

# 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 2a, Kingsway West Retail Park, Clepington Road, Dundee, DD3 8RX**

**Applicants and Appellants: Boots UK Ltd**

**Health Board: NHS Tayside (“the Board”)**

**PPC Decision issued: 10 April 2019**

**Panel case number: NAP 85 (2019)**

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

### **1. Background**

- 1.1 Boots UK Ltd, 79/91 High Street, Falkirk (hereafter referred to as “the Applicants” or “the Appellants”) 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 Unit 2a, Kingsway West Retail Park, 467 Clepington Road, Dundee, DD3 8RX (“the premises”). The application was dated 20 December 2018.
- 1.2 The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 22 March 2019. The PPC decided that the current provision of services in the neighbourhood defined by the PPC was adequate and accordingly refused the application.
- 1.3 The Applicants lodged an appeal against the PPC’s decision dated 29 April 2019 received by the Board on 2 May 2019.

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

- 2.1 The Appellants grounds of appeal may be summarised as follows:
  - 2.1.1 That the PPC failed to have regard to the Pharmaceutical Care Services Plan (“PCSP”). The Appellants state that the PCSP 2018/21 states that there are gaps within the pharmaceutical provision in the Lochee LCCP area as well as neighbouring areas and in particular identifies gaps for 7-day opening and as such the PPC had not addressed the matter of adequacy sufficiently in their decision to satisfy the legal test.
  - 2.1.2 Whilst the PPC had accepted that the Applicants had identified a potential gap in accessibility it expressed disappointment that they had chosen not to address the issue by extending the opening hours at the existing neighbourhood pharmacies owned by Boots. They Appellants argue that the premises themselves were in a location that was open to extended hours being a retail park and that other premises owned by them were considered to be inappropriate for extended opening hours.
  - 2.1.3 Whilst the Appellants accepted the Consultation Analysis Report (“CAR”) had been considered by the PPC it appeared that weight had been given to the number of responses received and not to the findings of the CAR. The Appellants argue that 341 responses to be a significant amount for a consultation relating to the neighbourhood defined by them. In addition, the PPC had not given sufficient weight to the comments in favour of granting the application.
  - 2.1.4 The PPC stated that in conducting its site visit it had visited Honey Pharmacy on Alpin Road where “in taking the opportunity to speak to the staff were impressed by the range of pharmaceutical services provided to patients”. The Appellants state that Honey Pharmacy is in fact located on Haldane Road whereas Houston Pharmacy, who were represented at the hearing, is located on Alpin Road. In any event the Appellants state that if the PPC had heard oral representations it ought to have given the Applicants and any persons from whom it had received written representations notice of the meeting and opportunity to make representations and that whilst Houston Pharmacy made representations and were at the meeting Honey Pharmacy neither made written submissions nor attended the hearing. They state that should the comments relate to Honey Pharmacy then the Applicants ought to have had the opportunity to respond to any written or oral submission made by representatives of said Honey Pharmacy.

### **3. PPC Decision**

- 3.1 The PPC considered the neighbourhood to be Kingsway West Retail Park being a self contained location within the boundaries adumbrated by it . There was no easy pedestrian access from and to that area in which the population of the defined neighbourhood was transient i.e. people who work and shop within the retail park stores. The PPC was of the view that this transient population would have access to pharmaceutical services within their respective neighbourhoods within which they lived.
- 3.2 The PPC had noted there were 10 pharmacies within a 1.2 mile radius and it had noted the locations of eight of the existing pharmacies and the GP surgeries in the area during the course of its site visit . It also stated that it had visited 'Honey Pharmacy on Haldane Avenue' (*sic?*) where it had taken the opportunity to speak to the staff and were impressed on the range of pharmaceutical services provided to patients. The PPC is noted as having considered the CAR and that 341 responses had been received in relation to the approximate footfall of 106,000 visitors to the retail park per week. The PPC took the view that there would have been a much greater response should there have been a perceived need for pharmaceutical services by the public.
- 3.3 The opening times of pharmacies in the area were limited to core hours of business as dictated by the pharmaceutical scheme and whilst the PPC was disappointed at having identified a lack of extended hours the Applicants had chosen not to address this issue by extending the opening hours of their existing neighbouring premises and took the view that the application was based purely on convenience. The PPC took the view that there was no evidence of inadequacy and thus refused the application.

