

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

Parkview, Pitmedden, Aberdeenshire AB41 7PB

Applicant and 1st named Appellant : A & L Porter Ltd

Health Board : NHS Grampian “the Board”

PPC Decision issued : 16 August 2017

Panel case number : 71 (2017)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1 A & L Porter Ltd of 18 Keirhill Gardens, Westhill (the “Applicant“ or “Appellant”) submitted an application to the Board to be included in the pharmaceutical list of the Board to provide pharmaceutical services from and in respect of premises at Parkview, Pitmedden AB41 7PB (“the Premises”) . The application was dated 1 June 2017.
- 1.2 The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 4 August 2017. The PPC decided that, as the current provision of services in the neighbourhood defined by the PPC were adequate, it was neither necessary nor desirable for pharmaceutical services to be provided at the Premises in order to secure the adequate provision of pharmaceutical services in the neighbourhood.
- 1.3 An appeal was lodged against the decision of the PPC by the Applicant on 6 September 2017.

2. Grounds of Appeal

- 2.1 The Appellant’s grounds of appeal relate to the designation of the area which forms the practice boundaries of the Scotstown Medical Group practice boundary as a controlled locality, as defined in the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009, as amended (“the Udney Station Controlled Locality”). In particular, the Appellant raises concerns that the Udney Station Controlled Locality was not properly constituted and not properly notified to relevant parties. On this basis, the Appellant contends that the location of the Premises within the

Udny Station Controlled Locality ought not to have been considered a relevant factor by the PPC.

2.2 The Applicant summarises the grounds of appeal as follows:

2.2.1 *“My pre-application stage was initiated in early autumn of 2016. My formal application was made on 5 June 2017. At the point where my formal application made, there was no controlled locality defined for the branch surgery at Udny Station which would allow the board to state, as they did in the letters to all Interested Parties, that “This application falls within an NHS Grampian controlled locality”.”*

2.2.2 *“The Board have claimed that the Controlled Locality for Udny Station, which includes the village of Pitmedden, was ratified at the Board Meeting of 6 July 2017. It is my opinion that this meeting **did not determine any controlled locality within NHS Grampian** under the terms of the relevant regulations.”*

2.2.3 *“Where an application is in a controlled locality, there is an additional **prejudice test** which should be applied. Even where it is not explicitly stated by the various Interested Parties, or in the minutes of the PPC hearing, it cannot be assumed that this additional test did not influence the representations of the Interested Parties or the decision of individual PPC members. Further, the Board cannot simply say “we were going to make it a Controlled Locality anyway” and thereby treat the application **as if** it is in a controlled locality.”*

3. Decision

3.1 Under the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009, as amended, (“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; or,

3.1.4 a failure to explain the application by the Board of the provisions of these Regulations to those facts.

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.

Controlled Locality

3.3 The first and second grounds of appeal set out by the Appellant relate to the assessment by the Board that the neighbourhood to which the application relates falls within a controlled locality. Paragraph 1 of Schedule 3 of the Regulations requires the Board, on receipt of an application of the nature made by the Appellant, to assess whether the boundaries of the neighbourhood to which the application relates fall within a controlled locality and to notify interested parties if it determines that it does. The Appellant accepts that such a determination was made after his application was submitted and that parties were notified on 21 June 2017. However, the Appellant contends that prior to making that determination there was no relevant controlled locality and that, in making its determination, the Board has mis-understood what constitutes a controlled locality.

