

23rd December 2009

REF: SHA/15384

APPEAL AGAINST NORTHAMPTONSHIRE TEACHING PCT DECISION TO REFUSE AN APPLICATION BY THURSFIELD & CO LTD FOR MINOR RELOCATION UNDER 500 METRES, FROM 1 SCHOOL LANE, KETTERING NN16 0DH TO 63-65 GOLD STREET, KETTERING NN16 8JB

1 The Application

By application dated 19th June 2009, Thursfield & Co Ltd ("the Applicant") applied to Northamptonshire Teaching Primary Care Trust ("the PCT") for minor relocation under 500 metres, from 1 School Lane, Kettering NN16 0DH to 63-65 Gold Street, Kettering NN16 8JB. In support of the application it was stated:

- 1.1 This is an easy journey along School Lane, then turn right onto Silver Street and then left onto Gold Street.
- 1.2 The two sites are within the same neighbourhood which is bordered to the north and east by the A4300. To the west by Northfield Avenue and to the south by Bowling Green Road.

2 The PCT Decision

The PCT considered and decided to refuse the application. The decision letter dated 24th August 2009 states:

- 2.1 The decision, and the reasons for the decision, is detailed below in the following extract from the minutes of the meeting:

Extract from Minutes from Pharmacy & Dispensing Committee Meeting held on 10 August 2009

- 2.2 This was an application for a minor relocation under 500m - Regulation 5(1)(b)(ii) and 6(1) and (3). An alternative neighbourhood structure had been suggested by the applicant, since the two premises were currently in different NHSN neighbourhoods.
- 2.3 RA outlined the fact that the committee needed to consider two issues:
- 2.4 The applicant's proposal for a new neighbourhood to be defined.
 - 2.4.1 The Committee agreed that neighbourhoods had originally been defined primarily by considering natural barriers eg: major roads, rivers, railway lines etc. It was considered that Queen Street, within the proposed neighbourhood did not meet this criteria.
 - 2.4.2 However, the Committee noted the date of the last neighbourhood review and agreed that the neighbourhoods needed to be reconsidered due to the ongoing re-development of Kettering town centre. The Committee discussed at length the possibilities for re-defining the boundaries, examined the detailed site visit report and agreed that the neighbourhoods K2/K4/K5 should all be redefined.
 - 2.4.3 Decision: The neighbourhoods were redefined as follows; K2 would be extended and now be bounded to the north by Lower St/Northall St/Newland

St, Silver St and then Montague St leading to Windmill Avenue to the east, St Mary's Rd, Bowling Green Rd to the south, leading to Northfield Avenue to the west.

2.4.4 Neighbourhood K4 would now be extended and bounded by Blandford Avenue to the north, Mitchell St, Weekley Glebe Rd and Stamford Road to the east, Montague St, Silver St, Newland St, Northall St and Lower St to the south and Northfield Avenue to the west.

2.4.5 Neighbourhood K5 would no longer be in existence.

2.5 The application for a minor relocation.

2.5.1 The Committee was aware that having re-defined the neighbourhoods, the applicant's premises and the proposed site were now in the same neighbourhood. However, it was agreed that the Committee was unable to approve the application since this would mean that 2 contracts would exist with the same address. This is not permissible.

2.6 Decision: The application was refused.

3 The Appeal

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit"), dated 21st September 2009, the applicant appealed against the PCT's decision. The grounds of appeal were:

3.1 The PCT did not consider all of the criteria relating to a minor relocation in determining the application. The PCT refused the application on the fact that the proposed site already had an NHS Contract. The applicant submits that this is not a matter upon which the PCT should have taken into consideration as part of the application.

3.2 It is not the applicant's intention to operate two NHS Contracts from the same site but that will be dealt by the applicant separately. A Minor Relocation should be considered as a 'matter of fact' and if the relevant criteria of being in the same neighbourhood, a short distance, no barriers, and serving essentially the same population are satisfied then the application must be granted.

3.3 The PCT has not provided any reasons that these criteria were not met and therefore, the application must succeed.

3.4 The relocation is only about 150 metres and is within the same neighbourhood as defined by the PCT and there are no barriers between the two sites.

3.5 For the reasons submitted in this appeal the applicant would ask that the application be approved and the appeal upheld.

4 Summary of Representations

This is a summary of representations received on the appeal.

4.1 LLOYDS PHARMACY

4.1.1 This application would appear to be a very short move in the same neighbourhood and therefore Lloyds support this application for a Minor Relocation.

