

21 January 2010

REF: SHA/15526

APPEAL AGAINST WARRINGTON PCT DECISION TO REFUSE AN APPLICATION BY LLOYDS PHARMACY LTD FOR PRELIMINARY CONSENT PRIOR TO INCLUSION IN THE PHARMACEUTICAL LIST IN THE VICINITY OF BIRCHWOOD MEDICAL CENTRE, 15 BENSON ROAD, BIRCHWOOD, WARRINGTON, WA3 7PJ

1 The Application

By application dated 15 June 2009, Lloyds Pharmacy Ltd ("the Applicant") applied to Warrington Primary Care Trust ("the PCT") for preliminary consent prior to inclusion in the pharmaceutical list in the vicinity of Birchwood Medical Centre, 15 Benson Road, Birchwood, Warrington, WA3 7PJ. In support of the application it was stated:

- 1.1 We believe this application is at the very least desirable to secure to the population the adequate provision of pharmaceutical services in the neighbourhood.
- 1.2 For the purpose of this application we would submit that the neighbourhood is that as highlighted blue on the attached map and is that of Birchwood. This neighbourhood is bordered by the M62, M6 and a major railway line. Within this area there are no pharmacies. [sic] There is also a significant population of over 11,000.
- 1.3 There is currently only one pharmacy in the neighbourhood serving this large population. There is also a Dr Redfearn and Partners Medical Practice with a significant patient list of around 12,000 patients.
- 1.4 The neighbourhood has a large suburban shopping centre which is used by a large number of residents in the neighbourhood and also from other areas. There is an ASDA store, Barclays bank, Iceland, Aldi, Greggs, Newsagents, Thorntons, Burger King, Peacocks etc and comprises of 377,000- sq ft of retail and other accommodation and has space for 1,500 car parking. Plans have also been drawn up by the developers of the site to include a new Anchor store and a further 20 retail outlets
- 1.5 There is currently no choice of pharmaceutical services in the neighbourhood with the next alternative being well over 1.5 miles away outside the neighbourhood to the west side of the M6 Motorway.
- 1.6 The existing pharmacy does not match the hours of the medical practice and closes at 6pm. The medical practice is open from 8am whereas the Co-Op pharmacy is only open from 9am. We propose to extend our opening hours beyond that of the surgery.
- 1.7 For the above reasons we submit that this application is desirable to secure in the neighbourhood adequate provision of pharmaceutical services and to provide a reasonable choice of services to patients and residents.

2 The PCT Decision

The PCT considered and decided to refuse the application. The decision letter dated 21 October 2009 states:

- 2.1 I refer to your application for the above. Warrington PCT Pharmaceutical Operational Group have refused your application for the reasons noted below; Members had before them all papers and responses relating to the above application to be heard under Regulation 5(1)(a).
- 2.2 The group reviewed the application history of Birchwood and noted that several 100 hour applications had been approved subsequently lapsed in Birchwood Shopping Centre. Not only this, in 2008 an application for preliminary consent was considered and refused by the PCT. This decision was appealed by the applicant and upheld on appeal. Therefore, the PCT decided that nothing had changed within Birchwood since 2008 to necessitate another pharmacy.
- 2.3 Thus, based on this information, the group felt that an additional contract was neither necessary or desirable to secure adequate pharmaceutical provision for the neighbourhood and so it was refused.

3 **The Appeal**

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit"), dated 18 November 2009, Lloyds Pharmacy Ltd appealed against the PCT's decision. The grounds of appeal are:

- 3.1 The PCT refused this application on the basis that a previous application had been refused by the Appeal Unit.
- 3.2 We do not believe however that a wholly adequate pharmaceutical service is currently being provided in the neighbourhood.
- 3.3 The PCT bases its decision on a previous decision and has not fully considered the merits of our application. The PCT has also not defined a neighbourhood.
- 3.4 The existing pharmacy is an extremely busy and congested pharmacy and we do not believe that the PCT has fully considered this when arriving at their decision.
- 3.5 We shall be submitting additional information to support this appeal shortly.
- 3.6 We would ask the FHS Appeal Unit to reconsider this application and uphold this appeal accordingly as currently there is not a wholly adequate pharmaceutical service being provided in the neighbourhood.

4 **Summary of Representations**

This is a summary of representations received on the appeal. A summary of those representations made to the PCT are only included in so far as they are relevant and add to those received on the appeal.

