

23rd December 2009

REF: SHA/15413

APPEAL AGAINST KIRKLEES PCT DECISION TO GRANT AN APPLICATION BY MR E PATEL FOR PRELIMINARY CONSENT PRIOR TO INCLUSION IN THE PHARMACEUTICAL LIST AT WAKEFIELD ROAD, DENBY DALE HD8 8RT

1 The Application

By application dated 4th March 2009, Mr E Patel ("the Applicant") applied to Kirklees Primary Care Trust ("the PCT") for preliminary consent prior to inclusion in the pharmaceutical list at Wakefield Road, Denby Dale HD8 8RT. In support of the application it was stated:

- 1.1 It has come to the Applicant's attention that the Co-operative Pharmacy currently trading from 335a Wakefield Road, Denby Dale (see attached map) will cease (sic) operating due to commercial reasons, the Applicant suspects, in the very near future. Since an application was granted to the Co-operative in the past, there must be a need for pharmaceutical services in the area. In the Applicant's view this need for pharmaceutical services is growing by the day, as Denby Dale has a significant growing population (evident from census data, extensive new housing developments e.g. currently being carried out near railway station (see attached map)).
- 1.2 Denby Dale village has a large elderly population, for whom the Applicant believes would be difficult to access the next nearest chemist which is over a mile away.
- 1.3 The village at the moment has a GP practice located at Wakefield Road, the Applicant proposes to operate a pharmacy within walking distance of this surgery. Denby Dale Surgery is part of Skelmanthorpe Family Doctors (located at Commercial Road, Skelmanthorpe). Majority of patients are seen at Skelmanthorpe, but those patients who find it difficult to access this surgery are seen in the Denby Dale Surgery. These are the patients who would benefit the most from Denby Pharmacy.
- 1.4 As can be seen from the map the area covered by Denby Pharmacy will be extensive, but distinct from the areas covered by the pharmacies in Skelmanthorpe and Scissett (the two nearest pharmacies).

2 The PCT Decision

The PCT considered and decided to grant the application. The decision letter dated 16th September 2009 states:

- 2.1 On examining the proposed location NHS Kirklees noted that it was in a similar location to that of the Co-operative Pharmacy which closed for business on 30th March 2009.
- 2.2 In making its decision, the NHS Kirklees Pharmacy panel considered the neighbourhood for the application, and considered a report provided to the committee by the Panel members who had undertaken a site survey in respect to this application on 15th May 2009. The site report and recommendations and decision in respect to the neighbourhood are held on file. The boundaries of the neighbourhood as determined by this site visit are as follows:
 - 2.2.1 North East boundary: Demarcation sign for Kitchenroyd. From this point to the centre of Denby Dale it is 0.9 miles.
 - 2.2.2 North West boundary: The viaduct which is just 0.2 miles from Denby Dale centre.

- 2.2.3 Northern boundary: Derestriction road sign on periphery of Lower Cumberworth. From this point to the centre of Denby Dale it is 0.9 miles.
- 2.2.4 South East boundary: The point at which Miller Hill intersects with the A635 Barnsley Road. From this point to the centre of Denby Dale it is 0.2 miles.
- 2.3 In considering the application, the panel was in agreement that following the closure of the former pharmacy in Denby Dale there was now a lack of provision of pharmaceutical services in the area. The panel were in agreement that the requirements relating to the necessary and desirable test had been satisfied. However, the panel were aware of the consultee responses in respect to the application, and therefore discussed each in turn:
- 2.3.1 Calderdale and Kirklees LPC - indicated that they supported this application.
- 2.3.2 The Co-Operative Pharmacy - indicated that they opposed this application on the basis that they would define a different neighbourhood which would incorporate Skelmanthorpe where the Co-Operative currently have the contract for a pharmacy. They indicated that other pharmacies also provide a delivery service to the Denby Dale area. They stated their decision that the previous pharmacy was unviable due to lack of demand as a reason, in their opinion, not to grant permission for a new pharmacy in Denby Dale as they would argue that there is adequate provision in the area.
- 2.4 The panel were mindful that when the Co-operative pharmacy opened in Denby Dale a number of years ago, that this had forced the cessation of dispensing by the local GP practice, and that the Co-operative had themselves indicated the need for a community pharmacy in Denby Dale, which had been supported by the previous organisation. If anything, additional housing has been constructed in Denby Dale since the original opening of the Co-operative pharmacy and therefore there is even greater need now than when the original contract was awarded to the Co-operative.
- 2.5 The panel were of the opinion, having considered all the information before it, that there was a need for a pharmacy in Denby Dale, and that the application had satisfied the criteria for the necessity and desirability of a pharmacy in the Denby Dale area. However, grant of preliminary consent is subject to the following conditions:
- 2.5.1 That the applicant secures premises, and commences trading within the prescribed time limits as specified within the NHS (Pharmaceutical Services) regulations 2005.
- 2.5.2 That satisfactory Fitness to practice declarations are received.

