APPEAL AGAINST MIDLANDS & EAST (CENTRAL MIDLANDS) AREA TEAM, NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY DEAN & SMEDLEY LIMITED FOR INCLUSION IN THE PHARMACEUTICAL LIST OFFERING UNFORESEEN BENEFITS AT ASCEBI HOUSE, 118 BURTON ROAD, ASHBY-DE-LA-ZOUCH, LE65 2LP UNDER REGULATION 18

1 A summary of the application, decision, appeal and representations and observations are attached at Annex A.

2 Initial Consideration

2.1 At the first hearing on 29 March 2016 the Pharmacy Appeals Committee ("the Committee") appointed by the Family Health Services Appeal Unit of the NHS Litigation Authority, had before it the papers considered by NHS England, ending at page 150 with a map showing the proposed location site and existing doctors surgeries and pharmacies within a 1.6 km radius of the location site. The Committee had been provided with further documents submitted by the applicant, including a petition signed by hundred and 64 individuals, a supporting letter counter signed by 16 further individuals, a map delineating a 1.6 km radius from the location site, an email supporting the application from the Rotary Assistant Governor, a further supportive email, the 2011 census neighbourhood statistics for Ivanhoe Ward, a breakdown of items prescribed by West Leicestershire Practices from January to December 2015, and the HSCI Centre Report on General Pharmaceutical Services in England 2005/06 to 2015/15. The Interested Party Clinicohealth Ltd, t/a Ashby Pharmacy, had provided a paginated bundle of photographs, a report dated 18 March 2016 from Waheed Rehman of AWR Accountants, with a profit and loss summary for the years ended respectively October 2013, 2014, and 2015, and also an income summary from November 2015 to January 2016, the Ashby de la Zouch December 2015 bus map and guide, the 2011 Census Neighbourhood Statistics for Hollywell Ward, and a letter from Cllr Graham Allman representing Ashby Money Hill Ward, dated 27 June 2016.

2.2 The Committee also had before it the March 2015 Pharmaceutical Needs Assessment published by the Public Health Department of Leicestershire County Council and the written responses to the NHS LA’s own statutory consultations.

2.3 On the basis of this material, the Committee considered it was necessary to hold an Oral Hearing.

2.4 For the reasons set out in its Decision Document dated March 2016 the Committee decided to adjourn the hearing and it resumed on 28 June 2016 at Rothley House, Colville Business Park in Colville, Leicestershire.

2.5 The Committee comprised Judge Graham White (Chair), Fiona Castle (Pharmacy Member) and Catherine Limm (Lay Member).

2.6 The Applicant was represented by Kevin Harrell of Pharmacy Sales & Consultancy, with Richard Dean, Lucy Dean, and Anna Wood, all of the Applicant Company, and Hein Le Roux of Pennington Manches LLP, Solicitors. Clinichealth Ltd was represented by Susan Hunneyball of Charles Russell’s Speechley, Solicitors, with Abdul Hamid of Clinichealth and Jo Watson of Boots UK Ltd.
2.7 There was no representation by or on behalf of either Leicester & Rutland LPC or Leicester & Rutland LMC.

2.8 At the outset of the resumed hearing the Chair read out an email from Lesley Harrison of NHS England (Leicestershire and Lincolnshire Team) asking for the original decision to be quashed and the application re-determined as a consequence of errors on the part of NHS England in processing the application. All parties agreed that this was within the Committee’s remit and that in any event the matter was to be dealt with by way of a re-hearing.

3 Site Visit

3.1 The Committee had undertaken an inspection of the new location site and had visited the town of Ashby de la Zouch on the morning of 29 March 2016 by taxi and on foot. The members were first driven from the location site to the premises of Ashby Pharmacy, and from there through the town centre out to the Tesco supermarket and then out around the road which acts as a bypass and then back into town, noting the Castle Surgery on route and arriving back at Ashby Pharmacy.

3.2 The Committee noted that Ashby Pharmacy was located in a small group of shops, a stone’s throw from the town centre itself. It is close to a day centre, the town library, a school, a church, a public house, and the former Castle Surgery site. Nearby there is unrestricted road parking and a municipal car park.

