

23 February 2010

REF: SHA/15561

APPEAL AGAINST NORTH SOMERSET PCT DECISION TO GRANT AP SHAW LTD APPLICATION FOR MINOR RELOCATION UNDER 500 METRES, FROM 30 WEST STREET, WESTON-SUPER-MARE, BS23 1JU TO THE VICINITY OF THE BOULEVARD, (WITHIN 500 METRES OF BS23 1JU) WESTON-SUPER-MARE, BS23

1 The Application

By application dated 25 September 2009, AP Shaw Ltd ("the Applicant") applied to North Somerset Primary Care Trust ("the PCT") for minor relocation under 500 metres, from 30 West Street, Weston-super-mare, BS23 1JU to the vicinity of the Boulevard (within 500 metres of BS23 1JU). In support of the application it was stated:

- 1.1 Improved communication for access, new site on major route with bus stops, taxi rank, pedestrian crossings and on street parking.
- 1.2 The nearest practicable route will be under 500m along the pedestriannised High Street.

2 The PCT Decision

The PCT considered and decided to grant the application. The decision letter dated 24 November 2009 states:

- 2.1 The above application has been considered by North Somerset Primary Care Trust (PCT) under the National Health Service (Pharmaceutical Services) Regulations 2005, regulation 6(1).
- 2.2 The following information was taken into account in reaching a decision:
 - 2.2.1 The neighbourhood is defined as North Boundary – Edge of Weston Woods; East Boundary – Trewartha Park leading into Hill Road. Left into Milton Road, turn right into Ashcombe Road. Continue down to Locking Road, turn right leading into the South Boundary – Locking Road leading into Regent Street until it meets the coast road at the West Boundary – Following the coast line back up to Burnbeck Island Pier, and the PCT agrees that the proposed relocation is within the same neighbourhood.
 - 2.2.2 The distance between the existing premises and the proposed premises is 465 metres and there is no physical barrier between the premises. Therefore the change is minor.
 - 2.2.3 There will be no interruption in the provision of pharmaceutical services as a result of a minor relocation.
 - 2.2.4 The same services will be provided at the new premises.

2.2.5 There is no good cause to consider the minor relocation as though it was over 500 metres.

2.3 This application for a minor relocation under 500 metres is therefore approved by North Somerset PCT.

3 **The Appeal**

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit"), dated 14 December 2009, Lloyds Pharmacy Ltd appealed against the PCT's decision. The grounds of appeal were:

3.1 The PCT state that they have measured the distance to be 465 metres however the proposed site was only specified as the vicinity of the Boulevard. There is no clear indication of to what the extent of this vicinity is or whether it includes both sides of The Boulevard. We note that the PCT state in their site visit report that The Boulevard is a very busy road and that the opposite side of the road has trees alongside it which are causing distress to the pavement and thus uneven in places. On this basis the proposed site may not be as conveniently accessible or easily accessible.

3.2 In our view the criteria for a Minor Relocation have not been satisfied and therefore we respectfully ask the Appeal Unit to reconsider the application and uphold this appeal.

4 **Summary of Representations**

This is a summary of representations received on the appeal.

4.1 AVON PRIMARY CARE AGENCY ON BEHALF OF THE PCT

4.1.1 On Tuesday 24 November 2009 the NHS North Somerset Control of Entry Panel considered the application listed above and unanimously agreed to approve the minor relocation. The decision was made for the following reasons:

4.1.1.1 The new location will be within the same neighbourhood as the current premises.

4.1.1.2 All services will remain the same.

4.1.1.3 There will be no disruption to services.

4.1.1.4 There are no physical barriers to stop people accessing the new pharmacy.

4.1.1.5 The distance from 30 West Street to the end of the Boulevard is less than 500m.

4.1.2 The site visit for this application was undertaken by Avon Primary Care Support Agency on behalf of NHS Somerset. Because this application was for preliminary consent the distance from 30 West Street to the furthest point on the Boulevard was measured. The distance was 465 metres. However upon approval of this application NHS North Somerset's Control of Entry Panel did stipulate that once AP Shaw has found their new premises the actual distance is re-measured so we can be sure that it fulfils the criteria for a minor relocation of less than 500m.