3 The Appeal

In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority ("the Appeal Unit"), dated 12th October 2009, The Co-operative Pharmacy appealed against the PCT's decision. The grounds of appeal are:

- 3.1 By trading unprofitably in Denby Dale for a number of years The Co-operative Pharmacy has clearly demonstrated that there is no demand for pharmaceutical services within the village. Therefore the approval of a replacement contract cannot be considered necessary or expedient for the population which can easily access adequate pharmaceutical provision within reasonable distance in adjacent neighbourhoods.
- 3.2 Indeed the PCT, on receipt of The Co-operative Pharmacy's notice to withdraw from its pharmaceutical list, expressed no concerns regarding future provision in the neighbourhood.
- 3.3 Ample notice of closure was given to the population and no representations were received from patients or customers - further indicating that there is no desire or support for a community pharmacy.

- 3.4 Examination of the last sets of dispensing figures from The Co-operative Pharmacy will reveal the lack of demand for pharmaceutical services. These figures include any increase in local population as a result of new housing.
- 3.5 The Co-operative Pharmacy urges the Appeals Authority to uphold this appeal.

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 CALDERDALE & KIRKLEES LPC

- 4.1.1 Calderdale & Kirklees LPC members still feel that their comments made in their letter to Wendy Maw on 1st April 2009 are valid.
- 4.1.2 They are still concerned with the accuracy of the map that has been circulated with the appeal papers and trust this will be rectified in advance of any decision.
- 4.1.3 Members wish the comments that they made previously to be taken in to consideration by the Authority in accordance with Regulation 29 of the NHS (Pharmaceutical Services) Regulations 2005 and wish to be notified of the decision.

Letter to PCT dated 1st April 2009

- 4.1.4 There should be the NCC Pharmacy at Scissett marked on the map, as this is probably the closest pharmacy by road.
- 4.1.5 The NCC Pharmacy at Denby Dale (Marked 1 on the map) has now closed down.
- 4.1.6 Denby Dale is a separate neighbourhood to Skelmanthorpe and Scissett.
- 4.1.7 There is a branch surgery in Denby Dale.
- 4.1.8 Because of the NCC closure at Denby Dale, the LPC feel there is now a gap in the pharmaceutical services in the area, and would not object to a new pharmacy in this location.

4.2 KIRKLEES PCT

- 4.2.1 The Co-Operative state that: they traded unprofitably in Denby Dale for a number of years and argue that this renders a replacement contract neither necessary nor expedient. The NHS (Pharmaceutical Regulations) 2005 are quite clear that 'the overriding objective is to determine an application in relation to the overall effect it will have on access to services for patients and not the overall effect it will have on other contractors' and therefore financial viability is not a consideration that a primary care trust needs to make when determining an application.
- 4.2.2 Notification of intention to withdraw services was received from the Co-Operative on 11th December 2008. However the letter indicated that the Co-Operative was actively marketing the pharmacy with the view to a sale. NHS Kirklees were then hopeful that a sale would be affected. At the Pharmacy Panel meeting on 21st January 2009 this issue was discussed and the minutes record that should the closure go ahead it would lead to a lack of pharmaceutical provision in the area. These minutes are available should they be needed.
- 4.2.3 NHS Kirklees did receive concerns from the Denby Dale Parish Council about the closure of the Co-Operative pharmacy and during the site visit the team conducting the investigation called into the sales office on the new development

at Bromley Park to ascertain when building was likely to cease. During the conversation the sales manager told the site survey team that existing residents had expressed concerns about the current lack of pharmaceutical provision and stated that she felt they would be happy if a new contract were to open. In addition one patient wrote on more than one occasion expressing her unhappiness at the closure of the Co-Operative pharmacy. Discussions relating to this are documented in the relevant Pharmacy Panel minutes.

