1 The Application

By application dated 25 March 2011, Community Pharmacies UK Ltd ("the Applicant") applied to Medway Teaching Primary Care Trust ("the PCT") for preliminary consent prior to inclusion in the pharmaceutical list at Gillingham Medical Centre, Woodlands Road, Gillingham, Kent ME7 2BU under Regulation 13(1)(b).

2 The PCT Decision

The PCT considered and decided to refuse the application. The decision letter from Kent Primary Care Agency (on behalf of the PCT) dated 28 November 2011 states:

2.1 The Pharmaceutical Regulations Committee met on Thursday 3 November 2011, and considered the application for a new pharmacy in Gillingham Medical Centre, Woodlands Road, Gillingham, Kent.

2.2 The Committee had before it the responses to the Agency’s statutory consultation, the PCT’s current Pharmaceutical Needs Assessment, together with a plan of the area showing existing pharmacies and doctors’ surgeries and the sites of the proposed pharmacies, the minutes of the public meeting (copies provided) and all comments received.

2.3 Members agreed that the neighbourhood relevant to the application was Watling Street to the South, Duncan Road, Nelson Road and Canterbury Street to the east, the railway line to the North and Ito Way to the west.

2.4 The Committee noted that there was no current provision of, or intention to provide, LPS services within this neighbourhood.

2.5 In considering this application in accordance with Reg.13(1)(b) the Committee, on the basis of the information available to them, decided that they were not satisfied that the proposed pharmacy could operate from the specified premises for at least 100 hours each week for the following reasons:

2.6 The premises specified in the application, Gillingham Medical Centre, is a GMS GP practice. All of the premises are currently used for, and reimbursed by the PCT for, the provision of the practice’s GMS contracted medical services and part of the existing building is an extension that was built to provide additional consulting and training rooms with the assistance of a capital grant from the PCT through the Advanced Training Practices (ATP) Programme. This Programme required the practice to commit to provide training placements for a period of 5 years following the completion of the extension in August 2010.
2.7 Formal approval from the PCT and the Kent, Surrey & Sussex Deanery is required for changes to the ATP agreement and no such approval has been sought or granted. Recent advice from the Postgraduate GP Dean has indicated that in his view premature withdrawal from the training (APT) scheme would not generally be acceptable. The PCT’s Estates division has also indicated that, should part of the existing premises be used for the provision of non-medical services such as a pharmacy, the PCT would be concerned that this would place additional pressure on patient access to existing services and result in limited capacity to offer the full range of services to the increasing population. The current GMS contract agreement between the PCT and the practice contains an approved floor area upon which payments in support of premises costs are calculated. Any changes to the approved floor area (as would be required were a non-medical service such as a pharmacy to be located within the existing building) would also require approval by the PCT and an amendment to the GMS contract.

2.8 Whilst it appears to the Committee that the part of the existing premises that it is proposed to use for this proposed pharmacy is not part of the extension referred to ante it was clear that locating a pharmacy within the existing building would significantly reduce the space available for the provision of medical services and would require the approvals referred to ante, and it was also clear that the prospects of obtaining these required approvals was minimal, if not non-existent.

2.9 The applicant provided no indication in their application, nor in their response to the Committee’s questions, that they envisaged locating the pharmacy anywhere (e.g. in a further extension yet to be built) other than within the existing building. The responses to the Committee’s questions, which the Committee noted, were broad brush responses lacking the substantive detail requested by the Committee and therefore largely failed to assuage the Committee’s concerns regarding lawful planning consents, medical premises security (particularly when the practice is closed but the pharmacy would be open) and an adequate private pharmacy consultation area. The existing practice premises are approved by the Local Planning Authority as a “Medical Centre” and therefore any changes in the use of the existing premises and any further possible development of the site (e.g. another extension to house a pharmacy) would require planning permissions which to the best of the Committee’s knowledge have not been either granted or applied for. Specifically locating a community pharmacy (as opposed to a dispensary available only to patients of the practice) either within the existing, or within a possible theoretical further extension, would require a Change of Use consent for A1 (Retail) use. The existing location of the Surgery is within a residential area and it is therefore highly probable that any such applications (Change of Use or New extension) would either be refused entirely or, if granted, have conditions attached to protect the amenities of neighbouring residential properties. Such conditions would be highly likely to include restrictions on the hours of use to mirror the hours that the surgery is open, which is significantly less than 100 hours per week.

