

2 February 2010

REF: SHA/15495

**APPEAL AGAINST BEDFORDSHIRE PCT DECISION TO REFUSE ASSURA PHARMACY LTD'S APPLICATION FOR PRELIMINARY CONSENT PRIOR TO INCLUSION IN THE PHARMACEUTICAL LIST AT CONISTON ROAD, SOUTHCOTT, LEIGHTON BUZZARD LU7 2PJ (APPROX)**

**1 The Application**

By application dated 26 May 2009, Assura Pharmacy Ltd ("the Applicant") applied to Bedfordshire Primary Care Trust ("the PCT") for preliminary consent prior to inclusion in the pharmaceutical list at Coniston Road, Southcott, Leighton Buzzard LU7 2PJ (approx). In support of the application it was stated:

- 1.1 The applicant's proposed neighbourhood is outlined (in blue) on the enclosed map, of which the boundaries are:

Northern Boundary: From railway line across open land north of Knaves Hill.

Eastern Boundary: Railway line.

Southern & Western Boundary: A418 (Wing Road) and the A4146 (a recently completed dual carriageway not yet marked on the map, running from Wing Road to Leighton Road).

- 1.2 The neighbourhood is based on Linslade and mirrors Southcott Ward. The population of the neighbourhood was 6,900 based on the 2001 census. The neighbourhood currently doesn't contain a pharmacy and access from the proposed location to current pharmacies is difficult due to the distances involved, with the nearest pharmacy approximately 1.5 miles away by the most practical route. The geography of the area includes gradients and poor pedestrian footpaths causing issues for the elderly, infirm and the population without access to a car.
- 1.3 In addition to the substantial current population there are plans for further residential and commercial developments which will substantially increase the reliant population within the neighbourhood.
- 1.4 The proposed site is situated at the retail and community centre at Coniston Road. A pharmacy situated here would alleviate access issues for the residents living in and around the Linslade neighbourhood and satisfy current and proposed future demand for pharmacy services.
- 1.5 The proposed site is situated in a community square location with other essential services which are utilised by the local population namely a Tesco Express which is open 119 hours per week, Chinese take away, Hair dresser, sports injury clinic, cash point. The Southcott Village Community Hall is located opposite.
- 1.6 Within the Linslade neighbourhood there are 2 primary schools.
- 1.7 The granting of this application will secure adequate pharmaceutical services in the neighbourhood.

## 2 The PCT Decision

The PCT considered and decided to refuse the application. The decision letter dated 28 October 2009 states:

### Definition of the Neighbourhood

- 2.1 The Panel considered the description of the neighbourhood and debated as to what formed the eastern boundary of the neighbourhood. The Panel agreed that the river should form the eastern boundary and agreed that the Tesco Pharmacy at Vimy Road, Leighton Buzzard should be in the neighbourhood.
- 2.2 The Panel noted that there had been a previous application in the same area and accepted the definition of the neighbourhood in the report as it was consistent with the previous application. The definition agreed as the Town of Linslade, with the River Ouzel to the east, Mentmore Gardens, Finch Crescent, Wyngates, Southcott Village, Chelsea Green and Derwent Road to the South, Derwent Road, Cotswold Drive, Malvern Drive, and fields to the west, Stoke Road, Rothschild Road to the north, including Bossington Lane and the Martins Drive.

### Is this application necessary?

- 2.3 There are no complaints regarding the existing provision of pharmaceutical services in the area and the applicant had not provided any evidence that the current provision of pharmaceutical services is inadequate.
- 2.4 The application was therefore not considered to be necessary.

### Is this application expedient?

- 2.5 The Panel noted that there is one Pharmacy and one GP surgery within the neighbourhood, on the eastern edge of the neighbourhood.
- 2.6 The application was therefore not considered expedient.

### Overall Conclusions

- 2.7 The decision of the Panel was as follows:
- 2.7.1 The application was not considered to be necessary.
- 2.7.2 The application was not considered to be expedient.
- 2.8 The Panel therefore rejected the application.

