

11<sup>th</sup> February 2010

REF: SHA/15488

**APPEAL AGAINST BERKSHIRE EAST PCT DECISION TO REFUSE AN APPLICATION BY GREEN CROSS CONSULTING LIMITED FOR INCLUSION IN THE PHARMACEUTICAL LIST AT FARNHAM ROAD SURGERY, 301 FARNHAM ROAD, SLOUGH SL2 1HD UNDER REGULATION 13(1)(b)**

**1 The Application**

By application dated 22<sup>nd</sup> September 2008, Green Cross Consulting Limited ("the Applicant") applied to Berkshire East Primary Care Trust ("the PCT") for inclusion in the pharmaceutical list at Farnham Road Surgery, 301 Farnham Road, Slough SL2 1HD under Regulation 13(1)(b). In support of the application it was stated:

- 1.1 The Applicant wishes to provide an extended service to patients of the area in order to allow them enhanced out of hours access.

**2 The PCT Decision**

The PCT considered and decided to refuse the application. The decision letter dated 21<sup>st</sup> October 2009 states:

**CONSIDERATION**

- 2.1 Berkshire East PCT determined the application in accordance with Regulation 24 of the National Health Service (Pharmaceutical Services) Regulations 2005. In considering the application, the PCT took note of the following:
- 2.2 The applicant proposed:
  - 2.2.1 to open a pharmacy for 100 hours per week
  - 2.2.2 to provide all Essential Services
  - 2.2.3 to provide MURs, from an identified dedicated consultation area
  - 2.2.4 to provide all Local Enhanced Services and any services commissioned by the PCT
  - 2.2.5 to employ sufficient number of pharmacists and pharmacy staff to provide a full service throughout the opening hours whilst complying with the EU working hours guidance
  - 2.2.6 to have documentation available for perusal in accordance with any PCT requirements
- 2.3 The PCT noted that this was a full application and not an application for preliminary consent.
- 2.4 The PCT took into account all representations that had been received from interested parties and also noted unsolicited comments received from other parties.

- 2.5 Mr Vibhakar of K Pharmacy on Farnham Road in Slough included a petition with his representation on this application. There were approximately 560 names/signatures on the petition. No addresses were included so it is not known whether these people were local to the Farnham Road area or Slough.
- 2.6 It was noted that the applicant did not respond during a second representation period to the comments received during the initial period, especially to those regarding the change in use classification/permission that may be required from Slough Borough Council.
- 2.7 Initially the PCT had deferred making a decision on this application pending further information from the applicant and a response from Slough Borough Council.
- 2.8 The applicant did respond to the queries raised by the PCT regarding the staffing of the pharmacy and a floor plan. The applicant also confirmed that the surveyors were allocating an 80sqm unit to the front of the development.
- 2.9 Slough Borough Council confirmed the following:
- 2.9.1 the Farnham Road Surgery fell under the Class of D1 of the Use Classes Order
  - 2.9.2 if a pharmacy was to form a retail shop where medicine and other articles were sold for the wider public and serve those who were not patients of the surgery, a planning application would be required to change the use class of the premises
  - 2.9.3 any operational development such as built works which would materially alter the appearance of the building would require planning permission
  - 2.9.4 there were currently no planning restrictions with regard to the number of opening hours provided by the surgery
  - 2.9.5 these comments represented the informal opinion of the Senior Planning Officer made without prejudice to any formal decision, which the council may make under the Town & Country Planning Act 1990
- 2.10 The Slough Borough Council website indicates that category D1 of the use classes order is for Non-residential institutions, which includes clinics and health centres. Category 'A1 - Shops' includes shops, retail warehouses, etc.
- 2.11 There is no evidence that the applicant has submitted either an application for the 80 sqm unit to the front of the development or to amend the Use Class category of the premises.

## DECISION

- 2.12 Having considered the application, all representations received, a report provided by the Thames Valley Primary Care Agency and additional information from both the applicant and Slough Borough Council, the PCT determined to refuse the application.

