

# 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**

**14 St Andrew Street, Stranraer, DG9 7EB**

**Applicant: Creebridge Mill Ltd (trading as Welcome Pharmacy)**

**Appellants: Gordon's Chemists, Boots UK Ltd and Lloyds Pharmacy Ltd (referred to as the "Appellants")**

**Health Board: NHS Dumfries & Galloway ("the Board")**

**PPC Decision Issued: 15 November 2021**

**Panel case number: NAP103 (2022)**

NAP 103 (2022) v0.1 FINAL

## **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 15 November 2021 in relation to the application of Creebridge Mill Ltd [trading as Welcome Pharmacy] (“the Applicant”).
- 1.2. The application was made on 11 June 2020. The application was considered at a meeting of the PPC on 28 October 2021. The decision of the PPC was issued on 15 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. Accordingly set out the grounds of appeal advanced by the Appellant collectively. 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 no site visit was carried out;
  - 2.1.2. That no consideration was given to the Pharmaceutical Care Plan;
  - 2.1.3. That the PPC has not adequately explained the significance that it has attributed to the findings of the Consultation Analysis Report (“CAR”);
  - 2.1.4. That the PPC has erred in Law in its approach to the assessment of whether it is necessary or desirable to grant the application in order to secure the adequate provision of pharmaceutical services in and to the neighbourhood;
  - 2.1.5. The PPC failed to consider the effect of granting the application on the viability of existing pharmacies;
  - 2.1.6. The PPC failed to properly explain its reasoning when considering submissions in relation to a stated unmet need within the neighbourhood;
  - 2.1.7. Potentially relevant new housing developments, the PPC failed to provide adequate reasoning in particular it failed to explain how any increase in population would impact upon the provision of services or to consider any development in the overall context of what is claimed to be a decreasing population in Dumfries & Galloway
  - 2.1.8. The PPC has failed to give adequate weight to the fact that there are no existing accessibility issues;
  - 2.1.9. The PPC has given undue weight to aspirational elements of the application (i.e. consultation rooms and tea/coffee making facilities etc.);
  - 2.1.10. The Appellants were not given sight of letters of support from an MSP and three Councillors and
  - 2.1.11. Planning permission and building works had not been granted for the proposed premises.

### **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 3, 4 and 6 above
  - 4.1.1. Grounds of appeal 3, 4 and 6 above raise separate issues but they are all directed at, what appear to me, the same overall failing in the decision of the PPC. That failing is that there is a lack of clarity in the decision of the PPC as to the basis on which it has concluded that the existing services provided to the neighbourhood are inadequate and, similarly, a lack of clarity as to the basis upon which the PPC has concluded that the grant of the present application will assist in securing the adequacy of service. This failing manifests itself both in there being a lack of clarity as to the reasoning behind the decision but also a lack of clarity as to whether the Legal Test has been applied correctly.
  - 4.1.2. The test which the PPC is required to apply by paragraph 5(10) of the regulations is whether it is necessary or desirable to grant the application in order to secure the adequate provision of services to the neighbourhood. This test must be applied in two discrete stages:
    - a) First, the PPC must consider whether the present services are inadequate
    - b) Second, if the PPC concludes that the existing services are inadequate the PPC must consider whether the application is necessary or desirable in order to secure the adequate provision of services in the neighbourhood.
  - 4.1.3. The PPC quite properly took legal advice on the correct approach to the Legal Test prior to it reaching its decision. However, the decision fails to address between the consideration of stage 1 of the test (i.e. whether the existing service is inadequate) and stage 2 of the test (i.e. whether it is necessary or desirable to grant the application). It is not clear whether this is as a result of an error in law or a failure of the PPC to explain the application of the law to the facts. In light of the legal advice received by the PPC during the course of the hearing my view is that it is most likely to be the latter.