## 3 The Appeal

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit"), dated 6 November 2009, the applicant appealed against the PCT's decision. The grounds of appeal are:

- 3.1 It is submitted that the PCT has placed too much weight on the previous application and in particular the previously defined neighbourhood.
- 3.2 Travelling from the application site eastwards the first barrier to movement encountered (and so it is submitted the most appropriate eastern neighbourhood boundary) is the train line. Should the train line not be considered a barrier to

movement then the Grand Union Canal also separates the neighbourhood from the existing pharmacies. The PCT has given no reasons why it did not consider either the train line or canal to be suitable neighbourhood boundaries.

- 3.3 The PCT does not appear to have considered whether there is a reasonable choice of pharmacy services in the neighbourhood. Had they done so (regardless of neighbourhood definition) they would have found that there was no choice of pharmacy provider in the neighbourhood.
- 3.4 It appears that the PCT's only consideration with regards to expediency was whether the neighbourhood contained a pharmacy or not. It is submitted that had the PCT considered other elements, such as accessibility, choice and service provision the PCT would have found that the application was at least expedient.
- 3.5 The PCT appear to have given no weight to the comments made during the consultation process by the Bedfordshire Local Involvement Network, which provides support for the application. The comments also raised specific problems regarding accessing the town centre.
- 3.6 It is submitted that this application is both necessary and desirable and the applicant would respectfully ask that the PCT's decision is overturned.

#### 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.

##### **Bedfordshire Primary Care Trust**

- 4.1 Assura's grounds of appeal refer to the definition of the neighbourhood arguing that the PCT had placed too much weight on the previous application's definition of the neighbourhood. The Panel had considered what would form the eastern boundary of the neighbourhood but as the population had not grown and there had not been any significant changes in the area since the previous application in June 2008, the Panel accepted the previous definition.
- 4.2 The applicant also refers to consideration of reasonable choice in the neighbourhood. The Panel were content that there is adequate provision of pharmaceutical services within the neighbourhood and that there are other pharmacies close by in Leighton Buzzard town centre for the public to use if they preferred. The Panel also noted that the PCT had not received any complaints about the provision of services in the neighbourhood.
- 4.3 The Panel had considered the response to the application from the Bedfordshire Local Involvement Network but noted that the comments contained in the letter were similar to those made in the response to the June 2008, application, and the Panel also noted that the comments were non specific.
- 4.4 The Panel remains convinced that their judgement was correct and reasonable.

##### **Bedfordshire Local Pharmaceutical Committee**

- 4.5 Bedfordshire LPC, in a letter dated 17 July 2009 in response to the notification by Bedfordshire Primary Care Trust, supplied a list of pharmacies situated within a distance of between 0.9miles and 1.2miles of the application site. The list set out in detail the opening times and the choice of advanced and enhanced services

available. One pharmacy falls within the PCT defined neighbourhood and three pharmacies are on the High Street adjacent to the neighbourhood.

- 4.6 The PCT, in arriving at its decision, would have considered that information.
- 4.7 The LPC notes the “uncontroversial proposition” set out by Lord Justice Lawrence Collins in the matter of The Queen on the Application of Assura Pharmacy Ltd and the NHS Litigation Authority:

*“the mere absence of a factor in the text of a decision does not necessarily mean that it was not considered.”*

- 4.8 Lord Justice Collins accepted the view of Justice Gary Hickingbottom who, in his review of the Pharmacy Appeal Committee decision on the same matter stated,

*“...Even where there is a limited or even no choice, it is still open to a decision maker to find that, taking all of the relevant factors into account, the provision of pharmaceutical services in the neighbourhood was adequate”.*

- 4.9 Bedfordshire LPC agrees with the PCT that the River Ouzel is logical eastern boundary of the neighbourhood and naturally separates the town centre neighbourhood from adjacent Linslade/Southcott.

#### **Cox & Robinson Pharmacy**

##### Neighbourhood

- 4.10 The PCT is correct in not accepting the railway line or canal as boundaries as there are good paths and bridges. The Area described by Assura is fully developed and has a static population. The nature of the town is such that the Pharmacy at Tesco is well placed to serve this population. In addition there are four other well placed Pharmacies to serve the town of Leighton Buzzard/ Linslade.