## REASONS FOR DECISION

- 2.13 The reasons for reaching this decision are as follows:

- 2.13.1 TVPCA, on behalf of Berkshire East PCT, checked the Slough Borough Council website and noted that the current premises category of D1 does not include shops, which would fall under the category of A1.
- 2.13.2 The applicant has not shown that the appropriate planning permission has been applied for from Slough Borough Council to amend the classification of the premises under the Use Classes Order.
- 2.13.3 The applicant has not demonstrated that the appropriate planning permission has been applied for in respect of the allocated 80sqm unit to the front of the development.
- 2.13.4 The applicant has not demonstrated its intention to comply with the requirements of an application under regulation 13(2)(a) which states: *"it is a condition of the applicant's inclusion in a pharmaceutical list (and so a term of service) that the premises to which the application relates are kept open for at least 100 hours per week for the provision of pharmaceutical services and the PCT may not vary or remove that condition"*

### 3 The Appeal

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit") dated 3<sup>rd</sup> November 2009, the Applicant appealed against the PCT's decision. The grounds of appeal are:

- 3.1 The Applicant notes from the decision that the only contentious issue with regard to the application was planning consent and as a consequence the PCT felt that the Applicant would be unable to open for the 100-hours per week that would allow this application to proceed under regulation 13(2)(a).
- 3.2 While the Applicant agrees that category D1 consent does not include shops, the PCT did not take into account PPS4, sections 26 and 27 concerning ancillary uses which states:
  - 3.2.1 *26... Planning permission is not normally required so long as such activities do not affect the overall domestic character of the building. However, if the non-residential use ceases to be ancillary, because the business has expanded, planning permission will be required for change of use... 27. Similar principles apply where a new activity is introduced within a building or site already in industrial use. New activities which are ancillary to the main use may not require planning permission. Where there is significant intensification, alteration in the dominant use, or change to a different type of use, planning permission will be required.*
- 3.3 The pharmacy unit, at 80 square metres is a very small proportion of the overall development and will not affect the overall character of the building. There will be no alteration in the dominant use of the building and therefore the pharmacy must be considered ancillary use and does not require separate planning consent.
- 3.4 As the only contentious issue in the application, the Applicant would entreat the appeal unit to overturn the decision of the Primary Care Trust in this case and grant the application.

Following a request from the Appeal Unit, the Applicant provided further information in support of the appeal by email dated 18<sup>th</sup> December 2009

- 3.5 With reference to the Appeal Unit's letter, the Applicant believes they quoted from the PPS4 on the Northern Ireland Planning office site:

[http://www.planningni.gov.uk/index/policy/policy\\_publications/planning\\_statements/pp\\_s04\\_97/pp\\_s04\\_97\\_development\\_control/pp\\_s04\\_97\\_homeworking.htm](http://www.planningni.gov.uk/index/policy/policy_publications/planning_statements/pp_s04_97/pp_s04_97_development_control/pp_s04_97_homeworking.htm)

- 3.6 However the Applicant also enclosed documentation from [dcp-online.co.uk](http://dcp-online.co.uk) (The Applicant has marked the relevant passages) and a copy of PPG4 - the relevant section being on the last page.
- 3.7 PPG4 will ultimately be superseded by PPS4 but the paper currently in consultation does not address the issue of ancillary use and therefore is expected to remain unchanged.

#### 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 BERKSHIRE LPC

- 4.1.1 The LPC at this stage would only like to re-iterate the points it has already made in its letter of 17<sup>th</sup> February & 6<sup>th</sup> March 2009.

Letter to PCT dated 17<sup>th</sup> February 2009

- 4.1.2 At its last meeting the LPC considered this application and the Committee was surprised that, since this was for a full application as opposed to a preliminary consent, the applicant had not supplied a copy of a planning consent for the change of use of the premises at Farnham Road Surgery. It was the Committee's understanding that would have to be in place for it could make a full application.

- 4.1.3 It is the LPC's contention that based on this alone the application cannot be granted and therefore should be refused.

Letter to PCT dated 6<sup>th</sup> March 2009

- 4.1.4 Having looked again at the original application the LPC note that the information about the company is now incorrect. They moved their registered office from 2<sup>nd</sup> floor 43 Broomfield Road, Chelmsford, Essex to Suite 3/24 High Street, Ruddington, Nottingham NG11 6EA on 19/12/2008. Presuming they have not informed you of this fact at the time, the application, not being correct, will now be invalid. Granted at the time of the application in September 2008 it was correct, but now it is not correct.

- 4.1.5 Therefore this application should not be granted.