2.10 Whilst the Committee accepted that the applicants were willing to provide pharmacy services for 100 hours per week from the specified premises the Committee decided that this willingness was, on much more than a mere balance of probabilities, incapable of being translated into actual provision of these services by reason of there being little, if any, realistic prospect of any space within the specified premises being available to them for the provision of these services. The Committee were also mindful of the provisions of Regulation 41 (Effect of Preliminary Consent) and the lack of any provisions within the Regulations allowing a grant of preliminary consent to be made subject to conditions which would assure the PCT and the Committee that before a pharmacy commenced the provision of services all the necessary approvals and permissions had been obtained.

2.11 The Committee therefore decided that the application be refused.

The Appeal
In a letter to the Family Health Services Appeal Unit of the NHS Litigation Authority (“the Appeal Unit”) dated 29 November 2011, the applicant appealed against the PCT’s decision. The grounds of appeal are:

3.1 KPCA and the PCT have misdirected themselves in considering various property matters as being reasons to reject the application. As the committee will note the application is for preliminary consent and as such it does not require premises to have been specified.

3.2 KPCA have cited a number of spurious reasons in relation to property to refuse the application all of which fall outside of the scope of the current pharmaceutical regulations.

3.3 The applicant has responded appropriately to all requests made of them by KPCA and have at all times been, and continue to be, willing to provide all of the services required of them under the regulations and to fulfil the requirements of regulation 13(b) in full.

3.4 There was no rational reason for KPCA to assume that any potential issues surrounding proposed premises could not be resolved and as such the refusal of the application was unlawful. The PCT had no discretion and should have granted the application as was required of them under the current regulations.

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.

Green Pharmacy Consultants (on behalf of Sturdee Avenue Pharmacy)

4.1 Whilst there is not normally any grounds for turning down an Exempt application for a 100 Hour Contract other than the existence of an LPS pharmacy within the same neighbourhood, the Sturdee Avenue Pharmacy believe that since the relevant premises are owned by the PCT and that the lease must contain certain limitations to the use of these premises, it was well within the remit of K.P.C.A. to turn down this application on behalf of the PCT in question.

4.2 The applicant is contradicting himself when he seeks to point out that a preliminary consent application does not require premises to have been specified since the applicant applied for a contract at “Gillingham Medical Centre” and in their original application to the PCT dated 25 March 2011. They continued to make similar references to a pharmacy “within the Medical Centre” in later correspondence connected with their application as well as at the public meeting which they attended together with the principal G.Ps who practise within that medical centre.

4.3 Equally, both K.P.C.A. and Sturdee Avenue Pharmacy have been advised by the Local Authority planning department that there is no possibility of building on the public spaces around the medical centre nor changing the present use of any of the residential properties in the vicinity of the medical centre to one in which a retail pharmacy could practise for 100 hours each week.

4.4 There have been a number of cases where, because of planning restrictions, other 100 Hour pharmacy contract applications have been turned down, e.g. the Tesco application in Wigston, Leicester, where the original planning application had limited trading from 8.00am to 8.00pm each day (Green Pharmacy Consultants represented an existing pharmacy contractor in that case). In a similar case when Asda attempted to open a 100 hour contract in Slough Green Pharmacy Consultants was able to
persuade both the PCT and Appeal Authority to turn this application down when they
were able to show planning restrictions limited the hours when a pharmacy could
trade. Where such restrictions exist it is therefore not without precedence to turn
down 100 Hour pharmacy contract applications.

4.5 For the above reasons, may Sturdee Avenue Pharmacy respectfully suggest the
Committee should turn down this Appeal by Community Pharmacies UK Ltd.