4.1 LLOYDS PHARMACY LTD

- 4.1.1 Further to the appeal we lodged against the decision of the Warrington PCT who refused our above application, I would, on behalf of Lloyds Pharmacy Limited wish to submit further evidence in support of our appeal.
- 4.1.2 We note there has been a previous application for inclusion in the pharmaceutical list in Birchwood however; at that time no evidence was put forward by the applicant to suggest that the existing services were not adequate. We submit this is now not the case. There is in our opinion clear and substantive evidence, which we have provided (Appendix A, sub sections appendix 1-5), which confirms that the current provision of pharmaceutical services cannot be considered wholly adequate and neither is there a reasonable choice of provider.

- 4.1.3 We note from the comments made to the PCT as part of the initial consultation reference to a 100 hour application. This application was by the Co-Op. The Birchwood Shopping Centre is not open for 100 hours and we do not believe that there is any evidence to suggest that the Co-Op intend to actually open a 100 hour pharmacy. We would submit this was an attempt to block our application. We would also submit that the evidence we have put forward clearly indicates that a choice of pharmaceutical services in the neighbourhood is desirable to secure adequate provision. An additional exempt application by the Co-Op would not address the issue of choice or address the concerns of residents in the neighbourhood. The Co-Op must believe that there is a gap in the current provision of pharmaceutical services (by their 100 hour exemption application). We also note they have not chosen not to amend the opening hours at their current premises which they could do.[sic]

Neighbourhood

- 4.1.4 The neighbourhood we have defined as well as representing geographical and social characteristics also correlates with the ward boundary (see appendix 5). This neighbourhood is bordered to the west by the M6 and to the north the M62 motorways. These are significant geographical boundaries and demonstrate that Birchwood is a neighbourhood in its own right. The bridge over the M62 has a sign on its south side stating you are entering Birchwood. This can be seen on the photographs in appendix 2 and supports the suggestion that the neighbourhood extends to the motorway.
- 4.1.5 The PCT do not provide a description or any definition of the neighbourhood in their decision. They also do not mention that the neighbourhood has a population of over 11,000 (see appendix 5 for confirmation of the population). Along with this significant residential population there are substantial office and business parks within the Birchwood neighbourhood/ ward. 'Birchwood Park' is home to over 145 companies including the Carphone Warehouse, British Nuclear Fuels, The Environment Agency, Fujitsu to name a few. These can be seen as illustrated within appendices 2 and 3. There is a working population of over 4,000 on Birchwood Park Business Park alone but there are also large offices on Birchwood Boulevard which increase the working population further (see appendix 2). These residents, workers and visitors all comprise part of the Birchwood neighbourhood use the services within it. To use services outside the neighbourhood involves a lengthy journey over the motorways into other areas.
- 4.1.6 The neighbourhood is therefore, a very diverse community and its size places large demands on the existing services.
- 4.1.7 The proposed site of the vicinity of the Birchwood Medical Practice within Birchwood Ward, falls within the Output Area of 005A (this is highlighted in appendix 4). This locality is a relatively deprived area as confirmed by the neighbourhood statistics profile. There are higher levels of income and employment deprivation.
- 4.1.8 Along with the Birchwood Shopping Centre which has over 100,000 visitors by footfall and accommodates a large ASDA superstore, ARGOS, Pet superstore, ALDI, New Look, Peacocks, banks, Johnsons cleaners, Subway, Timpsons, Waterfield's, Greggs, the Shoe Zone, neighbourhood centre, cafes and other retail services, the neighbourhood also contains additional services and facilities such as
- 4.1.8.1 Birchwood Medical Practice
 - 4.1.8.2 Birchwood Community High School
 - 4.1.8.3 Library

- 4.1.8.4 Community office
- 4.1.8.5 Banks
- 4.1.8.6 New Community College opening 2010
- 4.1.8.7 Health and Fitness centre on Birchwood Park

4.1.9 The Birchwood Medical Practice is located approximately 300m from the proposed site, and has a patient list of around 12,000 patients.

Access to Pharmacies

4.1.10 There is currently only one pharmacy within the proposed neighbourhood. This pharmacy is situated within the shopping mall of the Birchwood shopping centre.

4.1.11 The next nearest pharmacy is situated over 3km away in Padgate and therefore not easily accessed and involves crossing over the M6 motorway.

4.1.12 The existing pharmacy in the shopping mall is dependent on the shopping centre being open as the pharmacy does not have its own entrance into the car park.