### **4. Discussion**

- 4.1 Under the Regulations the available grounds of appeal against the Board are limited to circumstances in which there has been:
- 4.1.1 An error in law by the Board in its application of the Regulations
  - 4.1.2 A procedural defect in the way the application has been considered by the Board
  - 4.1.3 A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based [schedule 3, paragraph 5 (2B)(b)]
  - 4.1.4 A failure to explain the application by the Board of the provision of these Regulations to those facts [schedule 3 paragraph 5(2B)(c)]
- 4.2 I am required to consider the notice of appeal and:
- 4.2.1 To dismiss the appeal if I consider that it discloses no reasonable grounds for appeal or is otherwise frivolous or vexatious
  - 4.2.2 To remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out at sub-paragraphs 4.1.2 to 4.1.4 above have occurred
  - 4.2.3 In any other case to convene the National Appeal Panel to determine the appeal
- 4.3 In terms of the Regulations an application should be granted by the Board *"(a) 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..."* [Regulation 5(10)]

- 4.4 In terms of paragraph 3(1) 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 PCSP and the likely long term sustainability of the pharmaceutical services to be provided by the Applicant.
- 4.5 The principal consideration of the PPC's decision for the present purposes 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, paragraphs 5(2A) and 5(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 be intelligible and it must be adequate. It must enable to 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 be readily be drawn. A deficiency in service must exist before an application may be granted. Consequently the existence of such a deficiency in service must be identified before it is necessary to consider what can be done to provide a remedy.
- 4.6 The Applicants made reference to the PCSP in their evidence and in particular to gaps in 7-day opening in several localities within the greater Dundee area and referenced their proposal in support for 7-day opening. The PCSP referred to by the Applicants was that of the "draft" 2018/2021 plan whereas the Interested Parties made reference to the existing plan. Be that as it may, extended opening is not a core requirement and the reference by the PPC to the evidence regarding Boots other premise within the greater area of Dundee in not providing extended opening is irrelevant and should not have influenced it. In addition, and this is not, I note, part of the Appellants' grounds of appeal, the PPC have not obtempered a requirement of the Regulations, specifically schedule 3 paragraph 3(f) that the Board shall have regard to the Pharmaceutical Care Services Plan. In normal circumstances a decision of the PPC sets out what documents they have taken into account in arriving at its decision. It has not done so here. Further, in certain circumstances it may be desirable for the PPC to go further and explain any apparent inconsistencies between its decision and the PCSP (whichever PCSP is extant ). This may be done with specific reference to the PCSP or it may be self evident from the wider reasoning of the PPC. In the circumstances it will require to amend its decision to take into account the fact they have had 'regard' to the PCSP and expand upon its reasoning as to why it considered that the application was based purely on convenience and, in its opinion, in the face of the Applicants' presentation and those of the interested parties that there was no evidence to suggest any inadequacy. It is clear that the PPC did not regard the Applicants' evidence as persuasive and it may be helpful were it to expand on the Applicants' evidence and that of the Interested Parties and the reasons why they found the latter more persuasive. The PPC need not go into any detail in this connection but it ought to give the objective reader of the decision an understanding as to why it came to the decision it did.
- 4.7 In so far as the CAR is concerned there is a specific requirement contained within the Regulations [Schedule 3 paragraph 3[6(a)] that the PPC's determination of the application *must* include a summary of the CAR submitted in accordance with Regulation 5(a). The PPC has failed to provide a summary nor has it provided (b) an explanation of how the CAR was taken into account in arriving at its decision. The PPC having failed to do so I accordingly require to remit the decision back to it for amendment to take into account the provisions of this Regulation.
- 4.8 The PPC has quoted the remarks of a representative of either Honey Pharmacy or Houston Pharmacy during the course of its site visit which the Appellants considered to be prejudicial in that they ought to have had the opportunity to respond to any written or oral submission by representatives of Honey Pharmacy (if indeed it was Honey Pharmacy). I do not regard this

as a relevant ground of appeal which has any prospect of success. The remarks themselves are of minor moment and in any event, in terms of Schedule 3 paragraph 1(d) of the Regulations the PPC may take into account any information available to it which in its opinion is relevant to the consideration of the application.

**5. Disposal**

- 5.1 For the reasons set out above I have concluded that the decision of the PPC failed to properly narrate the facts and reasons upon which its decision is based. I am, therefore, required by paragraph 5[5](b) of Schedule 3 of the Regulations to remit the decision back to the Board for reconsideration.
- 5.2 In the particular circumstances of this application the PPC is required to expand upon its decision to take into account the fact that it had regard to the PCSP in arriving at its decision and expanding upon its reasoning as to why the current provision of pharmaceutical services is adequate. It is necessary for the PPC to obtemper the requirements of schedule 3 paragraph 3 [6(a)] and (b) in its amended decision.
- 5.3 In reconvening it will be unnecessary for the Applicants and Interested Parties to attend although all members of the PPC who attended the hearing on 22 March 2019 are required to do so.
- 5.4 Thereafter the PPC will require to issue its amended decision to the Applicants and Interested Parties who may yet appeal against the amended decision.

**(sgd.) J M D Graham**  
**Interim Chair**  
**5 August 2019**