

**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**

27 High Street, Aberlady, EH32 0RA

<b>Applicants and Appellants:</b>	Barrie Dear/Mahyar Nickkho-Amiry for Barrie Dear Ltd
<b>Health Board:</b>	NHS Lothian ("the Board")
<b>PPC Hearing:</b>	25 April 2018
<b>Panel Case Number:</b>	NAP77 (2018)

## **Decision of the Chair of the National Appeal Panel**

### **1. BACKGROUND**

- 1.1. Barrie Dear Ltd t/a Dears Pharmacy, 645 Ferry Road, Edinburgh, EH4 2TX (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 27 High Street, Aberlady, EH32 0RA (“the premises”). The application was dated 4 May 2017.
- 1.2. The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 25 April 2018. The PPC decided that as the current provision of services in the neighbourhood defined by it was 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 Appellant to the Board dated 24 May 2018.

### **2. GROUNDINGS OF APPEAL**

- 2.1. The Appellant’s grounds of appeal may be briefly summarised as follows:
  - 2.1.1 The Health Board took over a year to hear the application and the start times for the hearing were in some instances incorrect. The decision letter initially rejecting the application had the wrong address for the Application.
  - 2.1.2 The Chair should have recused herself on the grounds of “several” conflicts of interest including those of being a patient of one of the GP practices, the use by her of one of the rival pharmacies who had objected and also being a member of the Integrated Joint Board for East Lothian. There is a suggestion in the appeal letter that these declarations of interest were disclosed at the hearing but were not reflected in the minutes.
  - 2.1.3 The letter of support from Iain Gray MSP had not been declared as noted by the PPC and that the letter from June Friel of Longniddry Pharmacy was sent out of time for comments.
  - 2.1.4 One of the Interested Parties, Mr George Romanes, had submitted two different letters of objection from two pharmacies owned by his company. Only one should have been taken into account.
  - 2.1.5 That 10% of Aberlady population had submitted evidence for the Consultation Analysis Report (CAR) had been disregarded by the PPC.
  - 2.1.6 Two neighbouring pharmacies had completed four smoking cessation interactions in 12 months despite there being 11.8% of the population being identified as smokers at the Gullane Medical Practice. It was wrong of the PPC to regard that as adequate. The uptake of the Minor Ailments Scheme (MAS) for the Gullane Practice is inadequate and evidence was submitted to confirm this.
  - 2.1.7 The PPC had placed too much emphasis on car ownership in the neighbourhood and did not take into sufficient consideration the number of new houses being built.

### **3. EVIDENCE OF THE PARTIES**

3.1. The evidence of the Applicant may be summarised as follows:

3.1.1 Mr Nikkko-Amiry for the Applicant highlighted the services that would be provided from the premises which would be used in conjunction with an existing Post Office. He indicated the projected hours of opening and details of the pharmacy layout. He advised that 107 new houses were being built in Aberlady, some of which would be affordable housing and which would have an impact on current healthcare resources. He acknowledged there was no GP practice in the area but that there were instances where pharmacies had opened in such circumstances. He defined the neighbourhood as being the Aberlady Parish boundary: on the North-West by Gosford Bay to Peffer Burn, to the North by Luffness Mill, to the South-East by Mungoswells and to the South by Spittal. He advised that the services currently available in Aberlady were a Parish Church, Post Office, village hall housing a range of community activities, convenience store, public house and a primary school.

3.1.2 He added that the PPC was required to take account of how people in the neighbourhood lived their daily lives e.g. shopping in the convenience store and Post Office, children attending primary school and that the fact that they wished to access pharmaceutical services and not require to make an additional journey in order to do so. The CAR had resulted in 146 responses which equated to more than 10% of the residents in Aberlady and there had been additional support from the Community Council and the local MSP. . He added that 96% of the local population accessed services provided by the Gullane Medical Practice. The existing pharmaceutical provision were those in Gullane and Longniddry at a distance of 2.8 and 3.5 miles respectively and which would require a bus journey of between 10 and 12 minutes. He advised the PPC that approximately 74% of patients in Aberlady had prescriptions dispensed at Gullane Pharmacy with prescription volume increasing by 19% while the list size at Gullane Medical Practice had increased by 14%. He suggested that when the new housing development was completed there was a potential increase in population of 1500 patients wishing to register at the Gullane Medical Practice.

