

National Appeal Panel

Constituted under

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)
(SCOTLAND) REGULATIONS 2009 (AS AMENDED)**

**DECISION
of the
CHAIR
of**

THE NATIONAL APPEAL PANEL

In the application relating to

4 Drumshorel Road, Pumpherston EH53 0LN

Applicant: Mohammed Ameen

Health Board : NHS Lothian "the Board"

PPC Decision issued : 11 November 2019

Panel case number : NAP 95 (2019)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1 Mohammed Ameen (“the Applicant”) 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 4 Drumshorel Road, Pumpherston (“the Premises”) . The application was dated 26 July 2019, although it is apparent that there is a history to the application which pre-dates its submission in its present form.
- 1.2 The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 11 October 2019 and a decision was issued on 11 November 2019. Appeals were lodged against that decision by the Applicant (also referred to herein as “the First Appellant”) and Pumpherston Community Council (hereinafter referred to as “the Council” or “the Second Appellant”).

2. Grounds of Appeal

- 2.1 The First Appellant’s appeal was submitted on 1 December 2019. It runs to 20 pages and sets out numerous grounds of appeal.
- 2.2 Broadly, the First Appellant’s grounds of appeal can be grouped under the headings which were adopted by the First Appellant:
 - 2.2.1 Ground of Appeal 1: The First Appellant asserts that the PPC suffered from a conflict of interest. This is asserted on a number of grounds, principally:
 - a. that the signatory of the letter from the Lothian Area Pharmaceutical Committee which did not oppose the application appeared to assist one of the interested parties in opposing the application;
 - b. one of the lay members was resident within the neighbourhood; and
 - c. one of the interested parties opposing the application was a member of the PPC in his capacity as a contractor and although he was not participating in that capacity in this instance the Appellant avers his relationship with other PPC members constitutes a conflict of interest.
 - 2.2.2 Ground of Appeal 2: The First Appellant asserts that the PPC displayed bias in the manner in which it dealt with the application. This is asserted on a number of grounds, principally:
 - a. procedural decisions in relation to the handling of the application were said to display prejudice towards the application generally;
 - b. one of the interested parties opposing the application submitted that he acted objectively when considering whether to oppose applications which may affect his practice;
 - c. the PPC contained members which were part of the panel convened for a hearing in relation to a previous iteration of the application which did not ultimately proceed;
 - d. the Chair of the PPC displayed bias against the Applicant by interrupting and questioning the Applicant in respect of his submission during the hearing;

- e. comments made by one of the lay members in relation to the reason a previous hearing did not proceed are said to have been incorrect and prejudicial;
- f. comments made by the contracting member of the PPC are said to be incorrect or unsupported by evidence to the extent that they demonstrated bias;
- g. existing pharmaceutical contractors had made a concerted effort to oppose the application in order to maintain the status quo; and
- h. the PPC did not consider statistics and data cited by the Applicant in support of the application.

2.2.3 Ground of Appeal 3: the First Appellant asserts that there were a number of procedural errors in considering his application, in particular:

- a. the Board failed to issue the decision within the correct timescales;
- b. the Board failed to properly consult the Council and invite it to participate in the application;
- c. the Board failed to provide all interested parties with the supporting documentation to the application;
- d. The PPC were not furnished with all relevant documentation; and,
- e. The Board did not provide the PPC with updated letters of support in favour of the application.

2.2.4 Ground of Appeal 4: the First Appellant submits that the PPC failed to fully consider the Pharmaceutical Care Services Plan ("PCSP").

2.2.5 Ground of Appeal 5: the First Appellant asserts that the PPC failed to give due consideration to the potential increase in population caused by local development.

