

17 December 2009

REF: SHA/15378

**APPEALS AGAINST DORSET PCT DECISION TO GRANT BESPOKE PHARMACY LTD APPLICATION FOR PRELIMINARY CONSENT PRIOR TO INCLUSION IN THE PHARMACEUTICAL LIST IN THE VICINITY OF ALDERHOLT SURGERY, PARK LANE, ALDERHOLT (RESERVED LOCATION)**

REF: SHA/15379

**APPEALS AGAINST DORSET PCT DECISION TO GRANT BESPOKE PHARMACY LTD APPLICATION FOR PRELIMINARY CONSENT PRIOR TO INCLUSION IN THE PHARMACEUTICAL LIST IN THE VICINITY OF ALDERHOLT SURGERY, PARK LANE, ALDERHOLT (PREJUDICE TEST)**

REF: SHA/15351

**APPEAL AGAINST DORSET PCT DECISION TO GRANT BESPOKE PHARMACY LTD APPLICATION FOR PRELIMINARY CONSENT PRIOR TO INCLUSION IN THE PHARMACEUTICAL LIST IN THE VICINITY OF ALDERHOLT SURGERY, PARK LANE, ALDERHOLT (NECESSARY OR DESIRABLE TEST)**

REF: SHA/15380

**APPEALS AGAINST DORSET PCT DECISION TO GRANT BESPOKE PHARMACY LTD APPLICATION FOR PRELIMINARY CONSENT PRIOR TO INCLUSION IN THE PHARMACEUTICAL LIST IN THE VICINITY OF ALDERHOLT SURGERY, PARK LANE, ALDERHOLT (GRADUALISATION)**

## 1 The Application

By application dated 10 March 2009, Bespoke Pharmacy Ltd ("the Applicant") applied to Dorset Primary Care Trust ("the PCT") for preliminary consent prior to inclusion in the pharmaceutical list in the vicinity of Alderholt Surgery, Park Lane, Alderholt. The applicant provided an extensive document in support of the application from which the following points were noted:

1.1 The neighbourhood is defined as the village of Alderholt. The proposed Pharmacy would serve the patients from The Surgery, 12 Park Lane, Alderholt, SP6 3AJ and the surrounding rural areas with pharmaceutical services. Alderholt has a population of 3,113 residents (census 2001) and the village is situated 3 miles west of Fordingbridge.

1.2 Services already existing in Alderholt:

Pubs	General store	Hair salon
Newsagent	Restaurants	Primary school
Doctors surgery	Local village store	Garden centre
Car garage services	Pet store	Veterinary Clinic

- 1.3 The doctors surgery in Alderholt/Fordingbridge has a list size of # (QOF database) and offers a dispensing only service to Alderholt residents. The surgery in Alderholt is the branch surgery; the main surgery is located in Fordingbridge. Below are the opening hours of the Fordingbridge surgery and their branch surgery in Alderholt. Fordingbridge has the luxury of full day openings and also the benefit of a pharmacy.

Days	Fordingbridge Surgery	Alderholt Surgery
Monday	08:30 – 18:30	11:30 – 13:00
Tuesday	08:30 – 18:30	11:30 – 13:00
Wednesday	08:30 – 18:30	11:30 – 13:00
Thursday	08:30 – 18:30	11:30 – 13:00
Friday	08:30 – 18:00	11:30 – 13:00
Saturday	Closed	Closed
Sunday	Closed	Closed

- 1.4 The nearest two Pharmacies are over 3.2km from the surgery and are not in the defined neighbourhood and can not really be considered when assessing the adequacy of Pharmaceutical services in Alderholt.

1.4.1 Lloyds Pharmacy, 1 Salisbury Street, Fordingbridge Located 3.2km away.

1.4.2 Lloyds Pharmacy, 23 Station Road, Verwood Located 5km away.

- 1.5 These are the two closest Pharmacies providing pharmaceutical services and are not within practical walking distance (a round trip of over 6.4km). This is not reasonable for patients especially the elderly, disabled and mothers with young children to travel such distances using public or private transport to obtain pharmaceutical services. From Alderholt village, the closest pharmacy (map provided) is located east along the B3078. This road is used by many HGVs the impact of this was discussed at the parish meeting in December 2006.

- 1.6 The residents of Alderholt are being denied access to pharmaceutical services. The nearest pharmacy is not practical to walk. Residents with no car (6% of households census) or single car (39% of households) which they may not have access during the day will and are struggling to access basic pharmaceutical services.

- 1.7 People living in the neighbourhood tend to be older, with households being a mix of couples with older children and retired people. According to the census 2001, the population of age group 65 years and over is 18% with a population of 3,113 people, that's over 560 people who have to make a 3.2km trip to the nearest pharmacy. This is totally unacceptable, and therefore the area is in desperate need of a pharmacy.

- 1.8 A large proportion of Alderholt population are of working age. The majority will find it difficult to access pharmaceutical services as they require easy access close to their homes, many patients need to attend the pharmacy for services such as MUR, OTC, diagnostic testing, repeat prescription, smoking cessation and other essential, advanced or enhanced services. 22% of the population is below the age of 16. Children are susceptible to a variety of illnesses most of which can be dealt with pharmacy medicines.

- 1.9 It is estimated that around 45% of those with long term conditions have more than one condition, and that this population may have more contact with pharmacists than

other health care professionals. Therefore pharmacists have the opportunity to help PCTs address the health needs of this population.

- 1.10 Easy and convenient access to pharmaceutical services is vital in order to support self care.
- 1.11 The aim is to enhance pharmaceutical services for this extensive residential population. The applicant envisages numerous benefits from the close and co-ordinated working between healthcare professionals (Importance of professionalism highlighted by Lord Darzi in 'High quality care for all'). The direction of national policy is currently for the growth of essential pharmaceutical services. The applicant has identified a desperate need for pharmaceutical services in Alderholt.
- 1.12 A cutting edge pharmacy will provide an extensive range of healthcare functions as part of its duties as a pharmaceutical service provider over and above dispensing prescriptions. The contractual framework for community pharmacists defines three tiers of services with Essential Services being the core foundational criteria required for patients, without compromise. In relation to adequacy of pharmaceutical provisions in Alderholt these fundamental services are not being provided by a contractor on the pharmaceutical list.
- 1.13 The Pharmacy in Alderholt will offer any future PCT commissioned enhanced services as need arises.
- 1.14 The Pharmacy will offer Signposting to other NHS services and support for self-care to patients who may have difficulty accessing general medical services or pharmaceutical services.
- 1.15 A pharmacy at the proposed location will ensure that:
  - 1.15.1 People can get medicines and pharmaceutical advice quickly and easily.
  - 1.15.2 People get a choice and better range of services.
  - 1.15.3 More support is available in using medicines.
  - 1.15.4 Patients can collect their medicines easily and promptly even in the evening and on Saturday.
  - 1.15.5 Reduce the need for extra and unnecessary car journeys, which increase pollution.
  - 1.15.6 Will build and effectively utilize the trust that people place in a local pharmacist.
  - 1.15.7 Its a point of first contact with healthcare services for people in the community.
  - 1.15.8 The pharmacy promotes patient safety by preventing, detecting and reporting adverse reactions and medication errors.
- 1.16 Services and opening hours will be adapted to meet the needs of the local community.
- 1.17 The applicant will provide advice and education on a healthy lifestyle, which will have a positive impact on reducing smoking, and reducing emergency hospital admissions in respect of Cardio vascular disease and diabetes. The free diabetes screening tests the applicant will provide will help to identify high-risk patients.

- 1.18 The residents of Alderholt are missing out on this basic standard of pharmaceutical service. By granting this application the PCT will be addressing the health needs of this population.
- 1.19 Through the new contractual framework, the proposed pharmacy will help address a number of health priorities bringing new benefits for patients.
- 1.20 The process of dispensing is more than the trivial selection and labelling of medication perceived by the public. Dispensing involves medication suitability checking, legal assessment as well as interaction considerations. Dose checks, medical calculations and formulation issues are integral parts of this primary essential service.
- 1.21 In a pharmacy, patients have the reassurance of a professionally qualified pharmacist on hand to counsel and advise on medication use. This level of essential service is currently not offered in Alderholt and is therefore not adequately provided.
- 1.22 Many of the minor ailments require advice, reassurance and access to treatment from the wide range of medicines available from the pharmacy, without the need for a visit to the doctor. More frequently, prescription medicines are becoming reclassified to be available without prescription under the supervision and guidance of a pharmacist as well as Patient Group Directive supplies. NHS Direct referrals frequently involve purchasing some of the more potent 'P' (Pharmacy only) medication. This essential service is currently not readily accessible to residents of Alderholt as GP dispensaries can not sell 'P' medicines.
- 1.23 The residents of Alderholt are being denied a full and complete healthcare service. Mothers with young children, who might be left without a car during the day time, would find it difficult to access a pharmacy this also applies to the elderly who do not have access to a vehicle. The proposed new pharmacy in Alderholt would offer a full range of services over extended hours.
- 1.24 The proposed pharmacy also intends to provide a full collection and delivery service to the population. Currently this does not exist for the residents of Alderholt. This will obviously improve the service available and suit the particular needs of the high elderly population.
- 1.25 The applicant also intends to use their experience and pharmacy ability in conjunction with the surgery to provide patient medication reviews and clinics such as Asthma/Diabetes/Blood pressure as well as supervised administration and needle exchange scheme. It is the applicant's intention to operate a fully commissioned essential service as well as nationally commissioned advanced and localised commissioned enhanced services with a consultation room to enable patients to receive the pharmaceutical services they need.
- 1.26 There is no other pharmacy provider within the defined neighbourhood; therefore there is no choice of service provider. In order to access a choice of providers, recipients currently have to travel considerably and unreasonably. A large elderly population would benefit from the convenience of a local pharmaceutical provider. The current service is a "dispensing service only". The NHS Regulations 2005 make a clear distinction between medical dispensing services and pharmaceutical services.
- 1.27 The proposed pharmacy would significantly improve access by virtue of the distances to the existing pharmacies. Choice would also be improved for the same reason.

The PCT considered and decided to grant the application. The decision letter from Dorset Family Health Services Agency (on behalf of the PCT) dated 18 August 2009 states:

- 2.1 The Dorset Pharmaceutical Contracts Group met on 10 August 2009 when the case was determined.
- 2.2 The Group noted this was an application under Regulation 5(1) (a) of the NHS (Pharmaceutical Services) Regulation 2005. The Group concluded that the proposed site is in a controlled locality.
- 2.3 The Group first defined the neighbourhood as follows; proceeding south west along the B3078 from its junction with Hilbury Road, then along Daggons Road taking in Station Yard, Old Forge Close, Churchill Close, Blackwater Close and Blackwater Grove and east along Attwood Close to Ringwood Road, south east along Ringwood Road and then east along the back gardens of Broomfield Drive, Hazel Close and Wren Gardens to Hilbury Road, then North west to its junction with the B3078.
- 2.4 The Group then assessed whether the area should be classified as a reserved location. The number of Dorset individuals on patient lists living within a 1.6km radius of the proposed location is 3,138 In Dorset this figure was arrived at by printing off the Exeter system all registered patients with an address of Alderholt and then each address was checked on a map to ensure it was within a 1.6 km radius. This resulted in 3,138 within 1.6 km radius and 9 outside of the 1.6 km radius with an address of Alderholt. The number of Hampshire individuals on patient lists living within a 1.6km radius of the proposed location (as supplied by Hants and I.O.W. PPSA) is 44. Therefore the total number of individuals on patient lists living within a 1.6km radius of the proposed pharmacy is 3,182.
- 2.5 As this population exceeds the 2,750 threshold specified within the NHS (Pharmaceutical Services) Regulations 2005, the Group concluded that the neighbourhood defined is not within a reserved location.
- 2.6 The Group noted that previous applications to establish a pharmacy in Alderholt were made in 1994 and 2000. The Group however determined that, although there has been no significant change in the population since that time (3,100 in 2000) or character of the neighbourhood, there have, since 2005, been significant changes in the NHS regulations that govern community pharmacy applications. The Group further noted that the nature and range of NHS essential community pharmaceutical services accessible and expected by the public had also altered significantly from 2005. The Group therefore proceeded to assess the application under the terms of the National Health Service (Pharmaceutical Services) Regulations 2005.
- 2.7 Firstly, as the neighbourhood was not considered to be a reserved location, but is in a controlled locality, the Group had to assess whether a new community pharmacy service in the area would prejudice the proper provision of primary medical services, dispensing services, pharmaceutical services or an LPS Chemist.
- 2.8 The Group, with reference to their site visit on 8 June 2009 noted that the branch surgery of the Fordingbridge Surgery was open daily for 1.5 hours per day. If patients require access to primary medical services outside of these hours, they would have to travel to Fordingbridge.
- 2.9 The Group was unable to confirm the existence of any weekly Friday surgery offered by the Cranborne Practice as there were no visible notices concerning the existence of the branch surgery at the Village Hall. The Group noted that a telephone enquiry to the practice by NSH Dorset had failed to elicit any clear information available on how patients may access primary medical services in Alderholt.

