

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

Old Monkton Primary School, Main Street, Monkton, KA9 2RH

Applicant: Sean Manson

Appellants: Boots UK Ltd, H & K Willis Ltd and Toll Pharmacy (referred to as “the Appellants”)

Health Board: NHS Ayrshire & Arran (“the Board”)

PPC Decision Issued: 23 November 2021

Panel case number: NAP102 (2022)

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 (“the PPC”) of the Board which was issued on 23 November 2021 in relation to the application of Sean Manson (“the Applicant”).
- 1.2. The application was made on 5 August 2021. The application was considered at a meeting of the PPC on 2 November 2021. The decision of the PPC was issued on 23 November 2021 approving the application.
- 1.3. Appeals were lodged against the decision of the PPC by the Appellants.

2. Grounds of Appeal

- 2.1. Three separate letters of appeal were sent by the Appellants, however, there is a degree of synergy in the grounds of appeal advanced. I, therefore, set out the grounds of appeal advanced by the Appellants. Each ground of appeal set out has been advanced by one or more Appellants. The grounds of appeal are as follows:
 - 2.1.1. that the PPC has failed to adequately set out its reasons for concluding that the existing service was inadequate, in this regard, it was noted that a similar application by the Applicant was refused in 2018 on the basis that the existing service was adequate;
 - 2.1.2. the PPC ought not to have taken into account speculative future development when considering the needs of the future population of the neighbourhood;
 - 2.1.3. the Community Council improperly sought to influence responses to the public consultation;
 - 2.1.4. the PPC ought not to have considered the ability of the proposed pharmacy to supply out-with the neighbourhood when considering its viability;
 - 2.1.5. the PPC ought not to have had regard to personal experience of difficulties in contacting existing pharmacies by telephone; and
 - 2.1.6. the PPC ought not to have had regard to additional information submitted by the Applicant which was not available to the Appellants at the hearing.

3. Decision

- 3.1. Under 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 of 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 appeals if I consider that they disclose no reasonable grounds or are otherwise is 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 in 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

4.1. Grounds of appeal 1

4.1.1. The first ground of appeal was stated by all of the Appellants. The Appellants stated in brief terms that they did not consider that the PPC had stated clearly the grounds upon which it had concluded that the existing services provided to the neighbourhood were inadequate. It is well understood that the PPC may only consider whether it is necessary or desirable to grant the application if it first concludes that the existing service is inadequate.

4.1.2. The PPC's reasoning in this regard is stated in paragraph 29.1 of its decision. The reasons are stated sufficiently briefly that I can quote them in full:

"...the Committee, for the reasons set out above, concluded that current provision to the neighbourhood was inadequate in terms of access"

4.1.3. From this it is clear that the PPC's decision in relation to inadequacy is based on issues around access only. No reliance is placed by the PPC on other issues. To understand the reasoning of the PPC regard should be made to its previous discussion around access.

4.1.4. The PPC's discussion of issues around access are contained in paragraph 28.3.4. In summary, the PPC highlights that although there is, on paper, a reasonably frequent bus service, in practice the bus service is unreliable. This is based on the CAR responses. In addition, although 81% of the residents of the neighbourhood had access to a car, parking at the pharmacies serving the neighbourhood was so challenging as to make this "almost irrelevant".

4.1.5. It is stated by the Appellants that there have been no material changes of circumstances since the consideration of the 2018 application to justify the PPC now reaching a different conclusion on the issue of adequacy. The situation before the PPC when considering the 2018 application was, it appears, very similar to the current situation. Indeed, it was noted by the PPC when considering the 2018 application that

- a) 81.3% of households had access to a car;
- b) there were difficulties with parking; and
- c) there was an adequate bus service

Having considered these issues in 2018 the PPC had concluded the existing service was adequate.

4.1.6. Each application must be considered on its own merits and a previous finding of adequacy, even a recent one, will not prevent the PPC from concluding that the current services are inadequate. However, in light of the proximity and similarities between the current and the earlier application, I consider it is incumbent upon the PPC to provide sufficiently clear reasoning as to why it has reached a different conclusion from its earlier decision. This does not necessarily require it to address its decision directly but does require its reasoning to be clearly understood.

- 4.1.7. In this regard, I take the view that the reasoning of the PPC is not sufficiently clear. In particular, I consider that the PPC has not clearly expressed the reason it concludes that issues around parking render the neighbourhoods relatively high access by cars to be almost irrelevant.
- 4.1.8. Parking in town centres (where pharmacies are routinely situated) will regularly be challenging. Challenges with parking were acknowledged in the previous decision of the PPC but were not considered sufficient to justify a conclusion that the existing services were inadequate. The situation regarding parking would have to be particularly severe in order to materially hinder access. The PPC does not address in any detail why the situation in relation to parking is so unusually severe as to justify the conclusion that the service, as a whole, is inadequate in this instance.
- 4.1.9. For these reasons I shall remit the application back to the PPC to more fully explain its reasoning as to why it concluded that the existing service is inadequate. In particular, I expect the PPC to set out clearly its reasoning including the evidence relied upon, as to why the issues with parking resulted in the conclusion that the existing services are inadequate.