In response to the further information provided by the Applicant the LPC stated:

- 4.1.6 It is the Berkshire LPC view that since this appeal is centred around the one issue of "ancillary" then the Appeals Unit does need to access the original DCS document (Hounslow L.B. 14/12/88 DCS No. 041-066-152) quoted by the applicant as its grounds for appeal and make some direct comparisons

between it and the Appeal documentation. The circumstances maybe completely different and therefore cannot be totally relied upon as the sole evidence for the appeal. As the dcp-online document states on page 2 "*Any test for whether a use is ancillary to another, or not, is a matter of fact and degree and each case has to be determined on its particular merits.*" It goes on to state two principal criteria. Firstly a severability test - "*One would ask whether the alleged ancillary use could practically and viably operate on its own were the primary use of the premises to cease. If it could, then the use is very unlikely to be ancillary...*". In the case of this pharmacy, it is firstly a separate legal entity and therefore if the Surgery Premises closed the pharmacy could continue to trade in its own right. In addition it would need to have separate access from the outside to maintain its 100 hour accessibility and therefore cannot be dependent on access just through the surgery. Secondly, the pharmacy would be accessible by any other patient in the locality who was not registered with the Farnham Road Surgery and therefore not dependent just on their patients. In its plans to be open for 100hours per week it clearly expects to receive prescriptions not just from the Farnham Road Surgery and therefore intends to viable in its own right and not dependent on the Farnham Road Surgery.

4.1.7 It is also worthy of note that in section 34 of the Planning Policy Guidance 4 (PPG 4) it does state that "*However, office or storage use by an unrelated business could well require planning permission*" Green Cross Consulting Ltd as already stated is a separate legal entity and the only relation it has is that it dispenses prescriptions, some of which will be generated by the Farnham Road Surgery. It could also be dispensing prescriptions from any other surgery in the area or in fact anywhere from Buckinghamshire and Berkshire as a whole. If this was in a rural village setting then it would possibly be a completely different scenario. The PPG 4 does give clear advice to businesses to check with the planning authority if they plan to claim the principal of ancillary use, The applicant has not provided any evidence that this checking process with the planning authority has taken place.

4.1.8 As already stated "*each case has to be determined on its particular merits*" and quoting one previous case is not enough to determine that this is ancillary and therefore the application, in the LPC's view, needs planning permission and the appeal respectively should be dismissed.

#### 4.2 THAMES VALLEY PCA

4.2.1 In response to the letter from Green Cross Consulting Limited dated 3 November 2009, the PCT would like to make the following points:

4.2.2 The PCT notes in particular the following extract from the appeal letter from Green Cross consulting: (*quotes para 3.2*)

4.2.3 The PCT would respond as follows:

4.2.4 The PCT is aware of the document PPS4 which has been the subject of a consultation process. The final document PPS4 has not been issued to the knowledge of the PCT although it is due to be issued 'late 2009'.

4.2.5 Regarding the two paragraphs quoted by the appellant (as reproduced above - Sections 26 and 27 of PPS4), the PCT has not been able to find the source of this information provided by the appellant. Following a telephone conversation with the Family Health Services Appeal Unit/Litigation Authority, the PCT would thank the FHSAU for agreeing to investigate further the

source of this information. As agreed with the FHSAU, once this information is received the PCT will further comment on the appeal letter.