Letter from Sturdee Avenue Pharmacy

4.6 By this stage Sturdee Avenue Pharmacy are confident that the NHSLA will have had
visibility of the sheer volume of support that Sturdee Avenue Pharmacy has received
from local patrons, based on their beliefs that there is a more than adequate existing
pharmaceutical service already available.

4.7 As a long standing Pharmacy Operator, Sturdee Avenue Pharmacy have continually
strived over 26 years to ensure that the services provided by Sturdee Avenue
Pharmacy are of the highest possible standard, thereby protecting the longevity of the
business in the face of continuous competition from the Multiples and more recently
that of the 100hr Pharmacy Practitioner.

4.8 Upon receiving copies of the appeal, Sturdee Avenue Pharmacy read with great
interest the grounds upon which the applicant chose to appeal and would like to
express their humble views on these arguments.

4.9 The main area of contention raised by Community Pharmacies UK Limited is that
pertaining to the physical premises at which the proposed 100hr pharmacy will
operate from, citing that the PCT had acted unlawfully and given excessive
consideration to the views expressed by the local community rather than abiding by
regulation, thereby implying prejudice.

4.10 To that end, Sturdee Avenue wish to enclose a floor plan of the Gillingham Medical
Centre, and highlight several very pertinent ‘property matters’ at this point.

4.11 The applicant stresses that their application should have been granted on the basis
that it is for preliminary consent and as such does not require premises to be
specified. However, this appears to be a complete contradiction from their side, as
Community Pharmacies UK Ltd have on all occasions expressed their intention to
operate within the Gillingham Medical Centre, as noted on the original application on
25 March 2011.

4.12 With specific regard to the premises in question, the PCT have provided numerous
reasons as to why the Gillingham Medical Centre is not suitable for the introduction of
a 100hr pharmacy namely those pertaining the change of use consent required for
the provision of a non-medical service (Di- Al), which to the best of their knowledge
has not been sought or granted. It must also be noted at this point that the
designated site is a GMS GP Surgery where by all of the premises is used for, and
reimbursed by the PCT for the delivery of Medical Services. The apparent inability of
Community Pharmacies UK Ltd to have sought planning permission for additional
service provision or approached the appropriate bodies for altering the designated
floor space for non-medical use cannot be seen as a mere oversight. As the
intentions for use were stipulated in the original application some 10 months prior.

4.13 This also leads onto the further question of exactly where within the Gillingham
Medical Centre, the pharmacy is to be located, as it has been highlighted by the PCT
that the current provision made by GMC is approximately 400sq ft and has no direct
entrances or exits other than those provided by the main surgery entrance (plan
provided). Clearly these two major property issues have not been given due
consideration by Community Pharmacies UK Ltd, as do not understand how an area
of this size can provide little more a dispensary function, and there is no additional floor space available to provide consultation rooms etc.

4.14 Following on from the above points, reference the entrance/exists to the GMC. It must also be pointed out that the GMC would have to ensure it could remain open for the extended hours to provide access to the pharmacy for the designated 100hrs, and this could potentially require Local Planning Permission to remain open to 11pm most evenings. In light of the highly residential nature of the area, the LPA would have to ascertain if this could be construed as a safety hazard.

Kent Local Medical Committee

4.15 The LMC note the grounds for the appeal to be associated with the consideration of various property matters as reasons to reject the application. Looking at the records the LMC have of the matter, it would appear from the letter dated 28 November from the Kent Primary Care Agency, that the reasons for rejecting the application did centre around the provision of premises not something that would often feature in a preliminary consent application under Regulation 40.

Kent Primary Care Agency (on behalf of the PCT)

4.16 Firstly the KPCA would submit that the grounds of appeal do not stand up to scrutiny.

4.17 KPCA accept that the Regulations do not require an applicant for Preliminary Consent to specify the premises but this applicant chose to specify the premises as Gillingham Medical Centre in the application. No application for a change of location/premises has been received.