2.2.6 Ground of Appeal 6: the First Appellant asserts that the PPC's reasoning is incoherent, in particular:

- a. the PPC gave excessive consideration to the distance between certain areas of the neighbourhood to existing pharmacies compared to the proposed pharmacy;
- b. the PPC appeared to incorrectly consider that the Council anticipated that the proposed pharmacy would form part of a community hub;
- c. the PPC gave undue weight to a concession by the Council that the existing services were adequate when the significant issue was accessibility of those services;
- d. the PPC gave undue weight to the lack of prominent consideration of the adequacy of pharmaceutical services on the Council agenda and minutes;
- e. the PPC wrongly concluded that there were limited services available within the neighbourhood; and
- f. it is incongruous for the PPC to recognise issues posed by accessibility to a GP practice but not to recognise the same issues in relation to a pharmacy.

- 2.3 The Second Appellant submitted their appeal on 2 December 2019. The Second Appellant's appeal is not set out or structured as an appeal by reference to any particular grounds. Rather, it sets out a number of comments on the procedure followed by the Board and decision of the PPC.
- 2.4 The issues set out by the Second Appellant are broadly:
- 2.4.1 that the Council has wrongly been omitted from correspondence by the Board and has not been given a proper opportunity to participate in the decision making process in relation to the Application and has not generally been treated equally to other participating parties;
 - 2.4.2 an anonymous letter was considered as part of the process which should not have been given any weight;
 - 2.4.3 insufficient or irrational consideration has been given to the transport difficulties faced by the residents of the neighbourhood with undue weight having been given to the absence of specific reference in the minutes of the Council meetings in relation to the lack of adequate pharmaceutical services; and
 - 2.4.4 unsupported conclusions have been drawn from the closure of a pharmacy previously located within the neighbourhood.

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 ("Schedule 3 para 5 (2B)(b)"); or,
 - 3.1.4 a failure to explain the application by the Board of the provisions of these Regulations to those facts ("Schedule 3 para 5 (2B)(c)").
- 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.

4. Consideration of Points of Appeal

Ground of Appeal 1

- 4.1 The first issue raised by the First Appellant is that Kaye Grieg acted as a support for one of the interested parties opposing the application. Ms Grieg was also the signatory of the letter

submitted by the APC which indicated that the APC was not opposed to the application. It is said that this resulted in a conflict of interest. I disagree. Ms Grieg was only the signatory of the letter from the APC. The position of the APC has remained the same. This is acknowledged by the PPC in their decision. Ms Grieg was free to assist in the opposition of the application in a separate role. This does not create any conflict of interest – particularly as any conflict would only be relevant if it existed in the PPC.

- 4.2 The second issue raised by the First Appellant is that one of the lay members lived within the neighbourhood. The First Appellant argues that this may have resulted in a conflict of interest as the lay member may have had a relationship with an existing pharmacy. No support is offered for this contention. Equally, it could be said that the lay member being resident in the neighbourhood could favour the Applicant as it would have given him first-hand experience of any deficiencies in the existing service. Again, there is no evidence of this. All that is clear is that the lay member was asked but indicated he had no interest to declare. Absent any evidence to the contrary that position must be accepted.
- 4.3 The final point made by the First Appellant under the heading conflict of interest is that one of the parties opposing the application is also a contracting member of the PPC and has previously appeared on panels containing members of the PPC which sat to hear the application. It would be preferable if the members of the PPC hearing the application had no relationship – personal or professional – with the parties participating in the hearing. However, the fact that members of the PPC have previously worked with a party participating in the hearing does not create a conflict of interest. Something more than a prior professional relationship must be demonstrated.