- 2.10 The Group noted comments made by the Fordingbridge practice to local residents suggesting that the loss of their right to dispense pharmaceuticals to patients within a 1.6km radius of the proposed pharmacy would result in the branch surgery service offered in Alderholt “unlikely to be economically viable;”. The Group noted that no financial evidence had been submitted by the Fordingbridge practice to support this comment. Further, the Group, when considering prejudice, noted that the onus must rest with the primary medical service providers to provide clear financial and other evidence that, should a community pharmacy application be granted, they would not be able to provide the primary medical services they are contracted to provide to their registered patient list.
- 2.11 The Group, in considering the prejudice issue, noted the following statement within the consultation document on the Pharmacy White Paper - Pharmacy in England: Building on strengths - delivering the future: proposals for legislative change;
- “The Department does not consider that funding arrangements for medical services are such as to usually require a further cross-subsidy from dispensing income. Funding for medical services supports services and GP income in small practices in urban areas which do not have access to dispensing income. Any cross-subsidising arrangements are, ultimately, anti-competitive unless there is sufficient justification to warrant them. Whilst there will be variations within the average to suggest that some GPs will be unable, without their dispensing income, to maintain appropriate patient services whilst sustaining a reasonable level of income from their primary medical service income, the Department believes this should be exceptional rather than normal.”*
- 2.12 The Group, on the basis of all the information presented, concluded that the grant of the application would not prejudice the proper provision of primary medical services.
- 2.13 The Group then noted that there does not appear to be a dispensary within Alderholt with dispensing services being provided at the surgeries in Cranborne and Fordingbridge. In this context, it was also noted that the dispensaries in Cranborne and Fordingbridge will serve a far larger population than just that of the village of Alderholt. The Group noted that Annex C to the Control of Entry guidance published by the Department of Health states that *“prejudice arises where the service provided under the terms of service laid down by the National Health Service has in some respect to cease or otherwise be curtailed or withdrawn without proper substitution in the area.”* The Group interpreted this guidance as meaning that the fact that a dispensing practice has to stop or reduce the level of their dispensing service is not in itself prejudicial as the service may be substituted by the dispensing service provided by a community pharmacy.
- 2.14 The Group, therefore concluded that the grant of the application would not prejudice the proper provision of dispensing services.
- 2.15 Finally, the Group noted that there are no existing pharmaceutical service providers or LPS contracts in the area of Alderholt. Accordingly, the Group concluded that the grant of the application would not prejudice the provision of pharmaceutical services or LPS.
- 2.16 The Group then progressed to assess whether the pharmacy application was necessary or desirable. As part of their deliberations, the Group reviewed public consultation undertaken by NHS Dorset with LINKS and Alderholt Parish Council; along with other interested parties.
- 2.17 The Group noted that the Parish Council held a meeting on 2 June 2009 and that, on 4 June 2009, Fordingbridge surgery wrote to all their Alderholt patients. The Group considered that both actions resulted in 281 patients writing to the Primary Care Trust to oppose the new pharmacy application with 1 letter in support. The Group regretted that the Primary Care Trust had not been invited to the Parish Council meeting and

that this may have prevented the presentation of a balanced view to the local community; particularly on the full range of services that can be provided by a Community Pharmacy, e.g. all the 7 essential services as well as Advanced and Enhanced Services as commissioned by the Primary Care Trust.

- 2.18 The Group considered that the Primary Care Trust would be very aware of its obligation to make a full range of pharmaceutical services accessible not only to urban populations but also rural communities in Dorset. As an example the Group considered the availability of a repeat dispensing service which would be advantageous to many of those patients who had written to the Primary Care Trust as they would not have to travel to Fordingbridge by taxi (as highlighted in individual letters).
- 2.19 The Group noted that from the outcome of their site visit that if a patient requested a repeat prescription at the Alderholt branch surgery on a Monday, they would have to wait until Thursday to collect their medication. Similarly, the Group presumed that patients attending the weekly Cranborne branch surgery would have to wait a week for their medicines or face travel to Cranborne.
- 2.20 The Group noted during their site visit that public transport links to Verwood and Fordingbridge was very limited with no public transport available to Fordingbridge (although there is a Taxi Link Service which must be booked in advance).
- 2.21 The Group considered that it was evident from the public's letters received that currently the majority of correspondents travel to the Fordingbridge surgery to access primary medical services. The Group's view on this issue was that the services available in Alderholt are necessarily limited and potentially difficult to access for a working population.
- 2.22 The correspondence reviewed by the Group also reflected comments in the letter to patients issued by the Fordingbridge Practice relating to the numbers of patients in a given locality that would make a community pharmacy viable. Whilst the authority for the practice's claim was not evident, the Group noted that this aspect is not required to be taken into account when considering a pharmacy application under the NHS Regulations.
- 2.23 The Group noted that they were required to consider an application for the provision of all essential pharmaceutical services whereas the existing dispensing service does not and is not able to offer an equivalent service within Alderholt. It was noted that the Parish Council and Fordingbridge surgery may not have effectively made this distinction to local residents resulting in many emotive comments in the correspondence received by the Primary Care Trust.
- 2.24 The Group noted comments in the public letters of relative high levels of car ownership in Alderholt but felt that this does not take into consideration the distances to access a full range of essential pharmaceutical services and the limited public transport available to non-car owners; particularly the elderly, children and young people.
- 2.25 The Group also noted that the applicant is willing to provide all Advanced Services and Enhanced Services as commissioned by the Primary Care Trust.
- 2.26 In accordance with Regulation 12, which covers the "necessary or desirable test," the Group concluded that because the full range of community pharmaceutical essential services are not currently available to the population of Alderholt, and because the service provided by the primary medical practices as described above means that patients could have to wait significantly longer than the usual 48 hours for a repeat prescription, the new pharmacy is determined to be both necessary and desirable.

- 2.27 The Group felt that the Fordingbridge and Cranborne practices would need time to assess their stocks of medicines and assess the staffing situation in the dispensaries. It therefore decided that patients should be gradually transferred to the prescribing lists over a six month period following the opening of the new community pharmacy. All existing dispensing patients should be gradually transferred starting one month after the community pharmacy opens with full transfer taking place within 6 months of the opening date as per the following schedule:

One month after opening date

Write to all patients with surnames beginning A —E advising that they will be transferred after 28 days.

Two months after opening date

Write to all patients with surnames beginning F - J advising that they will be transferred after 28 days.

Three months after opening date

Write to all patients with surnames beginning K - O advising that they will be transferred after 28 days.

Four months after opening date

Write to all patients with surnames beginning P — T advising that they will be transferred after 28 days.

Five months after opening date

Write to all patients with surnames beginning U - Z advising that they will be transferred after 28 days.

- 2.28 In summary, the Group concluded that:

2.28.1 The area is not a reserved location.

2.28.2 Primary medical services, dispensing services and pharmaceutical services would not be prejudiced and there is no LPS in the area.

2.28.3 There should be a period of six months after the opening of the pharmacy during which patients are gradually transferred to prescribing status.

2.28.4 The new pharmacy was both necessary and desirable.

and recommended that the application should be granted.

- 2.29 The Dorset PCT representatives endorsed the Group's recommendations.

### 3 The Appeals

The Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit"), received letters of appeal in connection with the various regulatory tests in the PCT's decision letter. The following appeals are listed in the order of the tests considered by the PCT.

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit"), dated 9 September 2009, Surelines Ltd appealed on behalf of Dr H J L Morris & Partners of The Fordingbridge Surgery ('TFS') against the PCT's decision regarding

'Reserved Location', 'Prejudice to Proper Provision' and 'Gradualisation'. The letter includes the following:

#### Reasons why the Determinations are Ultra Vires

In TFS's opinion, supported by case law, the determination made by the Group on 10 August 2009, is ultra vires and legally invalid for the following reasons (this list is not exhaustive) and support ample grounds for appeal.

- 3.1 No reference is made to the consideration of any representations received from any party notifiable under regulation 23.
- 3.2 Insufficient efforts were made to verify the existence of a branch surgery of the Cranborne Practice, which alone compromises the credibility of Dorset FHSA's determinations that there would be no prejudice to medical services if the application was to be granted.
- 3.3 The letter contains two statements of conclusion (see below) that there would be no prejudice to medical services (paras. 7 and 9 on page 2 of the decision letter dated 18 August 2009 - reproduced below in italics)

*"The Group, on the basis of all the information presented, concluded that the grant of the application would not prejudice the proper provision of primary medical services."*

*"The Group therefore concluded that the grant of the application would not prejudice the proper provision of dispensing services." (The Group)*

which could raise doubt as to whether para. 8 was considered at all before the conclusion was reached.

- 3.4 The question of possible prejudice must be considered, in the context of ANY locality (regulation 18ZA(2)(a)), but the Group only appears to have considered 'the area of Alderholt and not the communities of Cranborne and Fordingbridge. Had the Group in fact done so in accordance with the requirements of this regulation, TFS would have expected that a request for dispensing figures in respect of the Lloyds pharmacy in Fordingbridge, at the very least, if not for other pharmacies in a wider area would have been made for local pharmacies in Hampshire. No such request was apparently made.

\*The Committee noted the appeal by TFS against the PCT's 'Necessary or Desirable' test decision. The Committee was mindful that in accordance with Regulation 38(1C), providers of Primary Medical Services do not have a right of appeal against that aspect of the PCT's decision.

#### Eight Reasons why the Determinations are Flawed

In TFS's opinion, supported by case law and natural justice, the determinations made by the Group on 10 August 2009 are flawed and support grounds for appeal for the following reasons (this list is not exhaustive);

- 3.5 The expectation that Fordingbridge practice should have proffered commercially confidential information into the public domain, as evidence of likelihood of closure of their Alderholt branch surgery, is unreasonable. TFS would have expected Dorset FHSA to have requested such information from both the Fordingbridge and Cranborne Practices, in confidence, to inform its decision. The onus of proof here lay, not solely with the practices alleging prejudice; there was also a duty on the part of the Dorset FHSA to collect and consider evidence itself, in accordance with the requirements of regulation 18ZA(2)(a), and in the light of the Pharmacy White Paper consultation document cited.

- 3.6 No specific mention is made of the details and content of the information presented to the Dorset Pharmaceutical Contracts Group (which informed their determination that there would be no prejudice). In short, no evidence was adduced by the Group.
- 3.7 No explanation was offered as to how or why all medical services that might be reduced or terminated as a result of the application being granted, could in fact be provided by the applicant. As a bald statement unsupported by facts, the argument appears merely suppositious.

*“The Group noted that from the outcome of their site visit that if a patient requested a repeat prescription at the Alderholt branch surgery on a Monday, they would have to wait until Thursday to collect their medication. Similarly, the Group presumed that patients attending the weekly Cranborne branch surgery would have to wait a week for their medicines or face travel to Cranborne.” (The Group)*

- 3.8 The Group was in no position to make presumptions about dispensing waiting times in respect of the Cranborne Practice branch surgery at Alderholt, since they were in possession of no details in this regard (see above paragraph in italics).