4.18 The Regulations do not prohibit an applicant from specifying the premises when applying for Preliminary Consent and, in KPCA’s submission, where, as in this case, the applicant did so specify then these premises are the location to which the Reg. 13(b) consent application relates and, if granted, to which Regulation 41 would apply.

4.19 The reasons KPCA have set out in the decision letter are not, they would submit, spurious.

4.20 The Control of Entry regulations, including Reg.13, are concerned with locations and therefore properties; in this case the specified property/building housing the Gillingham Medical Centre.

4.21 If, for whatever reason, the specified location is not lawfully available for a pharmacy to be sited in it then this is, in KPCA’s submission, a relevant consideration that in the light of Reg. 41 the PCT must consider. Similarly if there are, or are likely to be, town planning issues or restrictive covenants relating to the specified location they must also be considered.

4.22 The responses to KPCA’s requests, particularly the responses to KPCA’s questions, were couched in such broad and general terms, lacking the detail the Committee had requested, as to be largely useless for their purposes. They essentially express a general conditional willingness to comply with various requirements if these, in the view of the applicant, are necessary.

4.23 The reasons outlined in the decision letter explicitly indicate the views of the PCT Estates section and the Deanery as reported to the Committee. KPCA are advised by the PCT’s Estates section that “there is no flexibility to amend the Deanery Grant from the PCT perspective. This was central funding and the practice signed a binding agreement — that this facility remain in use for a defined period of time.
4.24 Under the terms of rent reimbursement as set out in “The National Health Service (General Medical Services — Premises Costs) (England) Directions 2004” the practice would need to apply to the PCT if they would be receiving rent from another source and the PCT would have to amend the amount of rent reimbursement — see section replicated below:

Abatements in respect of contributions towards recurring premises costs from third parties

Where a contractors practice premises or any part thereof, are or form part of premises that are owned or rented by any person other than the contractor, and that person—

(a) is required by any agreement (which includes a licence or a lease) to make or make any contribution towards any recurring premises costs in respect of which the PCT is providing financial assistance to the contractor in accordance with this Part; or

(b) is required by any agreement (which includes a licence or a lease) to pay or pays to the contractor any amount—

(i) by way of rent in respect of the practice premises or any part thereof, or

(ii) in respect of the running costs of the practice premises,

the PCT must set off that contribution or that amount, equitably, against the payments made to the contractor pursuant to this Part.

4.25 These views, in KPCA’s submission, clearly indicate a very high probability, beyond reasonable doubt, that were an application to vary the terms of the Deanery grant, and/or the terms of the current GMS contract, to be received by the PCT/Deanery neither the PCT, nor KPCA believe the Deanery, would wish to approve such applications. Clearly KPCA cannot state that such applications would definitely be refused since no such applications have been received and therefore no formal consideration and/or decision has been possible to date.

4.26 The Pharmaceutical Regulations Committee (PRC) is a joint committee established by the three PCTs in Kent and Medway to consider and make decisions, under powers delegated by the PCT Boards, upon pharmacy applications such as this one. However these decisions are in law decisions of the PCT (in this case the Medway PCT) and it is KPCA’s submission that the PRC cannot lawfully make a decision based upon the 2005 pharmaceutical Services Regulations that is contrary to the existing legal contractual relationship between the PCT and the Gillingham Medical Centre and which would effectively pre-empt decisions that the PCT and/or the Deanery might wish to make re the grant conditions and/or the GMS contract/rent reimbursement should the practice apply for the necessary changes to the existing arrangements. There are no provisions in the Regulations that either require or permit KPCA to make such a decision or one that that would effectively constrain the PCT/Deanery from freely exercising its powers re these contractual issues. It would appear that were preliminary consent to be granted the PCT and/or the Deanery could be faced with a Fait Accompli despite their concerns indicated both in these representations and KPCA’s decision letter.