- 4.2.4 Dispensing figures were not considered as part of the determination as again this relates to financial viability. Equally a pharmaceutical service is not solely about the dispensing of prescriptions.
- 4.2.5 Taking all of the above into consideration NHS Kirklees are still of the opinion that it is both necessary and expedient to have a pharmacy in Denby Dale.

4.3 MR E PATEL

- 4.3.1 In response to the points raised by the Co-operative, for the above application, the Applicant would like the panel to note the following. Firstly, the Applicant finds the nature and reason for their appeal hypocritical, as they themselves argued for and successfully demonstrated there was a need for pharmaceutical services in the area not so long ago. Leading to the closure of a doctors dispensing service, and then in turn closing their branch taking away a vital service from the people of Denby Dale. If anything there is now a greater need for pharmaceutical services in the area, since the original contract was granted to the Co-operative, additional houses have been built in the Denby Dale area since. Further to the Applicant's investigations of the local area, there are two current developments at Bromley Park and Brook Meadows in Denby Dale consisting of 100 and 34 new dwellings respectively.
- 4.3.2 The Co-Operative pharmacy claim that by trading unprofitably at Denby Dale shows that there is no need for a chemist in the area. In the Applicant's opinion trading unprofitably in no way shows or proves that there is no need for a chemist in the area. Their unprofitability could be due to a number of their own shortcomings, i.e. Poor customer service, poor clinical management (shown by their lack of MURs performed. Only 6 mur's from January to June 2009; the Applicant aims to provide extensive clinical services), unviable business model etc. It should also be noted that the two nearest chemists to Denby Dale are Co-Operative owned (Skelmanthorpe and Scisett) therefore it could be argued that greater importance was placed on these chemists outside of Denby Dale, and this only demonstrates an internal Co Operative decision and does not reflect local need. The Applicant aims to provide much wider choice for patients in the area which can only be of benefit to the people of Denby Dale and surrounding areas.
- 4.3.3 The Co-Operative also state that the people of Denby Dale can 'easily access adequate pharmaceutical provision within reasonable distance in adjacent neighbourhoods'. According to the NHS choices website the nearest chemist to Denby Dale is over a mile away (1.3 miles). The pharmacies in the surrounding neighbourhoods are difficult to access based on the distances from Denby Dale and the increased travelling time involved (both by foot and by public transport). The proposed pharmacy would improve access to core and essential pharmaceutical services, information, advice and 'GSL' and 'Pharmacy-Only' medicines, which are currently absent in this neighbourhood. Although pharmaceutical services are accessible in adjacent neighbourhoods, it does not necessarily mean that the residents of Denby Dale should have to travel a minimum of 1.3 miles every time to access pharmaceutical services, thus highlighting health inequality. Denby Dale itself has a significant population that is increasing and warrants its own pharmacy. The Applicant believes these existing pharmacies are currently failing to meet the needs of the local residents of Denby Dale let alone the inevitable future increases in population brought about by the recent housing developments. With an ageing population and high elderly

demographics the Applicant believes access will become more difficult in the future. Current NHS initiatives aim to increase access to health and choice.