3.3 The Members then walked the short distance into the town’s main shopping street and noted that it had the characteristics of a thriving market town with a wide range of retail shops, including independents, public houses, banks, cafes, and a post office. The existing pharmacies of Dean and Smedley Limited and Boots UK Ltd are positioned on opposite sides of the road about 50 metres from each other. Both are clearly visible and easily accessible. Dean and Smedley are more to the centre of the town and Boots is situated close by WH Smith and Boots Optical.

3.4 Walking around roads leading off the centre and parallel to it the Committee noted a good supply of car parks not all of which were full at the time.

3.5 The Members then walked from the town centre to the location site, an 800metre journey mainly uphill. This took approximately 12 minutes, after allowing for a short detour into the side road 100 metres or so from Ascebi House to view a modest convenience shop. No customers were evident inside when the members opened the door, but they noted a greater range of products displayed than the exterior appearance suggested. The housing estate beyond it comprised post-war council stock, some of which are likely now to be in owner occupation, and the estate on the other side of the main road consisted of higher value owner occupied houses.

3.6 The location site comprises a new medical centre to which the Castle Surgery moved into in 2015, and the applicant has already established a non-contract pharmacy there. Within close proximity of the medical centre are bus stops on both sides of the road with a service running into and from the town centre.

3.7 A summary of the above observations was provided to those in attendance. They were invited to comment upon them or indicate if any of the observations appeared to be inaccurate.

3.8 No such comments or observations were made, save for a query by Mr Harrell about the number of car parks visited, as when he viewed the town, there were cars queuing to enter some of them.

3.9 The Chair confirmed that all car parks serving the town centre had been viewed by the Committee with spaces noted in some. It was agreed that a visit at any time would have provided only a snapshot reflecting that moment.
4 Oral Hearing Evidence and Submissions

4.1 The oral submissions on behalf of both parties reflected their respective written submissions.

4.2 It was accepted by both parties that no person on the pharmaceutical list is providing or has undertaken to provide pharmaceutical services from the premises to which the application relates or from any adjacent premises other than the Applicant who, whilst providing such services from the location site itself, is not doing so under an NHS Contract.

4.3 Mr Harrell reminded the Committee that the Applicant has a well-established presence in Leicestershire with 11 individual pharmacies in the County and that after acceptance of its tender the Company had opened a pharmacy in part of the building to which the Castle Surgery Medical Practice had moved. It was now operating there without an NHS contract, and NHS prescriptions issued by the Practice could, if the patient so wished, be faxed to its long established pharmacy in the town centre, from where patients can collect whatever has been prescribed. They need for an on-site facility was demonstrated by the result of a monitoring exercise undertaken during the period between the opening of the Centre on 4 December 2015 and 2 March 2016 which showed 800 people having a prescription dealt with in that way. The Applicant has no plans to leave its town centre address.

4.4 The Applicant had been denied the opportunity until the appeal stage to address the challenges made to its application. In its response the LPC had referred to the new Health Centre as having been planned for several years, yet the specific relocation of the surgery had not been foreseen at the time of the 2015 PNA and was not mentioned in it.

4.5 The argument that an inevitable increase in prescriptions dispensed by the new pharmacy will lead to the closure of Ashby Pharmacy was, in his submission also flawed. Out of 24,000 prescriptions in the area, 93% were dispensed by these for existing pharmacies in Ashby Town. There is sufficient for Ashby Pharmacy to remain viable if split more or less evenly between them, even without taking into account population growth. The evidence produced suggests that Ashby Pharmacy has a loyal following and Cllr Allman states that the 1800 households in his Ward would not connect with the Applicant’s new pharmacy. Ashby Pharmacy will remain available to them.

4.6 There had been no accounts produced to back up claims that Ashby Pharmacy is likely to suffer such a reduction in prescription custom that it will fail as a business. To calculate gross profit on the basis of 30% of fee income was an unrealistic simplification. The revised profit and loss projection was flawed, and the overheads figure inaccurate as it was not shown as reducing at all, despite a projected large decrease in income and therefore activity, which ought to result in lower staff costs.

4.7 It was for Ashby Pharmacy to satisfy the Committee on balance of probabilities that the granting of the application would result in the closure of its business and, if so, that it would result in a significant change in the provision of pharmaceutical services. No evidence had been provided about the number of patients using their out of hours’ service who would be adversely affected, and its location was no more advantageous to patients than any of the others in the town.

