago to provide a modern consulting room. The pharmacy provided a free prescription collection and delivery service 6 days per week from 1-4pm on Monday to Saturday and 6-8pm on Monday to Friday.
- 4.2.5 If Morrisons pharmacy was not open from 1-2pm, it would provide no help to those working in the industrial area. The neighbourhood should be limited to the Anchorage Park residential area which was different in kind to the industrial areas.

- 4.2.6 In reply to Morrisons it was accepted that a notice on the Anchorage Park bus shelter said that low-level access to the bus could not be guaranteed and that an emergency hormonal contraception service on Sundays would be helpful, although it was provided in other parts of Portsmouth. Mrs Felstead was unable to say how many MURs or flu vaccinations Copnor Pharmacy had carried out this year. She was adamant that the delivery service would not be withdrawn; a new vehicle had just been bought for deliveries.
- 4.2.7 In reply to the LPC Mrs Felstead confirmed that the pharmacy had received no complaints and indeed some local GPs had asked permission to advertise her delivery service in their practice information.
- 4.2.8 In reply to the Panel Mrs Felstead confirmed that the biggest uptake for the delivery service was for patients of the local GP practice. It was used particularly for repeat prescriptions so that patients did not need to visit their GPs monthly. The service was free and not restricted to persons with impaired mobility. The PCT commissioned smoking cessation, emergency hormonal contraception, weight management, supervised methadone use and possibly needle exchange service from the Pharmacy.
- 4.2.9 Students needing emergency hormonal contraception on Sundays would probably go to Boots on Commercial Road.

4.3 SAINSBURY'S SUPERMARKETS LTD

- 4.3.1 In addition to the matters raised in its letter of 15 April 2009 and letter of appeal which are at pages 20 and 43 of the bundle, Mr. Gilder made the following additional points in oral evidence and in answer to questions.
- 4.3.2 He had no view on the definition of neighbourhood. Anchorage Park has adequate access to pharmacy services and there is no evidence to the contrary. He believed that Sainsbury's Pharmacy provided a smoking cessation service but it was confirmed by the PCT that it did not commission such a service from Sainsbury's although the new manager had recently asked the PCT to provide training for that service.
- 4.3.3 Anchorage Park is an affluent area with high car ownership. Many residents choose to shop at Sainsbury's as it has a wider range of goods than Morrisons. They also use the Sainsbury's pharmacy for their prescriptions. The pharmacy has had no complaints but has received compliments in patient surveys. Collection and delivery services were not regarded as important.
- 4.3.4 In reply to Morrisons Mr Gilder said that his pharmacy was the result of a minor relocation from Drayton and agreed that it was in a different neighbourhood from Anchorage Park although the boundary of the M27 could be crossed. He was not aware of the percentage car ownership but considered the housing to be affluent in style. If 40% of households had no car or one car, this was not evidence of the restriction of access to services. He did not know the number of patients for any of the commissioned services.
- 4.3.5 There was no evidence of the inadequacy of services and there was adequate access to services outside the neighbourhood. If the PCT perceived a need in its Pharmaceutical Needs Assessment ("PNA") in 2005, it could have approached contractors to meet that need, but had not done so.

4.4 HAMPSHIRE & ISLE OF WIGHT LPC

- 4.4.1 In addition to the comments made in the letters of 19 April 2009 (pages 23-25) and 21 September 2009 (page 51), Mr. Warner made the following additional points in oral evidence and in answer to questions.

- 4.4.2 The Anchorage Lodge Surgery was a branch of the Kirklands Surgery. The fact that it was presently limited to one hour opening per week showed that there was no unfulfilled need for services that would promote business in a pharmacy in Anchorage Park.
- 4.4.3 If there was no pharmacy at Morrisons, customers could access other pharmacies at any time.