- 4.3.4 Currently, the only sources of OTC medication to the people of Denby Dale are the local newsagents and the mini supermarket (convenience shop) for 'GSL' medication, and the pharmacies outside the neighbourhood for 'P' medication. This again highlights a lack of a pharmaceutical service in the area. The residents of Denby Dale are purchasing medication locally (GSL) without the relevant information and advice to facilitate their correct usage. Although this is not a legal issue it does raise concerns when these are the closest sources of medication.
- 4.3.5 The Co-Operative claim that ample notice of closure was given to the people of Denby Dale and no representations were received from patients or customers. The Applicant finds this hard to believe. The Applicant urges the panel to look at the Minutes of the Meeting of Denby Dale Parish Council held on Tuesday 3 March 2009 in the Civic Chamber, Council Offices, Skelmanthorpe. The Clerk submitted correspondence from a local resident who was concerned about the proposed closure of the pharmacy in Denby Dale and wanted to know if a pharmacy service would be available direct from the Health Centre. It was RESOLVED that the Clerk raise the matter with the PCT. Please see enclosed a petition (54 signatures) in support of the proposed pharmacy. This petition was left at the local convenience store on the 6/11/09 and collected on 07/11/09. These signatures indicate a snapshot of the support that the application currently has for a pharmacy in Denby Dale (Refer to Appendix A).
- 4.3.6 In conclusion the Applicant believes they have provided sufficient information to highlight that there is a lack of pharmaceutical services in Denby Dale. These include access issues, patient choice and convenience. The Applicant respectfully requests the Litigation Authority to uphold the original decision made by the Kirklees PCT to grant this application, as the Applicant believes it is necessary and desirable for a pharmacy in Denby Dale.

5 Consideration

- 5.1 The Pharmacy Appeals Committee appointed by the Family Health Services Appeal Unit of the NHS Litigation Authority, ("the Committee") had before it the papers considered by the PCT, together with a plan of the area showing existing pharmacies and doctors' surgeries and the site (or location) of the proposed pharmacy.
- 5.2 It also had before it the responses to the Authority's own statutory consultations.
- 5.3 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 5.4 The Committee had regard to Regulation 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").
- 5.5 The Committee dealt with the application by way of reconsideration of all the issues.
- 5.6 The Committee noted the neighbourhood of Denby Dale and surrounds defined by the PCT, which has not been disputed on appeal. The Committee therefore accepted this neighbourhood without prejudice to future applications.
- 5.7 The Committee noted that the Appellant's pharmacy in Denby Dale had closed in March 2009. The Committee further noted that there is no pharmacy within the neighbourhood and therefore no choice of pharmaceutical provider or services for those living there. The Committee were mindful that this is just one of a number of factors as set out in Regulation 12(2) which must be considered.

- 5.8 The Committee noted the locations of existing pharmacies in the nearby villages of Scissett and Skelmanthorpe and noted that the distance to the nearest pharmacy is stated to be 1.3 miles by the Applicant. Given the nature of the area the Committee viewed it as reasonable to assume that most residents of Denby Dale would be accustomed to travelling outside the neighbourhood for work or other reasons on a regular basis. The Committee were therefore of the view that the current provision could not be said to be wholly inadequate and therefore it was not necessary to grant the application.
- 5.9 The Committee had regard to the PCT site visit report and noted that Denby Dale comprises a discrete community with a good selection of amenities based in the centre of the village. The Committee noted that there is a branch of the Skelmanthorpe Family Doctors on Wakefield Road and thereby a source of prescriptions. The Committee were mindful that the lack of a pharmacy in proximity to a surgery is not necessarily an indication of inadequate services however convenience is not an irrelevant factor.
- 5.10 The Committee noted the information concerning the recent and ongoing housing developments. The Committee also noted the Applicant's comment that there is a significant population however had been provided with no figures by which to consider this matter.
- 5.11 The Committee had regard to the petition comprising 54 signatures submitted by the Applicant. The Committee further noted both the PCT and Applicant's comments regarding the concerns of the Parish Council however had been provided with no documentation in this respect.
- 5.12 The Committee noted the Appellant's comments regarding the financial viability of the proposed pharmacy however did not view this as a relevant matter for consideration under the Regulations.
- 5.13 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 desirable to grant the application.

6 Decision

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

Abby Richards
Appeal Officer

A copy of this decision is being sent to:

Mr E Patel
The Co-operative Pharmacy
West Yorkshire CSA, on behalf of Kirklees PCT
Leeds LPC