3.1.3 The Applicant stated that both pharmacies in Gullane and Longniddry had not sufficiently engaged in MAS and the Chronic Medication Service or Smoking Cessation demonstrated by the low uptake numbers for these essential services. He added that by providing a new pharmacy the needs of the neighbourhood could be met and greater access to healthcare services locally in the village could be supported.

3.1.4 In response to questions from both the Interested Parties and the PPC, the Applicant acknowledged that changes to the MAS service resulted in greater restrictions being put in place and that figures would naturally reduce but felt that pharmacies were still required to actively engage with registered patients. He stated that as the pharmacy would be situated within the Post Office there would be two kinds of staff roles, covering Post Office and pharmacy but that on occasion there would be cross cover arrangements if required. He felt that there could be a high number of patients from Gullane Medical Practice using the proposed pharmacy particularly to be seen under MAS so long as the GP practice promoted the service. In response to a question about population he advised that the population of the village of Aberlady was 1190 and that the percentage of car ownership in the village was 89% with 36% possessing one car, 44% two cars, 5% three cars and 11% no cars and that the percentage of the population over 65 years was 21.6%. He considered that if the Application were granted he anticipated 2000 prescription items to be dispensed per month which would be sufficient to support a pharmacy. In response to a query as to what evidence the Applicant had about the numbers of population visiting Aberlady he stated there were more people coming to the village in order to use existing services, e.g. the Post Office and local bank as these services were no longer available in Gullane.

3.2. The evidence of Mr Sagoo of Boots UK Ltd may be summarised as follows:

- 3.2.1 Mr Sagoo stated that the PPC should be aware that consideration ought to be given to the provision of services to the neighbourhood from pharmacies located outside it, that Aberlady was a village with a small population of under 1200 people and as such the viability of the proposed pharmacy and the effect on the existing provision in the area ought to be considered. He stated that 76% of all housing is owner occupied with detached housing being the most common form in the North Berwick coastal ward and that residents of the ward rated their health as good/very good which was higher than the East Lothian average and those rating their health as bad/very bad was lower than the area average. He stated that given the very limited facilities within the village many residents of Aberlady would leave it on a frequent basis to access amenities in the wider area and would access pharmaceutical services in doing so and highlighted the significant percentage of households having access to two or more vehicles.
- 3.2.2 Mr Sagoo suggested that the high support for the Application indicated within the CAR may have been due to the fact that residents would wish their valued Post Office services to remain. There was no suggestion within the CAR that patients were experiencing significant difficulties when wishing to access services or that the existing services were not meeting their needs. He went on to highlight the negative aspects of the CAR and suggested that these responses were excited more by concern of losing a Post Office than acquiring a pharmacy which was not a relevant consideration of the regulatory test and there was no evidence either within the Application or the Applicant's submission that the existing services were unable to meet the present or any future demand for pharmaceutical services. The village had a relatively affluent population with high levels of car ownership, high home ownership and good levels of health and that the comments within the CAR suggested a level of convenience in having a pharmacy at the location but none suggesting an inadequacy of the existing services.
- 3.3 The evidence of Mr George Romanes of Gullane Pharmacy may be summarised as follows:
- 3.3.1 Mr Romanes stated that he was representing both Gullane and Market Street pharmacies. He advised that Aberlady residents had a choice of five pharmacies within a short drive with Gullane pharmacy being the nearest at just over two miles. There are other pharmacies in Longniddry and three in Haddington and some patients choose to travel to North Berwick where there were another two pharmacies. He agreed with the definition of neighbourhood suggested by the Applicant. He thought that it could not be regarded as a neighbourhood for all purposes in that whilst the village has a shop and a Post Office there is no GP surgery, dentist, optician and little in the way of retail shops to anchor the residents to the village. The residents of the village and the proposed new housing would not be able to use the facilities of Aberlady for day to day needs and would not benefit the village hugely in economic terms. They would require to leave the village to access banks, supermarkets, butchers and other similar services. He considered that the CAR did not provide much in the way of substantial information and only three respondents actually mentioned easier access whilst six did not want daily supervision of methadone to be offered as a service. He considered parking to be difficult due to the narrow street and the number of parked cars. He considered that the opening of the pharmacy would result in a very marginal economic benefit.
- 3.3.2 In response to questions from other Interested Parties and the PPC Mr Romanes stated that there had been a very low number of patients signed up for smoking cessation but patients could not be forced to access the service and that it was challenging to get patients to commit to full assessments under the CMS.
- 3.4 The evidence of Mr Hay of Gullane Community Council may be summarised as follows:
- 3.4.1 Residents in the neighbourhood would want all services within easy reach and that the Application should not be considered as a Post Office wanting a pharmacy but the other way round and that it was important for villages to have a hub where people could congregate and