- 4.2.6 The PCT is therefore sending this letter in response to the appeal but will comment further once the information regarding the PPS4 is received.
- 4.2.7 In the interim, the PCT would comment that the following advice was provided by Slough Borough Council and taken into consideration when determining this application: (*quotes 4.2.2.5*)
- 4.2.8 The PCT would also confirm that it was required to consider the application from Green Cross Consulting in line with information known and in force at the time of the application/decision making process. The application was made under regulation 13(l)(b) under the 100 hour exemption. In addition, the PCT was mindful of the following:
  - 4.2.9 Determination of applications:
    - 4.2.9.1 Para 24(1): the PCT may determine an application in such manner as it thinks fit
    - 4.2.9.2 Para 24(2)(a): in considering any application from an applicant who is not already included in that PCT's pharmaceutical list a PCT shall— (a) check as far as reasonably practical the information provided by the applicant'
- 4.2.10 Therefore the PCT determined that the application did not meet the criteria under which it was submitted, i.e. Regulation 13(1)(b) which provides that: '... regulation 12 (the necessary and desirable test) shall not apply to an application in respect of... (b) premises which the applicant is willing to keep open for at least 100 hours per week for the provision of pharmaceutical services...'
- 4.2.11 And due to the current restraints of the existing planning consent from Slough Borough Council regarding Use Classes, the applicant would be unable to meet the criteria in accordance with Regulation 13(2)(a) which states: 'it is a condition of the applicant's inclusion in a pharmaceutical list (and so a term of service) that the premises to which the application relates are kept open for at least 100 hours per week for the provision of pharmaceutical services, and the PCT may not vary or remove that condition'.
- 4.2.12 In addition, the document 'Planning Permission "A Guide for Business"' issued by the Office of the Deputy Prime Minister (Revised July 2005) (which is the latest edition of this Planning Permission guidance) gives information at Annex 2 about Use Classes and those changes of use that do not require planning permission. A change of use from D1 to A1 (which is the requirement in this case) is not included in that list. Therefore the PCT and Slough Borough Council believe that in the case of the application under consideration herewith, planning permission will be required for this change of use.

#### Conclusion

- 4.2.13 In conclusion TVPCA would like to reiterate that the PCT has given careful consideration to all of the relevant issues raised in this case and is, at all times, mindful of the appropriate Regulations and is satisfied that this application was dealt with by the PCT in accordance with these Regulations.

In response to the further information provided by the Applicant the PCT stated.

4.2.14 The PCT notes that in this further information it is stated that the planning document quoted in their original letter of appeal actually referred to planning within Northern Ireland. As such the PCT does not feel that this information is relevant to the application which was made for premises in Slough, Berkshire.

4.2.15 In addition, the PCT notes that the appellant quotes the last page of document PPG4 Planning Policy Guidance 4: Industrial, commercial development and small firms. The PCT believe that the paragraph referred to by the appellant is as follows:

4.2.15.1 'Ancillary uses 34. Similar principles apply where a new activity is introduced in, or within the cartilage of a commercial or industrial building. The established planning principle of ancillary (or incidental) uses recognises that new activities may be started in a building or within its cartilage without any further need for permission, provided they remain ancillary to the main use. The use of the rear of a shop for office and storage purposes in connection with the shop, for example, would be part of the shop use in planning terms and would not require further permission. However, office or storage use by an unrelated business could well require planning permission. **It will always be sensible for businesses to check with the planning authority before instituting any new use of land or premises.'**

4.2.16 The PCT notes that the final sentence of this paragraph (in bold for emphasis) advises that businesses should check with the planning authority regarding any changes to the usage of premises. The PCT has no evidence that the appellant has checked with the Slough Borough Council (the planning authority in this case). Indeed, the appellant did not provide any information to this effect during the representation periods when the opportunity to do so was provided.

4.2.17 As the Appeal Unit will note from the PCT paperwork regarding this application, the PCT itself checked with Slough Borough Council in relation to any planning requirements and information received from the Council indicated the following: (*quotes 2.9*)

4.2.18 In addition, the PCT also noted the following: (*quotes 2.10 and 2.11*)

4.2.18.1 The applicant has provided information at the appeal stage of the application which had not been provided to the PCT during the application processing. However, even if it had been provided previously, the information obtained by the PCT during the application process shows that a planning application would be required to change the use class and for the 80 sqm unit to the front of the development

4.2.18.2 The document 'Planning Permission "A Guide for Business" issued by the Office of the Deputy Prime Minister (Revised July 2005) (which is the latest edition of this Planning Permission guidance) gives information at Annex 2 about Use Classes and those changes of use that do not require planning permission. A change of use from DI to AI (which is the requirement in this case) is not included in that list. Therefore the PCT and Slough Borough Council believe

that in the case of the application under consideration herewith, planning permission will be required

- 4.2.19 The PCT believes that the decision made regarding the application is robust. As stated in our previous letter, the reasons for reaching this decision are as follows: (*quotes 2.13.1 - 3*)
- 4.2.20 Therefore the PCT determined that the application did not meet the criteria under which it was submitted, i.e. Regulation 13(1)(b) which provides that: '...regulation 12 (the necessary and desirable test) shall not apply to an application in respect of... (b) premises which the applicant is willing to keep open for at least 100 hours per week for the provision of pharmaceutical services...'
- 4.2.21 And due to the current restraints of the existing planning consent from Slough Borough Council regarding Use Classes, the applicant would be unable to meet the criteria in accordance with Regulation 13(2)(a) which states: '*it is a condition of the applicant's inclusion in a pharmaceutical list (and so a term of service) that the premises to which the application relates are kept open for at least 100 hours per week for the provision of pharmaceutical services, and the PCT may not vary or remove that condition*'