Ground of Appeal 2

- 4.4 The second ground of appeal set out by the First Appellant relates to a number of instances of claimed bias. The first issues raised relate to prior procedural decisions made by the Board in dealing with the application. The fact that procedures may have been made in dealing with the application (should they have been errors) is not indicative of bias. Decisions are routinely made as part of any process. Simply because an error was made or the First Appellant does not agree with the decision does not mean that there has been bias.
- 4.5 There is no indication of bias in the decisions made as part of the prior process. Ultimately the application has proceeded as the Applicant wished. In any event, prior procedural decisions have no bearing on the decision making process of the PPC.
- 4.6 The second issue raised relates to the submissions of one of the parties opposing the application. The parties opposing the application are free to make whatever submissions they wish. Such submissions are in no way indicative of bias by the PPC and cannot, by definition, be indicative of bias by the PPC as they are outwith the control of the PPC.
- 4.7 The third issue raised relates to the members of the PPC being the same as those empanelled to hear the first application. The First Appellant considers that this creates the potential for bias and refers to previous decisions which I have made indicating that a fresh PPC should be empanelled when re-hearing an application. The same reasoning does not apply in this situation. As has been pointed out by the Board in correspondence with the Applicant, the first hearing did not proceed. As such, the PPC did not reach a prior decision and, therefore, there is no need to empanel a new PPC.
- 4.8 The fourth issues raised by the First Appellant relates to the conduct of the Chair. Under headings 2(c) and 2(d) of the First Appellant's letter of appeal the First Appellant indicated that actions of the Chair, principally in questioning him was indicative of bias. Again, I disagree. The Chair is required to manage the conduct of the hearing. In doing so the Chair is entirely entitled to question the Applicant and to control proceedings. In each instance referred to by

the First Appellant I consider that the Chair has done no more than reasonably exercise her function as Chair.

- 4.9 The fifth issue raised by the First Appellant relates to the lay member indicating that the first hearing had been cancelled due to issues with handwritten responses to the CAR. The First Appellant asserts that this is incorrect and irrelevant. It may well be. However, the existence of an incorrect summary of prior procedure in the decision of the PPC does not indicate bias. As is evident from the subsequent sections of the decision, the PPC was aware of the background. In any event, the procedural background to the application is not and was not a significant part of the decision.
- 4.10 The sixth issue raised by the First Appellant relates to comments made by the contracting member of the PPC. In particular, the First Appellant takes issue with the contracting member indicating (i) that a reduction of 1,000 – 2,000 in the prescriptions dispensed in one of the existing pharmacies may mean that the pharmacy would need to reduce the number of pharmacists without any supporting evidence and (ii) that people will often use pharmacies located close to GPs due to convenience.
- 4.11 In the first instance, I would note that the role of the contracting pharmacist is to provide their knowledge as prescribing pharmacists to the PPC. As such, they should be expected to provide views based on their own professional experience and opinion. They are not required to provide evidence for their views. They are there to provide the PPC with the benefit of their professional experience. That is all the contracting member appears to have done in this instance. The fact that the Applicant may disagree with the views of the contracting member of the PPC is irrelevant.
- 4.12 The seventh issue raised by the First Appellant is that existing practitioners act and lobby as a group to maintain the status quo. This may be correct. If so, it would make sense as it is to be expected that existing practitioners would be unlikely to welcome additional competition. It is, however, entirely irrelevant to the consideration of the application by the PPC. Indeed, the PPC no doubt takes this into account when considering the basis on which objections are made.
- 4.13 The final issues raised under this ground of appeal is that the PPC did not pay attention to data provided by the Applicant. I do not consider that there is any indication that the PPC has failed to take account of statistics presented by the Applicant. The PPC is not required to discuss in detail all information presented to it. It is for the PPC to consider the information and set out in its decision what it considers to be significant. Not all information, particularly large volumes of statistics, will be relevant. The First Appellant's real criticism seems to be that the PPC indicated that his statistics were unsourced. This seems to be a fair criticism by the PPC. Statistics without context and referencing will inevitably be of little assistance to the PPC.

Ground of Appeal 3

- 4.9 The first issue raised by the First Appellant under this heading is that the decision was issued 19 working days after it was taken whereas the Regulations state that the decision should be issued within 15 working days of it being taken. Whilst the First Appellant is correct that, where possible, a decision should be issued within 15 working days of it being taken, there will be situations in which this is not possible for a variety of potential reasons. In this instance, it is to be noted that the decision runs to in excess of 110 pages. I do not consider that a turnaround of 19 working days is unreasonable for a decision of such length. Equally, such a delay will have no bearing on the decision itself and will cause no prejudice to the Applicant.
- 4.10 The second issue raised by the First Appellant relates to the alleged failure of the Board to engage with the Council throughout the process. This issue is also raised by the Council in their appeal. I will deal with it under that head.