4.8 Indeed, patients would have a greater choice if the application were granted and access would be easier for some, being on the spot. Improvements would result by reason of the seamless care offered. It would be an important and better alternative to Tesco, which is used by only 3% of the population for prescriptions and is less accessible.
A walk of 20 minutes each way between the new medical centre and the centre of town, involving an uphill stretch in one direction, would be avoided thereby improving the situation of persons with limited mobility and children. There are parking challenges in the town itself. There is a question mark over whether the bus service will remain and, in any event, the last bus from outside the medical centre leaves at 5:30 pm. Taxi fares are £3 each way. There are complaints by medical centre patients that they cannot have their prescriptions dispensed on site.

Mr Harrell submitted that, although there was a choice for those both inside and outside the town, it could not be considered a reasonable one for a significant number of people. People in the area to the north-east of town are shown to be more affluent and healthy than those to the south west. Age and disability, as protected characteristics, are not adequately catered for in the context of the surgery’s new location. A double journey on foot with a hill in one direction would be difficult for children, the elderly, and those with disabilities. 16 residents of the sheltered housing, close to Ashby Pharmacy, have signed a letter recording their concern at Ashby is possible closure.

Innovation would be achieved by the adoption of a triage system of patient care, of which a minor ailments service would form part, thus enabling GPs to more efficiently use their time, and by the introduction of a falls assessment service which is not currently offered anywhere in the County. The application form also referred to immediate access to Primary Health Care (including importantly for young people) either directly or by triage from the surgery next door, independent prescribers would be able to offer prescribing advice and deal with medication related queries, either as part of the surgery team or in the pharmacy itself. A further 400 MURs and at least 50% of possible NMS would be delivered to Ashby patients as a result of the new pharmacy.

Mr Dean described the leading role played by his Company, established since 1927, in hands on pharmacy practice; including training and development, governance, engagement with other healthcare professionals, and the extension of treatment options, with a falls service anticipated at some time. He could not remember whether he fed into the 2014 consultation process the future need that he has now described for an expansion of pharmacy provision into the medical centre, although the plans for this were submitted the year before. A falls service is not being offered in the Applicant's town centre premises, although a trial had been undertaken by one of their pharmacists in Burton who is an independent prescriber and who also works in a GP surgery. There are no current plans to implement this at the new centre. The delivery service has been improved and they operate a “no refusal” policy.

Castle Group GP practice is undergoing expansion but their patient list has not altered in number. Part of their catchment area falls outside Castle Ward which is itself densely populated. Tesco’s dispensing list has not markedly changed.

Ms Hunneyball produced her client’s profit and loss account summary for the years respectively ended 31.10.13, 31.10.14, and 31.10.15. The latter shows an operating profit of £# before depreciation and directors remuneration. She also referred to the revised forecasts of annual profit and loss in the event of Dean and Smedley’s application being granted. This projected an annual loss, after allowing for directors remuneration of £#, amounting to £# should prescriptions reduced by 10%, £#, should they reduce by 20%, and £# should they reduced by 30%.

Ms Hunneyball reminded the Committee that the burden of proof is on the Applicant to established that significant benefit would be derived from granting the application. In considering whether significant detriment would be caused the Committee must have regard to the matters contained in regulation 18 (2) (a) concerning proper planning in respect of the provision of pharmaceutical services and the existing arrangements for the provision of pharmaceutical services in the area of the relevant HWB. Her clients were not a pharmacy which dispenses a loss of prescriptions per
month. The high level of overheads shown in the accounts was inevitable given the need for qualified pharmacists to provide a 100 hour service under their contract.

4.16 In her submission, there is a clear risk that Ashby Pharmacy would suffer lower prescription numbers given the historical experience that a pharmacy situated close to a new surgery is likely to captures 70% of its prescriptions, currently running in this case at %. This likelihood is enhanced by the applicant’s planned provision of pharmacy personnel to the surgery and the strong links envisaged between the two. An equal division of the remaining % prescriptions between the other four pharmacies in the town would result in % for each. Allowing for fluctuations in the figures, Ashby Pharmacy’s reduction in custom would worsen, and the lower the baseline the less viable it would become.

