

17th December 2009

REF: SHA/15381

APPEAL AGAINST NORFOLK PCT DECISION TO GRANT AN APPLICATION BY ASSURA PHARMACY LTD FOR PRELIMINARY CONSENT PRIOR TO INCLUSION IN THE PHARMACEUTICAL LIST AT THETFORD HEALTHY LIVING CENTRE, CROXTON ROAD, THETFORD IP24 1JD

1 The Application

By application dated 11th March 2009, Assura Pharmacy Limited (“the Applicant”) applied to Norfolk Primary Care Trust (“the PCT”) for preliminary consent prior to inclusion in the pharmaceutical list at Thetford Healthy Living Centre, Croxton Road, Thetford IP24 1JD. In support of the application it was stated:

- 1.1 This application is both necessary and desirable in order to secure in the neighbourhood in which the premises are located adequate provision of those services.
- 1.2 The proposed neighbourhood’s boundaries are:
 - 1.2.1 Northern boundary: A11.
 - 1.2.2 Eastern, southern and western boundary: the train line.
- 1.3 A map of the proposed neighbourhood is included.
- 1.4 This neighbourhood has recently been defined by the Pharmacy Appeals Committee (REF: SHA/14191) following a site visit. There have been no significant changes to the neighbourhood since this time to merit a change in the neighbourhood definition.
- 1.5 The neighbourhood contains a significant population and a range of services and facilities including the Healthy Living Centre. There are no pharmacies in the neighbourhood.
- 1.6 The Pharmacy Appeals Committee found that a pharmacy in the neighbourhood was desirable and approved the previous application in June 2008. There have been no significant changes in the neighbourhood since this decision to suggest a different outcome.
- 1.7 Due to delays in securing a unit at the Healthy Living Centre it is likely that the original application will expire before a unit can be constructed, for this reason Assura are having to re-applying. All the details in this application are the same as the previously approved application.

2 The PCT Decision

The PCT considered and decided to grant the application. The decision letter dated 20th August 2009 states:

Background

- 2.1 A previous preliminary consent application by Assura Pharmacy Ltd for the Healthy Living centre site had been granted on 12th June 2007, that decision being upheld on appeal on 15th November 2007. Full consent was subsequently granted under

regulation 41 and this expired on 29th July 2009. The current application was received on 18th March 2009.

Previous applications

- 2.2 The Committee noted the following history of applications in Thetford in the preceding five years:
- 2.2.1 April 2005 - E Moss Ltd (Alliance Pharmacy); new pharmacy at Tanner Street: application refused - no appeal.
 - 2.2.2 May 2006 - E Moss Ltd (Alliance Pharmacy); 100 hour pharmacy at Tanner Street - application granted but pharmacy failed to open and consent expired.
 - 2.2.3 July 2006 - Sainsburys London Road; 100 hour pharmacy: application granted but pharmacy failed to open and consent expired.
 - 2.2.4 November 2007 - Assura Pharmacy Ltd; preliminary consent granted for Thetford Healthy Living Centre, Croxton Road. Decision upheld on appeal; conversion to full consent granted with validity until 29 July 2009.
 - 2.2.5 April 2008 - Sainsbury's London Road, further application for 100 hour pharmacy granted; pharmacy opened on 08 September 2008.
 - 2.2.6 May 2009 - Lime Pharmacy Ltd; application for inclusion in the pharmaceutical list at Grove Lane Surgery, Thetford refused, with the decision currently under appeal.

Neighbourhood

- 2.3 At the time of the previous Assura application in 2007 the Committee had defined the neighbourhood as the A11 to the north, Mundford Road to the west and south and the railway line to the east. The reasons for this had been set out in the decision report on that application. On appeal, the NHS Litigation Authority also adopted this definition (ref SHA/14191).
- 2.4 Whilst noting arguments being advanced by Lime Pharmacy Ltd in respect of an appeal against refusal of their application in a different neighbourhood, the Committee had no evidence of significant changes in the area since since (*sic*) 2007 and therefore again adopted the neighbourhood set out above.