- 3.4 I am satisfied that the appeal discloses no reasonable ground of appeal in this regard. The operative requirement of the Regulations is that, on receipt of the application, the Board is required to identify whether the application relates to a neighbourhood within a controlled locality. The Appellant accepts that the Board has done so and notified the relevant parties. Whether that was done on the basis of a prior designation of a controlled locality or on the basis of the identification of a controlled locality following the receipt of the application is not relevant. A controlled locality has been identified either prior to the application being made or by virtue of the Board's decision on receipt of the application.
- 3.5 The substance of the Appellant's complaint is the Board have not given specific consideration to the requirement that a controlled locality be an area which is remote or rural as well as served by a dispensing practice. In support of this position the Appellant points to minutes of board meetings on 2 June 2016, 28 June 2016 and 6 July 2017 which he states do not give consideration to the remoteness or rural nature of the area served by the Udney Station Controlled Locality. To the extent that they are relevant, these minutes make reference throughout to the difficulty of patients in accessing pharmaceutical services. This difficulty is considered with particular reference to the distance of travel for patients. Accordingly, these minutes do not support the Appellant's contention that the Board has not considered whether the Udney Station Controlled Locality is remote or rural as well as served by a dispensing pharmacy. Even if it did, the Appellant does not suggest that the Udney Station Controlled Locality does not satisfy the test set out in the Regulations for identifying a controlled locality. The complaint relates to the manner in which the decision was reached rather than its substance.
- 3.6 For the above reasons I am satisfied that there has been no procedural defect or error in law by the Board in relation to the identification of the neighbourhood to which the application relates being within the Udney Station Controlled Locality and I am accordingly of the opinion that the appeal discloses no reasonable ground of appeal in this connection. In the event that there had been any procedural error I consider that there would remain no

reasonable ground of appeal as there has been substantial compliance with the procedural rules and, for the reasons set out below, it is apparent that whether or not the application related to a neighbourhood within a controlled locality it was wholly irrelevant to the ultimate decision of the PPC.

Additional Prejudice Test

- 3.7 The Appellant's third ground of appeal relates to what the Appellant refers to as the "additional prejudice test" which applies if the application relates to a neighbourhood within a controlled locality. The Appellant states that because the Board have determined that the application relates to a controlled locality the "additional prejudice test" is engaged and although it may not have been expressly considered by the PPC it may, nevertheless, have had an influence on their decision. The Appellant considers that the Board's determination that the application relates to controlled locality to be flawed and, therefore, that any consideration by the PPC of the test which flows from that determination undermines its decision.
- 3.8 The Board may only grant an application of the nature submitted by the Applicant if the tests set out in section 5(10) of the Regulations are satisfied. Section 5(10) of the Regulations set out what is, in essence, a tripartite test. The Board must only grant an application if it is satisfied that (a) the existing pharmaceutical services provided are not adequate; (b) that the application is necessary or desirable to secure the adequate provision of pharmaceutical services; and (c) that the application would not prejudice the provision of NHS funded services in a controlled locality. Point (c) is what the Appellant refers to as the "additional prejudice test".
- 3.9 It is clear from the decision of the PPC that whether or not the application relates to a neighbourhood within a controlled locality it has formed no part of their decision making process. The decision of the PPC is extremely brief but to the point. They considered that there was adequate provision of pharmaceutical services to the neighbourhood to which the application related. This was on the basis of pharmaceutical services provided by six existing

pharmacies in the neighbourhoods of Tarves, Ellon, Balmedie, Newmachar and Oldmeldrum. No consideration was given to services provided by dispensing medical practices.

3.10 Having determined that adequate pharmaceutical services were already accessible by residents of the neighbourhood the PPC did not consider the remaining parts of the test set out in the Regulations, namely whether the application was necessary or desirable to secure the adequate provision of pharmaceutical services or whether it would prejudice the provision of NHS funded services in a controlled locality.

3.11 It is plain from the decision of the PPC that whether or not the application related to a neighbourhood within a controlled locality had no bearing on the decision of the PPC. As such, I am satisfied that the appeal discloses no reasonable grounds of appeal in this regard.

Disposal

4.1 For the reasons set out above, I am satisfied that the grounds of appeal stated by the Appellant disclose no reasonable grounds of appeal. Accordingly, I shall dismiss the appeal.

(sgd) JMD Graham

J Michael D Graham

Interim Chair

28th November 2017