4.17 Ms Hunneyball submitted that the failure of Ashby Pharmacy to survive would cause significant detriment because of the key role it plays in remaining open from 7.00am to midnight on Mondays to Fridays and 9.00am to midnight on Saturdays. This contrasts with Dean and Smedley’s hours which are 7:45am to 6.00pm, whilst the surgery remains open longer. Tesco closes at 10:30pm and Boots’ hours are shorter. Ashby Pharmacy is located close to a day centre, two care homes, and a library. The quality of its service and the trust placed in it are exceptional, as testified by the references supplied, and it provides a personal service not obtained from Tesco.

4.18 Mr Hamid confirmed that deliveries to patients are being made before 7:45am. He recently served as many as 25 customers between 9.00pm and 10:30pm, of whom between seven and nine were for prescriptions. He provided a further example of a patient whose prescription was dispensed at 11:45 pm. His patients tended to come from the Millbank area particularly, but from a wide area generally, including from near Tesco’s and beyond. They use all manner of transport. He conceded that his pharmacy’s recent concentration on patients’ general needs had been at the expense of MUR’s which had fallen, and he acknowledged there are shortcomings in this regard. He said that they also get a large number of dental prescriptions. He explained that the big increase in their overheads for 2015 is attributable to the cost of employing a locum pharmacist and to staff costs generally. Extra car parking will be provided in the vicinity of the pharmacy as a result of the space provided by the demolition of the former Health Centre.

4.19 Ms Hunneyball submitted that there was little in the Applicant’s case, as presented, to demonstrate benefits in terms of access by people with protected characteristics who have specific needs. There are no details on the face of the petition to show what the signatories were told before they signed it, and no address details in the emailed letters. The spreadsheet at page 18 showing commissioned services available at existing pharmacies in Ashby de la Zouch should be amended to show that Tesco does provide alcohol brief intervention, healthy living pharmacy, smoking cessation, and palliative care. The reference to Boots not providing needle exchange is misleading. It does provide this within a global service in respect of drug use. The reality is that Ashby is a thriving market town with a mobile healthy population and car ownership, with 82% of people having access to a vehicle. 78% of Ivanhoe Ward population and 85% of Hollywell Ward report good health. Home ownership is around 67%. There is not a high level of people with protected characteristics.

4.20 Ms Hunneyball argued that access to pharmaceutical services for the population as a whole is easy. There is no evidence that the convenience shop close to the subject premises was a retail outlet that was necessary to members of the public. The town centre is thriving and the convenience store near the surgery is not. People do not meet their daily needs around the health centre site. The distance from the centre of town to the new medical centre is 900 metres which can be walked in 10 minutes. Most people use a car, there is a bus service there and back, there is evidence that many people visit the surgery by taxi, and there is also a dial and ride service available. The pharmacies that people use are near where they live. The most densely populated area in Ashby is the Castle Ward in the town. Access for those
living around the Health Centre is a red herring. People are still making the same journeys they have always made to their local pharmacies. The likely prescription rate arising from the new housing development of between 675 and 700 homes near the medical centre can be absorbed by the existing providers.

4.21 Neither the falls assessment service nor a trial system should, in Ms Hunneyball’s submission, be considered an innovative approach as they can be provided by any pharmacy under existing arrangements. Reasonable choice is already available with the existing pharmacies located not only in the town itself but also in the nearby villages of Woodville, Measham and Swadlicote where there are Dean and Smedley pharmacies. In Swadlicote there are two others. In support of Ms Hunneyball’s case Ms Watson gave evidence that the Ashby Boots branch is a community pharmacy with a high level of customer loyalty, open from 8:15 am to 6.00 pm Mondays to Fridays and 8:45 am to 5:30 pm on Saturdays. It offers a wide range of services including MUR’s and a “free to anyone” sexual health service.

4.22 In conclusion Mr Harrell reminded the Hearing that it was for Clinicohealth to provide evidence to the Committee on balance of probabilities that granting the application would result in Ashby Pharmacy failing to survive, and, if so, that its closure would result in a significant detriment as set out in regulation 18. The figures do not prove that Ashby will suffer a reduction in prescriptions and it is more likely that they will increase. Any vulnerability they may be suffering is more likely to be the result of other factors than the granting of a contract to the Applicant.