Current service provision

- 2.5 There are no pharmacies located within the neighbourhood defined above.
- 2.6 Pharmacies outside the neighbourhood are Boots Ltd at 29-31 King Street (938 metres on foot from the proposed site), and Lloyds Ltd at 10 King Street, 1,032 metres on foot from the proposed site, Tesco's at Norwich Road (approximately 1.4 miles by car from the proposed site), and Sainsbury's at London Road (approximately 2 miles by car from the proposed site).
- 2.7 There are doctor's surgeries at School Lane (Dr. Hadley Brown & partners), Grove Lane (Dr. Smith & partners), and the Healthy Living Centre (PMS practice managed by the School Lane practice).

Consideration

- 2.8 The Committee noted that this is effectively a re-application, following grant of an earlier application in respect of which consent has now expired, and therefore took

into account their previous decision (publicly available within the minutes of the Pharmacy & Dispensing Committee meeting held on 15th November 2007) and the NHS Litigation Authority's decision (publicly available under reference SHA/14191).

- 2.9 The Committee noted the reasons for those decisions and used these as a starting point for their deliberations. They then went on to consider whether there had been any material changes in the meantime likely to affect the outcome of the current application.
- 2.10 In this regard they considered that there was no evidence to indicate that the pharmaceutical needs of the neighbourhood have altered since the original decision.
- 2.11 The following changes outside the neighbourhood were noted:
- 2.11.1 A 100 hour pharmacy at the Sainsbury's store in London Road had opened.
- 2.11.2 An application from Lime Pharmacy Ltd in respect of Grove Lane surgery was refused and is currently under appeal.
- 2.12 In respect of the Sainsbury's pharmacy the Committee considered that this was too far away from the neighbourhood to have any significant effect upon service availability within that neighbourhood, and therefore concluded that this did not represent a material change.
- 2.13 In respect of the Lime Pharmacy application the Committee noted that this was for a different neighbourhood in the town centre. Even if this were approved on appeal it would not change service accessibility within the neighbourhood, since it has previously been established that the journey into the town centre from the Healthy Living Centre is too far for pedestrians and too difficult for others. The Committee had no reason to deviate from this view. They therefore agreed with Assura Pharmacy that the outcome of the Lime Pharmacy application was not material to the outcome of the Assura application.
- 2.14 Against this background the Committee was satisfied that none of the representations from the statutory interested parties contained evidence of any material changes or raised issues that had not already been fully dealt with.
- 2.15 Lime Pharmacy Ltd was not a statutory interested party under regulation 23(2) as they were neither included in a pharmaceutical list nor were they an LPS provider. They had, however, been notified of the application for information and the comments they provided were taken into account as "other relevant information" under regulation 12(2)(c). They had questioned the PCT's handling of the Assura application and contended that the regulations did not allow a second application to be made by the same applicant whilst there was an outstanding consent for the premises or location in question. The Committee was satisfied that there was no such restriction imposed by the regulations and that the PCT had acted in accordance with regulation 23(2) by notifying the application to interested parties "as soon as practicable". Linked to this and notwithstanding the absence of a specific regulatory mechanism, the Committee considered that Assura could have withdrawn the earlier application at any time but were satisfied that there was no statutory requirement for them to do so.

Decision

- 2.16 For the reasons set out above the Committee concluded that it remained desirable to grant the application and has accordingly granted approval under regulation 12.

Rider

- 2.17 However the Committee expressed reservations and concerns about the slow rate of progress towards commencing service provision following the original grant. As a consequence it wishes to place on record that when the preliminary consent is converted to full consent - and Assura is urged to do this at the earliest opportunity - it is likely to invoke regulation 39(3) to require service provision to commence by a specified date.