##### Adequacy

- 4.11 Assura have indicated accessibility is of concern. However, access to service at all the pharmacies in Leighton Buzzard is good. The nearest pharmacy to the proposed location is Tesco Pharmacy open from 8.00am - 8.00pm Monday-Sturday and offering a Sunday service from 10.00am-4.30pm giving excellent long hours of access for all residents of Leighton Buzzard.

##### Choice

- 4.12 C&R view of the neighbourhood is that the provision of services at Tesco and the additional contractors give adequate choice.

##### Service Provision

- 4.13 Assura Pharmacy gives no indication of why they believe there is an inadequacy of service provision.

##### Conclusion

- 4.14 There is no inadequacy of service; therefore the application is not necessary or desirable.

#### **Boots UK Ltd**

- 4.15 Boots agree with the PCT decision to reject the application and their reasoning.

- 4.16 There are five pharmacies in Leighton-Linslade, which are located in close proximity to the five GP surgeries in the area, offering patients a choice of both provider and services.
- 4.17 There is no evidence to suggest that these pharmacies cannot adequately serve the neighbourhood or that patients are experiencing any difficulties in accessing them.
- 4.18 The applicant's proposed opening hours are until 1pm on Saturday afternoon and do not offer patients anything different to those already available in the area.
- 4.19 The area is affluent with high car and home ownership and has in general a mobile and healthy population that typically places lower demands of pharmaceutical services. People who consider their health to be good at 79.6% is above both the local (70.3%) and national averages. Those who consider their health as not good at 4.1% and those with a limiting long-term illness at 9.5% are also considerably below the local and national averages.
- 4.20 Also, the working population in the area travels on average 21.5 km to work and may access services outside the area, close to their place of work.
- 4.21 In conclusion, Boots submit that the above application does not meet the required criteria of regulation 12(1), and respectfully urge the Appeal Authority to dismiss this appeal accordingly.

#### **Assura Pharmacy Ltd (Applicant/Appellant)**

##### Neighbourhood

- 4.22 Assura proposed that the neighbourhood should be based upon Linslade, with the following boundaries:
- Northern boundary: the open land.
- Eastern boundary: The train line.
- Southern & western boundary: the Leighton Buzzard bypass (A4146).
- 4.23 The PCT has also agreed that the neighbourhood should be the town of Linslade, but has extended the eastern boundary to the River Ouzel.
- 4.24 Linslade was historically a separate town from Leighton Buzzard, but has since merged into one large town. Linslade has however kept much of its identity and facilities.
- 4.25 The maps supplied by the PCT clearly identify Linslade as a separate area from Leighton Buzzard in the east.
- 4.26 It is submitted that the train line forms a significant barrier to movement for residents of Linslade travelling to Leighton Buzzard and so is the most appropriate neighbourhood boundary.
- 4.27 Should the train line not be considered a suitable boundary, then it is submitted that the Grand Union Canal creates the next barrier to movement and so either should be preferred to the PCT's proposed eastern boundary the River Ouzel.
- 4.28 If the train line is not considered an appropriate boundary then it is submitted that using the canal would be more appropriate than the river. The Ordnance Survey map supplied clearly shows that the canal marks a change in land use from mainly residential in the west to commercial buildings to the east.

- 4.29 The train line has limited crossing points and for much of its length also forms a ward boundary, as does the entire length of the Canal. The River Ouzel is not a ward boundary.
- 4.30 The Assra neighbourhood is almost identical to Southcott Ward, which had a resident population of 6,900 based on the 2001 census. It is submitted that the population figure today is likely to be in excess of 7,000 residents.
- 4.31 The Assura neighbourhood contains a range of typical neighbourhood facilities including a large Tesco Express (open from 6am to 11pm 7 days a week) and three schools, community centre, physiotherapist and hairdressers, most of which are located at or close to the application site.
- 4.32 Should the PCT's neighbourhood be accepted then this also contains a large health centre serving over 13,000 patients, several supermarkets and other typical town centre shops and services.