- 4.11 The third point raised by the First Appellant is that the Council did not receive the full papers for the hearing. I note that this is not a point raised by the Second Appellant in their grounds of appeal. In any event, while I accept that it would be desirable for all parties to be provided with relevant paperwork in advance of any hearing, there is no obligation on the Board to do so. As I have noted previously, the PPC is free to consider the matter solely on the papers if it considered it appropriate. There is no requirement to hold a hearing and allow further submissions or questioning of the interested parties. Equally, it should be borne in mind that routine parts of the consideration process by the PPC will exclude certain interested parties from the process. For example, site visits made by the PPC will not convene all interested parties in order that they can comment fully on any information obtained by the PPC during the site visit.
- 4.12 In relation to the specific issue raised by the First Appellant, I do not consider that it is a relevant issue that the Council was not aware of the letters of support obtained by the Applicant from MSPs. When the PPC asked the Council what level of support they were aware of from elected representatives they would have been asking about the Council's own experience of such support. The Council simply re-stating the content of the papers submitted by the Applicant would have been of no further assistance to the PPC.
- 4.13 The fourth issue raised by the First Appellant is that the PPC were not provided with full documentation in relation to concerns regarding handwritten responses to the CAR. As is evident from the decision of the PPC, this was not a material issue for the PPC. They proceeded to consider the terms of the CAR in full and in the usual way, without reliance on the nature of the responses to it. The availability of the information would simply have assisted the PPC in cutting through an issue which was raised by the interested parties in the course of the hearing.
- 4.14 The final issue raised by the First Appellant under this ground of appeal is that the Board did not provide the PPC with updated letters of support from MEPs. The committee considered letters of support which dated from the middle of 2018 which it notes did not assert that the existing services provided were inadequate. The Applicant contends that more current letters of support were submitted which did submit that the existing services were inadequate.
- 4.15 This is a matter which I consider requires further explanation. If the Board has failed to provide the PPC with the updated letters of support I consider that this may, depending on the circumstances, amount to a procedural defect. If they have been provided and the PPC's decision does not consider them when expressly addressing earlier letters I consider that this would amount to a failure to properly explain the facts and reasons for their decision.

Ground of Appeal 4

- 4.16 Under this ground of appeal the First Appellant submits that the PPC has failed to adequately consider the PCSP. In particular, the First Appellant considers that the PPC should have taken account of the fact that the PCSP notes that West Lothian has a high number of patients per pharmacy. The First Appellant then goes on to take issue with conclusions within the PCSP itself that there is no evidence of unmet need in certain areas on the basis that a lack of evidence of unmet need is not evidence that needs are met.
- 4.17 The PPC is required to have regard to the PCSP. It is clear that it has done so. In this instance, it has gone further and specifically noted that the PCSP did not identify a requirement for the proposed pharmacy. The PPC is entitled to carry out its own analysis of the PCSP and reach its own conclusions based on it. This ground of appeal is little more than an indication that the First Appellant disagrees with the conclusion drawn by the PPC. He is free to do so, but that does not constitute a valid ground of appeal. Particularly when his contention is, in effect, that the PPC should have looked beyond the terms of the PCSP and concluded that the PCSP was itself wrong.

Ground of Appeal 5

- 4.18 The First Appellant's fifth ground of appeal is that the PPC failed to properly consider the effect of residential development in the neighbourhood on the adequacy of existing services.
- 4.19 It is correct that the PPC is required to consider the adequacy of the existing services in the context of the demand which future development within the neighbourhood may place upon those services. In this instance, it is clear that they did. The noted that any effect would not arise in the short term as the majority of local development was some way from completion. Again, the First Appellant may disagree with this conclusion. However, the PPC is an expert tribunal and, provided it has regard to relevant factors (which in this instance it clearly has) is free to reach its own conclusions.