that currently the Post Office is the hub and the addition of a pharmacy would only increase the number of residents using the facility.

- 3.4.2 In response to questions from the interested parties and members of the PPC, Mr Hay stated that whilst the residents of Aberlady considered the existing pharmaceutical services to be adequate the surrounding environment changes and there being a 30% change in the East Lothian population the existing services may not be adequate for the future. He stated that he had not been aware of any discussion about the need for additional pharmaceutical provision in the area prior to the information coming to light about the proposed pharmacy which was willing to take on the Post Office and retail unit in Aberlady and advised that there had not been a pharmaceutical provision in Aberlady for a long time, if ever, and it would be an addition that would be useful and convenient to the population.

#### **4. THE PPC DECISION**

- 4.1 All parties having summed up left the hearing together with the Board administrators. All parties indicated that they had had a fair and full hearing and that there was nothing further to add.
- 4.2 In addition to the oral evidence, the PPC took account of all written representations and all supporting documents submitted by the Applicant, Interested Parties and those entitled to make representations. The PPC indicated the written representations received and considered. They also considered the CAR and other information provided by the Board.
- 4.3 In determining the **neighbourhood** the PPC did not accept that the neighbourhood proposed by the Applicant and instead accepted the following as more appropriate the community of Aberlady in its entirety which is a natural neighbourhood surrounded by clear green spaces.
- 4.4 As to **adequacy** of pharmaceutical services the PPC felt that no gaps existed as other pharmacies in the area could provide the full range of pharmaceutical services. They highlighted that there was no evidence of concern being raised about the adequacy of current pharmaceutical services and they expressed the view that the existing pharmacies had capacity to take on additional patients and could quite easily absorb any increase in demand. The Committee had considered the CAR and had noted that the majority of respondents had provided positive feedback about a new pharmacy in Aberlady although when the individual comments were taken into consideration this was felt to be about convenience and not inadequacy of service. The PPC noted that respondents also referred positively to the continuation of the Post Office service which would sit alongside the proposed new pharmacy and were of the view that this was not an area for consideration by the PPC. The PPC noted further that there was high level of car ownership in the area and that the public transport links from and to Aberlady were good and that parking available at the other pharmacies was good. That 107 new houses were being built in the area it noted that the existing pharmacies would be able to cope with the increase in demand. The PPC also noted that the Community Council were unable to provide any evidence of concern from the Aberlady residents about existing pharmaceutical services.
- 4.5 It was the unanimous view of the PPC that the provision of existing pharmaceutical services in the neighbourhood was adequate and that it was neither necessary nor desirable to grant the Application.