4.23 The relocation of the doctors surgery was not a red herring for anyone who does not live in the town centre. Not everyone in Ashby is affluent and mobile and for those that are not their journey to a pharmacy after visiting the health centre is now significantly more difficult.

4.24 His clients vision for the role of a community pharmacy such as is being developed at the additional location site and the integration of healthcare services reflects the current direction of travel of the Health Service. The issue of clusters, such as the grouping in Ashby, is one that is being addressed.

4.25 Ms Hunneyball submitted that any issue arising out of clustering could have been addressed by the applicant by a different application route and suggested that the Applicant’s submissions supported a case of convenience rather than significant benefits. The issue of detriment had been addressed by the figures produced by her clients.

5 Further Consideration

5.1 The Committee had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”).

5.2 The Committee first considered Regulation 31 which states:

(1) A routine or excepted application must be refused where paragraph (2) applies

(2) This paragraph applies where –

(a) a person on the pharmaceutical list (which may or may not be the applicant) is providing or has undertaken to provide pharmaceutical services (“the existing services”) from –

(i) the premises to which the application relates, or

(ii) adjacent premises; and
(b) the NHSCB is satisfied that it is reasonable to treat the services that the applicant proposes to provide as part of the same service as the existing services (and so the premises to which the application relates and the existing listed chemist premises should be treated as the same site).

5.3 The Committee was of the view that, in the light of the circumstances agreed by the parties in 5.2 above, Regulation 31 does not apply in this case. The nearest pharmacy to the proposed location is in fact 0.7 miles away.

5.4 The Committee was accordingly not required to refuse the application under the provisions of Regulation 31.

5.5 The Committee noted that this was an application for “unforeseen benefits” and fell to be considered under the provisions of Regulation 18 which states: (a) the NHSCB receives a routine application and is required to determine whether it is satisfied that granting the application, or granting it in respect of some only of the services specified in it, would secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB; and

(b) the improvements or better access that would be secured were or was not included in the relevant pharmaceutical needs assessment in accordance with paragraph 4 of Schedule 1,

in determining whether it is satisfied as mentioned in section 129(2A) of the 2006 Act (regulations as to pharmaceutical services), the NHSCB must have regard to the matters set out in paragraph (2).

(2) Those matters are—

(a) whether it is satisfied that granting the application would cause significant detriment to—

(i) proper planning in respect of the provision of pharmaceutical services in the area of the relevant HWB, or

(ii) the arrangements the NHSCB has in place for the provision of pharmaceutical services in that area;

(b) whether, notwithstanding that the improvements or better access were not included in the relevant pharmaceutical needs assessment, it is satisfied that, having regard in particular to the desirability of—

(i) there being a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB (taking into account also the NHSCB’s duties under sections 13I and 13P of the 2006 Act (duty as to patient choice and duty as respects variation in provision of health services)),

(ii) people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that, in the area of the relevant HWB, are difficult for them to access (taking into account also the NHSCB’s duties under section 13G of the 2006 Act (duty as to reducing inequalities)), or

(iii) there being innovative approaches taken with regard to the delivery of pharmaceutical services (taking into account also the NHSCB’s duties under section 13K of the 2006 Act (duty to promote innovation)).
granting the application would confer significant benefits on persons in the area of the relevant HWB which were not foreseen when the relevant pharmaceutical needs assessment was published;

(c) whether it is satisfied that it would be desirable to consider, at the same time as the applicant’s application, applications from other persons offering to secure the improvements or better access that the applicant is offering to secure;

(d) whether it is satisfied that another application offering to secure the improvements or better access has been submitted to it, and it would be desirable to consider, at the same time as the applicant’s application, that other application;

(e) whether it is satisfied that an appeal relating to another application offering to secure the improvements or better access is pending, and it would be desirable to await the outcome of that appeal before considering the applicant’s application;

(f) whether the application needs to be deferred or refused by virtue of any provision of Part 5 to 7.

(3) The NHSCB need only consider whether it is satisfied in accordance with paragraphs (2)(c) to (e) if it has reached at least a preliminary view (although this may change) that it is satisfied in accordance with paragraph (2)(b).

5.6 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:

5.6.1 confirm NHS England’s decision;

5.6.2 quash NHS England’s decision and re-determine the application;

5.6.3 quash NHS England’s decision and, if it considers that there should be a further notification to the parties to make representations, remit the matter to NHS England.