#### Reserved Location Determination

*“The Group then assessed whether the area should be classified as a reserved location. The number of Dorset individuals on patient lists living within a 1.6km radius of the proposed location is 3,138. In Dorset this figure was arrived at by printing off the Exeter system all registered patients with an address of Alderholt and then each address was checked on a map to ensure it was within a 1.6km radius. This resulted in 3,138 within 1.6km radius and 9 outside of the 1.6km radius of the proposed location (as supplied by Hants and I.O.W. PPSA) is 44). Therefore the total number of individuals on patient lists living within a 1.6km radius of the proposed pharmacy is 3,182. (The Group)*

*As this population exceeds the 2,750 threshold specified within the NHS (Pharmaceutical Services) Regulations 2005, the Group concluded that the neighbourhood defined is not within a reserved location.” (The Group)*

- 3.9 TFS has looked carefully at the postcodes of their patients and they find it difficult to prove the registered population is more or less than 2750. TFS challenges on the basis of ‘beyond reasonable doubt’ - in other words, the reserved location status is so fundamental that the FHSA have to make the decision with complete and unimpeachable authority - but that the nature of the area and the marginal numbers involved leave it open to a challenge. For example:
- 3.9.1 According to the Exeter system and the FHSA there are 3182 registered patients within the catchment area. TFS can show flaws in this figure - there are postcodes with an Alderholt address who are outside the 1.6km, namely:
- SP6 1PU, SP6 1PX, SP6 3DT, SP6 3DU, SP6 3DX, SP6 3DY, SP6 3DZ, SP6 3EB, SP6 3EE SP6 3EF, BH21 5QT, BH2I 5QX
- 3.10 It is a complex area, with winding rural roads and a convoluted county boundary. One postcode may involve a long stretch of road, some houses inside the 1.6km and some outside.
- 3.11 TFS calculates the population from the department of National statistics website as 2,783 - for an area larger than just the 1.6km.
- 3.12 In June TFS wrote to Dorset FHSA under the FOI act to determine their calculations of reserved location status - they only used the Exeter system. TFS has recently written to the chief executive and requested an internal review of the calculation (please see exhibit 1). This will be helpful evidence in support of my TFS’s appeal.

*“The Group noted that previous applications to establish a pharmacy in Alderholt were made in 1994 and 2000. The Group however determined that, although there has been no significant change in the population since that time (3,100 in 2000) or character of the neighbourhood, there have, since 2005, been significant changes in the NHS regulations that govern community pharmacy applications. The Group further noted that the nature and range of NHS essential community pharmaceutical services accessible and expected by the public had also altered significantly from 2005. The Group therefore proceeded to assess the application under the terms of the National Health Service (Pharmaceutical Services) Regulations 2005.” (The Group)*

- 3.13 The Group is obliged to follow the strict criteria of the Pharmaceutical Services Regulations 2005, however laudable public expectation is not part of a statutory test. The Group has not given the authority which states or demonstrates that the nature and range of NHS essential pharmaceutical services have altered, either moderately or significantly from that required under the Pharmaceutical Services Regulations 1992, to the 2005 Regulations quoted. The Group agrees as TFS does that there has been no significant change in the population or character of the neighbourhood since the past refusals of grant of consent to join the pharmaceutical list in Alderholt in 1994 and 2000. TFS's legal advice is the Group has misdirected themselves and that this aspect alone would support request for Judicial Review of the many failings of process by the Group on behalf of the PCT.

Further Comments on the Determination of no Prejudice

*“The Group with reference to their site visit on 8 June 2009 noted that the branch surgery of the Fordingbridge Surgery was open daily for 1.5 hours per day. If patients require access to primary medical services outside of these hours, they would have to travel to Fordingbridge”. (The Group)*

- 3.14 TFS has requested from the Group under the Freedom of Information Act, a copy of the site visit. It would be TFS's intention to comment robustly on this aspect when they have sight of this report.

*“The Group then progressed to assess whether the pharmacy application was necessary or desirable. As part of their deliberations, the Group reviewed public consultation undertaken by NHS Dorset with LINKS and Alderholt Parish Council; along with other interested parties.” (The Group).*

- 3.15 It would appear from information received from LINKS and Alderholt Parish Council, that no public consultation was undertaken by NHS Dorset with LINKS and Alderholt Parish Council; along with other interested parties, or at best lacked dialogues and consisted of a standard notification letter (see exhibit II).

*“The Group considered that it was evident from the public's letters received that currently the of correspondents travel to the Fordingbridge surgery to access primary medical services. The Group's view on this issue was that the services available in Alderholt are necessarily limited and potentially difficult to access for a working population.” (The Group)*

- 3.16 Hence the need is for an extra pharmacy in Fordingbridge, not in Alderholt.

*“The Department does not consider that funding arrangements for medical services are such as to usually require a further cross-subsidy from dispensing income. Funding for medical services support services and GP income in small practices in urban areas which do not have access to dispensing income. Any cross-subsidising arrangements are, ultimately, anti-competitive unless there is sufficient justification to warrant them. Whilst there will be variations within the average to suggest that some GPs will be unable, without their dispensing income, to maintain appropriate patient services whilst sustaining a reasonable level of income from their primary medical*

*service income, the Department believes this should be exceptional rather than normal”(The Group)*

- 3.17 Alderholt is exceptional as it is a branch surgery dependent for its existence on dispensing income. TFS would refer to the precedent of SHA/14470 “Appeal against Cumbria PCT decision to refuse United Pharmacies (UK) Ltd’s application for preliminary consent prior to inclusion in the Pharmaceutical List at Duke Street, Askam in Furness, Cumbria.”
- 3.18 For the benefit of this appeal TFS would comment that there are 30-40 medical consultations a week at Alderholt branch surgery as compared to 550-650 medical consultations a week at the main surgery site at Fordingbridge.
- “The Group was unable to confirm the existence of any weekly Friday surgery offered by the Cranborne Practice as there were no visible notices concerning the existence of the branch surgery at the Village Hall. The Group noted that a telephone enquiry to the practice by NHS Dorset had failed to elicit any clear information available on how patients may access primary medical services in Alderholt.” (The Group)*
- 3.19 They appear to be judging and demeaning the service that Cranborne Surgery provide on the basis of one telephone call which TFS understand was not answered and definitely the partners of Cranborne Surgery have confirmed that they were not aware of this oral enquiry. Cranborne Surgery has had no written request for information from the Group.
- 3.20 TFS would also comment that the nature of any branch surgery, in general is part time.
- 3.21 The responsibility for confirming what medical services are provided in Alderholt by any surgery is the responsibility of the PCT. The PCT fails to have comprehension of the medical services, its medical practices are contracted to provide.
- “The Group noted comments made by the Fordingbridge practice to local residents suggesting that the loss of their right to dispense pharmaceuticals to patients within a 1.6km radius of the proposed pharmacy would result in the branch surgery service offered in Alderholt “unlikely to be economically viable”. The Group noted that no financial evidence had been submitted by the Fordingbridge practice to support this comment Further, the Group, when considering prejudice, noted that the onus must rest with the primary medical service providers to provide clear financial and other evidence that, should a community pharmacy application be granted, they would not be able to provide the primary medical services they are contracted to provide to their registered patient list.” (The Group)*
- 3.22 If the practice loses its dispensing rights TFS categorically confirm they will request permission to close the branch surgery at Alderholt. There is no other reason to have it there other than to offer a dispensing service for local patients. When the branch surgery closes, the quality, quantity and convenience of medical services, will reduce. What clearer definition of prejudice could have been provided to the Group with a complete loss potentially of medical services provided in Alderholt itself. The surgery did not wish to make any other stronger comment than the potential for closure, as it did not want to be accused of threatening to close it prior to any decision by the Group as this would appear to a lay person to be symptomatic “of blackmail”.
- 3.23 Specific viability - because the pool of patients available to any potential community pharmacy - at its most, according to the PCT, is 3,257.
- 3.24 Many of those potential patients will access pharmaceutical services from outside of the neighbourhood rather than the non-located locations which they would simply drive past.

- 3.25 TFS note that the Group mentions the potential for job losses (page 4 of the determination). However, it did not mention the threat to the branch surgery posed by the pharmacy application.

*“The Group noted that the Parish Council held a meeting on 2 June 2009 and that, on 4 June 2009, Fordingbridge surgery wrote to all their Alderholt patients. The Group considered that both actions resulted in 281 patients writing to the Primary Care Trust to oppose the new pharmacy application with one letter in support. The Group regretted that the Primary Care Trust had not been invited to the Parish Council meeting and that this may have prevented the presentation of a balanced view to the local community; particularly on the full range of services that can be provided by a Community Pharmacy, e.g. all the 7 essential services as well as Advanced and Enhanced Services as commissioned by the Primary Care Trust.” (The Group)*

- 3.26 The above comment is unfounded and mendacious

3.26.1 The meeting was called by the Parish Council, not by the practice.

3.26.2 The council alone decided who to invite.

3.26.3 The council invited the applicant who decided and chose not to attend. However, his letter was read out. Therefore the applicant had every opportunity to provide a balanced view to the local community.

3.26.4 The Parish Council Clerk, Maria Humby, contacted Dorset FHSA at the beginning of the consent process to ask advice about the best way for Alderholt Parish Council to handle its response to the application including a public meeting and the invitees.

3.26.5 The FHSA therefore had an opportunity to include itself both in the list of invitees and to attend. The FHSA chose not to attend.

3.26.6 The letter from the applicant and the summary of the surgery's presentation are both part of the public record. Why didn't the FHSA ask to see this before the Group made salacious comments about balance?

3.26.7 Why does the PCT feel its role is to oppose TFS's views and categorically support the pharmacist applicant? Surely the PCT should be balanced in this respect and should refrain from making clear accusations and slurs about the information they gave to their patients.

3.26.8 After ASSUMING the Parish Council meeting had been given unbalanced information, they then go on to dismiss the letters from patients as emotive and have taken no notice of them.

3.26.9 TFS contends that the above examples are bias, run throughout the Group's determinations and demonstrate their continued unjustified assumptions. It is TFS's contention that the Group knew the “answer” they wanted and have worked towards that objective without following the statutory process in general and natural justice in particular.

*“The Group considered that the Primary Care Trust would be very aware of its obligation to make a full range of pharmaceutical services accessible not only to urban populations but also rural communities in Dorset. As an example the Group considered the availability of a repeat dispensing service which would be advantageous to many of those patients who had written to the Primary Care Trust as they would not have to travel to Fordingbridge by taxi (as highlighted in individual letters)”. (The Group)*

- 3.27 Another example of bias. The surgery already provides a repeat dispensing service to Alderholt as well as a branch surgery for those with transport problems. Instead of the Group acknowledging these services, they highlight patients travelling to Fordingbridge by taxi. This is not a balanced approach. TFS has not seen the individual letters. What about the 281 letters of support for their practice? If the patients already have transport problems, they would hardly be able to afford a taxi!

*“The Group noted that from the outcome of their site visit that if a patient requested a repeat prescription at the Alderholt branch surgery on a Monday, they would have to wait until Thursday to collect their medication. Similarly, the Group presumed that patients attending the weekly Cranborne branch surgery would have to wait a week for their medicines or face travel to Cranborne.*

*The Group noted during the site visit that public transport links to Verwood and Fordingbridge were very limited with no public transport available to Fordingbridge (although there is a Taxi Link Service which must be booked in advance).” (The Group)*

- 3.28 The Group failed to comprehend that for any patient prescribing or dispensing, requiring a repeat prescription, every practice has a minimum period to turn around and generate such a repeat request of a non-emergency nature. The patients in Alderholt would be no better off if the branch surgery closes. The dispensing service at Alderholt supplements the dispensing service the practice provides from Fordingbridge, the collection and delivery services provided by TFS surgery and Lloyds pharmacy in Fordingbridge.

