

**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

**25 MAIN STREET, MID CALDER, LIVINGSTON  
WEST LoTHIAN, EH53 0AS**

<b>Applicant:</b>	<b>David Stevenson</b>
<b>Appellants:</b>	<b>The Red Band Chemical Company Ltd t/a Lindsay &amp; Gilmour Pharmacy</b>
<b>Health Board:</b>	<b>NHS Lothian</b>
<b>PPC Decision Issued:</b>	<b>27<sup>th</sup> October 2017</b>
<b>Panel Case Number:</b>	<b>NAP72(2017)</b>

## **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 of NHS Lothian ("the PPC") which was issued on 27 October 2017.
- 1.2 David Stevenson ("the Applicant") made an application for inclusion in the pharmaceutical list of NHS Lothian ("the Board") to provide pharmaceutical services in respect of the premises at 25 Main Street, Mid Calder, West Lothian ("the Premises"), said application dated 31 March 2016.
- 1.3 The PPC under delegated powers of the Board held a Hearing on 17 October 2017 taking evidence from the Applicant and Interested Parties and considered supporting documentation and following upon which determined that the provision of Pharmaceutical Services at the Premises was desirable in order to secure adequate provision of Pharmaceutical Services in the neighbourhood in which the premises are located and accordingly granted the application.
- 1.4 The Red Band Chemical Company Ltd t/a Lindsay & Gilmour ("the Appellants") submitted a letter of appeal against the PPC's decision dated 10 November 2017.

### **2. Summary of Grounds of Appeal**

- 2.1 The Appellants assert that there had been a procedural defect in the manner in which the application had been considered by the Board in that the papers sent to them by the Board on 26 September 2017 ,along with the application, were incomplete in that the Consultation Analysis Report ("CAR") had not been supplied with all the pages ; the scans received included odd numbers only. They assert that this was only identified on the day prior to the hearing thus disadvantaging their preparation for it.
- 2.2 The Appellants make reference to paragraph 15 of the guidance note PCA (2011) no. 7 in relation to the position whereby should the Board seek to secure any missing information from the Applicant such information must be provided to the Board within 5 working days. The Appellants state that a letter was sent to the Applicant requesting additional information on 23 March and that the information was submitted some 6 days later on 31 March and that accordingly the Board had failed to provide any reasons as to why it proceeded to hear the Application having failed to receive the requested alterations within the legislative timeline of 5 working days.
- 2.3 The Appellants state that the Regulations provide for the completion of a CAR which is to include reference to the level of support of residents in the neighbourhood to which the application relates, but as the summary had been incorrectly put together, they argue that the CAR should not stand.
- 2.4 The Appellants assert that the PPC did not consider the Board's Pharmaceutical Care Services Plan ('PCP') which they are required to do.
- 2.5 The Board had failed to consult with a pharmacy contractor in Kirknewton whose viability may have been affected in the event that the application were granted.
- 2.6 The Appellants assert that there had been a failure by the Board to properly narrate the reasons upon which the determination of the application was based , specifically in that they had failed to consider the CAR.
- 2.7 The Appellants argue that the statement in the PPC's decision that "the existing pharmaceutical services in the neighbourhood were not adequate" omitted any reasons as to why they considered this to be so.

### **3. The PPC's Decision**

- 3.1 The PPC declared that they took account of all relevant factors concerning the issues of neighbourhood and adequacy and had considered the oral submissions put before them as also the written representations received and considered by them. It determined the neighbourhood which appeared to be non contentious and finally in determining adequacy it took account of evidence provided by the Applicant, Interested Parties and information made available to it from other sources.
- 3.2 The PPC declared that the existing pharmaceutical services in the neighbourhood were not adequate on the basis of the evidence presented to it by the Applicant and the Community Council Representative. The PPC finally determined that the provision of pharmaceutical services at the premises was desirable in order to secure adequate provision of pharmaceutical services to the neighbourhood in which the premises were located and accordingly granted the application.