4.27 The PRC Committee also remains very concerned regarding the effects of Regulation 41 should this appeal be allowed. As the Committee understand it Reg.41 is mandatory and will, in the event that Preliminary Consent is granted, and assuming no changes are contained in any application for Full Consent, result in the applicant having to be granted Full Consent; and subsequently being able to serve Notice Of Commencement on the PCT and thereby require the PCT to issue a pharmaceutical
services contract to the applicant, all on the basis of the application as it now stands. KPCA can find no provisions within the Regulations that would allow them to decline either Full Consent, Commencement of Service or the issuing of a contract in the event that the Deanery Grant conditions and/or the PMS contact issue and/or any planning issues remain as they are at the moment. The Conditions referred to within Reg. 41 all appear to relate to Fitness to Practice issues (of which there are none in this case) and apparently would not allow KPCA to make either Full Consent or Commencement of Service conditional upon the necessary approvals of variations of the grant conditions and/or the GMS contract, both of which KPCA submit are necessary before there is a lawful site to which this application could lawfully apply.

4.28 A similar problem also relates to the Town Planning issue. The Committee were mindful that if they granted preliminary consent Reg.41 could place the PCT in a position where they appeared to be complicit in an act contrary to the Town and Country Planning legislation. Currently the specified premises have Use Class D1 permission. KPCA are advised that a pharmacy providing a full pharmaceutical service, including the locally enhanced services KPCA would have directed the pharmacy to provide as a Reg. 13 condition of a grant had KPCA not refused the application, and providing it to all residents of, visitors to, and workers in the neighbourhood requires Use Class A1 permission. A community pharmacy providing a service would, KPCA submit, have to be serving a significant number of patients registered at other GP practices, and providing much more (including OTC medications) than medications requiring dispensing following a medical consultation, this being the definition of Use D1. KPCA's understanding is that D1 Use is the Use normally obtained for a surgery dispensary operated by a medical practice with dispensing patients registered with the practice. The apparent intention of the applicant, and the practice, to proceed on the basis of D1 use, coupled with the proposed location of the pharmacy inside the existing practice building, therefore also raises the issue as to whether this application is in reality an attempt to obtain a doctor dispensing service serving the patients of this practice, under the guise of a community pharmacy. The practice is located within a Non-Controlled locality and does not currently have dispensing patients. Attempting to create a doctor dispensing service, under the guise of a community pharmacy, would be clearly contrary to the intentions of the 2005 Regulations and, KPCA would submit, be clearly unlawful. KPCA's concerns have been strengthened still further by the reaction of the practice to our refusal decision in which they verbally indicated to KPCA that they consider this proposed pharmacy as their pharmacy, with the applicant company acting, in their words, as their agent.

4.29 KPCA would respectfully request that in considering this appeal the Appeal Unit consider both the contents of their decision letter, particularly KPCA's reasons, together with the points and submissions made herewith. In KPCA's view granting this appeal would place the PCT in a totally unreasonable if not an impossible position where it could not lawfully prevent the establishment of this pharmacy/dispensary but where once the pharmacy commenced operations the PCT would be left in a position where it was obliged to either accept the fait accompli or consider the options of taking action against the practice for breach of their grant conditions (if not prevented by the principle of estoppel) and attempting to withdraw the pharmacy's contract under the Regulations.

4.30 Therefore KPCA do not believe that the evidence submitted to them establishes, on a balance of probabilities, that this proposed pharmacy will be able to provide full pharmaceutical services 100 hours each week lawfully from the specified premises and that therefore this appeal should not be upheld and that this application should be terminated at this stage.

4.31 KPCA await the NHSLA's decision with great interest.

J Spensley Dispensing Chemists
4.32 J Spensley understands the preliminary consent is not concerned with planning regulations or premises payments but these issues are likely to be debated by other authorities if consent is given.

Lloyds Pharmacy Ltd

4.33 Lloyds note that the applicant stresses that their application is for preliminary consent (and therefore that premises do not need to be specified) however, as the FHSAU will note the applicant does provide/submit a full address and post code on the application i.e. 'at the Gillingham Medical Centre”. The application is therefore site specific and quite clearly relates to premises at the Gillingham Medical Centre.

4.34 The PCT had concerns over the applicant’s ability to meet the contractual requirement of providing services over 100 hours but this has not been addressed by the appellant in the appeal.