*“The correspondence reviewed by the Group also reflected comments in the letter to patients issued by the Fordingbridge Practice relating to the numbers of patients in a given locality that would make a community pharmacy viable. Whilst the authority for the practice’s claim was not evident, the Group noted that this aspect is not required to be taken into account when considering a pharmacy application under the NHS Regulations.” (The Group)*

- 3.29 Viability of the pharmacy is enormously important and should not be dismissed by the PCT. It is their responsibility to ensure adequate and consistent provision of pharmaceutical services. If a pharmacy is not viable, then the people of Alderholt are worse off because the business would close and the PCT/Group has failed in their statutory duty. Whilst my client accepts that a future viability of the pharmacy is not considered under regulations regarding necessary or desirable, it should have been part of the test of prejudice to medical and pharmaceutical services.

- 3.30 A pharmaceutical services contractor would require viability over a number of years by ensuring it can be sustained from day one.

- 3.31 It was open to the Group to have undertaken now for the purposes of this determination, a mini pharmaceutical needs assessment in advance of the forthcoming Health Bill requirement for 2010.

- 3.32 It is not sufficient for the Group to question the practice authority for the claim of non-viability. The Group should have comprised pharmacists of sufficient knowledge of the viability of rural community pharmacists without dismissing, without comment or evidence as to the perverseness of TFS’s claim.

- 3.33 The granting of consent does place responsibility on the PCT to provide future support for the contractor and the patients he may potentially serve. The PCT have sought not to at least consider and comment even if outside of regulations the future consequences.

*“The Group noted comments in the public letters of relative high levels of car ownership in Alderholt but felt that this does not take into consideration the distances*

*to access a full range of essential pharmaceutical services and the limited public transport available to non-car owners; particularly the elderly, children and young people.” (The Group)*

- 3.34 The high car ownership does make access to other pharmaceutical services easier. However, TFS branch surgery and the dispensing service they provide at Alderholt are valuable precisely because of the poor transport. How will a new pharmacy improve the transport links?

“The Group also noted that the applicant is willing to provide all Advanced Services and Enhanced Services as commissioned by the Primary Care Trust.” (The Group)

- 3.35 Not according to the applicants original application.

*“In accordance with Regulation 12, which covers the “necessary or desirable test”, the Group concluded that because the full range of community pharmaceutical essential services are not currently available to the population of Alderholt, and because the service provided by the primary medical practices as described above means that patients could have to wait significantly longer than the usual 48 hours for a repeat prescription, the new pharmacy is determined to be both necessary and desirable.” (The Group)*

- 3.36 They are basing the decision of necessary and (sic) desirable on how fast a repeat prescription can be undertaken in a rural branch dispensing surgery. They have no evidence of patient dissatisfaction. TFS would comment that prescribing only patients accessing medical services at Fordingbridge have the same potential turnaround time of 72 hours not 48 hours as quoted above. For the information of the PCT TFS would always supply any repeat prescription urgently needed as soon as it is logistically possible, irrespective of where the patient lives or whether they are prescribing or dispensing.

#### Postponement of Termination of Dispensing Services (Doctors)

- 3.37 TFS wishes to appeal against the determination of the Group that:

*“The Group felt that the Fordingbridge and Cranborne practices would need time to assess their stocks of medicines and assess the staffing situation in the dispensaries. It therefore decided that patients should be gradually transferred to the prescribing lists over a six month period following the opening of the new community pharmacy. All existing dispensing patients should be gradually transferred starting one month after the community pharmacy opens with full transfer taking place within 6 months of the opening date as per the following schedule: (The Group)*

*One month after opening date*

*Write to all patients with surnames beginning A-E advising that they will be transferred after 28 days.*

*Two months after opening date*

*Write to all patients with surnames beginning F-J advising that they will be transferred after 28 days.*

*Three months after opening date*

*Write to all patients with surnames beginning K-O advising that they will be transferred after 28 days.*

*Four months after opening date*

*Write to all patients with surnames beginning P-T advising that they will be transferred after 28 days.*

*Five months after opening date*

*Write to all patients with surnames beginning U-Z advising that they will be transferred after 28 days.*

*Regulation 20(2) would apply;*

*Where the Primary Care Trust considers that the provision of primary medical services by any provider of such services (other than itself) or pharmaceutical services by any chemist or local pharmaceutical services by any LPS chemist is likely to be adversely affected in consequence of a grant under paragraph (1), it may impose conditions to postpone, for such period as it thinks fit, the making or termination of arrangements under regulation 60 (or equivalent provision under the GMS Regulation or PMS Regulations) for the provision by a doctor or a GMS contractor or PMS contractor of pharmaceutical services or dispensing services to patients on the relevant patient list"*

- 3.38 In TFS opinion, the imperative word is postpone. Where in the Regulations does it state 'gradually transferred'?
- 3.39 The matter of gradual (phased) removal of dispensing patients from both Cranborne and Fordingbridge Surgeries' lists would, TFS believes, be subject to successful appeal in itself, as it seems to TFS to be manifestly insensitive, apparently taking no account of how many patients each alphabetical surname grouping actually represents. If the appeals against granting of consent are unsuccessful to them.
- 3.40 With regard to regulation 20(1) where the Primary Care Trust shall, where it grants the application, consider the conditions (if any) which are to be imposed in relation to that grant under paragraph (2), and pending the final determination of such conditions, shall not in consequence of the grant give notice to any doctor to discontinue the provision of pharmaceutical services or dispensing services to any patient, TFS would state that:
- Then TFS would request a simple 9 months postponement of termination of dispensing services determination by the Litigation Authority.
- 3.41 TFS has previously stated their case that there should be such a Hearing. TFS client would welcome such an Oral Hearing so that the Litigation Authority Committee could have direct evidence from the Oral Hearing Panel as to;
- 3.41.1 the neighbourhood.
- 3.41.2 prejudice.
- 3.41.3 reserved location status.
- 3.41.4 postponement of termination of dispensing services (gradualisation).
- 3.42 It is my TFS 's intention to provide further evidence supporting their case of prejudice in a timely and appropriate manner.

Conclusion and Summary

- 3.43 TFS wishes to appeal against the determination that there would be no prejudice to Medical Services in either Alderholt and Fordingbridge. TFS states that there would be prejudice to medical services in both Alderholt and Fordingbridge irrespective of whether they are one neighbourhood or two.
- 3.44 TFS wishes to appeal against the determination that Alderholt is not a reserved location. TFS's assertion is that Alderholt is a reserved location.
- 3.45 TFS wishes to appeal against the determination of postponement of termination of dispensing services is introduced in a phased manner. TFS has elsewhere in this appeal requested a 9 months from the actual opening of the pharmacy in the event that consent to enter the list is granted.
- 3.46 TFS wishes to assert against the determination that the application was necessary and (sic) desirable.

The Committee noted Mr N V Morley's further of 22 September 2009 with enclosed copy letters from Dr E Staunton and Alderholt Parish Council.

In a letter to the Appeal Unit dated 12 September 2009, Dr C M Davidson of The Cranborne Practice (TCP) appealed against the PCT's decision regarding 'Reserved Location' and 'Prejudice to Proper Provision'. The letter includes the following:

- 3.47 TCP would like to lodge an appeal as follows:

#### Reserved Location

- 3.48 Whilst it appears that the moving of the goal posts in 2005 in favour of establishing community pharmacies with little hope of viability has altered the perception of the location to Controlled status; the fundamental position remains the same. In the two previous applications it was felt that granting a licence which could not be supported by a community whose size and distribution was unlikely to be viable; and therefore in danger of reducing services or closing. This would result in a long term worsening of dispensing services from those that currently exist. TCP would refer to the current support from the local community for the current services from both practices and the startling lack of complaints. TCP would ask the Appeal committee to consider the long term situation, and if the proposed new pharmacy does open and then fail; where will the people of Alderholt be then.

#### Dispensing Services

- 3.49 If the pharmacy opens and fulfils all of its' promises then the dispensing service to the patients of Alderholt will not be adversely affected, but neither will it be improved. TCP's weekly satellite dispensing service backed by their staff and doctors provides an efficient and valued facility for planned repeat prescriptions for which they have had no complaints or requests to alter over the past 20 years. TCP's experience of other local pharmacies would suggest that the goal of a 48 hour target from request to availability is not met — other than by TCP's other dispensing patients. Unexpected or urgent requests for repeat medication are currently available immediately from TCP's main surgery in Cranborne just over 4 miles away.

#### Medical Services

- 3.50 TCP think it would be naïve in the extreme to think that withdrawing dispensing services from practices would not influence the provision of medical services. The quote used in the report from the Group TCP think has been misinterpreted. It is for the very exceptional circumstances of a village like Alderholt that this potential for cross subsidy was acknowledged. As the Group will have noticed the area is primarily a rural village, and as such is part of TCP's wider practice area. TCP have recognised this by providing a weekly presence in the village, in the character of

traditional rural practice. One of the main purposes of this service is the delivery of planned repeat medication; and obviously if this purpose was removed that service would become unviable and withdrawn.

#### Pharmaceutical Services

- 3.51 Obviously TCP cannot comment directly on the impact on current Pharmaceutical Services, apart from pointing out that there are excellent Pharmaceutical Services available less than 3 miles a way in Fordingbridge and under 4 miles a way in Verwood; where most of the population do their regular shopping.
- 3.52 In conclusion TCP feel that the Group have not sought or given due importance to the community's opinion, which should form the bedrock of any major change in provision of health services. TCP do not believe that the proposed pharmacy will be viable as described and therefore the long term provision of dispensing services is under threat. Finally TCP feel if this appeal fails and Bespoke Pharmacy does open, at a site yet to be defined then the medical services available to the people of Alderholt will be prejudiced.

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit"), dated 12 September 2009, the Bespoke Pharmacy Ltd (the applicant) appealed against the PCT's decision regarding 'gradualisation':

- 3.53 The applicant is of the opinion that Gradualisation should be at most three months. Any longer than three months would prejudice against pharmaceutical services provided by the new pharmacy. As the branch surgery in Alderholt does not have a dispensary, all the prescriptions are dispensed at the Fordingbridge main surgery. We feel any adjustment in staff and stock can be done easily within three months of the new pharmacy opening.

By letter dated 7 September 2009, Lloyds Pharmacy Ltd appealed against the PCT's decision (Necessary or Desirable test). The grounds of appeal are:

- 3.54 Alderholt is only a small community and patients would access Fordingbridge as part of the fabric of every day life. Fordingbridge has recently been determined to provide adequate pharmaceutical services. Residents in the area have high car ownership. For the ward, only 7.5% of households do not have a car compared to 17 per cent within the county which is indicative that there is a mobile population.
- 3.55 Lloyds do not believe that the addition of a further chemist contractor can be considered necessary or desirable in order to secure the adequate provision of NHS pharmaceutical services to the area.
- 3.56 Therefore, Lloyds would kindly ask the FHS Appeal Unit to uphold this appeal and reject the application accordingly.

#### 4 **Summary of Representations**

This is a summary of representations received on the appeals. 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 appeals.

**Mr N V Morley on behalf of The Fordingbridge Surgery**

- 4.1 TFS wish to take the opportunity to make further representation in accordance with Regulation 38 of the NHS (Pharmaceutical Services) Regulations 2005, as amended, in addition to the evidence adduced in their appeal of 9 September 2009.
- 4.2 To support TFS appeals in respect of;
- 4.2.1 The area is not a reserved location.
- 4.2.2 Primary medical services, dispensing services, and pharmaceutical services would not be prejudiced and there is no LPS in the area.
- 4.2.3 There should be a period of six months after the opening of the pharmacy during which patients are gradually transferred to prescribing status.
- and TFS appeal against the de facto determination that the neighbourhood for the purposes of this application is Alderholt.
- 4.2.4 As regards TFS appeal against non-reserved location status:

#### Determination of Reserved Location PCT — Validation Methodology

- 4.3 It is TFS understanding that:
- 4.3.1 The PCT information team uses commercial mapping software to plot the location of the proposed pharmacy (in this case the surgery) using its postcode. The program then maps and lists all postcodes located within a radius of 1.6 kilometres from the proposed pharmacy location.
- 4.3.2 The Exeter patient registration system was then interrogated to produce a list of all registered patients living at those postcodes. This produced a total of 3,257 patients and this was the figure quoted in the notification to interested parties.
- 4.4 In view of the challenges to this figure by Fordingbridge and the LMC the figures should have been re-examined, and TFS invite the Litigation Authority to instruct the PCT so to do.
- 4.5 There are several postcodes located on or just inside the radius but whose geographical area extends beyond the radius and there is a significant total of patients in those postcodes. Within those postcodes there are patients at addresses falling inside the radius, and patients at addresses falling outside the radius. The remaining patients live on roads crossing the radius and it would not be possible for the PCT to ascertain exactly how many are each side of the radius.
- 4.6 Those patients clearly outside the radius and, erring on the side of caution, all the patients living on roads that cross the radius, should be removed from the original total 3,257 leaving a revised total which TFS believe will be less than 2,750.
- 4.7 From this TFS believe the Committee should be satisfied that, on a balance of probabilities, the number of registered patients within 1.6 kilometres of the proposed pharmacy is lower than the reserved location threshold of 2,750 particularly for the reasons above.
- As regards TFS appeal concerning prejudice
- 4.8 TFS understand that the Committee, when considering any appeal, is usually of the view that the burden of proof is upon those alleging prejudice and that it may not be sufficient for those making such assertions to do so without providing supporting documentary evidence, which might include financial information such as accounts.