Ground of Appeal 6

- 4.20 The First Appellant's sixth ground of appeal relates to what is said to be incoherent reasoning by the PPC.
- 4.21 The first issue raised under this heading is that the PPC is said to have given undue consideration to a small area of the neighbourhood which is a similar distance from an existing pharmacy to the proposed pharmacy. This is against the background of one of the principle grounds on which the application was advanced being difficulty of access to existing services. Against this background, I consider that the PPC was entitled to have regard to the proximity of the neighbourhood as a whole to existing services, including the periphery of it. I do not consider that it has given undue weight to this issue. After the comment highlighted by the First Appellant the PPC proceeds to acknowledge that some walking routes to existing pharmacies were unsuitable and that existing pharmacies provided a delivery service. The issue of the proximity of one area of the neighbourhood to existing pharmacies has clearly been considered as one of a number of factors related to access to services.
- 4.22 The second issue raised relates to a statement by the PPC that it understood that the Council wished the proposed pharmacy to form part of a community hub. The First Appellant's concern is that the creation of a community hub, including the proposed pharmacy, was not part of the submission. Instead, the proposed pharmacy would be located at the premises owned by the Applicant rather than at a community hub. I do not believe that the PPC were using the phrase "community hub" in any more specific sense than an increase in services providing a heart to the community. As such, I do not see any contradiction between the submissions made to the PPC and the comments complained of. In any event, this was evidently not a significant part of the PPC's reasoning.
- 4.23 The third issue raised under this ground of appeal is that the PPC noted that the representative of the Council accepted that the services provided by the existing pharmacies were adequate. The First Appellant considers that this should not be a relevant consideration because this was a slip of the tongue from the representative of the Council and the issue from his and from the Council's perspective was one of access to those services rather than the nature of those services themselves. I disagree. I consider that it was entirely reasonable of the PPC to take into account the acknowledgement that the existing services were adequate, provided they could be accessed. This acknowledgement helps focus the core issue with the services from Council's perspective as one of access.
- 4.24 The fourth issue raised by the First Appellant relates to the PPC's focus on the existence of services rather than the ability to access them and, in particular, the content of the Council minutes rather than the substance of the Council's submissions. This overlaps significantly with grounds of appeal advanced by the Council and I will therefore address it alongside the Second Appellant's grounds.

- 4.25 The fifth issues raised under this head is the conclusion by the PPC that there are very limited services within the neighbourhood. The First Appellant takes issue with this and lists a number of services which are available within the neighbourhood. What constitutes a lack of services is a matter of perspective. However, the comments in relation to services made by the PPC reflect submissions made to it by the Council. As such, I do not consider that the First Appellant can reasonably take issue with these comments.
- 4.26 The final point raised by the First Appellant under this ground of appeal is that the PPC notes that there may be challenges presented for the Community by GP facilities being located out of the village, however, despite similar issues existing in relation to pharmaceutical services it did not recognise the same issues. This statement from the PPC relates to the fact that issues with access to GP services were raised in the Council minutes but were not reflected in the Council minutes in relation to pharmaceutical services. This ties in with the issues set out in para 4.24 above so I will return to it when addressing those issues.

Second Appellant's Appeal

- 4.27 The first issue raised by the Second Appellant is that it was not afforded the same opportunity to participate in the application as other interested parties and was not provided with the same information. This is also reflected in the First Appellant's grounds of appeal referred to at paragraph 4.10 above.
- 4.28 On the basis of the appeals submitted it appears that there has been a failure by the Board to provide relevant information to the Council and that there have been errors in information provided to the Council, particularly that it was not entitled to appeal against the decision. This is unfortunate and I would urge the Board to ensure in future that all participating parties are given the same information and opportunity. However, in this instance, I do not consider that any procedural issues in communicating with the Council have caused any prejudice. Ultimately, the Council has been allowed to participate in the hearing on an equal footing to all other parties, it has had the opportunity to make submissions, ask questions of other parties and to make this appeal. As such, whilst I can appreciate the frustration of the Council that it considers that it has had to fight for that opportunity, ultimately, it has had the same opportunity as all other parties. I, therefore, consider any procedural defects not to be material and not to have caused any prejudice to the Council.
- 4.29 The second issue raised by the Second Appellant is that consideration has been given by the PPC to an anonymous letter which raises concerns in relation to the way in which the CAR was carried out. This is on the basis that the PPC decision at paragraph 9.1 notes that concerns were raised in relation to the conduct of the CAR, which included an anonymous letter.
- 4.30 Whilst the PPC's decision notes the existence of this letter it does not do so other than to note that the CAR process has been contentious given the significant volume of hard copy responses received compared to electronic responses. This is abundantly clear from the conduct of the hearing. As such, I consider that the PPC was entitled to note the existence of this controversy. The decision does not give any weight to the anonymous letter other than to note its existence.
- 4.31 The third issue raised by the Second Appellant is that the PPC has failed to properly explain its analysis of the issues with access to the existing pharmaceutical services and has instead focused on the lack of direct evidence of the issues being considered by the Council in the Council's minutes. The particular issue is that the decision of the PPC appears to recognise issues with poor transport connections and difficulty in accessing a GP practice but dismisses these issues so far as they relate to accessing pharmaceutical services on the basis of a lack of reference to these issues in the Council's minutes. In this regard, I consider that there has