Service Provision

4.1.13 An independent survey was undertaken in December 2009 to assess the current provision of pharmaceutical services in the neighbourhood. The results and background to this survey can be found at appendix 1.

4.1.14 The results show that 74 per cent of patients questioned do not consider the current provision of pharmaceutical services in the neighbourhood to be adequate.

4.1.15 Long waiting times were considered to be of major concern along with return trips having to be made due to unavailability of medicines.

4.1.16 There are comments made by patients of there being half an hour to an hour waiting times and there is not enough staff.

4.1.17 We would draw the Appeal Units attention to the comments made by respondents from the survey which is a statistically representative sample. We believe these responses provide a clear indication that that the patient and neighbourhood population do not find the current provision of pharmaceutical services to be adequate and that there is not a reasonable choice in the neighbourhood.

4.1.18 The raw data collated from the survey will be sent to the appeal unit separately.

Choice in the Neighbourhood.

4.1.19 The Pharmaceutical Services Regulations define that a PCT must have regard to whether there is a reasonable choice of pharmaceutical services in the neighbourhood. The decision by the Warrington PCT on the 20 October 2009 does not indicate that they had any regard to whether there is a reasonable choice of pharmaceutical services in the neighbourhood.

4.1.20 While we accept that it is not axiomatic that every neighbourhood must a choice of pharmacy, the PCT must have regard to choice and determine what weight to place on it. Given the circumstances of this application, population size, evidence in the survey, distance to the nearest pharmacies, views of the patient population then we would submit that there should be a

choice of pharmaceutical services in the neighbourhood as there is not currently a wholly adequate pharmaceutical service being provided.

Conclusion

4.1.21 This application is at the least desirable in order to secure adequate pharmaceutical services in the neighbourhood for the following reasons:

4.1.21.1 There is a significant distance to the nearest pharmacies, which for many will be prohibitive given the journey that is required.

4.1.21.2 There is already a significant residential population in the neighbourhood exceeding 11,000 people with its own identity.

4.1.21.3 The neighbourhood demographics demonstrate that the reliant population have greater health needs when compared to national figures

4.1.21.4 An independent survey has highlighted a range of issues that patients are concerned with at the existing pharmacy. There appear to be issues around the current capacity of the existing pharmacy being able to cope with the current levels of demand, dissatisfaction about the service highlighted by patients, significant waiting times and unfulfilled prescriptions.

4.1.21.5 As well as a significant residential population, there is a large transient population utilising the wide range of services and facilities within the neighbourhood. This increases the pressure on the existing pharmaceutical services.

4.1.21.6 There is not a reasonable choice of pharmaceutical services in the neighbourhood.

4.1.22 The granting of this application would overcome all of these issues and secure adequate pharmaceutical services in the neighbourhood.

4.2 Lloyds Pharmacy Ltd also sent to the Appeal Unit, with a covering letter dated 23 December, the raw data relating to the independent survey which was carried out by In4metrix Ltd for the assessment of the current provision of pharmaceutical services in Birchwood.

4.3 CO-OPERATIVE HEALTHCARE LTD

4.3.1 The objection submitted by the appellant has no merit whatsoever; it provides no evidence that the PCT has not secured the adequate provision of pharmaceutical services in the neighbourhood.

4.3.2 Indeed, it would appear that the appellant requires time to assemble evidence and, to date, Co-operative Healthcare has not had sight of any additional supportive information.

4.3.3 The appellant's comment that our pharmacy in Birchwood Centre is extremely congested is wholly untrue and unsubstantiated. This remark demonstrates the paucity of the appellant's evidence and I am concerned that this appeal is purely vexatious.

4.3.4 Our pharmacy delivers all the essential and directed services promptly, being staffed with a permanent manager and qualified staff. The pharmacy is well appointed and a very good professional relationship exists between our staff and the staff of the nearby Birchwood Medical Centre.