3 The Appeal

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority (“the Appeal Unit”), dated 18th September 2009, Sainsbury’s Supermarkets Ltd appealed against the PCT’s decision. The grounds of appeal are:

- 3.1 The PCT approved the application on the basis that the Litigation Authority previously approved the same in 2008 and that circumstances had not changed. With respect, it is the Appellant’s contention that in the period since the initial approval was granted to the submission of this fresh application, not one shred of evidence has been supplied by the Applicant nor the PCT to suggest that proposed sire neighbourhood are in any way disadvantaged in accessing pharmaceutical services.
- 3.2 The Appellant respectfully contends that the existing network of pharmacies in Thetford can, and do, adequately cater for the needs of the neighbourhood population and no evidence has been put forward by the Applicant nor PCT to suggest otherwise.
- 3.3 The Appellant therefore respectfully requests that the Litigation Authority reject this application.

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 NORFOLK PCT

- 4.1.1 The PCT are content to rely upon their decision report previously sent to the Appeal Unit and do not wish to offer any specific representations.

4.2 ASSURA PHARMACY LTD

Background

- 4.2.1 An identical application was previously granted by the Appeals Unit (following a site visit and oral hearing) in May 2008 (ref: SHA/14191).
- 4.2.2 On 21 August 2009 the PCT approved this application on the grounds that there had been no significant changes since the previous application was granted.

Neighbourhood

- 4.2.3 The neighbourhood defined in the previous application has been adopted by the PCT for this application. The PCT’s decision letter states that there was “no evidence of significant changes in the area since 2007” and so adopted the same neighbourhood as previously defined.
- 4.2.4 No parties have disputed the PCT neighbourhood definition, it is submitted that this neighbourhood is still appropriate.

- 4.2.5 The defined neighbourhood contains one medical centre (the application site) and no pharmacies.

Access

- 4.2.6 The nearest pharmacies are located in the town centre approximately 1km away. In the previous application the Appeals Panel described this journey by foot as "...simply too far. It does not matter whether the resident population is young, old or in between the journey on foot is inconvenient, unpleasant and for the return journey up a long, slow incline".
- 4.2.7 An application from Lime Pharmacy Ltd (for a town centre location) has recently been rejected by the Appeals Unit (ref: SHA/15206) and so should have no bearing on this application.
- 4.2.8 The opening of the Sainsbury's 100 hour pharmacy (approximately 4km away by road) was considered at the previous oral hearing, which stated that "the fact remains it is sufficiently distant from the neighbourhood to have minimal impact". The PCT specifically considered this in their decision letter and found that the Sainsbury's pharmacy "was too far away from the neighbourhood to have any significant effect upon service availability within the neighbourhood".

Necessary and Desirable

- 4.2.9 At the time of the previous hearing the patient list size of the Healthy Living Centre was growing quickly. It is submitted that this growth will have continued resulting in an even greater demand for pharmacy services in the neighbourhood today.
- 4.2.10 None of the interested parties have submitted any information to suggest that there have been any significant changes in the neighbourhood since the previous application that would merit coming to an alternative decision.
- 4.2.11 It is submitted that the PCT has considered all the relevant information in significant detail and has come to the correct decision that this application is both necessary and desirable.

4.3 LIME PHARMACY

- 4.3.1 Any decision regarding boundaries for a neighbourhood will inevitably be somewhat subjective. Although it is likely that the PCT will continue to retain its currently defined boundaries despite any inadequacies (for instance... which neighbourhood is Vicarage Road in?) it is clear that the proposed pharmacy site at the Healthy Living Centre is only approximately 100 yards from being within the "Town Centre" neighbourhood and is well located with respect to the town centre pharmacies.
- 4.3.2 Assura Pharmacy would be located a little over half a mile from both Lloyds and Boots Pharmacies who provide a full range of pharmaceutical services. No inadequacy of service provision has been defined for those living in the currently defined Northern neighbourhood.
- 4.3.3 Access levels from the Assura site to the town centre are good. The PCT have previously stated that "pedestrian access from the Healthy Living Centre to the town centre is relatively straightforward" and that the "short walk via the Croxton Road into the town centre was an easy quiet walking route."

