

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

UNIT 3B, HILTON RETAIL PARADE, UNWIN AVENUE, ROSYTH, KY11 2ZQ

Applicants and Appellants:	Barrie Dear and Mahyar Nickkho-Amiry
Health Board:	NHS Fife
PPC Decision Issued:	9th December 2016
Panel Case Number:	NAP66(2017)

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 (“the PPC”) of NHS Fife (“the Board”) which decision was issued on 9 December 2016.
- 1.2 Messrs Barrie Dear and Mahyar Nickkho-Amiry t/a Dears Pharmacy (“the Applicants” or “the Appellants”) made an application for inclusion in the pharmaceutical list of the Board to provide pharmaceutical services in respect of the premises at Unit 3B, Hilton Retail Parade, Unwin Avenue, Rosyth, KY11 2ZQ (“the Premises”), said application dated 15 July 2016.
- 1.3 The application was heard by the Board at its PPC meeting held on 25 November 2016 and following upon the decision of which to refuse the application the Applicants appealed on various grounds to the National Appeal Panel (“NAP”).

2. Grounds of Appeal

- 2.1 The Appellants submitted a letter of appeal dated 27 December 2016 on grounds which may be summarised as follows:
 - 2.1.1 The agenda at the meeting had altered from that which was originally communicated to the Applicants as there was also an alteration to those making oral representations.
 - 2.1.2 After the papers were received, the Applicants queried why the Area Pharmacy Committee (‘APC’) did not pass any comments and that there were members of the PPC advising lay members despite the Area Pharmacy Committee not being able to pass comments due to “conflicts of interest”.
 - 2.1.3 The Minutes were not an accurate reflection of the meeting, specifically referring to Mr Kelly’s comments.
 - 2.1.4 Mr Timlin had commented on a failure to prove that services were inadequate but not articulated how he had arrived at this opinion.
 - 2.1.5 A PPC member had highlighted the absence of complaints but had not commented whether this was opinion or fact.
 - 2.1.6 A PPC member had highlighted existing pharmacies were closer than the Premises but had not clarified what was used as a measure.
 - 2.1.7 The footbridge application referred to in the Minutes was not determined at the point of the application.
 - 2.1.8 The comments on delivery of service was not relevant as this was not a pharmaceutical service.
 - 2.1.9 Mr Timlin had highlighted that 3,000 people used pharmacies elsewhere and which was not significant for Fife but did not pass comment as to what this information refers to.

3. Evidence of the parties to the hearing

- 3.1 The evidence of the Applicants and the other parties to the hearing are contained in the Appendices submitted by each. The responses to questions by the various parties to each other may be summarised as follows:-
 - 3.1.1 The **Applicants** were represented by Mr Nickkho-Amiry who stated that he thought there was a lack of service around Blister Packs in the area and that he was aware that the Scottish Government were looking at funding automated dispensing, albeit it was still in its infancy stage. It was put to him that if his proposed neighbourhood, along the dual carriageway, was defined to deliberately exclude existing pharmacies

to which he responded that the dual carriageway was not truly a road and that Rosyth in its entirety was entirely separate from the Camdean area in which the Premises are situated. He did however agree that the Camdean area was closer to existing pharmacies than the location of the proposed site although the new pharmacy would have better access links to the Camdean area. Mr Nickkho-Amiry advised that he had looked at the current pharmacies and the new housing localities in the area whilst travelling past Rosyth and identified available units. He had spoken with local developers and engaged with the local Community Council. He advised in 2009 the NAP had made the decision that the neighbourhood was Rosyth in its entirety and when asked what had changed since then, Mr Nickkho-Amiry confirmed that there had been new housing constructed and additional pharmaceutical services introduced since . The Applicants intended providing a delivery service and accepted that a Patients' Agreement would be required before the dosette box service could be effected, albeit he was unaware of this requirement during the course of questions. He stated that there would be 32 car parking spaces and a footpath enhanced with footbridge to the Premises. He confirmed on further questioning that he believed the provision of the neighbourhood to be the Camdean area which was shaded purple in the illustration on his diagram. One interested party had noted that there had been a large amount of information in the Applicant's presentation and asked why it was not possible to supply this information in advance to which Mr Nickkho-Amiry responded that he did not feel the need for this information to be submitted in advance, especially as the questioner was an objector. He stated that the statistical evidence information submitted by him had been extracted from the Fife Dataset and in response to the question as to whether these were specific to his proposed neighbourhood advised that the data was specific to his proposed neighbourhood but also included areas outside the neighbourhood. It was his opinion that if the pharmacies in Rosyth did not engage in all pharmaceutical services available, then there was a need for a new pharmacy contract. He subsequently stated that he was unaware of any gaps in the pharmaceutical services as set out in the Fife Pharmaceutical Care Services Plan ('the Plan'). He was of the view that 300 additional houses would be sufficient to warrant an additional pharmacy. He also stated that it was his opinion that Rosyth north was a deprived area but on being advised that official statistics showed that the Rosyth area appears to be in the top third of the deprivation index he agreed that it was parts of Rosyth and latterly stated that it was not a deprived area. He agreed with one questioner who advised that statistics indicated that Rosyth was 79% better off with access to pharmaceutical services to which Mr Nickkho-Amiry agreed if that was what the statistics indicated. On being questioned on the Consultation Analysis Report ("CAR"), to which only 18 people responded, Mr Nickkho-Amiry believed that CARs had advantages and disadvantages but he was aware that patients require to choose whether to respond and that he considered it could be interpreted that the lack of response could be due to the fact that residents did not wish a new pharmacy in the neighbourhood. He was of the view that the neighbourhood included and could comprise a convenience store, a café, a charity shop and potentially a nursery and a dentist, albeit he accepted that the dentist and nursery were current proposals.