- 4.3.5 The Appeal Unit needs to be aware that the genesis of the above application lies in a desire by the GPs of the Birchwood Medical Centre to lease an area in their premises which has recently been vacated by the PCT. As a community pharmacy will realise the highest returns then they have canvassed pharmacy operators to take the lease.
- 4.3.6 This application is therefore entirely speculative and opportunistic and, consequently, a rational argument for another inclusion in the PCT's Pharmaceutical List has been difficult to construct.
- 4.3.7 In addition, Guidance to the NHS (Pharmaceutical Services) Regulations 2005, advises that special consideration should be given to the detrimental impact on future overall access and choice of pharmacy services of an application which would secure an unjustifiably large proportion or virtual monopoly of NHS pharmaceutical service provision within the neighbourhood. Applications to run GP-surgery based pharmacies may be such examples.
- 4.3.8 The above application, if approved, would result in damaging domination of the local market.
- 4.3.9 Furthermore an application under Regulation 13(b) has recently been granted in the neighbourhood.
- 4.3.10 Co-operative Healthcare urges the Appeals Unit to dismiss the appeal and refuse the above application.

4.4 BOOTS UK LTD

- 4.4.1 A similar previous application submitted under Regulation 12 was rejected at appeal in March 2008 (application by Mr L Hardman for preliminary consent - NHSLA Case Reference SHA/14210).
- 4.4.2 We note that in comments submitted in response to both the initial consultation and in response to the appeal, Lloyds Pharmacy suggested that they considered the application from Mr Hardman to be neither necessary nor desirable.
- 4.4.3 To our knowledge there have been no significant changes in the neighbourhood since the time of this decision that would adversely affect the adequacy of pharmaceutical services.
- 4.4.4 In November this year, the PCT approved an application for a 100-hour pharmacy in the vicinity of Benson Road, Birchwood.
- 4.4.5 The appellant has provided no evidence to suggest that both applications required to secure the adequacy of services in the Birchwood area. [sic]
- 4.4.6 The appellant has failed to provide any evidence to suggest that the existing pharmacies in the area are unable to meet the present demand for pharmaceutical services or that these pharmacies will be unable to meet any future increase in demand for such services.
- 4.4.7 Furthermore, the appellant has failed to provide any indication of significant difficulties encountered whilst wishing to access pharmaceutical services in the area. Pharmaceutical services are available in the Warrington area seven days a week and until 11pm most evenings.

4.4.8 In conclusion, we submit that the above application does not meet the required criteria of regulation 12(1), and respectfully urge the Appeal Authority to dismiss this appeal accordingly.

4.5 PATHVALLEY LIMITED

4.5.1 The applicant has provided no evidence of complaints, to our knowledge, or inadequacy regarding current pharmaceutical services in the area.

4.5.2 The Co-operative Pharmacy at 28 Benson Road is less than 0.1miles from this site, and the Co-operative Pharmacy also had a 100 hour pharmacy granted at the applicants location on the 1 November 2009.

4.5.3 We agree with the PCT define neighbourhood and that there have been no significant changes in the neighbourhood population since the refusal of a similar application in 2008.

4.5.4 We request that the application be rejected on the grounds that it is neither necessary or desirable to secure the adequate pharmaceutical services for this area.

5 Unsolicited Comments

5.1 BIRCHWOOD MEDICAL CENTRE

5.1.1 As the GP for Birchwood Medical Centre we support the application request for a pharmacy attached to our premises.

5.1.2 Our patient population is currently 11,334 and the vast majority of our patients use the local pharmacy situated in Birchwood Shopping Centre. The nearest alternative pharmacies are in the localities of Culcheth, Padgate and Fearnhead and reachable by car or public transport but not within walking distance, therefore if the local pharmacy has any problems with their suppliers or items are out of stock patients either have to wait for their items or travel considerable distance to obtain their medication.

5.1.3 Having an on-site pharmacy would have several other benefits including: helping to reduce the pressure with dispensing, give the patients a choice of pharmacy to obtain their medication. The problems that patients may experience with their prescriptions can be dealt with quickly and appropriately under one roof. Acutely ill patients cannot always get across to the shopping centre for their prescriptions and would benefit enormously from having services in one location.

5.1.4 We would be grateful if the above could be taken into consideration when making a decision whether or not to approve a second pharmacy in the area.

Also enclosed with the letter from Birchwood Medical Centre, was a letter from resident to National Co-operative Chemist (copied to the Medical Centre) dated 19 January 2007. This is enclosed at Appendix B.

6 Observations on Representations

6.1 CO-OPERATIVE HEALTHCARE LTD

6.1.1 A letter dated 18 January was received from Co-operative Healthcare Ltd. The Committee noted that this letter had been received however did not read it or place any weight upon it.