5.7 Taking account of the matters referred to in the 16 June 2016 email from Lesley Harrison and the agreed position of both parties in relation to it, the Committee has decided to quash the NHS’s decision for procedural irregularity.

5.8 The Committee considered that Regulation 18(1)(a) was satisfied in that it was required to determine whether it was satisfied that granting the application, or granting it in respect of some only of the services specified in it, would secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB.

5.9 The Committee went on to consider whether Regulation 18(1)(b) was satisfied, i.e. whether the improvements or better access that would be secured if the application was granted were or was included in the PNA in accordance with paragraph 4 of Schedule 1 of the Regulations.

5.10 Paragraph 4 of Schedule 1 requires the PNA to include: “a statement of the pharmaceutical services that the HWB had identified (if it has) as services that are not provided in the area of the HWB but which the HWB is satisfied (a) would if they were provided...secure improvements or better access, to pharmaceutical services... (b) would if in specified future circumstances they were provided...secure future improvements or better access to pharmaceutical services...” (emphasis added).

5.11 The Committee considered the latest Pharmaceutical Needs Assessment (“the PNA”) prepared by Leicestershire County Council, conscious that the document provides an
analysis of the situation as it was assessed at the date of publication. The Committee bears in mind that, under regulation 6(2), the body responsible for the PNA must make a revised assessment as soon as reasonably practicable (after identifying changes that have occurred that are relevant to the granting of applications) unless to do so appears to be a disproportionate response to those changes. Where it appears disproportionate, the responsible body may, but is not obliged to, issue a Supplementary Statement under regulation 6(3). Such a statement then forms part of the PNA. The Committee noted that the PNA was dated March and that no supplementary statements had been issued.

5.12 The Committee noted that the Applicant seeks to provide unforeseen benefits to the patients of the Castle GP Practice at Ascebi House, Burton Road, Ashby de la Zouch and other patients living in existing and new housing developments in the surrounding area.

5.13 The Committee noted that the improvements or better access that the Applicant was claiming would be secured by its application were not included in the relevant pharmaceutical needs assessment in accordance with paragraph 4 of Schedule 1.

5.14 In order to be satisfied in accordance with Regulation 18(1), regard is to be had to those matters set out at 18(2). The Committee's consideration of the issues is set out below.

**Regulation 18(2)(a)(i)**

5.15 The Committee had regard to

(a) whether it is satisfied that granting the application would cause significant detriment to—

(i) proper planning in respect of the provision of pharmaceutical services in the area of the relevant HWB"

5.16 There was no evidence before the Committee that such detriment would be cause and no argument had been put forward by any interested party to that effect.

5.17 On the basis of the information available, the Committee was not satisfied that, if the application were to be granted and the pharmacy to open, the ability of the NHS England thereafter to plan for the provision of services would be affected in a significant way.

5.18 The Committee was therefore not satisfied that significant detriment to the proper planning of pharmaceutical services would result from a grant of the application.

**Regulation 18(2)(a)(ii)**

5.19 The Committee had regard to

(a) whether it is satisfied that granting the application would cause significant detriment to— …

(ii) the arrangements the NHSCB has in place for the provision of pharmaceutical services in that area"

5.20 The only evidence and submissions before the Committee supporting a case that significant detriment would be caused were those put forward on behalf of Clinicother Ltd within the documents and oral evidence provided, as summarised in paragraphs 4.14 to 4.21 and in paragraph 4.25 above.
Clinicohealth argued that granting the application would lead to such a large diversion of NHS prescription customers to the new surgery that Ashby Pharmacy would be forced to close. As a consequence there would be insufficient provision of pharmaceutical services for the population living in, employed in, or visiting the areas that they currently serve. Loss of custom would also apply to the Boots and Tesco as the other providers in the town.

The Committee was satisfied on balance of probabilities that the existence of a new NHS contracted pharmacy .07 miles away would not cause Ashby Pharmacy to close.

The Applicant’s new pharmacy, which is able to dispense privately and direct NHS prescription patients to its branch in the town centre, has been operating since December 2015. Ashby’s 31.10.15 profit & loss account, sparse in detail as it is, shows a decline in annual operating profit over 3 years from £# to £# against a slight increase in the number of prescription items dispensed each month. The summary of most recent income showed a decline in the number of items dispensed over the period November 2015 to January 2016 and a consequential reduction in NHS turnover and over the counter sales.