4.2 PROSPECT PHARMACY

- 4.2.1 Prospect's comments for the appeal panel will concentrate on two matters: whether two pharmaceutical services contracts may be held by the same (or different) contractors for the same premises, and whether the newly re-defined neighbourhood/s was a proper and correct decision for the PCT Pharmacy & Dispensing (P & D) committee to make.
 - 4.2.2 It is clear to Prospect that multiple contracts may not be held by the same contractor operating from a single set of premises. Such a situation would affect the payments due under the NHS contract resulting in pecuniary advantage to such a contractor (two practice payments, reduced discount payments to the NHS, possible doubling of payments for MURs etc.). In Prospect's view, the PCT were correct to refuse the application and Prospect urge the Appeal panel to reject the applicant's appeal.
 - 4.2.3 The PCT P & D Committee also took the opportunity to review the defined neighbourhood. The reason given for the need for the area to be re-considered was the 'on-going re-development of Kettering town centre'.
 - 4.2.4 Prospect are not aware of the developments referred to. Recently, there has been a re-development of the market area of the town centre but this was entirely included within the boundary of the existing neighbourhood definition.
 - 4.2.5 There have been no developments of any significance in the area between Montague St., Stamford Rd., and Windmill Ave that could possibly justify this change.
 - 4.2.6 A very recent publication from Kettering Borough Council, issued as part of their consultation on traffic management through the town, described and delineated the town centre as the area that held the major stores present in the town but excluding Sainsburys and Morrisons. This document would appear to support Prospect's view that the town centre neighbourhood has not changed.
 - 4.2.7 It is surprising that the PCT P & D Committee felt able to take this decision without consultation with any other parties and this would appear to be, prima facie, against natural justice.
 - 4.2.8 The PCT P& D Committee, as recently as March 2009, confirmed its view that the neighbourhood should remain as that determined in August 2006.
 - 4.2.9 Prospect urge the Appeal panel to rescind this decision of the PCT P & D Committee and revert back to the previously defined neighbourhood.
- 4.3 NORTHAMPTONSHIRE LPC
- 4.3.1 It would appear that the PCT have refused this minor relocation on 24 August 2009, under new legislation which was not implemented until 17th September 2009.
 - 4.3.2 As far as the LPC can see there was no prohibition to relocating the contract from School Lane when the application was submitted and once the neighbourhoods had been re-defined.
 - 4.3.3 If the application is to be determined at the time that it was submitted to the PCT the LPC feel that this application (and any others received) should have been determined under the "old rules" in effect at the time.
 - 4.3.4 The LPC also see that the new regulation 17A is a bit complicated, but there may still be a possibility that the application could still be granted under section (b).

- 4.3.5 The LPC are advised that as the legislation is new and untested it will be necessary to seek legal advice, and they understand the applicant is doing this along with getting a legal interpretation of the "time matter" which the LPC have outlined above.
- 4.3.6 It would seem to the LPC that the appeal should be allowed and the relocation allowed, but they look forward to receiving the benefit of the Appeal Unit's deliberations and conclusions on the matter.

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 6(1) and 6(3) of the National Health Service (Pharmaceutical Services) Regulations 2005 (as amended) ("the Regulations").
- 5.5 The Committee noted the PCT's decision on this application had been notified with a right of appeal, to the Applicant. Regulation 29(2) indicates that where the PCT has determined an application to which regulation 6(1) applied, the applicant and any person who has been notified of the decision under regulation 27(1)(a)(ii) or (iii) may appeal to the Secretary of State. Regulation 27(1)(a) includes 'an application to which regulation 6 applies' thereby (in the Committee's view) including regulation 6(3) (minor relocation applications under 500 metres). The Committee proceeded to determine the appeal by the Applicant.
- 5.6 The Committee dealt with the application by way of reconsideration of all the issues.
- 5.7 The Committee noted the PCT neighbourhood as defined in the decision letter. The Committee noted that this definition had been disputed by Prospect Pharmacy who contend that the 'old' neighbourhood definition with the A6900 (Dalkeith Place) to the west, although the Committee were mindful that no reasoning had been submitted as to why that road should constitute a boundary. The Committee noted that the PCT had undertaken a site visit in order to determine the neighbourhood and in the absence of any reason to conclude otherwise, were content to accept the PCT neighbourhood for the purposes of this application without prejudice to future applications. The Committee noted that the existing and proposed sites are within the same neighbourhood.
- 5.8 The Committee noted that the PCT had refused the application on the basis that there is already a pharmacy based at the proposed premises. The Committee further noted the comments of the LPC on this matter. The Committee were of the view that it is the regulations in force at the time the PCT decision was made to which it shall have regard. In this case the PCT decision was notified to parties by letter dated 24th August 2009, that is, before the 2009 amendment regulations came into force on 17th September 2009. The Committee noted that there is no provision within the regulations in force at the relevant date by which the PCT may refuse an application on this basis.
- 5.9 The Committee noted the Applicant states that the distance between the existing and proposed sites is approximately 150 metres. In the Committee's view, there was no information that the population in respect of the current site could not reasonably access the proposed site should they choose to do so.

5.10 The Committee saw no reasons to suggest that the services provided from the proposed site would be any different to those currently provided, or that there would be any interruption in services.

6 **Decision**

The Committee was of the view that the proposed change of premises was a minor relocation. Accordingly the Committee allows the appeal.

Abby Richards
Appeal Officer

A copy of this decision is being sent to:

Thursfields Pharmacy
Northamptonshire Teaching PCT
The Co-operative Pharmacy
Dudley Taylor Pharmacies
Prospect Pharmacy
Lloyds Pharmacy Ltd
Boots UK Ltd
Superdrug Stores plc
Northamptonshire LPC