- 4.3.4 The Local Pharmaceutical Committee confirms that the Assura application site location is “quite close” (Norfolk LPC re Lime Pharmacy Application, February 2009) to that of the failed application for Lime Pharmacy (approximately 700 metres). Given that current service provision is deemed adequate for those living intimately South of the Northern neighbourhood it is presumably the case that such service provision may also be adequate for those within this Northern neighbourhood. Lime Pharmacy know of no evidence to suggest that services as currently provided are not entirely adequate.
- 4.3.5 For those who depend on vehicular access, Tesco’s and Sainsbury’s are readily accessed. The presence of 100 hour provision significantly improves Assura’s proposed opening hours. A reasonable percentage of patients who visit local primary care providers have their prescriptions dispensed via Sainsbury’s (despite only recently opening) or Tesco’s. Such provision cannot be considered at all insignificant given the convenience for those accessing their weekly shop or for those living in the Northern neighbourhood who travel to/from their home/work along the A11.
- 4.3.6 Since the previous Assura application (SHA/14191) was upheld in 2008 Sainsbury’s 100 hour pharmacy has opened and provided yet further choice and pharmaceutical service provision to those living in the neighbourhood. Whilst the previous Assura decision was considered marginal Lime Pharmacy feel that there have been sufficient significant changes in local circumstances to clearly underline a lack of indication for further provision.
- 4.3.7 The Oral Hearing SHA/14191 which previously met to consider Assura’s application confirmed that the Northern neighbourhood did not appear “in any sense” to appear deprived.
- 4.3.8 The opening hours advanced by Assura pharmacy will not improve access to services for those in the neighbourhood who are already adequately provided for by the extensive hours offered by current providers. Opening hours advanced by Assura may of course be altered to reduce access further.
- 4.3.9 While offering to provide various additional services is clearly commendable, such improvements to service provision is not at all relevant (within the meaning of the 2005 Regulations) when considering adequacy. The applicant has provided no evidence whatever to show that such services are being requested, are needed, or are necessary and/or desirable to provide adequacy of pharmaceutical services to the population of Thetford and, more particularly, to the neighbourhood.
- 4.3.10 Adequacy or inadequacy of existing services can be found in a number of ways such as:
- 4.3.10.1 Complaints about existing services.
 - 4.3.10.2 Complaints about services which should be provided are not being provided.
 - 4.3.10.3 Complaints that services directed or commissioned by the PCT, be they enhanced services or otherwise, are not being provided by the pharmaceutical provider/s who should provide them.
 - 4.3.10.4 An evident need for pharmaceutical services which is not currently being met. (SHA/15206 Oral Hearing re Lime Pharmacy Appeal, October 2009)

- 4.3.11 In Assura's case none of these criteria are met (for further description please note SHA/15206 Oral Hearing as referenced above).
- 4.3.12 The PCT have previously stated that they have not been asked and have not felt the need to commission, at this stage, any further enhanced services. It felt/feels that the existing provision of pharmaceutical service is adequate.
- 4.3.13 An Oral Hearing has previously defined that, with reference to Assura's initial application " it is inappropriate to grant the application on grounds of necessity" (Ref SHA/14191 Appeal against granting of Assura Pharmacy, May 2008).
- 4.3.14 The SHA/14191 Oral Hearing previously acknowledged a balancing up of "impact of services provided by the Healthy Living Centre, the short to medium term prospects for growth within the neighbourhood and increased convenience to residents and visitors" against the lack of indication to grant on the grounds of necessity.
- 4.3.14.1 The Healthy Living Centre continues to be a "white elephant" suffering from a virtual absence of consultant presence and services provided. This might best be gauged by a journey around the building to note the significant majority of empty rooms. This situation exists despite the Healthy Living Centre being open for many years.
- 4.3.14.2 The Oral Hearing into Lime Pharmacy's application (SHA/15206 October 2009) expressed the view that plans/considerations to increase the town's population was not of great worth given the lack of significant well defined progression to date. In addition, despite great weight being previously given to recent inward migration, the small net growth in population over many years suggests significant additional outward migration.
- 4.3.14.3 Lime Pharmacy have found no great evidence that a closer pharmacy in itself would increase convenience. Indeed the great majority who travel to the Southern extreme of this Northern neighbourhood are simply passing the Healthy Living Centre in order to travel either along the Mundford Road or along the Norwich Road (past Tesco's Pharmacy) to the A11. Alternatively they may be travelling into the town centre (where the town centre pharmacies (Lloyds and Boots) would be readily accessed). In contrast the recently refused application from Lime Pharmacy was accompanied by a petition of support of over 2,000 signatures, such support providing quantifiable evidence in that case of a perception of a desirability and presumably an increased convenience.
- 4.3.15 Although pharmacy services have previously been defined as being "integral" to a "one stop centre" philosophy (Southern Norfolk PNA) the Hearing Panel will be fully aware that such a philosophy has no bearing on the test of necessity or desirability with respect to the provision of pharmaceutical services. Lime Pharmacy feel that there is a significant amount of clear evidence to suggest that the Assura application should be refused and Lime Pharmacy therefore respectfully request that the previous decision made by Norfolk PCT be overturned.