#### Access to Pharmacies

- 4.33 The distance to the nearest pharmacy (Tesco) is approximately 2.5km one way, regardless of whether it is in the neighbourhood or not, this distance alone makes accessing it problematic for many.
- 4.34 If the Tesco pharmacy is found to be within the Linslade neighbourhood it is submitted that, as it is located on the eastern boundary, accessing it for the majority of the neighbourhood requires a considerable journey. The proposed location of the Assura Pharmacy is in the centre of the neighbourhood and near to existing facilities, such as the Tesco Express store. This location will ensure easy access for the entire neighbourhood, regardless of definition.
- 4.35 In addition to the distance the western part of the neighbourhood is significantly higher than the area around the Canal and River. This ensures that currently people making a return journey from the Tesco pharmacy must travel up a long incline.
- 4.36 Due to the radial road layout there is just one road (A4146 Leighton Road) into the central area around the Tesco Pharmacy. This road suffers from significant congestion making access to the Tesco pharmacy and Leighton town centre difficult. The Town Councillors have stated:

*The 'peak time' traffic flow along the A4146 — Leighton Road— West Road Billington Road is very congested. The Town Councillors of Leighton Linslade, particularly, Cllr Brian Sadler, have expressed their frustration at the ongoing traffic congestion and traffic delays during the evening and morning peak periods. Local residents and a number of the Town Councillors believe the following:*

*That the traffic is at a virtual standstill during the peak periods.*

*That there are 'too' many traffic signals and pedestrian signals along the route.*

*A number of the pedestrian signals may be disconnected to reduce the traffic congestion.*

- 4.37 The Leighton Linslade Town Council website states:

*Congestion is a major issue for the town with journey times and delays increasing from a combination of inadequate roads, poorly designed junctions and intersections, ineffective management of traffic flows and steadily increasing volume of traffic. This pressure is set to worsen substantially as the town expands.*

*Specific issues are:*

*20,000 vehicles using West Street (the turning for Tesco) each day.*

*HGVs ferrying minerals across town.*

*Very high proportion of school journeys by car.*

*Under and fragmented bus services.*

*Inaccessible railway station.*

*Unsuitable Victorian/Edwardian streets as key arterial routes.*

*Uncoordinated traffic lights disrupting flows.*

- 4.38 The public transport serving the Linslade neighbourhood is fairly limited and also suffers the same problems with the traffic congestion highlighted above.
- 4.39 Assura accepts that the opening of the bypass may have eased some of the traffic issues, but has certainly not resolved the problems of travelling from the neighbourhood to the centre of Leighton Buzzard, especially at peak times.
- 4.40 It is submitted that given the distance, inclines, congestion and limited bus service accessing the nearest pharmacy (regardless of whether it is in the neighbourhood or not) is not easy for many and at the very least is inconvenient.
- 4.41 The courts have made it perfectly clear that convenience is a ground to consider. Beldam L J observed in *ex parte E. Moss Ltd*, Transcript p22, that “*convenience is not an irrelevant consideration*”, the relevant passage is quoted below;
- “To decide whether it is desirable to grant an application in order to secure adequate provision of services in a neighbourhood, the Authority has to compare the advantages with the disadvantages of doing so by using its judgment based on local knowledge and observation, present circumstances and future expectations. Convenience is not an irrelevant consideration.”* (emphasis added).
- 4.42 The comments received during the consultation process from the Bedfordshire LINKs clearly demonstrate the residents support for a pharmacy in Linslade and highlights some of the issues of accessing the town centre pharmacies.

#### Choice in the Neighbourhood

- 4.43 Under the (Pharmaceutical Services) Regulations 2005, reasonable choice of both contractor and services have been included as a matter which the PCT and Appeal Unit are obliged to have ‘particular regard’ to.
- 4.44 In the recent review of the Control of Entry Regulations, the government specifically set out the reasons for the explicit inclusion of choice in the 2005 Regulations. The reasons included:
- 4.44.1 Promote consumer choice and harness the benefits of increased competition.
- 4.44.2 Improve further the accessibility and convenience of pharmaceutical services.
- 4.45 Choice is part of the overall test of adequacy, but nevertheless must be considered in each application for inclusion in the Pharmaceutical List.