4.35 Lloyds do not believe that the appellant has provided any reasons which should lead to a departure from the decision made by the PCT to refuse the application and therefore ask that the appeal be dismissed.

Community Pharmacies UK Ltd (Applicant)

4.36 The applicant would like to make the following further comments to specifically address the reasons given for rejecting the application. For ease of reference the applicant has numbered each reason below and commented with the prefix CPL in bold.

4.37 The premises specified in the application, Gillingham Medical Centre, is a GMS GP practice. All of the surgery premises are currently used for, and reimbursed by the PCT for, the provision of the practice’s GMS contracted medical services and part of the existing building is an extension that was built to provide additional consulting and training rooms with the assistance of a capital grant from the PCT through the Advanced Training Practices (ATP) Programme. This Programme required the practice to commit to provide training placements for a period of 5 years following the completion of the extension in August 2010.

CPL — This is not relevant under the current regulations.

4.38 Formal approval from the PCT and the Kent, Surrey & Sussex Deanery is required for changes to the ATP agreement and no such approval has been sought or granted. Recent advice from the Postgraduate GP Dean to the PCT indicated that in his view withdrawal from the training (APT) scheme would not generally be acceptable.

CPL - This may well be the case but is nevertheless completely irrelevant as no one is seeking to change the ATP agreement.

4.39 The PCT’s Estates division has also indicated that, should part of the existing premises be used for the provision of non-medical services such as a pharmacy, the PCT would be concerned that this would place additional pressure on patient access to existing services and result in limited capacity to offer the full range of services to the increasing population and result in limited capacity to offer the full range of services to the increasing population.

CPL — Again this is irrelevant. This application is for preliminary consent and following approval a satisfactory pharmacy design will be worked up to ensure that both the quality and range of services offered are maintained and that capacity to increase the provision of services is unaffected.
4.40 The current GMS contract agreement between the PCT and the practice contains an approved floor area upon which payments in support of premises costs are calculated. Any changes to the approved floor area (as would be required were a non-medical service such as a pharmacy to be located within the existing building) would also require approval by the PCT and an amendment to the GMS contract.

CPL — This is completely misleading. Under the GMS contract if a pharmacy were to open in the premises then there would be a reduction in the rental reimbursement paid by the PCT. The Partners of the surgery own the freehold of the premises and are within their legal rights to use the building as they find appropriate.

4.41 Whilst it appears to the Committee that the part of the existing premises that it is proposed to use for this proposed pharmacy is not part of the extension referred to ante it was clear that locating a pharmacy within the existing building would significantly reduce the space available for the provision of medical services and would require the approvals referred to ante, and it was also clear that the prospects of obtaining these required approvals was minimal, if not non-existent.

CPL — This is pure supposition and conjecture as well as being irrelevant.

4.42 The applicant provided no indication in their application, nor in their response to the Committee's questions, that they envisaged locating the pharmacy anywhere (e.g. in a further extension yet to be built) other than within the existing building. The responses to the Committee's questions, which the Committee noted, were broad brush responses lacking the substantive detail requested by the Committee.

CPL — The information provided was more than adequate considering that this is an application for preliminary consent.

4.43 The existing practice premises are approved by the Local Planning Authority for D1 use and therefore any changes in the use of the existing premises and any further possible development of the site (e.g. another extension to house a pharmacy) would require planning permissions which to the best of the Committee's knowledge have not been either granted or applied for. Specifically locating a community pharmacy (as opposed to a dispensary available only to patients of the practice) either within the existing, or within a possible theoretical further extension, would require Change of Use consent from D1 to Al (Retail) use. The existing location of the surgery is within a residential area and it is therefore highly probable that any such applications (Change of Use or New extension) would either be refused entirely or, if granted, have conditions attached to protect the amenities of neighbouring residential properties. Such conditions would be highly likely to include restrictions on the hours of use to mirror the hours that the surgery is open, which is significantly less than 100 hours per week.

