

National Appeal Panel

Constituted under

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)
(SCOTLAND) REGULATIONS 2009 (AS AMENDED)**

DECISION

of the

CHAIR

of

THE NATIONAL APPEAL PANEL

In the application relating to

Old Monkton Primary School, Main Street, Monkton KA9 2RH

Applicant: Sean Manson

Appellants: Boots UK Limited and Burns Pharmacy

(referred to as “the Appellants”)

Health Board: NHS Ayrshire and Arran (“the Board”)

PPC Decision Issued On: 14 June 2022

NAP Reference : NAP 102 A (2022)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1 This is an appeal against the decision of the Pharmacy Practices Committee (“PPC”) of the Board, which was issued on 14 June 2022 in relation to the application of Sean Mason (“the Applicant” and “the Appellant”).
- 1.2 The application was made on 5 August 2021. The application was initially considered at a meeting of the PPC on 2 November 2021. The decision of the PPC was issued on 23 November 2021 approving the application. Following an appeal by Boots UK Limited, H&K Willis Limited and Toll Pharmacy, I issued a decision instructing the PPC to clarify certain aspects of its original decision. Following my decision, the PPC met on 1 June 2022 and issued a revised decision on 14 June 2022.
- 1.3 Appeals have been lodged against the revised decision of the PPC by the Appellants.

2. Grounds of Appeal

- 2.1 Two separate letters of appeal were sent by the Appellants. The grounds of appeal set out by the Appellants largely mirror issues raised in the previous appeal. The grounds of appeal advanced are:
 - 2.1.1 that the PPC has failed to adequately set out its reasons for concluding that the existing service was inadequate, in particular in relation to the PPC’s decision so far as it relates to the inadequacy of parking at existing pharmacies;
 - 2.1.2 the PPC ought not to have had regard to additional information submitted by the Applicant which was not available to the Appellants at the hearing;
 - 2.1.3 the PPC has not demonstrated that the proposed pharmacy will be viable; and
 - 2.1.4 there is a perception of bias as the PPC which considered this present application was similar in make up to that which considered a similar application in 2017.

3. Decision

- 3.1 Under the Regulations, the available grounds of appeal against a decision of the Board are limited to circumstances in which there has been:
 - 3.1.1 an error in law by the Board in its application of the Regulations;
 - 3.1.2 a procedural defect in the way the application has been considered by the Board;
 - 3.1.3 a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based (“Schedule 3 para 5 (2B)(b)"); or,
 - 3.1.4 a failure to explain the application by the Board of the provisions of these Regulations to those facts (“Schedule 3 para 5 (2B)(c)").
- 3.2 I am required to consider the notice of appeal and:
 - 3.2.1 to dismiss the appeal if I consider that it discloses no reasonable ground of appeal or is otherwise frivolous or vexatious;

3.2.2 remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out at points 3.1.2 to 3.1.4 have occurred; or

3.2.3 in any other case, convene the National Appeal Panel to determine the appeal.

4. Consideration of Points of Appeal

Ground of Appeal 1

4.1 The first ground of appeal is stated by both Appellants. The Appellants, particularly Boots UK Limited, have set out in some detail what they consider to be the availability of parking at, or around, existing pharmacies. Against this background, and with reference to an earlier decision of the PPC in relation to a similar application which concluded that parking difficulties were not such as to result in the existing provision being considered inadequate, the Appellants consider that the reasoning provided by the PPC is inadequate.

4.2 The PPC's reasoning in this regard is expanded upon in paragraph 30.1.9 of its revised decision. In relation to the issue of parking, the PPC considered that parking was not readily available at the existing pharmacies on the basis of individual site visits, a conclusion which they consider was supported by the responses to the CAR. In addition, the PPC considered that residents opted to take the bus due to difficulties with parking. On this basis, the PPC considered that vehicular access was close to irrelevant. The PPC then proceeds to set out its rationale for considering that the availability of access via the existing bus service also does not allow for adequate access to the existing service.

4.3 The reasoning of the PPC must be reasonably clear to a person who is familiar with the underlying facts and circumstances on which the decision is based. The PPC is not required to address each issue raised before it or address and explain its position in relation to all admissibles of evidence before it. It also must be borne in mind that challenges to the adequacy of the reasoning of the PPC should not be used as a back door to simply challenge the correctness of the decision of the PPC. Whether the PPC is right or wrong it not a valid ground of appeal.

4.4 Against this background, I consider that the decision of the PPC is sufficiently clear. It has concluded that there are substantial difficulties with parking on the basis of a variety of sources of evidence. It has not addressed and explained why each potential parking option in relation to each potential pharmacy is in itself inadequate. However, I do not consider that it is required to. I consider that this ground of appeal, properly construed, is an assertion that the decision of the PPC is wrong, rather than insufficiently reasoned. Such a ground of appeal is not available to the Appellants.

Grounds of Appeal 2

4.5 The PPC has explained that it asks for all parties to provide any additional information they intend to rely on as part of their submissions in advance of the hearing. It does not circulate that information to other parties as it treats it as part of the parties' submissions.

4.6 Boots UK Limited consider that it would have been helpful to have had sight of this information in order that they could have raised issues with what it appeared to demonstrate. In particular, they indicate that they would have that the information provided appeared to demonstrate challenges with access to the proposed pharmacy.

4.7 I do not consider the approach of the PPC to be best practice. Where documentation is made available to it as part of submissions, I consider that it should, where possible, be made available to all parties. However, in this instance, I do not consider that it amounts to a

procedural irregularity which undermines the decision of the PPC. The PPC have confirmed that they did not rely on the information provided. The objection by Boots UK Limited is that, had they been aware of the information, they could have used it to highlight issues with access to the proposed pharmacy. They do not say that they were prejudiced because they were unable to address information which was favourable for the applicant. The purpose of the provision of information to all parties would be to allow all parties to properly address and respond to the case of the party producing the information. It would not be to provide information to assist in the development of any arguments which the parties may wish to make. It is for Boots UK Limited to provide any information to the PPC which they consider supports any case they wish to make. As such, I do not consider it open to Boots UK Limited to complain that they were not provided with information which they could have used to their advantage.

Ground of Appeal 3

- 4.8 I consider this ground of appeal to be misconceived. It is not for the PPC to demonstrate the viability of the proposed pharmacy. Viability is simply one factor that the PPC must consider when assessing whether it is necessary or desirable to grant the application.
- 4.9 In this case, I consider the PPC's reasoning to be entirely clear. It considers that the likely increase in population caused by imminent development will provide an adequate population base to support the proposed pharmacy. Viability will always be challenging to assess but the PPC, as an expert body, is considered to be best placed to make such judgments.

Ground of Appeal 4

- 4.10 I do not consider there to be any merit to this ground of appeal. The PPC is the body designated with responsibility for considering applications for inclusion in the pharmaceutical list. It will consider numerous applications, a number of which are likely to involve similar issues and similar parties. The fact that the PPC may have considered a similar application before plainly does not discount it from considering another in the future.

Disposal

- 5.1 For the reasons set out above, I consider that the appeals lodged do not disclose any reasonable grounds of appeal. I shall, therefore, dismiss the appeals.

(Sgd) JMD Graham

Interim Chair

10th August 2022