- 4.1.3 I hope this information demonstrates why the decision was reached to approve this preliminary consent application for a minor relocation of under 500m.

4.2 GREEN PHARMACY CONSULTANTS

- 4.2.1 I have been asked by Mr A.P. Shaw, Director of A.P. Shaw Ltd, to respond on his behalf to the Appeal lodged by Lloyds Pharmacy Ltd to the A.P. Shaw Ltd proposed Minor Relocation under 500m.
- 4.2.2 Having read the comments in the report by the Avon Primary Care Support Agency, prepared for the PCT committee, ahead of their decision making process, I would refer you to the final sentence on page 2 of 3 in which the Agency states 'to the far end of The Boulevard the measurement in distance taken was 465 metres, this is the furthest point away from the existing location to the proposed location of "vicinity of the Boulevard" (N.B. my italics). I understand that to mean a distance measured to the end of the neighbourhood of the existing and proposed sites with reference to SHA/15561.
- 4.2.3 In fact, the preferred location which my client is about to complete upon is less than half that distance of 465m but at the time of his Application in September 2009 my client had not secured premises so, quite reasonably, gave himself as much latitude as possible over alternative premises that met the criteria of the Minor Relocation under 50Dm Regulation when applying for this Preliminary Application.
- 4.2.4 Since his proposed location is on the same side of the road as his existing one and does not involve crossing roads carrying anything other than light slow moving vehicles – hence there are no physical barriers – I believe the A.P. Shaw Ltd Application fits all the criteria for a Minor Relocation under 500m.
- 4.2.5 May I therefore respectfully request that your committee should dismiss the arguments tabled by Lloyds Pharmacy Ltd and so turn down their Appeal against my client's Minor Relocation, thus allowing A.P. Shaw Ltd to move at an early date.
- 4.2.6 I would also ask you to advise your committee the A.P. Shaw Ltd lease in West Street expired at the end of 2009 and so they remain in their existing premises for only a limited period of time thanks to the generosity of their landlord.
- 4.2.7 My client would therefore be grateful if your committee could give the decision on this case at the earliest opportunity and so avoid Mr Shaw seeking permission to suspend his NHS Pharmacy Contract.

4.3 AP SHAW LTD

- 4.3.1 I enclose a copy of a letter Mr Green has forwarded to you, I would like to add the following comments and for this letter to be included and regarded as an extension to his reply on my behalf.
- 4.3.2 My preferred location is under 100m from my existing pharmacy.
- 4.3.3 The preferred location is on the same side of the road as my existing pharmacy and is closer to the local surgeries so the site is more conveniently accessible and therefore more easily accessed.

- 4.3.4 The preferred location is more conveniently accessible and more easily accessed as it is situated almost opposite a light controlled pedestrian crossing, has a loading/parking bay outside (my existing premises has double yellow lines), a bus stop 10m away on the same side of the road and a taxi rank directly opposite.
- 4.3.5 The trees, which Lloyds Pharmacy draw attention to, are 100m away and on the opposite side of the road to the proposed site, distress to the pavement outside the premises due to these trees is impossible.
- 4.3.6 I have arranged with my solicitor for the lease on the proposed site being subject to the consent for minor relocation being granted, this is why an application was made for a relocation in the vicinity of the Boulevard so that if my deadline date for completion 28th February 2010 (set on my application to the PCT on 24th Sept 2009) is not met another site can be looked at.
- 4.3.7 My understanding of the minor relocation regulations is that the “necessary or expedient” test does not apply for minor relocations. For the application to fall into this category I, as applicant, must show that under regulation 6 that:
- the services to be provided from the new premises are the same as those provided at the existing premises*
- 4.3.8 The services will be the same, this has not been disputed in the Lloyds appeal
- the proposed move is “within the (came, neighbourhood”*
- 4.3.9 The move is within the same neighbourhood, this has not been disputed in the Lloyds appeal
- the change of premises is a “minor relocation”*
- 4.3.10 The move is under 500m and therefore a minor relocation, this has not been disputed in Lloyds appeal.
- there are no barriers winch would change the accessibility of the new premises i.e. a railway line, a main road without obvious crossing points*
- 4.3.11 As detailed above there are no barriers, the accessibility will be improved and Lloyds reasons for suggesting that access may not be as convenient are totally spurious and should be dismissed
- the provision of pharmaceutical services will not be interrupted*
- 4.3.12 There will be no interruption in services, this has not been disputed in Lloyds appeal.
- 4.3.13 As Mr Green, in his part of the response has said, I would be grateful if your committee could give a decision at the earliest opportunity, my potential Landlord has been very generous in allowing his property to remain vacant for over five months subject to the approval of the relocation and my Landlord is soon to market my existing premises, as my lease expired on 31st December 2009.