CPL — It is not a requirement to have applied for planning consent under the current regulations. It isn’t a requirement to have identified premises at the stage of a preliminary consent application. This is based wholly on assumptions which the committee do not have the relevant expertise or knowledge to make. In fact there has previously been a planning permission approval for an Al retail use building on the surgery site.

4.44 Whilst the Committee accepted that the applicants were willing to provide pharmacy services for 100 hours per week from the specified premises the Committee decided that this willingness was on much more than a mere balance of probabilities, incapable of being translated into actual provision of these services by reason of there being little, if any, realistic prospect of any space within the specified premises being available to them for the provision of these services. The Committee were also mindful of the provisions of Regulation 41 (Effect of Preliminary Consent) and the apparent lack of any provisions within the Regulations allowing a grant of preliminary consent to be made subject to conditions which would assure the PCT and the
Committee that before a pharmacy commenced the provision of services all the necessary approvals and permissions had been obtained.

CPL — The applicant has provided the committee with all of the information that they needed to grant this application. The committee have failed to apply the regulations correctly and have based their decision on assumption, conjecture and supposition taking into account matters that are irrelevant under the current regulations. The applicant would ask the appeal authority to overturn the decision of the PCT and grant the application.

Kent Local Pharmaceutical Committee

4.45 Kent LPC replied to the original consultation on this application, and whilst recognising that it was an exemption application stated that there are already three pharmacies operating within a short distance from the applicant’s proposed pharmacy; one of which is only 250m away. The LPC believes that these are providing an adequate pharmaceutical service. Whilst this cannot be taken into account under the regulations governing this exemption application, any resulting adverse effect from this application on the viability of existing pharmacies, could ultimately result in a deterioration of their existing services to the patients in the area.

4.46 The content of the application suggests that the proposed pharmacy will be at the site of the existing surgery and the LPC would therefore wish to be assured that there is sufficient space available for providing full pharmaceutical services and that the necessary planning permission for providing retail sales of pharmacy commodities is in place. It must be remembered that a pharmacy must be accessible to the public in general and not only patients of the existing surgery. To this end a separate entrance to the pharmacy must be available in addition to the entrance to the surgery.

4.47 The surgery has facilities which are totally unsuitable for the provision of a comprehensive pharmaceutical service, which is implicit in the contract which would be awarded. The traffic congestion at normal trading hours together with the noise disturbance during late trading hours would be such that LPC would recommend that planning permission for A1 retail trading should not be granted.

4.48 Kent LPC is in agreement with the points made by the PCT in the decision letter.

4.49 With reference to the stated grounds for appeal the LPC wish to make the following points.

4.50 Regulation 40 in respect of ‘Preliminary Consent to be included in a Pharmaceutical List’ states quite clearly under (2)(c) that the applicant must provide the information set out in Parts 1 and 3 of Schedule 4. Part 3 of Schedule 4 is DETAILS OF PREMISES AND OPENING HOURS and states that name and address of premises or where seeking preliminary consent, relevant location of premises and whether the applicant is currently in possession of the premises.

4.51 The LPC cannot agree that the reasons in relation to property, which have been stated by the PCT are spurious. Indeed the LPC’s understanding of the word spurious would appear to be different from that of the appellant, as the reasons stated by the PCT are both genuine and relevant.

4.52 The appellant may believe that they have responded appropriately to all requests made of them by KPCA, but have obviously not satisfied the PCT that they are capable of overcoming or have attempted to resolve what they call potential issues, which would prevent them from providing the full pharmaceutical service required for 100 hours a week.
4.53 Far from being unlawful, the LPC believe that it would have been remiss of the PCT not to have considered all matters before making the decision which the LPC believe is correct.

5 Further Comments

The NHSLA also received a number of comments from non-statutory parties who wished to indicate their opposition to the application.

6 Consideration

6.1 The Pharmacy Appeals Committee appointed by the Family Health Services Appeal Unit of the NHS Litigation Authority, ("the Committee") had before it the papers considered by the PCT, together with a plan of the area showing existing pharmacies and doctors' surgeries and the location of the proposed pharmacy.