- 4.1.4. In relation to the narration of the facts and reasons for the decision, it appears to me that the PPC has failed to clearly explain its rationale for concluding that the services are inadequate. It also appears to me that the PPC has failed to clearly explain the basis on which it has concluded that the grant of the application will resolve, or assist in resolving, these inadequacies.
- 4.1.5. In this regard there are two elements of the decision in particular which I consider are unclear:
- a) The PPC concludes that the CAR provides a clear indication that the population of the neighbourhood is of the view that the application should be granted to secure the adequate provision of services to the neighbourhood. It reaches this conclusion following a summary of the responses to some of the questions posed in the consultation. However, it does not address (1) the relatively low response rate to the CAR and how, given the level of response it considers it is able to draw the firm conclusions it did from the CAR; or (2) how its conclusion is consistent with the relatively lukewarm response to question 3 in the CAR which directly related to the inadequacy of the existing services placed on the CAR by the PPC I consider that this element of its decision is lacking and requires further explanation.
  - b) The PPC states that it noted the comprehensive presentation by the applicant, which addressed the age of the deprivation profile of the population, prescription volumes, update of services and the Applicant's assertion that there is unmet need in the neighbourhood. Having done so, the PPC states that it was persuaded that the existing service was inadequate. The PPC does not however explain why it was persuaded that the existing service was inadequate on this basis.
- 4.1.6. The assessment of inadequacy may, I accept, be difficult to place the precise threshold on. However, for the PPC's decision to be comprehensible it must be able to point to some specific failing or shortcoming of the existing service and explain why this is either individually sufficiently significant to justify the conclusion that the existing service is inadequate or why cumulatively a number of failings or shortcomings justify this conclusion. The decision of the PPC does not provide any explanation in this regard.
- 4.1.7. In light of these conclusions I am required to send the matter back to the PPC for further consideration and explanation of its decision.

#### 4.2. Grounds of appeal 1, 2, 5 & 7-11

- 4.2.1. As I have reached the conclusion on what I have designed as grounds of appeal 3, 4 and 6, I am not required to consider the remaining grounds of appeal stated. However, in order to seek to avoid so far as possible any further appeals in relation to the revised decision of the PPC I would make the following observations:
- a) It would assist parties in understanding the decision of the PPC if the PPC were to explain its reasoning more fully in relation to the issues identified in grounds of appeal 5 & 7.
  - b) With regards to grounds of appeal 9 and 11, it does not appear to me that these issues have played any significant part in the decision of the PPC and, as such, I do not think it is reasonable to criticise what weight the PPC has given, or not given to these issues; however, it may assist the Appellants if the PPC were to clarify the position in relation to these issues.
  - c) In relation to ground of appeal 10, it does not appear that any weight has been given to these letters of support and as a result I do not consider that this issue is of any practical relevance and
  - d) In relation to grounds of appeal 1, 2 & 8 respectively (1) there is no requirement for a site visit, (2) the PPC is only required to have regard to the Pharmaceutical Care

Plan, it is not required to address any specific elements of it and (3) the PPC is required to consider whether the existing services are inadequate, as such it is not required to address any elements of the existing service which may be said to be adequate. Had I been required to reach a conclusion on any of these grounds of appeal I would have concluded that they had no prospects of success and dismissed the appeal.

## **5. Disposal**

- 5.1. For the reasons set out above I consider that the appeals are successful in respect of grounds of appeal 3, 4 & 6. I shall therefore refer the matter back to the PPC to clarify its decision and revise it. In doing so, I should emphasise that I have not concluded that the PPC has reached the wrong decision. 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've not concluded that its original decision was wrong, it is free to abide by its original decision but it must simply express its reasons more fully and clearly.
- 5.2. In clarifying these elements of its decision, I would encourage the PPC to address the remaining grounds of appeal in line with my comments above in order to minimise the prospects of any further appeals.

(sgd) J M D Graham  
Interim Chair  
National Appeal Panel  
22 February 2022