- 3.1.2 The **Alderston Pharmacy** was represented by Mr Campbell Shimmins, one of the objectors, who responded to various questions from the Applicants and other interested parties. He stated that waiting times were not part of the pharmaceutical contract and did not accept that an addition 390 houses would warrant a new pharmacy on the basis that people would be working outwith the area and have access to a car. He confirmed that he did handle prescriptions from the proposed neighbourhood and that said neighbourhood was fairly affluent.
- 3.1.3 The **Well Pharmacy** was represented by Mrs Griffiths-Mbarek who responded to questions put to her by the Applicants and other interested parties. She confirmed that as more drugs had been manufactured, more prescriptions had been listed but did not accept thereby that the health of the population had become worse. She confirmed that there had been no issues with the General Pharmaceutical Council as to her pharmacy being able to satisfy patient needs and that waiting times were reasonably prompt for a small pharmacy which employed two dispensing technicians, one pharmacist and one delivery driver.
- 3.1.4 The **Charlestown Pharmacy** was represented by Mr Raymond Kelly who confirmed

that following upon the closed lists in Rosyth, there had been an extra 300-400 patients registered with the Charlestown Practice. He was of the view that the proposed neighbourhood should be the whole of Rosyth which includes 2 pharmacies, 2 GP surgeries and other pharmacies close by and that the proposed neighbourhood was in the middle of an overlapping catchment area.

- 3.1.5 The **Rowlands Pharmacy** was represented by Mr Michael Church, who confirmed that the refit of his pharmacy was effected in early 2016 and denied that the refit was linked to the Applicants' application. It had be redesigned to make it larger. He stated that various surveys including waiting time audits, Mystery Shopper, patient questionnaires, and feedback indicated the service high at over 90%.
- 3.1.6 The **Lloyds Pharmacy** was represented by Mr Tom Arnott, who felt that there was no need for an additional pharmacy and believed that all services were currently being provided, apart from CMS, but there was not much to be done as GPs were not willing to engage in the service. In response to questions from the Applicant, he stated that Lloyds provided a service including to Rosyth.
- 3.2 The various interested parties summed up stating that there was no proof of inadequacy of service in the area and on that basis alone the application should fail on the grounds that it was neither necessary nor desirable. Some were of the view that the neighbourhood was wrong as defined by the Applicant and the whole of Rosyth should be the neighbourhood and that there was no problem with access to the neighbourhood.
- 3.3 The Applicants summed up stating that it was clear that the interested parties did not agree with the proposed neighbourhood but he felt strongly that the neighbourhood of Camdean was a neighbourhood within its own right. Councillors and MSPs engaged and gave their support and that the application should be considered as both necessary and desirable.

4. The PPC's Decision

- 4.1 The PPC were noted to have considered all submissions and had regard to a pharmaceutical services already provided in the neighbourhood, representations received by the Board, information available to it relevant to the consideration of the application, the CAR, Plan, and likely long term sustainability of the pharmaceutical services to be provided by the Applicants and various papers and letters submitted.
- 4.2 As to **neighbourhood**, the PPC was of the view that the neighbourhood outlined by the Applicants was small and not a neighbourhood for all purposes as it did not contain a church, dental surgery, school or bank and the main shopping centre was located outwith the area. It was of the opinion that the Kings Road was not a natural boundary as it was not an impediment to movement in the area and that the neighbourhood as proposed had been manufactured as Camdean which was not an official area for postal purposes and that the neighbourhood should be that area known as Rosyth. In the circumstances, the PPC defined the neighbourhood as follows:
- North: A823(m) leading cross country to Grange Road
 East: Grange Road, Brankholm Brae
 South: A985 veering south below Castlandhill residential area to A90
 West: A90 to A823(m)
- 4.3 As to **adequacy** of the existing services, discussion ranged on whether the population of Rosyth was higher than the average population , the current pharmacies providing services in the defined neighbourhood in comparison with the rest of Fife , whether and how well the population was served and that there were no "hard facts to prove adequacy" as suggested by one member. One member expressed the view that over 3,000 patients already use pharmacies elsewhere and that the average for the neighbourhood was not significantly higher than that of Fife and that, in any event, the Applicants required to prove inadequacy of the current service and whilst the Applicants had shown problems with several services, these had either been resolved or Blister Packets, albeit GP-led, CMS uptake and accordingly outwith the pharmacies' control. It was noted that there had been an absence of complaints regarding services currently being provided to the neighbourhood and that access to existing pharmacies did not appear to be a problem in that these pharmacies were closer to much of