4.4 BOOTS UK LTD

- 4.4.1 We agree with the view of the appellant with regards to the lack of a specified location.

- 4.4.2 The applicant has clearly stated that the premises are already constructed and are under negotiation. As the application is for a minor relocation under 500 metres, we consider it reasonable to expect for the applicant to have provided a more specific address at the time of application to enable a measurement to the exact location, or locations, to be taken.
- 4.4.3 We acknowledge the details provided by the PCT report relating to the distance measured on their site visit. However, as the applicant has stated that they will relocate to premises 'in the vicinity of the Boulevard', it is conceivable that the proposed pharmacy could be located at the far end of the Boulevard or in a street off the Boulevard. Therefore the final distance could be greater than that measure by the PCT and in excess of 500 metres (please see map enclosed).
- 4.4.4 Should the application be successful, we believe the lack of a more specific address could present the PCT with difficulties when determining a subsequent application for full consent. As the most recent guidance states, receipt of a full application should not be the occasion to re-examine decisions nor does it introduce further opportunities to appeal.
- 4.4.5 In summary, we concur with the view of the appellant and respectfully request the Appeal Unit to reconsider this application and uphold the appeal.

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 Lloyds Pharmacy Ltd. 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 Lloyds Pharmacy Ltd.
- 5.6 The Committee dealt with the application by way of reconsideration of all the issues.
- 5.7 The Committee noted that the neighbourhood defined by the PCT had not been disputed on appeal. The Committee accepted the neighbourhood defined by the PCT without prejudice to any future applications. The Committee noted that the proposed site was in the same neighbourhood as the existing pharmacy and that the appellant had not sought to argue this.
- 5.8 The Committee noted that the applicant proposed to serve the same population and offer the same services without interruption and that neither of these points had been appealed against by the appellant. The Committee had no reason to believe that the same services would not be provided to the same population and that in this regard the move could be considered minor in nature.

- 5.9 The Committee noted that the appellant had not provided any further information to support their assertion as to why a distance of over 460 metres could not be considered minor in the context of this neighbourhood. The Committee were of the view that with no information provided as to why a distance of over 460 metres could not be considered minor, and in the absence of any arguments with regards to the reliant population to be served and whether the application site was in the same neighbourhood as the existing site, they concluded that the proposed change of premises was a minor relocation.
- 5.10 The Committee noted that the applicant had applied for “preliminary consent” for a minor relocation under 500 metres. The Committee were of the view that the effect of preliminary consent (under Regulation 40) means that the applicant will have to apply for full consent within the time periods as stated in the regulations. It will then be a matter for the PCT to determine if the application to convert the preliminary consent to a full application can be granted in accordance with regulation 41(1).

6 Decision

Accordingly the Committee dismisses the appeal.

Jill Jackson
Appeal Officer

A copy of this decision is being sent to:

Lloyds Pharmacy Ltd
Green Pharmacy Consultants on behalf of AP Shaw Ltd
Boots UK Ltd
Avon Primary Care Agency on behalf of North Somerset PCT