TFS adduce the following evidence, can you please confirm you will seek undertakings of confidentiality from interested parties before releasing it to them.

- 4.9 TFS clients are conscious that it is not easy to disentangle the use of dispensary profits from the business of the surgery. They feel it would be helpful to know however, what additional services and arrangements the practice has developed over the years which have been, in part, funded by the additional income generated via dispensing.
- 4.9.1 Full phlebotomy service, 5 mornings per week.
- 4.9.2 Full anti-coagulation service which, although currently forming part of enhanced service income, was originally developed and funded by the practice.
- 4.9.3 Increased access for patients with minor ailments by the employment of 2 fully qualified nurse practitioners/prescribers. They also provide a range of female health services which otherwise may not be offered in the area.
- 4.9.4 Administrative structure of the workforce has been carefully skill-mixed to allow first class I.T. and management services which impact positively on G.P. work-load and availability by releasing them from administrative management and moreover, gives the practice the ability to pilot and roll out new projects and hence improve patient care. High level I.T. skills ensure accurate data collection and storage, efficient data retrieval and audit systems which also impact positively on total patient care.
- 4.9.5 Extensive, spacious premises, which have received favourable comments from their patients in the GPAQ questionnaires.
- 4.10 They and TFS have reviewed the dispensing profit figures in the 2008 accounts with the following findings:
- Based on Sandisons (Accountants).
- 4.10.1 Loss to the practice
- 4.10.2 If the practice loses Alderholt dispensing = £#
- 4.10.3 In addition the practice will lose 40% of the DSQS, so a further @£#. Total loss = £# per annum
- 4.11 TFS have calculated that excluding medical and nursing labour costs incurred at Alderholt in providing General Medical Services, the branch runs at a nett loss of £#per annum. This nett loss is covered by the dispensing income. If dispensing income is lost of £# per annum, the surgery will have no option but to immediately notify the PCT that it will seek to close the branch surgery at Alderholt. A loss of just over £# is unsustainable.
- 4.12 Any pharmacy opened in Alderholt would fail and both medical and pharmaceutical services to Alderholt patients would be compromised.

Alderholt Costings@October 2009

<u>Expenditure</u>		<u>Reimbursement</u>	
General Rates	#	Fixed Cost Rent#	
Water Rates	#	General Rates	#

Loan Interest	#	Water Rates	#
Cleaning	#	Waste	
Gardening	#	Clinical/Trade/ Confidential	#
Repairs & Maintenance	#		
Telephone	#		
Insurance	#		
Electricity & Oil	#		
Estate Mgt %	#		
Receptionist	#		
Management time	#		
Waste: Clinical/Trade/ Confidential	#		
<b>Total</b>	<b>#</b>		<b>#</b>

N.B General Rates, Water Rates, Clinical Waste, Trade Waste, Confidential Waste – all 100% reimbursed.

- 4.13 TFS are aware that an oral hearing may be needed before an appeal is determined.
- 4.14 TFS do not think the matter should be determined without such a hearing.

#### **Lloyds Pharmacy Ltd**

- 4.15 Lloyds note the comments made by the Fordingbridge Practice with regard to the prejudice of Medical Services provision. They confirm that their practice at Alderholt would be forced to request permission to close should this application by Alderholt Pharmacy Limited be granted. The Practice provide detailed reasons as to why their practice would be prejudiced and this should be taken into account by the Committee.
- 4.16 Lloyds note that the Practice express no dissatisfaction with the pharmaceutical services in the surrounding areas that provide pharmaceutical services to Alderholt. This includes the Lloyds pharmacy in Fordingbridge which along with the Fordingbridge Practice provides services to residents in Alderholt.
- 4.17 The Fordingbridge Practice refer to a previous FHS Appeal Unit M(bn)/0324 decision where the provision of pharmaceutical services within Alderholt and Fordingbridge were considered the same neighbourhood, adequate and therefore accessible. Also more recently the Appeal Unit will be aware of a decision which reinforced that adequate pharmaceutical services were being provided in Fordingbridge ref SHA/15178 in 2009.
- 4.18 Alderholt is only a small community and residents already have access to wholly adequate pharmaceutical and primary care services. Residents in the area are mobile and car ownership is high. In rural communities residents are used to travelling greater distances to access services. Lloyds would draw the Committee to

a similar application Ref SHA/14470 in Askam in Furness where it was concluded that prejudice would occur to the provision of medical services and therefore it was neither necessary or desirable to grant the application.

- 4.19 The application by Bespoke Pharmacy Ltd does not provide any evidence that patients have difficulty accessing pharmaceutical services. Lloyds would therefore maintain their appeal and respectfully ask the FHS Appeal Unit to reconsider the application and refuse the application as there is no evidence of an inadequate pharmaceutical service.

#### **Bespoke Pharmacy Ltd (Applicant)**

- 4.20 The applicant respectfully asks the appeal authority to uphold the decision made by the PCT and dismiss the appeal. The PCT were correct to grant the pharmacy application for reasons given below and also those in the original application.
- 4.21 The location of the proposed pharmacy is currently classified as a controlled locality.
- 4.22 Consequently the application falls to be determined under regulation 12, 18ZA, 35, and 36. In determining the application there was three essential matters for the PCT to consider:
- 4.22.1 Whether the location of the proposed pharmacy is in a reserved location. Regulation 35(2)(a) defines a reserved location as one where the number of registered patients on all patient lists (excluding temporary residents) within 1.6 km of the proposed pharmacy location is less than 2,750.
- 4.22.2 If not a reserved location whether granting the application will prejudice the proper provision of medical or pharmaceutical services in any locality (Regulation 18 — “the prejudice test”). If granted, dispensing doctors will normally lose the right to dispense for patients living within a radius of 1.6 kilometres of the pharmacy although under regulation 36(2) measures could be put in place to defer the loss of dispensing rights for a period if it is felt appropriate to do so.
- 4.22.3 Whether it is necessary or desirable to grant the application in order to secure the adequate provision of pharmaceutical services in the neighbourhood of the proposed premises (regulation 12 — the necessary or desirable test: an application SHALL be granted by the PCT if it is satisfied that it is necessary OR desirable to grant the application in order to secure, in the NEIGHBOURHOOD in which the premises from which the applicant intends to provide the services are located.
- 4.23 Taking these regulations into consideration Alderholt has a resident population of nearly 3,200 well over the threshold of 2,750 so the reserved status does not apply. The PCT used the Exeter system and then CHECKED EACH ADDRESS on the map to ensure it was within 1.6km from the proposed area. The result being 3,138 (+44 from Hants and I.O.W. PPSA) within 1.6km and 9 outside. The applicant does not understand how Surelines can argue that the proposed neighbourhood of Alderholt is a reserved location. Alderholt is not a complex area; this can be seen on the map. It's not even well spread out.
- 4.24 The prejudice test was considered by the PCT and concluded that the grant of the application would not prejudice the proper provision of primary medical services.
- 4.25 The guidance issued by the Department of Health states. “In determining applications in a controlled area, Authorities must apply the test that the proper provision of general medical or pharmaceutical services in any area means that people in that area should have available to them general medical and pharmaceutical services and that those services should be of standard which GMPS and pharmacists are obliged

to provide in order to comply with their respective terms of service. It is that which must be prejudiced if an application is to be rejected. The fact that the granting of an application could lead to a reduction in the level or standard of general medical or pharmaceutical service does not, constitute prejudice to proper provision”.

- 4.26 The Fordingbridge practice objection is based on the potential negative impact on their income. It is claimed the loss of dispensing income would leave no option but to close the branch surgery in Alderholt. However no appropriate evidence has been provided to support this claim. The surgeries have not stated how dispensing income is used to fund general medical services or how any loss in income will impact upon their ability to comply with their terms of service.
- 4.27 The applicant would like the appeals authority to note that no financial evidence has been submitted by the Fordingbridge practice to support all their claims. Fordingbridge practice has a large patient list size of over # patients. The applicant suggests that Fordingbridge practice provide the appeals authority with full financial accounts for the appeals authority to take into consideration any loss of income. Once this information is provided by the practice this should be compared to another non-dispensing practice of the same size. The applicant strongly believes no financial information will be provided by the practice to support any of their claims.
- 4.28 The applicant would like to inform that there is a judicial authority for saying that dispensing income should not support other income received by Doctors. In the 1996 case of R v North Yorkshire FHSA, Justice Carnwath said “It is not part of the scheme of those regulations or indeed of the statute that pharmaceutical services should be relied upon to provide financial underpinning for medical services which are intended to be financed in other ways”.
- 4.29 The financial provisions of the general medical service contract are sufficient to support practitioners in their practice without the need for extra income from other sources such as dispensing.
- 4.30 The NHS IC recently published GP earnings and expenses for 2007/08. The average income before tax for contractor GPs in the UK in 2007/08, by dispensing practice status was:
- 4.30.1 £121,753 for GMS dispensing GPs.
- 4.30.2 £96,189 for GMS non-dispensing GPs.
- 4.30.3 £132,222 for PMS dispensing GPs.
- 4.30.4 £113,517 for PMS non-dispensing GPs.
- 4.31 The PCT then considered regulation 12 and granted the application on ground that it was necessary and desirable.
- 4.32 The nearest two Pharmacies are over 3.2km from the surgery and are not in the defined neighbourhood and cannot really be considered when assessing the adequacy of Pharmaceutical services in Alderholt.
- 4.32.1 Lloyds Pharmacy, 1 Salisbury Street, Fordingbridge - located 3.2km away.
- 4.32.2 Lloyds Pharmacy, 23 Station Road, Verwood - located 5km away.
- 4.33 These are the two closest Pharmacies providing pharmaceutical services and are not within practical walking distance (a round trip of over 6.4km). This is not reasonable for patients especially the elderly, disabled and mothers with young children to travel such distances using public or private transport to obtain pharmaceutical services. It

has been made clear by the PCT during their visit that public transport links to Fordingbridge and Verwood are extremely poor. From Alderholt village, the closest pharmacy is located east along the B3078. This road is used by many HGVs the impact of this was discussed at the parish meeting in December 2006.