#### 4.3 THE MARTIN PHARMACY

- 4.3.1 The Martin Pharmacy include a copy of their original objections and also some new ones. The suggestion that 80 square metres (does this include the patient waiting area?) is a small proportion of an already congested surgery seems absurd. The medical partners have been looking for a larger site for some time, It would seem that far from being ancillary a significant change in the overall character of the building would result from the inclusion of a pharmacy. If an addition is to be made to the building will parking spaces be lost? This surgery is at a very busy junction infamous for its pedestrian casualties (will they be patients unable to gain access to the carpark?).
- 4.3.2 In addition to the planning issues the PCT has stated that a reason for the decision to decline the application was that Green Cross consulting ltd had not complied with the requirements under regulation 13(2)(a). Berkshire East PCT & TVPCA are bodies with much experience in these matters and it is significant that they reject the application on grounds of not being able to demonstrate an intention to keep the premises open for pharmaceutical services for 100 hours a week.

#### Letter to PCT

- 4.3.3 My objection to the application is on the grounds that it is not in the interest of patients, taxpayers & fellow healthcare professionals.
- 4.3.3.1 PATIENTS: If there is any link (whether by profit through direct ownership of a pharmacy or rent paid) between what a doctor prescribes and his/her wealth there is conflict of interest. I believe every patient would like to think there was no connection between the medicines a doctor prescribes and his income.
- 4.3.3.2 TAXPAYER: There is a consistently higher average net ingredient cost for NHS prescriptions amongst dispensing doctors.

4.3.3.3 FELLOW HEALTHCARE PROFESSIONALS: For many years the status quo has allowed what profit there is in NHS dispensing to remain with pharmacist ownership. This along with the relative independence of dentistry has led to a healthy balance of primary care professions spread in the community where they are needed. A mutual respect has, in my view, developed in Slough between these entities, a change on a scale this size would disrupt this.

4.3.4 From the start of the NHS the prescribing function was separated from the dispensing function for essentially the reasons above. A temporary situation has arisen with the amended regulations which has tempted surgery managers to further increase their funds. It is vital for the interests of patients & taxpayers & for harmonious relationships between the various professions that such applications do not proceed.

#### 4.4 K PHARMACY

4.4.1 K Pharmacy have sought professional advice from Carter Planning Limited - Planning Consultant on the above mentioned matter and they have enclosed their findings along with this letter.

4.4.2 The appeal has been made on the grounds that planning permission is not necessary which K Pharmacy believe is invalid. Please take the enclosed information into consideration when making your decision.

Letter dated 16<sup>th</sup> December 2009 from Carter Planning Ltd

4.4.3 We are Chartered Town Planners and regularly give advice as to whether a development requires planning permission, and if it does, the likelihood of such permission being granted.

4.4.4 It is our view, in concurrence with the views given by Slough Borough Council, that the current use of the Farnham Road Surgery comes within Class DI (Non Residential Institutions) of the Town and Country Planning (Use Classes) Order 1987 as amended. If a pharmacy was to be opened in part of the Surgery dispensing prescriptions and other goods and services to visiting members of the public, and not just to patients registered with the Practice, the use would come within Class AI (Shop). Planning permission would be required to change the use from a DI use to an AI use.

4.4.5 If the Pharmacy is to be opened to serve prescriptions and services to patients of the practice only, it is our view that such a use would be sui generis and if open for 100 hours per week, could no longer be taken to be ancillary to the main Doctors' Surgery which is open Monday to Friday and Saturday mornings for a total of only 59 hours a week. As such planning permission would also be required.

4.4.6 Slough Borough Council's view is that there are no planning restrictions on the opening hours provided by the surgery. The current opening hours are 59 hours per week Monday to Fridays only. However if a pharmacy use was to open for 100 hours per week this would be an intensification confirming that a change of use has occurred which requires planning permission.