been a failure by the PPC to properly explain their reasoning for concluding that any issues with access to the existing services do not result in the service being inadequate.

- 4.32 I should make clear that in reaching this conclusion I make no comment on whether or not any access issues to genuinely interfere with the provision of adequate services. It may well be that there are good reasons for the PPC to conclude that any access issues are not significant or have otherwise been addressed by alternative means. However, given that this is a significant element of the case for the application I consider that the PPC should set out its reasoning clearly in a way which does not give the impression that any issues have been dismissed as they did not appear regularly in the Council's minutes.
- 4.33 The final issue raised by the Council is that the PPC has drawn unsupported conclusions from the closure of a pharmacy within the neighbourhood some 25 years ago. I do not consider there to be any merit to this ground of appeal. The PPC simply noted that it was surprising that the previous pharmacy had closed and that this may indicate problems with viability. I do not consider it is unreasonable to flag that the closure of a previous pharmacy may be indicative of issues with viability. However, it is irrelevant as considerations of the viability of the proposed pharmacy would only be relevant if the PPC had concluded that the existing provision was inadequate. As it did not reach that conclusion it was not necessary for the PPC to consider the viability of the proposed pharmacy.

Disposal

- 5.1 For the reasons set out above, I shall remit the decision back to the PPC on two specific and narrow grounds. Those grounds are that the PPC has failed to adequately narrate the reasons for its decision in relation to its:
- 5.1.1 consideration of letters submitted in support of the application; and,
 - 5.1.2 explanation of the reasons why it concluded that any access issues did not prevent the existing services being considered adequate.
- 5.2 The issues which are of concern are set out in paragraphs 4.14 – 4.15 and 4.31 – 4.32 of this decision. I request that the PPC addresses these issues specifically and sets out its reasoning.
- 5.3 For the reasons set out above, I dismiss the remaining grounds of appeal on the basis that they disclose no reasonable grounds of appeal or are vexatious. In doing so I wish to note that my task in considering this appeal has not been assisted by the numerous and lengthy grounds of appeal stated, in particular by the Applicant. A number of the grounds of appeal are simply a list of grievances with the decision of the PPC, the conduct of the hearing or the conduct of the application by the Board. In some cases, the issues raised relate to the actions of third parties involved in the process and not the PPC or are wholly unsubstantiated accusations of bias.
- 5.4 Whilst I appreciate that the Applicant and the Council may well feel aggrieved and upset that matters have not gone their way, there are limited grounds on which an appeal may be presented and I would encourage all parties considering submitting an appeal to have regard to those grounds and to consider carefully whether concerns they have with the decision or process are substantial and have had a bearing on the outcome. In doing so, I would encourage potential appellants to have regard to the fact that the PPC is an expert tribunal and is entitled to reach conclusions which the appellant may disagree with. Appeals which set out as many grounds of appeal as possible in the hope that one will be successful are not to be encouraged.

(sgd) J Michael D Graham

Interim Chair

5th March 2020