5 Further comments

5.1 ASSURA PHARMACY LTD

- 5.1.1 Lime Pharmacy make numerous references to their recent appeal (Ref: SHA/15206), however as these applications were not joined by the Appeal Unit, it is submitted that these references should be given little weight. Lime Pharmacy provides no factual information on why an alternative outcome to the previous application should be arrived at.
- 5.1.2 As Lime Pharmacy does not appear to be on a Pharmaceutical List it is assumed that these are unsolicited comments and as such the appropriate weight is attached to them.

6 Consideration

- 6.1 The Pharmacy Appeals Committee appointed by the Family Health Services Appeal Unit of the NHS Litigation Authority, ("the Committee") had before it the papers considered by the PCT, together with a plan of the area showing existing pharmacies and doctors' surgeries and the site (or location) of the proposed pharmacy.
- 6.2 It also had before it the responses to the Authority's own statutory consultations.
- 6.3 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 6.4 The Committee had regard to Regulation 12(1), the necessary or desirable 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").
- 6.5 The Committee dealt with the application by way of reconsideration of all the issues.
- 6.6 The Committee was mindful of the previous decision in appeal ref. 14191 and noted that the application granted to Assura Pharmacy in June 2008 had not opened due to delays in securing premises and consent had now expired. Given the relatively short time since Assura's grant, the Committee accorded weight to that decision which followed a site visit and hearing.
- 6.7 The Committee noted that the neighbourhood had been defined in accordance with that accepted for the previous appeal ref. 14191. The Committee noted that this had not been disputed and were therefore content to accept that neighbourhood for the purpose of determining the current application.
- 6.8 The Committee noted that there are no pharmacies within the neighbourhood and that there is a PMS practice located at the proposed site, the Healthy Living Centre. The Committee further noted the location of the nearest pharmacies in the town centre. The Committee were mindful of the access difficulties raised in the site visit reports for the previous appeal, specifically the distance and incline involved in travelling to the nearest pharmacies, in particular for patients of the Healthy Living Centre. The Committee noted that a 100 hour pharmacy had opened at Sainsbury's on London Road however were of the view that this did not improve the situation with regard to actual physical access to services for residents of the neighbourhood in question.
- 6.9 The Committee reminded itself that with no pharmacy within the neighbourhood there was neither a choice of provider nor services for the reliant population.
- 6.10 The Committee noted the Appellant's contention that no evidence has been supplied to suggest that residents of the neighbourhood are in any way disadvantaged in accessing pharmaceutical services, however the Committee were of the view that the issues above remain in considering the current application and concluded that a gap in provision remains.

- 6.11 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, given that a purpose of being in that neighbourhood may be to access primary medical services from which pharmaceutical services may be required by the reliant population, then the Committee determined that pharmaceutical services were not currently secured to the extent that it was desirable to grant the application.

7 Decision

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

Abby Richards Appeal Officer

A copy of this decision is being sent to:

Assura Pharmacy Ltd
Sainsbury's Supermarkets Ltd
Norfolk PCT
Boots UK Ltd
Lloyds Pharmacy Ltd
Lime Pharmacy