6.2 It also had before it the responses to the Authority's own statutory consultations. The Committee dealt with the application by way of reconsideration of all the issues and, on the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.

6.3 The Committee noted references to the adequacy of current pharmaceutical provision. Given this is an application exempt from the test in Regulation 12(1), adequacy was not a matter to which the Committee had to have regard when determining the appeal.

6.4 The Committee had regard to Regulation 13 of the National Health Service (Pharmaceutical Services) Regulations 2005 (as amended) ("the Regulations").

6.5 The Committee was mindful that Regulation 13 states:

(1) Unless the applicant requests otherwise, or the premises to which his application relates are in a neighbourhood in which local pharmaceutical services are or are to be provided, regulation 12 shall not apply to an application in respect of:

(b) premises which the applicant is willing to keep open for at least 100 hours per week for the provision of pharmaceutical services.

6.6 The Committee noted there was no dispute that the premises to which the application relates are not in a neighbourhood in which local pharmaceutical are or are to be provided.

6.7 The Committee noted Regulation 13(2)(b) states:

As regards an application to which (1)(b) applies, if the application is granted-

(a) It is a condition of the applicant’s inclusion in a pharmaceutical list (and so a terms of service) that the premises to which the application relates are kept open for at least 100 hours per week for the provision of pharmaceutical services, and the Primary Care may not vary or remove that condition;

and

(b) the Primary Care Trust may only remove a person from the pharmaceutical list for breach of that condition if-

(i) that person has repeatedly breached the condition, or is likely to breach the condition repeatedly, without good cause, or
(ii) the breach is, in all the circumstances, a serious breach and as a consequence of it the safety of a patient has been or may be put at serious risk.

6.8 The Committee noted as indicated above, it is a condition that the applicant remains open for at least 100 hours per week for the provision of pharmaceutical services. Any failure to do so, would render him potentially liable to action by the PCT to remove him from the pharmaceutical list. In the Committee’s view, Regulation 13(1) nor 13(2)(a) provide no discretion for the PCT to refuse the application on grounds that the applicant may in the PCT’s view, not be open for at least 100 hours per week for the provision of pharmaceutical services. The wording of Regulation 13(2)(b) indicates action that the PCT may take after the applicant has been included in the pharmaceutical list and has breached the condition to remain open for 100 hours per week.

6.9 The Committee considered that any agreement between the PCT and the surgery regarding the use of the premises is a separate issue. The Committee also noted the PCT’s concerns for a number of reasons given, that the applicant would be unable to open their pharmacy at the proposed site. The Committee was mindful that the PCT shall in accordance with Regulation 41 and subject to certain conditions in that regulation having been met, grant the application so long as it was received within the six months preliminary consent period referred to in Regulation 40(4). In the Committee’s view it is a matter for the applicant to ensure that he is able to comply with the terms of his application. Where he is unable to submit his application to the PCT within the six months period, then his application will fail. If he has submitted his application to the PCT and it is finally granted, he must then provide pharmaceutical services for at least 100 hours per week or as indicated in paragraph above, face possible action by the PCT to remove his name from the pharmaceutical list. The Committee has concluded therefore, that whilst the reasons suggested by the PCT could ultimately prevent the applicant from providing pharmaceutical services from the proposed site, this was not a reason to refuse the application.

6.10 The Committee further noted that as this was an application for preliminary consent, the applicant would be entitled under Regulation 41(2) to specify in their application premises, that are different from those for which preliminary consent was granted.

7 Decision

Accordingly the Committee allows the appeal.

Ray Bushell
Appeal Officer

A copy of this decision is being sent to:
Mr A Murray, Community Pharmacies UK Ltd - Applicant/Appellant
Mr J Butler - Kent PCA (on behalf of the PCT)
Mr G Green, Green Pharmacy Consultants (on behalf of Sturdee Avenue Pharmacy)
Mr M Cox - Lloyds Pharmacy Ltd
Ms G Spensley - J Spensley Dispensing Chemists
Mr M Keen - Kent LPC
Mrs D Tyas - Kent LMC