The letter from Clinicohealth’s Accountants dated 18 March 2016 expressed the opinion that a 10% reduction in prescription items would turn the business into “a loss making” and a 20% reduction would increase the loss to £# making the business unviable. No starting point for these reductions is referred to. There is no detailed analysis or sufficient explanation to show how that conclusion has been reached. The management of the pharmacy’s overheads and the deployment of its staff is not explained.

The Committee is satisfied on balance of probabilities that even if Ashby Pharmacy were to close the remaining four providers, namely the Applicant in Burton Road, the Applicant and Boots in the town centre and Tesco on its edge, would be able to cope between them. In reaching this conclusion the Committee did take account of the new housing development and the fact that, on Clinicohealth’s case, a large proportion of Ashby Pharmacy’s prescription customers come from a particular area, namely Mill Ward, adjacent to the town centre.

The Committee was therefore satisfied that significant detriment to the arrangements currently in place for the provision of pharmaceutical services would not result from a grant of the application.

In the absence of any significant detriment as described in Regulation 18(2)(a), the Committee was not obliged to refuse the application and went on to consider Regulation 18(2)(b).

Regulation 18(2)(b)

The Committee had regard to:

(b) whether, notwithstanding that the improvements or better access were not included in the relevant pharmaceutical needs assessment, it is satisfied that, having regard in particular to the desirability of—

(i) there being a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB (taking into account also the NHSCB’s duties under sections 13I and 13P of the 2006 Act (duty as to patient choice and duty as respects variation in provision of health services)),

(ii) people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that, in
the area of the relevant HWB, are difficult for them to access (taking into account also the NHSCB’s duties under section 13G of the 2006 Act (duty as to reducing inequalities)), or

(iii) there being innovative approaches taken with regard to the delivery of pharmaceutical services (taking into account also the NHSCB’s duties under section 13K of the 2006 Act (duty to promote innovation)),

granting the application would confer significant benefits on persons in the area of the relevant HWB which were not foreseen when the relevant pharmaceutical needs assessment was published

Regulation 18(2)(b)(i) to (iii)

(i) Reasonable Choice

5.29 There are 3 pharmacies within a 1.6 km radius of the new location site all offering NHS prescription and associated services. One of these is the Applicant’s existing pharmacy only 0.9 miles away which it does not intend to close. Another is Ashby Pharmacy only 0.7 miles away and the third is Boots also in the town centre. Access to all three from the new surgery whether on foot, by car, by public bus, by taxi or by the use of the voluntary dial a ride is manageable for all age groups, including any with mobility issues. The town centre is clearly used routinely for general shopping needs. Tesco Superstore is located on the outer edge close to the bypass road and is a usual shopping destination accessible by car or bus.

5.30 Ashby and Tesco offer extended opening hours. The Applicant does not do so at its town centre pharmacy, and neither does it intend to do so at the new location where, in fact, its hours will be shorter than those of the surgery.

5.31 No evidence has been produced to show that the position is materially different from the description in the PNA of a pharmacy provision level which is sufficient to meet both current and projected needs. The Committee considers that the new housing referred to in the application form as a total of 1753, plus a care home, is adequately catered for by the current provision both in terms of access and scope.

5.32 Although there has been criticism by some patients in terms of inconvenience, as evidenced by the letter(s) produced by the Applicant, the Committee does not accept that patients of the surgery in its new location experience an unacceptable degree of difficulty in accessing the established NHS contracted pharmacies.

5.33 The Committee has seen no persuasive evidence to demonstrate that there would be any significant improvement in terms of access to pharmaceutical services were the application to be granted. The existing provision is sufficient and there is no lack of reasonable choice.

5.34 Therefore the Committee was not satisfied that, having regard to there being a reasonable choice with regard to obtaining services, granting the application would confer significant benefits on persons, by way of access.

(ii) Protected characteristics

5.35 In considering regulation 18(2)(b)(ii) the Committee was conscious of the fact that it was required to address itself to the “specific needs” that were “difficult to access” for those in the population “who share a protected characteristic” (as defined in the Equality Act 2010). The committee is therefore required to consider the elimination of discrimination and advancement of equality between patient groups and persons who do not fall within these groups.
5.36 There was little evidence before the Committee about patients with protected characteristics.