- 4.34 Patients without access to private transport would not be able to access a Pharmacy conveniently, when allowing for travelling and waiting times. Having a local pharmacy would be highly desirable for patients, especially during the darker winter months in a rural area.
- 4.35 It is questionable whether it is satisfactory that a patient for example requiring a strong pain killer for a migraine or paracetamol for a child's high temperature, would readily travel the 6.4km round trip journey to the nearest Pharmacy. The applicant submits that patients in these typical scenarios would feel that in comparison, a local Pharmacy is necessary or at least desirable.
- 4.36 In controlled localities there often tend to be few complaints regarding Pharmaceutical services as dispensing services are provided by the surgery staff (these are not relevant to the question of adequacy under the regulations). However, the general public is often not aware of the full range of Pharmaceutical services available from a pharmacy because they have not been available in Alderholt. It is also questionable whether Fordingbridge practice provides a satisfactory dispensing service to their patients in Alderholt as the branch surgery is only open 1.5 hours a day.
- 4.37 A cutting edge pharmacy will provide an extensive range of healthcare functions as part of its duties as a pharmaceutical service provider over and above dispensing prescriptions. The contractual framework for community pharmacists defines three tiers of services with Essentials Services being the core foundational criteria required for patients, without compromise. In relation to adequacy of pharmaceutical provisions in Alderholt these fundamental services are not being provided by a contractor on the pharmaceutical list
- 4.38 With respect to adequacy, Sir Louis Blom-Cooper in the case of R -v- Yorkshire Regional Health Authority ex parte Baker, having regard to the question of consideration of adequacy of existing pharmaceutical services. The PCT could reach a valued judgment ranging from adequate to inadequate. In asking themselves there is or there is not adequate provision of pharmaceutical resources, specified in the application, the PCT must consider that if their answer is 'wholly inadequate' then the conclusion will be that there is a need to secure adequate provision in the form of granting this Application. If there is any doubt in the mind of the decision maker as to whether the current service provision is "adequate" then the PCT must properly invoke the desirability test, whereas the necessity test would not be apt to supplement a service provision that might marginally qualify as being adequate.
- 4.39 The new NHS (Pharmaceutical Services) Regulations 2005 contains some noteworthy amendments to previous control of entry regulations. One important factor stated is choice. The PCT should take into account "whether the recipient of pharmaceutical services already have a REASONABLE choice regarding the services or the range of persons ALREADY on the pharmaceutical list in the neighbourhood (these are the new criteria of 'competition and choice')". There is no other pharmacy provider within the defined neighbourhood; therefore there is no choice of service provider. In order to access a choice of providers, recipients currently have to travel considerably and unreasonably. A large elderly population would benefit from the convenience of a local pharmaceutical provider. The current service is a "dispensing service only". The NHS Regulations 2005 makes a clear distinction between medical dispensing services and pharmaceutical services.
- 4.40 The proposed pharmacy would significantly improve access by virtue of the distances to the existing pharmacies. Choice would also be improved for the same reason.

- 4.41 This application offers increased benefit and services to the residents of the neighbourhood. The applicant submits that it is at least desirable to grant this application to secure adequate provision in the neighbourhood for the present time and in the longer term.
- 4.42 The applicant would like to bring to the attention of the appeals unit an email sent to them by Mr Austin. Mr Austin was employed by the Fordingbridge practice to represent them during the current application determination. Should the application be successful the surgery has been advised to change to three monthly scripts and it has been indicated to the applicant that the surgery will do what they can to make the pharmacy unviable. This is one of the reasons the applicant requests a three month gradualisation period as they feel that all steps are being prepared to make the new pharmacy unviable should the application be successful. Granting a Gradualisation of six or nine month for the surgery would prejudice against pharmaceutical services provided by the new pharmacy. This is because it is unlikely for the pharmacy to receive any significant number of prescriptions and therefore make it financially unattractive to the point of possibly not opening.
- 4.43 In summary:
- 4.43.1 The current Pharmaceutical service provision in Alderholt is inadequate due to its absence. The two closest pharmacies are 3.2km and 5km by road with no simple direct route making them inadequate as an alternative to a local Pharmacy in Alderholt.
- 4.43.2 An innovative local Pharmacy offering a wide range of services would be highly desirable in Alderholt. The pharmacy will be open over extended hours 6 days a week and also offer a free unlimited delivery service. This cannot be compared to the 1.5 hour daily opening of the dispensary in the branch surgery.
- 4.43.3 Residents of Alderholt will be able to purchase more potent 'P' medicines from the proposed Pharmacy supporting the Government's drive towards supporting self care.
- 4.43.4 The population within 1.6km of the proposed location is above 2,750 and cannot be regarded a reserved location.
- 4.43.5 No financial evidence has been provided by the surgeries to support their claims that the new pharmacy would prejudice general medical services.
- 4.43.6 The applicant believes that the appeals unit has all the facts before them to come to a decision and respectfully ask the appeals unit to avoid wasting any further time by holding an oral hearing.
- 4.43.7 To ensure the viability of the pharmacy the applicant requests a three month gradualisation period.
- 4.44 The case for recognizing the changing needs of this growing neighbourhood is prominent, pressing and unequivocal. The applicant has reached the juncture where silence is not an option and the ease for fill and fair access to pharmaceutical care for all has to be made. The applicant has exceeded the critical mass at which it can be judged that the current provision or lack of pharmaceutical provision demonstrates serious inadequacy. It would therefore be both necessary and desirable to site a pharmacy in the neighbourhood of Alderholt. The applicant humbly requests the committee to acknowledge the sense in their reasoning and to therefore dismiss the appeal.

The only comments the PCT would like to make are to re-iterate two points that were made in the decision letter:

- 4.45 The calculation of the registered population of Alderholt was checked manually to ensure an accurate figure. A member of the team at the FHSA checked each address to ensure it fell within the 1.6km radius. This resulted in a figure of 3,138. In addition Hampshire PCT provided information to say that there are an additional 44 people living in Hampshire who would fall within the 1.6km radius. The resulting figure is 3,182 which clearly indicates that the area cannot be regarded as a reserved location.
- 4.46 On the matter of prejudice to the proper provision of primary medical services, dispensing services, local pharmaceutical services or pharmaceutical services, no evidence was submitted to prove that there would be prejudice. The PCT note that the burden of proof is on the party alleging that prejudice will occur.

## 5 Further Comments

### Mr N V Morley on behalf of The Fordingbridge Surgery

TFS would like to comment on the following:

Lloyds pharmacy (dated 19 October 2009)

- 5.1 TFS note they support their case of prejudice to medical services at and to TFS's branch surgery in Alderholt. TFS would point out they have not addressed their satisfaction with the adequacy of Pharmaceutical Services or otherwise in Fordingbridge itself, which is currently provided by Lloyds. The decision SHA/15178 is irrelevant to the above case, as the application is not for Fordingbridge.

NHS Dorset (dated 20 October 2009)

- 5.2 As regards their substantive paragraph 2, TFS have provided evidence (as most recently as 19 October 2009) which TFS would state proves there would be prejudice.
- 5.3 TFS can clearly show that the branch surgery costs them money, with no provision made in GMS.
- 5.4 Bespoke Pharmacy (dated 18 October 2009) As regards their comment;

*"The applicant would like to bring to the attention of the appeals unit an email sent to them by Mr Austin. Mr Austin was employed by the Fordingbridge practice to represent them during the current application determination. Should the application be successful the surgery has been advised to change to three monthly scripts and it has been indicated to the applicant that the surgery will do what they can to make the pharmacy unviable. This is one of the reasons the applicant requests a three month gradualisation period as they feel that all steps are being prepared to make the new pharmacy unviable should the application be successful. Granting a gradualisation of six or nine months for the surgery would prejudice against pharmaceutical services provided by the new pharmacy. This is because it is unlikely for the pharmacy to receive any significant number of prescriptions and therefore make it financially unattractive to the point of possibly not opening."*

- 5.5 TFS would point out;
- 5.5.1 Brian Austen was used briefly by TFS at the very beginning of this process, between May and June 2009. He no longer works for them in any capacity.

- 5.5.2 At no time was TFS aware of this e-mail and its content was not instigated or sanctioned by the partnership.
- 5.5.3 They neither accepted his advice nor have any intention to institute changes regarding length of treatment prescribing policy.
- 5.5.4 Mr Austen's statements cannot be relied upon, as it would appear he was meeting the applicant at a public house and emailing them concurrently with when he was employed by TFS, the appellants. Such behaviour at best gives a perception of naivety and at worst gives a perception of duplicity.
- 5.5.5 All the practice patients, dispensing and pharmacy get the same 28 day scripts from the practice - the evidence is clear.
- 5.5.6 The e-mail also emphasises that Bespoke knew about the public meeting, but chose not to attend.
- 5.6 TFS would urge the Committee to disregard the adduced email of Brian Austen as ultra vires.
- 5.7 If the consent is granted they would urge the Litigation Authority to grant TFS a substantial period of gradualisation of 9 months.
- 5.8 Bespoke Pharmacy's observation that their proposed, new and isolated pharmacy in Alderholt is unlikely to receive many prescriptions in the first few months may be true. It highlights TFS concerns about the fundamental viability of such a pharmacy, but it is not a valid parameter in the "gradualisation" determination.
- 5.9 In the final paragraph of their letter they state: "The case for recognising the changing needs of this growing neighbourhood is prominent, pressing and unequivocal". Bespoke pharmacy have not supplied any evidence to support this assertion and TFS are not aware of any significant changes in the numbers, demographics or needs of the population since the Litigation Authority rejected the last application in 2000.
- 5.10 TFS note the support of;
  - 5.10.1 Peter Kirby, Clerk to Whitsbury Parish Council.
  - 5.10.2 Cllr Dr Miranda Whitehead.
  - 5.10.3 Cllr Ian Monks MSc, East Dorset District Council.
  - 5.10.4 Robert Walter MP.
  - 5.10.5 Desmond Swayne TD MP, House of Commons.
  - 5.10.6 Fordingbridge Surgery.

#### **Whitsbury Parish Council**

- 5.11 Whitsbury Parish Council are very concerned that an unintended consequence of siting a Bespoke Pharmacy in Alderholt will be the contraction, or possible closure, of the internal pharmacy at Fordingbridge Surgery, when the economic viability of a dispensary at Alderholt is unproven. It should be noted that Alderholt presently does not even have a Bank and medical services are provided by a branch of Fordingbridge Surgery which means that if Bespoke proceeds then the use of the in-house pharmacy will drop.

- 5.12 The unusual circumstances of the area served by Fordingbridge Surgery (sited in Hampshire but also serving residents of Dorset and Wiltshire PCT's) mean that co-ordination and co-operation is required between the 3 PCT's and therefore the Parish Council request that, as the Committee are in a position to have an 'overview' of the situation, they investigate that this has indeed taken place.

**Cllr Dr M Whitehead (District Councillor for Fordingbridge)**

- 5.13 Alderholt lies on the border of Dorset only a couple of miles from Fordingbridge and in terms of community can be considered part of the Fordingbridge area. The residents shop, relax and use the facilities of Fordingbridge, including of course, the doctors practice.
- 5.14 The residents were fully informed of this application and Alderholt Parish Council held a public meeting in June 2009. All interested parties were invited. Bespoke pharmacy did not attend. Nearly 300 residents wrote to Dorset FHS, the overwhelming majority against the proposal.
- 5.15 The reasons that the residents are so strongly against what would appear to be a useful addition to their village is that they can see the difficulties they would have as patients.
- 5.16 When they need prescriptions they will be at the doctors surgery in Fordingbridge. Rather than going back to Alderholt some will leave the surgery premises and use the Lloyds pharmacy in town. Why would they do this? Because they will be doing their shopping in Fordingbridge, and having come in to town they will collect their repeat prescriptions at the same time.
- 5.17 The ones who are feeling ill and are not doing shopping will no longer wait in the comfortable surgery and collect their new prescription but have to struggle down to a pharmacy (probably Fordingbridge, which is nearer and more convenient).
- 5.18 Of course some will use the new pharmacy but do have doubts as to the viability of a business like that in the area.
- 5.19 What happens if the business fails? Will the patients be able to return as dispensing patients to the surgery?
- 5.20 I also understand that the branch surgery in Alderholt is subsidised by the profits from dispensing and that its future is at risk if the pharmacy opens.
- 5.21 Cllr Whitehead objects to this proposal and asks the Committee to reconsider the application?
- 5.22 Cllr Whitehead has to declare an interest as a patient of this practice who is lucky enough to be able to use the dispensing facilities there. It is extremely convenient, especially when one is not well.

**Cllr I Monks – East Dorset District Council Ward Member for Alderholt South**

- 5.23 Cllr Monks understands that the Dorset Family Health Services Agency (FHSA) has recently decided to grant a licence to Bespoke Pharmacy that will allow them to open a pharmacy in the village of Alderholt.
- 5.24 As the East Dorset District Council Ward Member for Alderholt (South), which area covers the majority of the households here, Cllr Monks is concerned as to the negative impact that this decision may have upon the village.