5 Consideration

- 5.1 The Panel was mindful of the test to be applied under Regulation 12(1) of the Regulations and the factors to which it must have regard under Regulation 12(2). It also had to assist the Department of Health Guidance which was revised in September 2009.
- 5.2 The Panel firstly considered the issue of neighbourhood.
- 5.3 The only issue in relation to the neighbourhood is the location of the southern boundary. The railway (with two vehicular crossing points), the M27 (to the immediate south of which there is in any event an area of sea or lake and mud rendering any further development impracticable) and Eastern Road provide highly impermeable boundaries.
- 5.4 The housing at Anchorage Park is compactly planned and homogeneous. The rest of the neighbourhood proposed by the Applicant is commercial (including retail and leisure facilities) and industrial and in various stages of development and occupation. Figures from the Local Authority suggest that the working population in the area is around 3000.
- 5.5 The Panel members thought that these workers would be likely to gravitate for shopping (including, if available, pharmacy items) to Morrisons rather than drive along busy roads to get to Sainsbury's or travel at least a mile into the North End of the City with, we were informed, its notorious traffic congestion.
- 5.6 The Panel concluded it would adopt the Applicant's suggested neighbourhood edged red on the plan at Appendix 4 so that the southern boundary would be Burrfields Road between Copnor Road and Eastern Road.
- 5.7 Within the neighbourhood as defined, there is no pharmacy and it follows that there is no choice of pharmacies. That, however, is just one factor to which the Panel must have particular regard, and it is weighed in the balance with other factors.
- 5.8 The Panel is satisfied it is impracticable for any but the physically fittest to walk a return journey in excess of 3 miles to either Copnor Pharmacy or Sainsbury's. The former would involve a walk along busy roads and the latter a walk along an extremely busy and noisy dual carriageway.
- 5.9 The Panel also notes that there are elements of both an ageing population and an increasing concentration of children and that car ownership, whilst high, is not universal. If the sole family car is away from home during the day with the main breadwinner, there is no effective access to pharmacy services for the rest of the family.
- 5.10 Although there is a regular bus service to both Copnor Pharmacy and Sainsburys, this would not be suitable for parents with young children, those of limited mobility or with heavy shopping. The Panel was of the view that it would be reasonable to expect part of the population of the neighbourhood who had easy access to a car or were fit and otherwise able to take a bus to access services outside the neighbourhood and thus the provision could not be said to be wholly inadequate.
- 5.11 The Panel was informed by the PCT that the Anchorgate Surgery was intended to return to thrice-weekly opening on the return from sick leave of one of the GPs. Since there is no fixed date for that return to work we take into account only as a marginal matter that this would be likely to increase demand for access to a local pharmacy service.

- 5.12 The Panel also took into account the PCT's 2005 PNA that reflected a population density for Portsmouth second only to that of London and the inequity of provision in the neighbourhood when compared to the rest of Portsmouth. The PNA had recommended the provision of a pharmacy in the neighbourhood and, indeed, the Committee had upheld a decision of the Portsmouth & South East Hampshire Health Authority in respect of the same premises and identifying the same boundaries in decision N(a)/1633 on 23 December 1999.
- 5.13 The Panel noted that there was no evidence of complaints by the residents or workers of the neighbourhood but did not regard that as conclusive evidence of the adequacy of existing services.
- 5.14 The Panel having considered all evidence, both written and oral and having undertaken a thorough site visit, determined that it could not be said that pharmaceutical services are wholly adequate in or to the neighbourhood.

6 Recommendation

The Panel members unanimously recommend (a) that the boundaries of the neighbourhood should be the M27 to the north, Copnor Road to the west, Burrfields Road to the south and Eastern Road to the east and (b) that it could not be said the pharmaceutical services are wholly adequate in the neighbourhood as defined and it is desirable/expedient to grant the application. The appeals should therefore be dismissed.

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Mark Mildred

Chairman

17 December 2009

APPENDIX 2

ORAL HEARING ATTENDANCE LIST

11 DECEMBER 2009

SHA/15304

The Panel

Professor Mark Mildred Chairman
Professor Christopher Dunn

Mr Barry Knox

The Applicant

Mr. K Tucker and Mr D Evans Morrisons Supermarkets plc

The Appellants

Mrs. L Felstead Quality Pharmacies Ltd (trading as Copnor Pharmacy)

Mr. D Gilder Sainsbury's Supermarkets Ltd

Interested Parties

Mr. G Warner and Mr M Holden Hampshire & Isle of Wight LPC

Mrs K Hovenden Portsmouth City PCT

Mr N Ford Hampshire & Isle of Wight Practitioner and Patient Services Agency

APPENDIX 3