- 4.46 There is no choice of pharmacy services in the proposed neighbourhood, regardless of definition.
- 4.47 It is important to note that there is no requirement for an Applicant to 'prove' that there is a demand for choice in the neighbourhood. The Regulations state that the PCT and Appeal Unit shall have regard in particular to whether or not reasonable choice exists.
- 4.48 The amount of weight to be given to the issue of choice is for the Appeal Unit to decide. It must however be noted that the amount of weight must be decided upon after consideration of the particular neighbourhood and the demand for services (or a choice of services). In particular it must be noted that the amount of weight given to this issue must be based on sensible and defensible criteria.
- 4.49 It is submitted that in an urban area with a significant resident population of between 7,000 and 11,500 (depending on neighbourhood definition) and a long distance to the nearest pharmacy, the issue of 'reasonable choice' should be an important consideration for the appeal unit.

#### Service Provision

- 4.50 As indicated on the application form Assura Pharmacy will provide all the locally enhanced pharmacy services commissioned by the PCT. In addition to these services, where there is a need, Assura Pharmacy provides the following services from their pharmacies:

Lipotrim Weight Management Programme.

Gastroview 3-in-1 Indigestion test.

Free Prescription Collection & Delivery Service.

Blood Pressure Monitoring.

Cholesterol Testing.

Diabetes Testing.

Pregnancy Testing.

- 4.51 All pharmacists employed will be qualified to provide Medicine Use Reviews (MUR's) and the premises fitted out in such a way to provide a private consultation room. Assura Pharmacy ensure they have more than adequate staffing and second pharmacist cover to enable the delivery of MUR in a professional manner from dedicated consulting rooms. The pharmacy will also be fitted with the relevant IT connectivity to enable electronic transmission of prescriptions.

#### Conclusion

This application is both necessary and desirable to secure adequate pharmaceutical services in the neighbourhood for the following reasons:

- 4.52 The neighbourhood proposed by Assura does not contain a pharmacy. Even if the larger PCT neighbourhood is accepted there is no choice of services or provider.
- 4.53 The nearest pharmacy is located approximately 2.5km away, a journey that will involve inclines for many residents.

- 4.54 The route to the nearest pharmacy suffers from traffic congestion, which affects both car owners and users of public transport.
- 4.55 The application site is in the centre of the Linslade, ensuring easy access for the entire neighbourhood and is near to the existing neighbourhood facilities.
- 4.56 The granting of this application will remedy all the above issues and secure adequate pharmaceutical services in the neighbourhood.

## 5 Consideration

- 5.1 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.
- 5.2 It also had before it the responses to the Authority’s own statutory consultations.
- 5.3 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 5.4 The Committee had regard to Regulation 12(1), the necessary or expedient test, and, in considering that test, had regard in particular to Regulation 12(2), (3) and (4) of the National Health Service (Pharmaceutical Services) Regulations 2005 (as amended) (“the Regulations”).
- 5.5 The Committee dealt with the application by way of reconsideration of all the issues.
- 5.6 The Committee noted this was an application for preliminary consent prior to inclusion in the pharmaceutical list at Coniston Road, Southcott, Leighton Buzzard LU7 2PJ (approx).
- 5.7 The Committee noted references to a previous application in the area of the current application. However, the Committee had no knowledge of the PCT’s decision as it had not been subject to appeal.
- 5.8 The Committee noted the PCT’s defined neighbourhood for the proposed pharmacy as described at paragraph 2.2, had been disputed on appeal. The applicant maintained the eastern boundary should be the railway line rather than the River Ouzel. Whilst Linslade and Leighton Buzzard had now merged into one town, Linslade maintained much of its identity and facilities. In their response to the appeal, Cox & Robinson stated neither the railway line nor the canal were neighbourhood boundaries. The LPC agreed the River Ouzel as defined by the PCT, was the logical eastern boundary. The Committee had considered the various suggestions for the eastern neighbourhood boundary. The alternatives put forward by the PCT and interested parties, lacked supporting information. Although the applicant had noted a change in land use from mainly residential in the west to commercial buildings in the east that in itself was not a conclusive indicator that the neighbourhood for the applicant’s proposed pharmacy ends at that point. The Committee noted that for much of its length, the Railway line was a ward boundary, and has limited crossing points. Overall, the Committee considered the information provided weighed towards adoption of the railway line as the eastern neighbourhood boundary. After having considered the information in respect of the application, the Committee decided to adopt the neighbourhood proposed by the applicant in their representations at paragraph 4.22.
- 5.9 The Committee noted the population of the neighbourhood was of not insignificant size being in the order of 7,000 residents. The Committee had no reason to doubt Boots claim that the population is affluent and healthy, the percentage of those describing their health as good, being above both local and national averages. Whilst