5.37 There is an existing care home close to Ashby Pharmacy. It can be assumed that residents will be elderly and some may be disabled but the numbers are not known. If they need to visit the surgery their return journey will take them back to the vicinity of Ashby Pharmacy in any event.

5.38 For residents of the care home which is to be built in Hollywell Ward the position may be different since they would be coming to the surgery from a different direction. Again the numbers are not known but there is no evidence of any physical barrier to gaining threshold access to the existing pharmacies.

5.39 The Committee has seen no evidence that any known specific needs of people sharing a protected characteristic as defined in the Equality Act 2010 currently lead to any difficulty in accessing pharmaceutical services.

5.40 The Committee was therefore not satisfied that, having regard to the desirability of people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that are difficult for them to access, granting the application would confer significant benefits on persons.

(iii) Innovative Approaches

5.41 The Applicant submits that the proposed minor ailments service operated within a triage system, and the provision of a falls assessment service would be innovative approaches. The Committee does not agree. Nor can the “widest range of commissioned services” as described in the application form be properly described as innovative.

5.42 All the services described by the applicant in the application form and at the hearing are examples of good modern practice but that does not make them innovative.

5.43 The Committee was not satisfied that, having regard to the desirability of there being innovative approaches taken with regard to the deliverability of pharmaceutical services, granting the application would confer significant benefits on persons.

Regulation 18(2)(b) generally

5.44 Having regard to the findings made the Committee was of the view that in accordance with Regulation 18(2)(b) the granting of this application would not confer significant benefits on persons in the area of the HWB which were not foreseen when the PNA was published.

Other considerations

5.45 Having determined that Regulation 18(2)(b) had not been satisfied, the Committee did not need to have regard to Regulation 18(2)(c) to (e).

5.46 No deferral or refusal under Regulation 18(2)(f) was required in this case.

5.47 The Committee considered whether there were any further factors to be taken into account and concluded that there were not.

5.48 The Committee was not satisfied that the information provided demonstrates that there is difficulty in accessing current pharmaceutical services such that a pharmacy at the proposed site would provide better access to pharmaceutical services.
Having decided to quash the decision of NHS England the Committee went on to consider whether there should be a further notification to the parties detailed at paragraph 19 of Schedule 2 of the Regulations to allow them to make representations if they so wished (in which case it would be appropriate to remit the matter to NHS England) or whether it was preferable for the Committee to re-determine the application.

The Committee noted that representations on Regulation 18 had been sought from parties by NHS England and representations had already been made by parties to NHS England in response. These had been circulated and seen by all parties as part of the processing of the application by NHS England. The Committee further noted that when the appeal was circulated representations had been sought from parties on Regulation 18.

The Committee concluded that further notification under paragraph 19 of Schedule 2 would not be helpful in this case.

**DECISION**

6.1 The Committee quashes the decision of NHS England and re-determines the application.

6.2 The Committee concluded that the site of the new pharmacy is not in a controlled locality.

6.3 The Committee has considered whether the granting of the application would cause significant detriment to proper planning in respect of the provision of pharmaceutical services in the area covered by the HWB, or the arrangements in place for the provision of pharmaceutical services in that area and is satisfied that it would not;

6.4 The Committee determined that the application should be refused on the following basis:

6.4.1 The Committee has considered whether the granting of the application would confer significant benefits and has had regard to the fact that:-

6.4.2 there is already a reasonable choice with regard to obtaining pharmaceutical services,

6.4.3 there is no evidence of people sharing a protected characteristic having difficulty in accessing pharmaceutical services, and

6.4.4 there is no evidence that innovative approaches would be taken with regard to the delivery of pharmaceutical services;

6.5 Having taken these matters into account, the Committee is not satisfied that granting the application would confer significant benefits as outlined above that would secure improvements or better access to pharmaceutical services.

6.6 The Application is accordingly refused.

Graham White
Committee Chair

A copy of this decision is being sent to:
Mr K Harrall, Pharmacy Sales and Consultancy - on behalf of the Applicant
NHS England
Ms S Hunneyball, Charles Russell LLP on behalf of Clinicohedh Ltd