- 5.25 Cllr Monks attended a Public Meeting in June 2009, organised by the Parish Council, giving their residents the opportunity to hear the case both for and against a new pharmacy, and was surprised that Bespoke Pharmacy chose not to be personally represented, a statement from them being read out. Our two local Surgeries, Fordingbridge and Cranborne, each sent representatives and presented their case opposing a new pharmacy. Residents had the opportunity of questioning these representatives, often in some detail, but were clearly denied the opportunity to question anyone from Bespoke Pharmacy. At the end of the meeting there was a show of hands that unanimously opposed the opening of a new pharmacy and subsequently 282 residents chose to write to the FHSA, only 1 of whom was in favour. It is apparent that the FHSA has chosen to ignore the opinions of local residents believing that they were not fully informed of the potential benefits of a new pharmacy opening in Alderholt. If Bespoke Pharmacy chose not to put their views across in person and make themselves available to questioning then it is hardly surprising that the FHSA believed that residents were not fully informed. In light of this Cllr Monks personally considers their decision to be fundamentally flawed.
- 5.26 Without the benefit of hearing first hand, and having the opportunity to thoroughly question the representatives of Bespoke Pharmacy Cllr Monks can only reiterate the potential harm to the community that the granting of this licence, and the subsequent opening of a retail chemist, will bring:
- 5.26.1 Patients will no longer be able to collect their medicines from the surgery in Fordingbridge. On the face of it a pharmacy in Alderholt adds choice. It does not as patients will lose the choice of using the Surgery dispensary.
- 5.26.2 The future of the branch surgery in Alderholt may be compromised as it is clearly not viable as a stand alone unit and is subsidised by the Surgery dispensary profits. If this branch surgery closes this will severely disadvantage many residents, particularly the elderly and those without their own transport. Again this is a removal of choice.
- 5.26.3 Should a new pharmacy in Alderholt not prove to be viable, and closes as a result, patients may not get back their Surgery dispensary in Fordingbridge. In these circumstances patients are considerably worse off than they were, reduced to using one chemist in Fordingbridge.
- 5.27 The last point also raises a number of other potential economic impacts. At the present time there are just two retail properties in Alderholt, a convenience store operated by the Co-operative Group and an adjacent smaller independent shop selling cards and stationary, gifts and haberdashery. In recent times there were at least three other retailers but these have closed and the property redeveloped for housing. Cllr Monks understands that the leaseholder and operator of the small shop has received an approach on behalf of Bespoke Pharmacy seeking an assignment of their lease. If this were to happen then the village would lose the services of this shop. Should the pharmacy not be viable the village will have lost yet another local business.
- 5.28 In conclusion Cllr Monks believes that the decision of the Dorset FHSA to grant this licence has been taken without regard to the views expressed by the residents of Alderholt and to the potentially negative consequences that the opening of a pharmacy could have for the community. It is Cllr Monks opinion that this decision should be opened to proper scrutiny and if necessary, reconsidered.

**Mr Robert Walter MP**

- 5.29 The village of Alderholt forms part of Mr Walter's North Dorset parliamentary constituency and he is concerned to hear that residents feel that their views have not been taken into account in this matter, despite some 280 letters of objection being written to Dorset FHSA against this proposal.

- 5.30 A public meeting was organised by Alderholt Parish Council in June 2009 of this year to allow the people of Alderholt the chance to hear the case both for and against a new pharmacy. Mr Walter understands that Bespoke Pharmacy chose not to be personally represented at this event, but to send a statement instead. Had Bespoke Pharmacy sent a representative local residents would have had the opportunity to question them in detail on the advantages and disadvantages of bringing a new pharmacy into the area, as they did with representatives from the two local GP surgeries that chose to attend.
- 5.31 The fact that this opportunity was denied to residents makes rather a mockery of Dorset FHSA's decision to ignore the views of local residents and accept the application from Bespoke Pharmacy on the basis that people were not fully informed of the potential benefits that a new pharmacy would bring to Alderholt. This, in Mr Walter's view, would suggest that the decision of Dorset FHSA was flawed and leads him to recommend that their decision be reviewed.
- 5.32 Mr Walter is also very concerned, following representation from Fordingbridge Surgery, about the potential negative impact of a new pharmacy in a village with a population significantly below the level usually required to sustain a pharmacy. Mr Walter is a great supporter of increasing the choice of products available and access to dispensing services, but not where it has the potential to give with one hand a take with the other.
- 5.33 If Alderholt were to lose its branch surgery dispensing service as a result of the arrival of a new pharmacy, Mr Walter cannot see how this would be of benefit to local residents, especially given that the size of the local population may not sustain this new business in the longer term. A new pharmacy would also impact on the profits of existing GP surgeries by cutting income from their in-house dispensaries and possibly lead to the closure of Fordingbridge Surgery's Alderholt branch, thereby disadvantaging those residents unable to travel to Fordingbridge or Cranborne. In this event residents would be considerably worse off in terms of choice and accessibility than they were before.
- 5.34 Local District Councillor for Alderholt, Mr Ian Monks, has expressed his concerns to Mr Walter regarding the potential economic impact of a new pharmacy. At the present time there are just two retail properties in Alderholt, a convenience store operated by the Co-operative Group and a neighbouring independent shop selling cards, stationary, gifts and haberdashery. There were at least three other retailers but these have recently closed and the properties involved have been redeveloped for residential housing.
- 5.35 Mr Monks informs Mr Walter that the leaseholder and operator of the small shop has received an approach on behalf of Bespoke Pharmacy seeking an assignment of their lease. If this is correct and were to go ahead, Alderholt would lose the services of this shop. If the new pharmacy then proceeds to be unviable, this village will have lost yet another local business.
- 5.36 On the basis of the above arguments Mr Walter would urge the NHS Litigation Authority to uphold this appeal and encourage Dorset FHSA to reconsider their decision taking into account the views of local people and their elected representatives.

Enclosed copy (unaddressed) letter from Dr H J Morris & Partners (Fordingbridge Surgery) dated 7 September 2009:

- 5.37 You may have become aware in recent days that Bespoke Pharmacy have applied to open a pharmacy in the region of Park Lane, Alderholt. The Dorset Primary Care Trust and Family Health Services Agency have reviewed that application and granted approval for the pharmacist to open. Fordingbridge and Cranborne Practices, as you know, already dispense to our patients in Alderholt and the surrounding villages. Both

Practices are gravely concerned that this application has been granted. Our main reasons for this concern were discussed at the Alderholt Parish Council Public meeting on Tuesday, 2 June and are summarised for your information as follows:

- 5.37.1 It is generally believed that pharmacies require a list of 4,500— 5,000 dispensing patients to be viable. Alderholt's population is currently assessed at only around 3,000 patients. The repercussions of such a pharmacy being sited there will be immense as the current Practices will not be permitted to continue to dispense to our patients as the Pharmacy Regulations forbid this. To make this clear, this will mean that even if Alderholt patients attend Fordingbridge main or branch Surgeries they will not be able to obtain their medicines as we will not be permitted to supply them. As a consequence of this impact on the Practice we would inevitably have to consider the viability and continuation of some of our current services. It follows that this may have a negative effect on the level of service that we may be able to continue to offer to our patients at Alderholt but also to our provision of additional or enhanced services at Fordingbridge.
- 5.37.2 If the in-coming pharmacy is not viable, as we believe, then it is likely not to be a sustainable business and is likely to close. This coupled with the repercussions to the Practice as mentioned above would mean that our Alderholt patients would ultimately suffer a loss to their existing services rather than any improvement i.e. the pharmacy would close and the dispensing service will not be available to them. We felt it right that you should be made aware of these matters and also wished to make it clear that Bespoke Pharmacy is not affiliated in any way to either Fordingbridge or Cranborne practices and has no local connection of any sort.

#### **Mr Desmond Swayne MP**

- 5.38 Mr Swayne has received representations from Fordingbridge Surgery regarding the application which has been granted, and now understood is under appeal, to grant a license for a new pharmacy in Alderholt. The complaint is that the original objections and reservations have not been properly considered or answered and in particular the long term consequences. Mr Swayne does hope that reassurance can be had that the appeal process will be exhaustive in addressing the salient issues.

Enclosed copy letter from Dr H J Morris & Partners (Fordingbridge Surgery) to Mr Swayne, dated 8 September 2009

- 5.39 A decision was recently made by Dorset Family Health Services Agency to grant a pharmacist a licence to practise in the village. At first sight this may not appear to be anything contentious, if anything, it sounds like a positive development. We have grave concerns however about the long term consequences of the decision and we are in the process of appealing against it.
- 5.40 Enclosed are copies of letters which we have written to our patients in Alderholt to give an outline of our objections.
- 5.41 In summary we believe:
- 5.41.1 The F.H.S.A. has chosen to ignore the opinions of 281 people who objected to the application.
- 5.41.2 The decision is unrealistic in its expectations and there is a very real danger of the area being worse off in the future.
- 5.41.3 Patients will have less choice and the quality and convenience of medical services will diminish.

- 5.41.4 The F.H.S.A. has made no substantive effort to genuinely assess the needs of the area.
- 5.42 Clearly, this is our own view which is unlikely to be shared by the F.H.S.A. or the pharmacist who made the application!
- 5.43 We wanted you, as a representative of the area, to be aware of the situation and hopefully to become involved, listen to arguments, canvass opinion and come to your own conclusions, The decision of the F.H.S.A. should be open to scrutiny.
- 6 A copy letter from Dr Morris & Partners, was essentially the same as the that sent to Mr R Walter MP.

## **7 Preliminary Consideration**

- 7.1 The Committee noted claims on appeal, regarding the PCT's processing of the application and its decision making process. The Committee takes no view on the PCT's actions, and considered it was not prevented from determining the appeals in accordance with the National Health Service (Pharmaceutical Services) Regulations 2005 (as amended).
- 7.2 The Committee noted reference to its previous appeal decisions one of which, related to Alderholt (M(bn)/0324). Whilst mindful of those decisions, the Committee was aware of the need to consider the current appeals on their individual merits.
- 7.3 The Committee was aware of considerable public interest in connection with the proposed pharmacy. It noted the many letters sent to the NHSLA from members of the Public, Parish Councils, Councillors and MPs. Whilst various issues and concerns were raised by the parties, the overall theme was not supportive of the application being granted.
- 7.4 The Committee attached no weight to Mr B Austin's comment's which cannot be verified.

## **8 Consideration**

- 8.1 The Pharmacy Appeal Committee appointed by the Family Health Services Appeal Unit of the NHS Litigation Authority, ("the Committee") had before it the documentation considered by the PCT, a map of the area showing the proposed location in Alderholt, pharmacies and surgeries in the area, together with the responses to the Authority's own consultations. On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 8.2 Alderholt is in a controlled locality. As such, the application which is made under provision of Regulation 5(1)(a) of the National Health Service (Pharmaceutical Services) Regulations 2005 (as amended) ("the Regulations") falls to be determined under the provisions of Regulations 18ZA, 12 & 35(1).
- 8.3 The Committee noted the PCT's decisions on all of the tests considered in connection with the application, were subject to appeal.
- Reserved Location
- 8.4 The PCT's determination that the premises or relevant location from which the applicant wishes to provide pharmaceutical services, at the date of the receipt of the application, is not in a reserved location, had been appealed by both The Fordingbridge Surgery and The Cranborne Practice.