## **5 DISCUSSION AND REASONS FOR DECISION**

- 5.1 The Regulations are governed by section 27 of the National Health Service (Scotland) Act 1978 wherein it is provided 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 drugs and medicines which are ordered by a Medical Practitioner in pursuance of his functions in the health service in Scotland. An application made in any case for pharmaceutical services 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 these services specified in the application. Regulation 5(10) also refers.
- 5.2 In terms of paragraph 3(1) of schedule 3 of the Regulations, the PPC shall have regard to the pharmaceutical services already provided in the neighbourhood of the premises, of 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 Applicant.
- 5.3 The grounds for appeal are limited to areas where the PPC on behalf of the Board 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 and reasons upon which their determination of the application was based, or there has been a failure to explain the Application by the PPC by the provisions of the Regulations to those facts.
- 5.4 The principal issue is whether or not the PPC has exercised its judgement fairly and given adequate reasons for it and it does not otherwise offend against the grounds for appeal set out in Schedule 3 paragraph 5(2A) and 5(2B). It is important 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.
- 5.5 The Appellant avers that the Board took over a year to hear the application and that the minutes were inaccurate. These are not matters upon which I am able to comment standing that my responsibility is restricted to procedural matters and those of law. I am required to regard the minutes as a true record of the Hearing. Save as below the Appellant does not elaborate on what aspects the minutes are deficient. The Appellant states that the Chair was subject to significant conflicts of interest but, again, does not specify that such (unknown) conflicts would give rise to any bias on the part of the Chair. Those that are mentioned would not, in my opinion, give rise to any bias on the Chair's part. I regard the error in the address in the letter of decision referred to by the Appellant as a simple mistake and does not affect the decision proper.
- 5.6 It is correct that the letter from the local MSP is not referred to by the PPC in its decision and the wording of the decision at paragraph 186 is deficient in this respect. It is unfortunate that whilst the PPC has indicated in the first sentence of this paragraph that it took account of all relevant factors and written representations and supporting documents submitted, it then proceeded to qualify this general statement by specifying the written representations excluding the letter from the MSP. Nevertheless, I do not consider the omission to be sufficiently critical in the context of

the PPC's duty to identify the adequacy or otherwise of the existing provision of pharmaceutical services all as set out in the Regulation 5(10). In any event the applicant had referred to the MSP's support in his evidence to the PPC.

- 5.7 As to the separate letters of objection received from the two practices owned by GLM Romanes Ltd there can be no objection to their submission prior to the hearing on the basis that they have been received from practices in the specified radius of the premises. Equally, no objection can be taken to consideration of the letter from Longniddry Pharmacy where the pharmacist from that pharmacy chose not to attend the hearing. Both the submission of a letter of objection and attendance at a hearing are rights not obligations.
- 5.8 The Community Council gave evidence that the projected increase in the population of East Lothian may have an impact on the adequacy of the existing pharmaceutical provision in Aberlady and that a pharmacy at the premises would be "useful and convenient". This is not the legal test.
- 5.9 The Appellant has raised other issues such as car ownership, environment, smoking cessation, an alleged lack of engagement with a Scottish Government publication all of which are irrelevant in terms of the Board's requirements under the Regulations are concerned. The Board may only grant an Application of the nature submitted by the Applicant if the test set out in Regulation 5(10) that it must only grant an Application if it is satisfied that (a) the existing pharmaceutical services provided are not adequate and that (b) the Application is necessary or desirable to secure the adequate provision of pharmaceutical services.
- 5.10 The decision of the PPC is extremely brief and whilst I would prefer to see more of a discussion on what aspects of the evidence they found to be persuasive as against those it found to be less so the decision is nevertheless to the point. It considered that there was adequate provision of pharmaceutical services to the neighbourhood to which the Application related. This was on the basis that the PPC felt that there were no gaps in the existing provision of services within the neighbourhood as the other pharmacies in the neighbourhood could provide the full range of pharmaceutical services and there was no evidence provided of concern being raised about the adequacy of the current pharmaceutical service. Further, the PPC felt that the existing pharmacies in the area had the capacity to take on additional patients and could easily absorb any increase in demand. In the circumstances I am satisfied that the appeal discloses no reasonable grounds.
- 5.11 However, there is one issue which does cause concern. In determining Applications, the Board through its PPC is obliged to have regard to various matters incorporated in Schedule 3 paragraph 3 of the Regulations including the CAR. These are mandatory requirements. The PPC's decision must include (see Section 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. Whilst the PPC has noted that it had considered the CAR, it has not provided a sufficient summary of the CAR or an explanation of how the CAR was taken into account in arriving at its decision.

## 6. DECISION

6.1 I direct that the PPC reconvene to consider the CAR, setting out a summary of the CAR, and an explanation as to how the CAR was taken into account in arriving at its decision and to thereafter reissue an amended decision to all parties.

6.2 There is no requirement for any of the parties to attend.

(sgd) J Michael D Graham

Interim Chair

23 August 2018