4.4.7 Slough Borough Council have not commented on the likelihood of planning permission being granted should a planning application for a change of use of part of the Surgery from DI to AI be submitted to the Council. The proposed AI use would be outside of the Farnham Road District Shopping Centre. As

such the proposal would be contrary to Saved Policy S1 (Retail Hierarchy) of the Local Plan for Slough 2004 and Core Policy 6 (Retail, Leisure and Community facilities) of the Slough Local Development Framework Core Strategy 2008. In addition the site is in very close proximity to residential units. If the Pharmacy were to be open until midnight on weekdays the occupants of the nearby houses are likely to be disturbed by customers and as such their residential amenities would be harmed. It is our opinion that any application is likely to be refused.

4.4.8 The Director of Green Cross Consulting, who is not a Chartered town planner, has supported his case by reference and quotation from PPS4. Firstly this is a publication from the Northern Ireland Planning Service and is not applicable in England. In addition it refers to development control in relation to industrial development which also does not apply to this case.

4.4.9 We would be grateful if you would take these representations into account in determining this appeal.

#### 4.5 D.S. KHATKAR DISPENSING CHEMIST

4.5.1 D.S. Khatkar's original objections regarding the application remain.

4.5.2 Regarding the points raised under the appeal i.e. section 27. D.S. Khatkar's assertion is that the application is granted WOULD mean a significant intensification to the business operating from these premises. Anything less than the pharmacy being a significant part of the business would render it uneconomical over the proposed 100 hours of opening per week.

4.5.3 Additionally, the requirements for additional parking required have not been addressed. Particularly since the current level of parking is inadequate during the peak hours and has attracted complaints from neighbours.

#### 4.6 H. A. MCPARLAND LTD

4.6.1 Further to the comments made in their letters dated 10<sup>th</sup> February 2009 and 2<sup>nd</sup> March 2009, H. A. McParland wish to reiterate their objection to this application on the following grounds:

4.6.2 H. A. McParland object to the applicant's argument that the proposed premises will be ancillary to the surgery for the following reasons:

4.6.3 The premises have applied under the 100 hours exemption and will be open for 50 hours per week in excess of the opening hours of the surgery. During these excess 50 hours the premises will be used solely as a pharmacy and therefore the proposed premises should be classed as an A1 independent retail outlet, and would therefore require planning permission.

4.6.4 The applicant has failed to provide plans for the premises indicating what percentage of the floor area will be used for retail purposes and therefore cannot support their argument that the premises are ancillary.

4.6.5 The applicant has not stated the proportion of turnover that is expected from the sale and supply of retail goods and services not directly related to the surgery, nor the range of retail goods that will be available and therefore cannot support their argument that the premises are ancillary.

- 4.6.6 The following should also be considered in H. A. McParland's representation:
- 4.6.7 There is already sufficient pharmaceutical cover provided between 8am and 9pm by the 17 pharmacy sites within Slough, of which 9 are within one mile of the surgery, and since there have been no complaints made to either the PCT or TVPCA regarding the lack of pharmaceutical services in the area, we question the need for a 100 hour pharmacy.
- 4.6.8 The premises are located in a residential area and the proposed pharmacy could cause increased traffic, reduced availability of parking, noise and disturbance to local residents.
- 4.6.9 Deliveries to the pharmacy during the extended opening hours could cause noise and disturbance to local residents.