- 8.5 In determining the appeals, the Committee noted the wording of Regulation 35 (Pharmaceutical Services in reserved locations) of the Regulations:

Regulation 35(1)

*'Subject to regulation 34, the Primary Care Trust shall, when the period for representations has expired under regulation 33 determine whether the premises, or relevant location, from which the applicant wishes to provide pharmaceutical services, at the date of the receipt of the application by the Primary Care Trust, are in a reserved location.'*

Regulation 35(2)

*'In this regulation-*

- (a) *subject to paragraph (3) a "reserved location" means that the number of individuals on all of the patient lists for the area which is within 1.6 km of the premises, or from the relevant location, as the case may be, is less than 2,750; and*
- (b) *the "relevant location" means where the location of the premises from which the pharmaceutical services are to be provided is specified in writing by the applicant before the Primary Care Trust make its determination, that location, and where that location is not so specified, the best estimate the Primary Care Trust is able to make of where those premises may be.'*

- 8.6 The PCT had determined the total number of individuals on patient lists within a 1.6km radius of the premises or relevant location was 3,182. This included 3,138 in Dorset and 44 in Hampshire. Although the Trust had not indicated the premises or relevant location at the centre of their 1.6km radius, this was not an issue raised by the parties on appeal.
- 8.7 The PCT stated they had arrived at the Dorset figure using the 'Exeter system' to identify all registered patients with an address in Alderholt, then checking each address location on a map. The Fordingbridge Surgery pointed out one postcode may involve a long stretch of road, some houses being inside the 1.6km radius and some outside. However, the Committee noted all of Alderholt village is included within a 1.6km radius wherever the centre of that radius is placed on Park Lane. No information was provided to the Committee to show that a large number of individuals would either be included or excluded, dependant upon where along Park Lane the point of the radius is located.
- 8.8 The Committee had no information to show Fordingbridge Surgery had access to the number of individuals on the patient lists of other GP surgeries. The appellant had themselves claimed they found it difficult to prove their own registered population is more or less than the threshold figure of 2,750 individuals. Although the appellant also sought to rely upon the Department of National Statistics, website they had in the Committee's view, still not been able to identify the number of individuals on all of the patient lists for the area which is within 1.6 km of the relevant location. Dr Davidson did not indicate why the PCT's calculations should be regarded as inaccurate.
- 8.9 On balance, the Committee considered the PCT's information source, and the methodology used in reaching their conclusion, had produced a more credible assessment than those of the appellants. The Committee determined that the relevant location, from which the applicant wishes to provide pharmaceutical services, at the date of the receipt of the application by the Primary Care Trust, is not in a reserved location.

Prejudice to Proper Provision test

The Committee noted the PCT's decision that to grant the application would not prejudice the proper provision of primary medical services, dispensing services, local pharmaceutical services or pharmaceutical services in any locality, had in part been disputed on appeal.

- 8.10 The Committee reminded itself of the wording of Regulation 18ZA(2)(a):

*"Subject to regulations 25 and 26, the Primary Care Trust-*

*shall refuse an application to the extent that it is of the opinion that to grant it would prejudice the proper provision of primary medical services, dispensing services, local pharmaceutical services or pharmaceutical services in any locality."*

- 8.11 The Committee was aware of guidance issued by the Department of Health entitled 'The NHS (Pharmaceutical Services) Regulations 2005 – Information for Primary Care Trusts'. The Committee noted Annex C, which states:

*'The regulations do not provide any further definition of the concept of "prejudice". In general, "prejudice" means that nothing must be done which would have the result of preventing people in any controlled locality from having access to those general medical and pharmaceutical services, at the level of service which is provided for by the National Health Service terms of service.*

*A mere reduction in the total level of service provided by either a pharmacist or a doctor is not of itself "prejudice"; prejudice arises where the service provided under the terms of service laid down by the National Health Service has in some respect to cease or otherwise be curtailed or withdrawn without proper substitution in the area.*

*In practice, the existence of "prejudice" involves, to a greater or lesser extent, making a judgement about events that will occur in the future. Inevitably, therefore, it can often be extremely difficult to judge whether or not there will be prejudice.*

*In considering questions of prejudice, it is important that decision-takers focus only on those services which have to be provided within the terms of service of the National Health Service. The fact that the provision of other non-NHS services or services provided above the level set by the NHS terms of service may be curtailed should not be regarded as relevant.'*

*The burden of proof is on the party alleging that prejudice will occur.'*

- 8.12 The Committee noted there was no suggestion that should the application be granted, there would be prejudice to the proper provision of local pharmaceutical services or pharmaceutical services in any locality. Rather, the claims of prejudice were in connection with primary medical services and dispensing services.

- 8.13 The Committee was mindful of the principal confirmed in the legal judgements. The question to be answered was whether the appellants had adduced evidence to disturb that principle and conclude 'prejudice' would occur, as allowed within the Regulations. The Committee noted that there was judicial authority for saying that dispensing income should not support other income received by Doctors. In the 1996 case of R –v- North Yorkshire FHSA ex parte Dr. Wilson and Partners Mr. Justice Carnwath said *"It is not part of the scheme of those regulations or indeed of the statute that pharmaceutical services should be relied upon to provide financial underpinning for medical services which are intended to be financed in other ways."*

- 8.14 The Committee was aware the doctors contract with the PCT required remuneration for essential medical services and any other e.g. enhanced NHS services that the doctors are contracted to provide. These have been determined after national

agreement and the Committee saw no direct consequence on that contract with the provision of pharmaceutical services by the appellant. In short, medical services are separately funded.

- 8.15 The Committee noted Fordingbridge Surgery's claim that its Alderholt branch surgery is exceptional in that it is dependant for its existence on dispensing income. Financial information provided by Fordingbridge surgery, was said to support their assertion that loss of the right to dispense pharmaceuticals to patients within a 1.6km radius of the proposed pharmacy, would result in their branch surgery in Alderholt having to close. The Committee noted the figures do show a disparity between expenditure at the branch surgery and the level of reimbursement made by the PCT. The Committee noted the concerns of Dr Davidson and partners regarding the future of medical services provision. That the doctors may seek to cease providing contracted NHS services, or close a particular surgery, in the event of the current pharmaceutical list application being granted, is however a matter within that contract with the PCT and open to separate resolution.
- 8.16 The Committee accepted that faced with the loss of part of the dispensing income the doctors would be obliged to take steps to mitigate the loss. This could be regarded as a sensible business decision. That the doctors may choose no longer to offer aspects over and above any contract, does not disturb the proper provision of the NHS contract. The Committee noted that even where the branch surgery closed and the doctors loose dispensing income, there was no information to show that people in any controlled locality would be prevented from having access to those general medical services at the level which is provided for by the National Health Service terms of service. The Committee considered that the reasons provided by the appellant fell short of establishing prejudice to the proper provision of primary medical services and dispensing services would occur.

Necessary or Desirable test

- 8.17 The Committee noted Regulation 12(1) states:
- "Subject to regulations 13, 19, 21, 25 and 26, an application shall be granted by the Primary Care Trust only if it is satisfied that it is necessary or desirable to grant the application in order to secure, in the neighbourhood in which the premises from which the applicant intends to provide the services are located, the adequate provision, by persons included in a pharmaceutical list, of the services, or some of the services, specified in the application."*
- 8.18 The Committee noted the viability of the proposed pharmacy was not a matter it had to consider in accordance with the Regulations. Viability is a commercial decision for the applicant.
- 8.19 The PCT's defined neighbourhood as described at paragraph 2.3, had been disputed on appeal. However, the Committee, had no information to show that the population in the discrete rural location of Alderholt, would consider themselves neighbours of those in other locations. After having considered the information in respect of the application, the Committee decided to adopt the PCT's neighbourhood definition for the purposes of determining the appeal.
- 8.20 The Committee noted the population of Alderholt was 3,100 people in 2000, and that there had been no change in the population since that time. Whilst the applicant had referred to a large elderly population, and that the population generally was growing, there was no information provided to indicate the latter was a significant factor in the decision of whether or not to grant the application. In it's consideration of the appeal, the Committee took into account the elderly, who are likely to have a greater need for pharmaceutical services. Even at just over 3,000 people, the Committee considered the population in the neighbourhood was not insignificant in size.

- 8.21 The Committee noted there are no existing pharmacies in the neighbourhood and thereby also no reasonable choice of pharmaceutical services or services providers in accordance with Regulation 12. The nearest are located at Fordingbridge. There are two GP branch surgeries and therefore sources of prescriptions.
- 8.22 The Committee noted comments by Lloyds Pharmacy Ltd and Cllr Whitehead, that the population access Fordingbridge for their facilities and services. That the population may have no other option but access many of their service requirements outside of the neighbourhood, did not in the Committee's view, automatically mean that they should also be obliged to do in order to access pharmaceutical services.
- 8.23 The Committee noted the nearest existing pharmacies are the Lloyds pharmacies at Fordingbridge (3.2 km away) and Verwood (5km away). The Committee had no information to show the existing pharmacies can reasonably be accessed on foot. The Committee also noted public transport links are very limited. Although it was said there are relatively high levels of car ownership in Alderholt, there would still be a need to cover some distance, to be able to access pharmaceutical services by a contractor included in the PCT's pharmaceutical list. The Committee considered the distance could more of an issue for those with limited mobility.
- 8.24 The Committee noted the applicant's proposed opening hours and services. In the absence of an existing pharmacy in the neighbourhood, the Committee considered these would be of benefit to the population.
- 8.25 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, 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 necessary and desirable to grant the application.

#### Gradualisation

- 8.26 The Committee had regard to regulation 20(2) of the National Health Service (Pharmaceutical Services) Regulations 2005 (as amended) which provide where the PCT considers that the provision of primary medical services by any provider of such services (other than itself) or pharmaceutical services by any chemist, or local pharmaceutical services by any LPS chemist is likely to be adversely affected in consequence of a grant under paragraph 20(1), it may impose conditions to postpone, for such periods as it thinks fit, the making or termination of arrangements under Regulation 60 (or equivalent provision under the GMS Regulations or PMS Regulations) for the provision by a doctor or a GMS contractor or PMS contractor of pharmaceutical services or dispensing services to patients on the relevant patient list.
- 8.27 The Committee reminded itself of relevant Department of Health guidance.
- 8.28 The Committee noted the PCT had determined there should be a period of 6 months after the applicant's pharmacy opens during which there should be a phased transfer from doctors dispensing to their prescribing lists. In their appeal, Fordingbridge Surgery suggested there should be a 9 months gradualisation period without any phased transfer of patients between lists. The applicant thought a 3 months gradualisation period was easily enough to allow the doctors to make any adjustments in staff and stock levels.
- 8.29 In the Committee's view, the appellant has already had some time to begin planning for the possible reduction in dispensing activity. Balancing the needs of both medical and pharmaceutical contractors, the Committee regarded a period of 6 months as

being too long, and considered a period of 3 months following the opening of the pharmacy should be sufficient to reduce any adverse consequences on the practice.

## 9 Decision

Accordingly the Committee has determined:

- 9.1 The Committee determined that the relevant location, from which the applicant wishes to provide pharmaceutical services, at the date of the receipt of the application by the Primary Care Trust, is not in a reserved location and therefore dismissed the appeals.
- 9.2 There would be no prejudice the proper provision of primary medical services, dispensing services, local pharmaceutical services or pharmaceutical services in any locality should the application be granted. The Committee has accordingly dismissed the appeals.
- 9.3 The application was necessary and desirable to secure the adequate provision of services in the neighbourhood. The Committee has therefore dismissed the appeal in this respect.
- 9.4 There should be a period of 3 months following the opening of the pharmacy, before dispensing patients are required to be transferred to their doctors prescribing lists.

### **Ray Bushell Appeal Officer**

A copy of this decision is being sent to:

Mr M Cox, Lloyds Pharmacy Ltd – Appellant  
 Mr K S Hundle, Bespoke Pharmacy Ltd – Applicant  
 Mr D Evans – Wm Morrison Supermarkets plc  
 Mr G Warner – Hants & I.O.W PC  
 Mr R King – Dorset LPC  
 Dr A Mostyn – Dorset & Wessex LMC's  
 Dr C M Davidson – The Cranborne Practice - Appellant  
 Surelines Ltd - Appellant on behalf of The Fordingbridge Surgery  
 Mrs M Theobald – Dorset FHSA  
 Mr P Kirby – Whitsbury Parish Council  
 Cllr M Whitehead – District Cllr for Fordingbridge  
 Cllr I Monks – District Cllr for Alderholt South  
 Mr R Walter MP  
 Mr D Swayne MP