7 Consideration

- 7.1 The Pharmacy Appeals Committee appointed by the Family Health Services Appeal Unit of the NHS Litigation Authority, ("the Committee") had before it the papers considered by the PCT, together with a plan of the area showing existing pharmacies and doctors' surgeries and the site (or location) of the proposed pharmacy.
- 7.2 It also had before it the responses to the Authority's own statutory consultations.
- 7.3 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 7.4 The Committee had regard to Regulation 12(1), the necessary or desirable test, and, in considering that test, had regard in particular to Regulation 12(2), (3) and (4) of the National Health Service (Pharmaceutical Services) Regulations 2005 (as amended) ("the Regulations").
- 7.5 The Committee dealt with the application by way of reconsideration of all the issues.
- 7.6 The Committee noted the comments from the applicant with regard to the neighbourhood, however there appeared to be no material differences between the neighbourhood defined by the PCT and that defined by the applicant. The Committee accepted the neighbourhood as defined by the PCT without prejudice to any future applications.
- 7.7 The Committee noted that there was currently one pharmacy in the neighbourhood which is located in close proximity to the existing medical practice and the site of the proposed pharmacy. In the Committee's view it is not axiomatic that a contract is needed within a neighbourhood presently containing one pharmacy in order to secure adequacy. The Committee accepted that while there is no choice within the neighbourhood, the level of adequacy may be dependent on pharmaceutical services elsewhere. In doing so the Committee noted the undisputed information that there were Pharmacies in the Warrington area giving provision over seven days each week until 11pm. No information was provided to conclude there were difficulties of access to these services.
- 7.8 The Committee noted that the proposed pharmacy was to be located only a short distance from the existing pharmacy in the neighbourhood, in the vicinity of the existing medical practice. The Committee was of the view that should there be any inadequacy as a result of terrain, barriers or distance from the Co-operative Pharmacy, of which the Committee has no information, then this application may not secure any shortfall due to the potential of it opening in close proximity to the existing pharmacy. In respect of actual physical access to pharmaceutical services in the neighbourhood, the Committee concluded that no inadequacy had been demonstrated that this application could secure. The Committee was of the view that there was no geographical advantage from granting this application.
- 7.9 Given the above, the Committee considered that the current provision of pharmaceutical services could not be said to be wholly inadequate and therefore the application was not necessary. The Committee went on to consider, on the spectrum of adequacy, whether the application was expedient.
- 7.10 While the Committee had regard to the services offered in the application, there is no suggestion that the existing pharmacy is not providing essential and directed services as commissioned by the PCT. In fact the existing pharmacy has stated that they are providing all essential and directed services. The Committee also noted that no gaps had been identified by the PCT which this application would secure.
- 7.11 The Committee noted the comments from the applicant with regards to waiting times and service provision, and the survey that they had had commissioned. The Committee noted that no complaints had appeared to have been received by the PCT, though they were alluded to in the comments enclosed with the survey. The

Committee was of the view however that should the concerns with regards to service provision be correct, the Co-operative Pharmacy had not been afforded the opportunity to address these in the appropriate forum, in the absence of which they cannot reasonably be considered determinative factors. In carefully considering the conclusions of the survey on determining any weight to be given the Committee noted the comments of the Birchwood Medical Centre. Whilst these supported a pharmacy attached to their premises it did not contain any information to conclude it was dissatisfied with services provided by the existing pharmacy.

- 7.12 On this occasion, the Committee viewed the provision of pharmaceutical services from outside the neighbourhood to be marginal when considering whether the neighbourhood had a reasonable choice of provider and services. The Committee accepted the argument that a potential gap may arise when considering whether there is a reasonable choice of provider or service. However, in the Committee's view that consideration alone did not lead to the conclusion that pharmaceutical services were inadequate.
- 7.13 In the Committee's view, taking into account the circumstances considered pertaining to the neighbourhood in question, balancing the current provision of pharmaceutical services within the 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 currently secured to the extent that it was neither necessary nor expedient to grant the application.

8 Decision

The Committee was of the view that the proposed pharmacy was neither necessary nor expedient to secure the adequate provision of services in the neighbourhood. Accordingly the Committee dismisses the appeal.

Jill Jackson
Appeal Officer

A copy of this decision is being sent to:

Lloyds Pharmacy Ltd
Boots UK Ltd
Pathvalley Limited
Sainsbury's Supermarkets Ltd
North Cheshire, St Helens & Knowsley LPC
Birchwood Medical Centre
Cheshire Health Agency on behalf of Warrington PCT