

NATIONAL APPEAL PANEL
constituted under
THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)
(SCOTLAND) REGULATIONS 2009 (AS AMENDED)
("the Regulations")

DECISION

of the

CHAIR

of

THE NATIONAL APPEAL PANEL

in the application relating to

**ORBISTON PHARMACY, 23 LAWMUIR ROAD,
ORBISTON, BELLSHILL, ML4 2BZ**

Applicant and Appellant:	Mr John Connolly
Health Board:	NHS Lanarkshire
PPC Decision Issued:	26 July 2016
Panel Case Number:	NAP61 (2016)

Decision of the Chairman of the National Appeal Panel

1. Background

- 1.1 This is an appeal against the decision of the Pharmacy Practices Committee of NHS Lanarkshire (“the PPC”)and which decision was issued on 26 July 2016.
- 1.2 John Connolly (“the Applicant” or “the Appellant”) made an application for inclusion in the pharmaceutical list of NHS Lanarkshire (“the Board”) to provide pharmaceutical services in respect of the premises at 23 Lawmuir Road, Orbiston, Bellshill, ML4 2BZ (“the Premises”), said application dated 25 May 2016.
- 1.3 The PPC, under delegated powers of the Board, held a meeting on 11 July 2016 in order to take evidence from the Applicant and interested parties and to consider supporting documentation, and following upon which it determined that the provision of pharmaceutical services at the Premises was neither necessary nor desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood in which the Premises were located by persons whose names are included in the Pharmaceutical List and accordingly it unanimously refused the application.

2. Grounds of Appeal

- 2.1 The Appellant submitted a letter of appeal dated 15 August 2016 which may be summarised as follows:
 - 2.1.1 The chair permitted a petition to be considered as evidence which petition did not form part of the agreed consultation process and was submitted after that process had concluded and had not been submitted by an interested party but by an individual who had stated that if granted, the pharmacy would be providing a needle exchange service and which information was false and that the signatures were accordingly gathered under false information. The Appellant argued that it should not have been considered and may have had a material impact on the decision the PPC reached. The chair did not discount the petition.
 - 2.1.2 Lloyds Pharmacy, who are one of the interested parties,had argued that the complaints information provided by the Board concerning their pharmacies was incorrect and that the Board had accepted this fact and the chair had acknowledged this at the commencement of the hearing. The Appellant states that the Board had advised the chair and hence the committee prior to the start of the hearing that Lloyds Pharmacy had raised the issue of the complaints information. The Appellant stated that this information was shared in advance with the PPC but not the Applicant or interested parties, and this unfairly disadvantaged the Applicant in being able to form arguments around the complaints information provided.
 - 2.1.3 The chair had permitted Mr Aslam (the pharmacist nominated by the Area Pharmaceutical Committee) to make statements when he should have been asking questions. Accordingly, he could have unduly influenced the PPC by asserting his own personal opinion which was, in the Appellant’s view, not based on statistical evidence which had been presented to the PPC.
 - 2.1.4 In Point 3.53.3 of the Minutes, when Mr Woods raised a question with Mr Taylor, Mr Aslam is alleged to have interjected with an inappropriate statement . The Appellant regarded this as an unprofessional statement regarding vulnerable people and raised concerns as to the advice Mr Aslan would be giving the PPC during their deliberations and may have affected the decision made. The Appellant noted that this was not recorded in the Minutes.
 - 2.1.5 The PPC made reference to “core opening hours” in considering that no pharmacies were able to offer dispensing or prescriptions at lunch times not to be inadequate. “Core opening hours” does not appear in the Regulations and accordingly the PPC failed to apply the legal test properly.