the Applicants' neighbourhood than the proposed Premises. Currently there had not been erected a footbridge over the Brankholm Burn access to the proposed pharmacy which would result in many residents in the Applicants' proposed neighbourhood currently taking an indirect loop in accessing the existing pharmacies. It was acknowledged that the footbridge was being planned but this was not a guarantee that it would be built. It was commented on that a delivery service was available to residents in the neighbourhood which would be adequate for housebound patients however they would not have access to a consultation with a pharmacist. The PPC was of the view that there was insufficient evidence adduced to indicate that the current services provided to the neighbourhood as defined by the PPC were inadequate and that being therefore adequate it was not required to consider the question of necessity or desirability.

Discussion and Reasons for Decision

- 5.1 In terms of the National Health Service (Scotland) Act 1978 and the Regulations, an application for inclusion in the pharmaceutical list to provide pharmaceutical services in respect of premises shall 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. The Board has to be satisfied that such provision is necessary and desirable in order to secure adequate provision in the neighbourhood. In this connection, the Board must have regard to the pharmaceutical services already provided in the neighbourhood and any information available to the PPC which in its opinion is relevant to the consideration of the application, the CAR, the PCP and the likely long-term sustainability of the services to be provided.
- 5.2 The NAP's involvement occurs where the grounds of appeal are limited to areas where the PPC has erred in law in its application of the provisions of the Regulations, if there has been a procedural defect in the way it has been considered, that there has been a failure by the PPC to narrate the facts or reasons upon which their determination on the application has been based or that there has been a failure to explain the application by the PPC of the provisions for regulations to those facts. Has the PPC exercised its judgement fairly and has it given adequate reasons for it? Is the decision intelligible and is it adequate? Is there any doubt as to why it has come to that particular decision? Has it erred in law? Any appellant requires to understand that these are high bars to reach.
- 5.3 Addressing the various grounds for appeal as narrated by the Appellants, I do not consider that the agenda for the meeting having been altered from that originally communicated to the Appellants is a matter of any moment. I am unable to determine that the Appellants have in any way been prejudiced. The Appellants presumably had prepared for the hearing, they had submitted their extensive dossier of evidence and their representative had readily answered questions put to him. Further, it was noted that paragraph 10/16.1 that the Chair had asked all present whether or not they felt they had had a fair hearing to which all, presumably including the Applicants, stated that they had. That the Appellants state that the Minutes were not an accurate reflection of the meeting in parts relating to Mr Kelly's comments and the "disruptive nature to request the meeting to be halted when making his representations" I am unable to comment as these are not minuted and that the Minutes themselves must be regarded as a true and accurate record, having been signed by the Chair of the PPC. It is not part of my function to accept any comments at this stage of an Appellant who has not detailed in what respects the Minutes were not an accurate reflection of the Meeting. The PPC discussion was referred to by the Appellants in their grounds for appeal, specifically Mr Timlin's comments and failure by the applicants to 'prove' that the services were inadequate and other various expressions of opinion and whether some members regarded these as opinion or fact but these are matters of detail which were touched upon during the course of each party's submissions and their responses to various questions by the interested parties and the Applicants at the Hearing. What was contained in the note of the PPC's decision was quite simply a discussion following upon which the PPC unanimously came to its decision. I would state in passing that it is not a matter for the Applicant to 'prove' inadequacy but rather a matter for the PPC to weigh up all the evidence and thereafter determine whether inadequacy has been established. It is accepted that a comment on a delivery service was not strictly relevant as this was not a pharmaceutical service yet it was noted that the Appellants in their questioning of the representative of Lloyds Pharmacy specifically asked whether they provided a delivery service.

5.4 The APC is not obliged to make submissions to the Board. There is an obligation upon the Board to inform the APC of an application. The PPC comprised three lay members (including the Chair) and two Area Pharmaceutical Committee representatives, one non-contractor and one contractor. In terms of Schedule 4 of the Regulations there shall be at least two pharmacist members, one being a pharmacist whose name is not included in any pharmaceutical list and to be appointed by the Board from persons nominated by the APC and the other included in the pharmaceutical list and, once again, appointed by the Board from persons nominated by the said APC. Accordingly there is no procedural defect in Messrs Craig and Timlin being appointed to the PPC on the basis of the grounds as set out by the Appellants..

6. Conclusion

6.1 For the reasons set out above, I conclude that the grounds of appeal as contained in the Appellants' letter of appeal dated 23rd December 2016 disclose no reasonable grounds and accordingly dismiss the appeal in terms of paragraph 5(5)(a)(i) of Schedule 3 of the Regulations. In the circumstances, paragraphs 5(2)(A) and(2)(B) are not engaged.

(Sgd. J M D Graham)

J Michael D Graham
Interim Chairman
National Appeal Panel
27 April 2017