4.2. Grounds of appeal 2-6

4.2.1. As I have reached this conclusion in relation to the first ground of appeal I am not required to consider the remaining grounds of appeal stated. However, in order to seek to avoid, so far as possible, any appeals in relation to the revised decision of the PPC I would make the following observations:

- a) In relation to ground of appeal 2, the Appellants state by reference to NHS Circular PCA(P)(7)(2011) (“the Circular”), that it would ordinarily only be appropriate to take into account known or fixed developments when considering the future population of the neighbourhood.

The Circular acts as guidance to all parties in relation to what it would normally be appropriate to consider. The Circular is however guidance only. It is not an exhaustive list of what may be considered by the PPC. Although in most situations speculative development is unlikely to be a relevant consideration, the PPC is free to consider wider developments if it considers that they are relevant to the application.

In this instance, the PPC had regard to a known development of 286 houses. In the context of an existing neighbourhood with a population of 1300 this is, on any view, a significant potential expansion of the population. The PPC also noted that future developments were in the pipeline and there was a trend of further expansion. This was, however, supplementary to the known development which was the principal consideration. I consider the approach of the PPC to be entirely reasonable in this regard and would have rejected this ground of appeal had I been required to consider it.

- b) In relation to ground of appeal 3, the Appellants state that the Community Council has sought to influence the response to the consultation by raising awareness of it in the community, encouraging responses and highlighting issues which it considers exist with the current service. The Community Council acts as a representative of the local community. If it considers that the grant of the application would benefit the local community, it seems entirely right and proper that it should engage with the local community to highlight the issues and encourage a response. It therefore strikes me that, rather than being a ground for complaint, this is almost precisely the role one would expect the Community Council to adopt.
- c) In relation to ground of appeal 4, the Appellants state the PPC has wrongly had regard to the ability of the Applicant to obtain business from outside the neighbourhood when considering viability.

When considering whether it is necessary or desirable to grant the application, the PPC is required to consider the viability of the application. Viability should be considered in two contexts

- (i) the viability of the proposed new pharmacy; and
- (ii) the impact of the proposed new pharmacy on the viability of the existing pharmacies

If the likely result of granting the application is that either the new pharmacy or that any of the existing pharmacies will not be viable it is unlikely that it will be desirable to grant the application. The extent to which the proposed pharmacy will be reliant on revenue generated out-with the neighbourhood will be a relevant factor in both contexts as it may indicate that the new pharmacy will struggle to support itself or it may have a negative impact on existing pharmacies. However, I do not consider the Appellants are correct in asserting that there is a black and white rule that prevents the PPC considering the ability of the proposed pharmacy to supply out-with the neighbourhood as a factor in its viability. The assessment of viability is a balancing act among a variety of competing interests, against the overall background of necessity and desirability. It is not amenable to black and white rules in relation to the approach to be adopted.

- d) In relation to ground of appeal 5, the Appellants are correct that the PPC should not have regard to their personal experiences of using the pharmacies providing the existing services. They should base their decision on the information and submissions made to them as part of the application process. However, in this instance, it does not appear that the ability to contact the existing pharmacies by telephone was a factor in the decision of the PPC. If I am correct in that this issue would be irrelevant. As the matter is already being referred back to the PPC as above, it would be of assistance if the PPC could clarify this point in their updated decision.
- e) In relation to ground of appeal 6, the PPC has provided a note to confirm that the documents which the Appellants consider were not provided to them were submitted by the Applicant in response to a request by the PPC that any additional documentation in which parties intended to rely on at the hearing were submitted in advance. As such, the papers were not part of the application papers but papers submitted for the purposes of the hearing.

I understand that it has, historically, become common practice that parties provided additional papers at the hearing. The practice requiring hearing papers to be submitted in advance was instituted to avoid substantial documentation being produced on the day. This practice is entirely sensible. However, I am of the view that it is appropriate that, if the additional paperwork is to be considered, it should be made available to all parties participating in the hearing in order that they may comment on it if they wish to do so. That said, as with ground of appeal 5 it does not appear that the PPC has placed any reliance on this documentation on reaching its decision. It has simply noted that it was considered. Again, if this is correct, I consider that this issue would be irrelevant but it would be of assistance if the PPC would clarify this point in its updated decision.

5. Disposal

- 5.1. For the reasons set out above, I consider that the appeals are successful in respect of ground of appeal 1. I shall therefore refer the matter back to the PPC to clarify its decision. In doing so, I should emphasise that I have not concluded that the PPC has reached the wrong conclusion. It is not my role to do so. However, when clarifying its decision, the PPC should not feel constrained by its original decision. If after further consideration, it reaches a different conclusion it is free to do so. Equally, as I have not concluded that its original decision was wrong, it is free to abide by its original decision but must simply express its reasons more fully and clearly.

- 5.2. When clarifying these elements of its decision, I would encourage the PPC to address the remaining grounds of appeal 5 and 6 in line with my comments above in order to minimise the prospects of any further appeals.

(sgd) J Michael D Graham
Interim Chair
National Appeal Panel
28th February 2022