#### 4. Discussion and Reasons for Decision

- 4.1 It was the responsibility of the Appellants to have identified any error on the Board's part in not copying the full details of the Consultation Analysis Report ('CAR') . They had sufficient time to do so .The Appellants had made no reference to this apparent error either during the course of their evidence nor in their summing up . Indeed they had expressed the view that they had had a full and fair hearing . In the circumstances I reject this aspect of the appeal
- 4.2 In terms of paragraph 5(2E) of the Regulations it is provided that if in the opinion of the Board the Applicant's assessment submitted with the application does not comply with the requirements of paragraph (2C) then the Board is not bound to refuse the application if the Applicant, within 5 working days of being asked by the Board provides further information that in the opinion of the Board meets the requirements as set out in paragraph (2C). The Appellants argue that the Board's letter to the Applicant was sent to him on 23 March 2016 and received by him on 24 March and that the appropriate clarification was not received by the Board until 31 March They argue that this was received 6 working days after the Applicant's receipt of the letter from the Board.
- 4.3 The PPC, at the Hearing, received an assurance from Mr David Hill representing the Board that the application was received within the Regulatory timescales, in that the initial application had been hand delivered by the Applicant on 15 March, and that further information was requested by letter of 23 March giving the Applicant 5 working days to return an amended application .The Board was satisfied that the Applicant had done so in returning the final amended application on 31 March. The PPC having been shown copies of the correspondence accepted them as a "valid determination of events" and that the amended application was received in time.
- 4.4 A day is a 24 hour period. Let us assume that the letter to the Applicant had been received by him on the morning of 24 March. The 24 hour period for day 1 would commence then. Accordingly the end of day 1 would fall in the morning of 25 March. By extension , therefore, day 5 would fall on the morning of 31 March. Accordingly the Applicant has complied with the Board's request. Even were this interpretation not correct, the Board clearly has a wide discretion to seek a clarification on the submission of an application. In sub paragraph (2E) there is no imperative such as 'must' or 'shall', merely that the Board is not bound to refuse the application if the Applicant provides the information requested within 5 working days. There is the potential for the Board to grant the application even were the Applicant not to provide an amended clarification. Further, even were the clarification sought to be one day out (which neither the Board nor I accept) a prescriptive exercise of the limited powers to seek clarification would in my view be contrary to the principles of equity and fairness.
- 4.5 The Appellants have argued that the PPC has been in breach of Regulation 5A(4d) in that the CAR has omitted any reference to the level of support of residents in the neighbourhood to which the application related for the issues consulted upon. Of the 297 responses, 219 considered there to be gaps/deficiencies in the existing provision of pharmaceutical services to

the neighbourhood and that 275 respondents considered that a Community Pharmacy would have a positive impact in the neighbourhood, that 89% of the respondents' comments were positive, that 265 considered that a community pharmacy in the neighbourhood would work with other NHS health services in the neighbourhood e.g. GP practices and so on. It is implicit in these responses, accordingly, that the Board has satisfied the terms of Regulation 5(A)(4d).

- 4.6 The Appellants assert that the Board has wrongfully refused to hear representation from the contractor in Kirknewton especially so that viability of that contract might be in jeopardy were the current application granted. The Board is not obliged to consult with the contractor in Kirknewton. In terms of Schedule 3 paragraph 1.(2)(c), the Board shall give written notice of the application to any person whose name is included in the pharmaceutical list 'whose interests may in *the opinion* (my emphasis) of the Board be significantly affected if the application were granted'. I understand that the practice in urban areas is to serve a notice to neighbouring pharmacists within a one mile radius and, in rural areas, a two mile radius. In Kirknewton Pharmacy's letter to the Board in November 2017 it stated that its pharmacy is situated 2.8 miles from the Premises. It is my opinion that the Board has obtempered its requirements in terms of the Regulations on this point.
- 4.7 In determining applications, the Board through its PPC are obliged to have regard to various matters incorporated in Schedule 3 paragraph 3 of the Regulations, including the CAR and the PCP. These are mandatory requirements. The PPC's decision must include (see Schedule 3 paragraph 6) a summary of the CAR, an explanation of how that CAR was taken into account in arriving at its decision and, of course, the reasons for its decision. The PPC has failed to note that it had considered the PCP and CAR and, further, failed to make reference to the latter in its determination. The grounds for appeal are accepted in this regard.
- 4.8 In its decision, the PPC in considering adequacy of existing pharmaceutical services concluded that "in determining adequacy of existing provision of pharmaceutical services within the defined neighbourhood (the PPC) took account of evidence from the Applicant, Interested Parties and from other sources'. On its own the PPC's decision does not provide a comprehensible explanation of its reasoning . No rationale has been given for the definition of adequacy nor, indeed, why it was considered that the granting of an application for the premises in the neighbourhood was desirable. The decision of the PPC must incorporate reasons for it which it is obliged to do in paragraph 3 (6)(c) of Schedule 3 to the Regulations. It is necessary to provide adequate and comprehensible reasons for the significant issues in dispute in relation to the application . They do not require to be meticulous to the point of addressing every aspect of the evidence ; however the salient points should be referred to such that a dispassionate observer may understand why the decision was arrived at in way that it had . In addition the PPC will require to consider, in granting the application, whether it is necessary or desirable *and* the reasons for that decision. Finally the PPC should note at the outset of its decision that it has taken into account the matters set out in Schedule 3 paragraph 3(i).
- 4.9 It may be helpful were I to set out the relevant passage from *South Bucks District Council v Porter* which is the commonly referred to authority on the duty to give reasons which is as follows :

*'The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inferences will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable ..... unsuccessful opponents to understand .....[why the Decision was made] Decisions ..... must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced'*

**5 Decision**

- 5.1 Whilst I have rejected some of the grounds of the appeal as narrated above and accepted others I am obliged to refer the decision back to the PPC with the following directions:
- 5.2 That the PPC reconvene and consider the PCP and CAR and other matters referred to in Schedule 3 para 3 (1)
- 5.3 That they take note of my comments in paragraph 4.7 above and to set out a summary of the CAR, an explanation as to how it was taken into account in arriving at its decision.
- 5.4 The PPC will therefore require to reissue the amended decision to all parties who may yet appeal against the decision within the appropriate time limit and should they wish to do so the grounds will be restricted to the amended appeal excluding any grounds that have already been addressed in this decision.

(sgd) J Michael D Graham  
Interim Chair

13<sup>th</sup> February 2018