3. PPC Decision

- 3.1 The PPC had considered the submissions and supporting documents including the Petition received from the Applicant, interested parties and others, as well as responses from the consultation process undertaken by the Board and the Applicant.
- 3.2 The PPC noted the **neighbourhood** as defined by the Applicant and the views expressed by the interested parties, and it was in agreement in the northern and western boundaries proposed by the Applicant, but not the southern and eastern boundaries, and considered that the neighbourhood should be defined as lying as follows: to the north from the point where Hamilton Road intersects the railway line at the entrance to Bellshill Station heading east to the railway line where it intersects Motherwell Road; to the east heading south from the point where the railway line intersects Motherwell Road until it intersects South Calder Water below Calder Road; to the south following south Calder Water westwards to the point it meets the railway line to the south and continues west along the railway line until it intersects with the A725; heading north along Hamilton Road until it intersects with the railway line in the north at Bellshill Station. The PPC considered that this neighbourhood contained amenities such as a convenience shop, hairdresser, nursery, two primary schools, two churches, a community centre and others and the whilst there were no pharmacies within the defined neighbourhood, there were five pharmacies just outwith the neighbourhood providing a full range of pharmaceutical services and that local buses passed close to Main Street.
- 3.3 As to **adequacy** of the existing provision of pharmaceutical services, the PPC considered that residents in the northern part of the neighbourhood found it easier to visit one of the pharmacies on Main Street outwith the neighbourhood as opposed to travel to the Applicant's proposed Premises and that other amenities such as bank, post office, petrol station, optician and others whilst not in the defined neighbourhood were easily accessible to those living in the neighbourhood. The PPC, whilst recognising the limited use of the MyBus service, considered that other bus routes and timetables were run at a sufficient level to allow residents to travel to existing pharmacies in a reasonable manner.
- 3.4 The PPC noted dispensing services at lunch times, noting further that the Applicant stated that his pharmacy would remain open to dispense prescriptions over the lunch period and that other pharmacies closed their dispensing facilities for the lunch period. The PPC concluded that a pharmacy unable to dispense for at lunch times could not be deemed to be providing an inadequate service as that was not considered within the core opening hours. The PPC had considered the petition and observed that nobody had represented the petitioners at the hearing. The PPC considered at the hearing and agreed to accept and acknowledge the petition, appreciating that residents had been concerned enough to sign it and recognised that the petition was limited in its terms and had noted the allegation about the needle exchange service and acknowledged the concerns with regards to residents and people who had signed the petition. It had noted that the Applicant would need to conduct a risk assessment before considering whether any needle exchange service would be offered at his proposed Premises. The PPC had acknowledged that the Consultation Analysis Report ("CAR") had elicited 108 responses with a slight majority indicating that pharmaceutical services provided in and to the neighbourhood were inadequate. The PPC were of the view that, whilst attaching appropriate weight to the responses, led to the conclusion that the overwhelming majority of objections were based on arguments of convenience and that there was insufficient evidence to indicate that the existing pharmaceutical services were inadequate.
- 3.5 Finally, the PPC concluded that the two nearby pharmacies together with the two other pharmacies within walking distance provided an adequate service to the neighbourhood at 5,200 people and that there was no evidence of any substance provided to demonstrate any inadequacy of pharmaceutical services to the defined neighbourhood.

4. Discussion and Reasons for Decision

- 4.1 The Regulations require to be considered in light of the objects of the scheme set out under the National Health Service (Scotland) Act 1978 and, in particular, Section 27, in that it shall be the duty of every Health Board to make arrangements as to its area for the supply to persons in that area of proper and sufficient drugs and medicines which are ordered for those persons by a medical practitioner in pursuance of his functions in the Health Service. An Application made in any case should be granted by the Board after procedures set out in Schedule 3 of the Regulations are followed, if the Board is satisfied that it is necessary or desirable to grant an Application in order to secure in the neighbourhood in which the premises are located the adequate provision by persons included on the list of the services specified in the Application. This is further extended by Regulation 5 (10) of the Regulations in that an Application shall be granted by the Board: (1) only if it is satisfied that the provision of Pharmaceutical Services at the premises named in the Application is necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood in which the premises are located by persons whose names are included in the pharmaceutical list and: (2) if the boundaries of the neighbourhood within which the Applicants intend to provide pharmaceutical services falls within any part of a controlled locality, only if it is satisfied that the granting of such an application, in its opinion, would not prejudice the provision of NHS funded services in the controlled locality. For the purposes of clarification in terms of paragraph 1a of Schedule 3 of the Regulations, a controlled locality is an area within a Health Board which is remote or rural in character and which is served by a dispensing doctor. This latter provision does not apply in the current circumstances.
- 4.2 In terms of paragraph 3 (i) of Schedule 3, the PPC shall have regard to the pharmaceutical services already provided in the neighbourhood of the premises, the pharmaceutical services to be provided in the **neighbourhood** at those premises, any information available to the PPC which, in its opinion, is relevant to the consideration of the Application, the CAR, the Pharmaceutical Care Services Plan and the likely long-term sustainability of the pharmaceutical services to be provided by the applicants.
- 4.3 The grounds of appeal are limited to areas where the PPC has erred in law in its application of the provisions of the Regulations, that there has been a procedural defect in the way the Application has been considered, that there has been a failure by the PPC to properly narrate the facts or reasons upon which their determination of the Application is based, or there has been a failure to explain the application by the PPC of the provisions of the Regulations to those facts.
- 4.4 The principal point of the PPC's decision is whether or not it has exercised its judgement fairly and given adequate reasons for it and that it does not otherwise offend against the grounds of appeal set out in Schedule 3, paragraph 5 (2A) and (2B). It is relevant to note that the PPC comprises pharmacists and lay members who may be expected to understand the issues involved on the evidence before it. It is an expert tribunal. Equally, it must be understood that the PPC's decision must be intelligible and it must be adequate. It must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal issues and its reasoning does not give rise to any substantial doubt that it had erred in law. Such adverse inference will not readily be drawn.
- 4.5 A petition had been submitted amongst the papers which had been distributed to all parties, including the Applicant and interested parties. There was no petitioner speaking to the petition and the Appellant's argument was that the petition should not have been permitted. From the petition address to the Board dated 30 June enclosing the petition, it stated that most people in the neighbourhood felt there was no need for a pharmacy. The Appellant had averred that the petition had been gathered on the basis of a statement that if granted, the pharmacy would be providing needle exchange and that many signatures were obtained on that basis. There was no reference to a needle exchange either in the letter or the signed petition although the Appellant had argued during the course of the hearing that he had been advised that the organiser of the petition had informed those signing that there would be a needle exchange service. It was noted that the Appellant in his evidence to the PPC was equivocal as to whether he would be providing a needle exchange service and that prior to considering doing so he would carry out a risk assessment. He argued that the chair ought to have discounted the petition but the chair had refused to do so and advised that appropriate weight would be attached to it in considering the objections. It was noted that the PPC had considered the petition in its decision observing that nobody had represented the petitioners (and therefore could not speak to it or answer any questions on it) but noting that residents