the Committee accepted that a healthier population generally has lower demands for pharmaceutical services, that factor alone, did not mean that the proposed pharmacy was neither necessary or expedient to secure the adequate provision of pharmaceutical services.

- 5.10 The Committee noted the applicant's reference to their neighbourhood containing a 'typical' range of neighbourhood facilities located at or close to the application site. Whilst noting the facilities are limited in both number and range, the Committee had no reason to doubt that the facilities would be used by the population during the course of their everyday lives.
- 5.11 The Committee noted there are no existing pharmacies and therefore no choice of pharmaceutical services or services provider in the neighbourhood. There are no GP surgeries.
- 5.12 The Committee noted the PCT's comment that there have been no complaints regarding existing provision of pharmaceutical services. However, the Committee was of the view that lack of complaints was not necessarily a reliable indicator that existing services are adequate.
- 5.13 The Committee considered the ease with which the population in the neighbourhood are able to access existing pharmaceutical services. The Committee noted the applicant's claim that the PCT appear to have given no weight to the comments made during consultation by Bedfordshire Local Involvement Network in support of the application. It was said the comments also raised specific problems regarding accessing the town centre. The PCT responded that the LINK's comments were not specific and similar to those made in response to the June 2008 application. In their response to the appeal, Boots stated there was no evidence to suggest that patients are experiencing any difficulties in accessing existing pharmacies not least because of high car ownership. In their representations on appeal, the applicant had referred to limited crossing points over the railway line which the applicant regarded as a significant barrier to movement. There were various distances provided to the nearest pharmacies however even at 0.9 miles as suggested by the LPC, the distance might not be regarded as reasonable. The Committee noted information provided by the applicant regarding the A4146 Leighton Road into the central area around the Tesco pharmacy and significant traffic congestion. Public transport serving the Linslade area was said to be 'fairly limited'. For those people in the western part of the neighbourhood, the return journey from the Tesco store would require negotiating a long incline. The Committee was persuaded that the applicant had been able to demonstrate that particularly for those on foot, but also for those using public transport or their own vehicle, access to existing services was less than reasonably convenient.
- 5.14 The Committee noted the applicant's proposed services and opening hours. In the absence of a pharmacy in the neighbourhood, the Committee considered these would be of benefit to the population.
- 5.15 In the Committee's view, taking into account the circumstances considered pertaining to the neighbourhood in question, balancing absence of a pharmacy within that neighbourhood with the provision of pharmaceutical services outside the neighbourhood, in particular by way of access and a reasonable choice of provider, the Committee determined that on the spectrum of adequacy, pharmaceutical services were not currently secured to the extent that it was at least expedient to grant the application.

## 6 Decision

The Committee was of the view that the proposed pharmacy was expedient to secure the adequate provision of services in the neighbourhood. Accordingly the Committee allows the appeal.

**Ray Bushell**  
**Appeal Officer**

A copy of this decision is being sent to:

Ms N Chatergoon, Assura Pharmacy Ltd – Applicant/Appellant  
Mrs J Bradley – Bedfordshire PCT  
Mr C Friedland – Bedfordshire LPC  
Mr S Allan – Cox & Robinson Pharmacy  
Mrs K Lockton – Boots UK Ltd