#### 4.7 CHARLES RUSSELL LLP, ON BEHALF OF H. A. MCPARLAND

- 4.7.1 As the Appeal Unit will be aware, before granting this application, the Authority must be satisfied that the applicant intends to open the proposed pharmacy for at least 100 hours per week for the provision of pharmaceutical services. The application is for premises at the Farnham Road Surgery. Charles Russell understand that the Surgery currently has planning consent for Use Class D (non-residential institutions, including clinics and health centres). The usual Use Class for a pharmacy is A1 (retail). H. A. McParland understands that the applicant has not submitted any application for Change of Use of the premises. In addition, H. A. McParland understands that no planning application has been made to convert 80 sq m of the Surgery into a pharmacy.
- 4.7.2 In order to rely on the 100 hours exemption, it is not sufficient for the applicant to say that it has the intention to open a pharmacy for 100 hours per week. The applicant must have a genuine intention of being able to lawfully open a pharmacy for at least 100 hours a week (see for example Zarvis and Pradhan [2003] All England Law Reports (D) 92(Mar) and Cunliffe and Goodman (1950 2KB 237). In order to show that it has the intention, the applicant must prove that it has the ability to provide the services referred to in the application at the times specified in the application.
- 4.7.3 Whilst it may be correct that, in certain circumstances, a pharmacy can be classed as ancillary to a Doctor's Surgery so that Change of Use consent is not required, this will be a question of fact and degree with each case determined on its own particular facts by the Local Authority Planning Officer. It is not axiomatic that every pharmacy is ancillary to a Surgery. The applicant refers to planning guidance documents but these do not demonstrate that Change of Use consent is not required for this proposed pharmacy the documents submitted by the applicant simply set out general principles to guide the Local Authority as to when Change of Use consent is and is not required. It is of note that the applicant could, but has not, obtained any confirmation from the Local Authority Planning Officer that Change of Use consent is not required.
- 4.7.4 In this case, it is unlikely that the proposed pharmacy would be considered ancillary for a number of reasons, including:
  - 4.7.4.1 The pharmacy will be open for almost twice as many hours as the surgery - 100 hours compared to 59 Surgery hours;

- 4.7.4.2 The pharmacy is likely to have a significant retail element (being 80 sq m in size), which would be entirely distinct from (and therefore not ancillary to) the supply of prescription only medicines against prescriptions written by doctors at the Surgery;
- 4.7.4.3 The applicant proposes to offer a range of enhanced services together with medicine use reviews. Such services are entirely distinct from (and therefore not ancillary to) the supply of prescription only medicines against prescriptions written by doctors at the Surgery;
- 4.7.4.4 Since the pharmacy will be open for significantly more hours than the Surgery, the pharmacy is likely to have its own separate entrance (it is of note that the applicant has not submitted any plans of the proposed pharmacy).
- 4.7.5 Even where a pharmacy is considered ancillary to the Surgery so that Change of Use consent is not required, planning consent will usually be required to modify the building. It is common for conditions to be attached to any planning consent to limit the pharmacy's activities.
- 4.7.6 In the absence either of Change of Use/planning consent or confirmation from the Local Authority that no such consent is required, the applicant has failed to illustrate any real intention to open a pharmacy for 100 hours a week from the proposed site. As a result, this application should be refused.

## 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. The Committee dealt with the application by way of reconsideration of all the issues and, on the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 5.3 The Committee had regard to Regulation 13 of the National Health Service (Pharmaceutical Services) Regulations 2005 (as amended) ("the Regulations").
- 5.4 The Committee noted that the PCT had refused the application on the basis that the proposed premises does not fall under the appropriate premises category, and that the applicant had not shown that planning permission had been applied for.
- 5.5 The Committee noted that the applicant disputes the need for planning permission and comments that the pharmacy should be considered ancillary, being a small proportion of the development, and therefore does not require separate planning consent.
- 5.6 The Committee considered the PCT's notification to refuse the application. The wording of Regulation 13(1)(b) is '**willing**' [emphasis supplied] to provide, which in the Committee's view creates a future obligation to which the applicant must be agreeable. The applicant has applied for the hours shown at 5.4 above 'under the 100 hour exemption category', which refers to the same future obligation. To this extent, the PCT misdirected itself in concluding, as it did, on the basis of appropriate planning permission being required. The Committee takes no view on whether

planning permission is required, or whether it is likely to be granted should it be applied for. Subject to this issue, there is no current reason to believe that the applicant will not provide pharmaceutical services for the hours applied for. These hours will form a term of service.

- 5.7 The Committee were mindful that in the event that planning permission is required and the applicant decides not to apply for such, or is unsuccessful such an application to the local authority, the applicant may not vary the current application and it will be a matter for him whether he re-applies to the PCT for premises where planning permission is granted.

## 6 **Decision**

Accordingly the Committee allows the appeal.

### **Abby Richards** **Appeal Officer**

A copy of this decision is being sent to:

Thames Valley PCA, on behalf of the PCT  
Green Cross Consulting Ltd  
Boots UK Ltd  
Superdrug Stores plc  
The Martin Pharmacy  
K Pharmacy  
D.S. Khatkar Dispensing Chemist  
Charles Russell LLP, on behalf of H.A. McParland Ltd  
Berkshire LPC  
Ms Fiona Mactaggart MP