had been concerned enough to sign it. That the PPC had “noted” the allegation of the needle exchange service and acknowledged the concerns of the people who signed the petition. The PPC were entitled to consider the Petition in terms of Schedule 3 paragraph 3 (d) of the Regulations. I do not consider that the Petition would have carried much weight with the PPC and such weight as it was given was not central to the PPC’s decision.

- 4.6 At the commencement of the hearing, the chair advised that an issue had been raised regarding the data on complaints and that one of the interested parties, Lloyds, were to make reference to it in their statement to the PPC. The Appellant had taken issue on the basis that the Board had advised the chair “and hence the committee” that Lloyds Pharmacy had raised issue with complaints information and “clearly had been in correspondence with the committee about this” and that no attempt had been made to advise the Applicant of the situation despite it having been raised by Lloyds three weeks before. Lloyds had clearly been in receipt of information of complaints which they considered to be wrong and had, it appears, raised this matter with the Board who had, on the face of it, advised the chairman. There was no suggestion that the PPC itself had been apprised and the chair was merely alerting the Applicant and interested parties that Lloyds had proposed to make a statement upon it and which it did in paragraph 3.3.31. Had the Appellant wished more information on this, he had an opportunity to question the representative from Lloyds on the issue but had failed to do so. In the circumstances, there was no prejudice to the Applicant in relation to this matter.
- 4.7 The Appellant has taken issue with one of the members of the PPC, Mr Aslam, making statements and particularly at paragraph 3.6.5. Mr Aslam had referred to this site visit and noted that many houses had cars in driveways and that many had two vehicles and he had been unable to view the Applicant’s statement that the area was deprived, to which the Applicant replied that although the PPC may have seen people with cars, the neighbourhood was below the national average in this respect. It is correct to state that Mr Aslam had purported to make a statement whereas the Applicant had addressed it as a question. The matter is of little moment and certainly would not in any way have prejudiced the PPC’s consideration of the principal issues of neighbourhood and adequacy. The chair ought to ensure that members of the PPC should not make statements and phrase whatever enquires they have in the form of a question.
- 4.8 The Appellant said Mr Aslam had interjected on a question which was being made by Mr Woods but there was no reference to this in the minutes and which was acknowledged by the Appellant. The signed minutes are a true record of the proceedings and it is not for me to look beyond that.
- 4.9 The Appellant argued that the PPC failed to apply the legal test properly in making reference to the “core opening hours” which does not appear in the Regulations. It is fair to say that all pharmacists would know what “core opening hours” were and, once again, this is not a procedural defect nor error in law.

5. Conclusion

- 5.1 For the reasons set out above, I conclude that the letter of appeal dated 15 August 2016 by the Appellant discloses no reasonable grounds for appeal and accordingly dismiss it in terms of paragraph 5(a)(i) of Schedule 3 of the Regulations. In doing so I am cognisant that the test set out in said paragraph is not a high bar for the Appellant to cross. In the circumstances, paragraphs 5(2A) and (2B) are not engaged.

(sgd JMD Graham

J Michael D Graham
Interim Chairman
National Appeal Panel
18 November 2016