

# 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**

**Saline Community Centre, 13 Main Street, Saline, Fife, KY12 9TL**

**Applicant and First Named Appellant: Lisa Duncan**

**The Second Named Appellant: Saline and Steelend Community Council**

**Health Board: NHS Fife ("the Board")**

**Hearing Held: 18 March 2022**

**PPC Decision Issued to Chair: 11 May 2022**

**Panel case number: NAP107 (2022)**

**NAP107 (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 followed upon a meeting of the PPC on 18 March 2022 in relation to the application of Lisa Duncan (“the Applicant” or “the first named Appellant”) in connection with subjects at Saline Community Centre , 13 ,Main Street ,Saline , Fife ( ‘the Premises’).
- 1.2. The Applicant lodged an application to be included in the Board’s pharmaceutical list on 23 October 2019 and, as stated ,the application was considered by the PPC on 18 March 2022 and a decision by them was issued refusing the application on the basis that the existing provision of pharmaceutical services to and within the neighbourhood were adequate.
- 1.2. Appeals were lodged against the decision of the PPC by both Appellants .

### 2. Grounds of appeal

- 2.1. The First named Appellant was of the view that the PPC ought not to have considered the letter from the Director of Pharmacy as, being an officer of the Board, this represented a conflict of interest. (**Ground 1’**)
- 2.2. There are certain aspects of the Second named Appellants’ grounds of appeal that suggest disappointment at the PPC’s decision which is not of itself a sufficient ground and there are other aspects that are not expressed with pellucid clarity . Nevertheless I will paraphrase as best I can what I understand to be the second named Appellants’ grounds of appeal:
  - 2.2.1. Both the contractor pharmacist and a lay member of the PPC had misunderstood the definition of ‘neighbourhood ’ as expressed by Lord Nimmo-Smith in the oft-quoted Boots case ;further another lay member had incorrectly taken the view that “neighbourhood” would impact on the viability of the proposed neighbourhood (*sic*); it was the Appellants understanding that “neighbourhood” as opposed to “catchment area” does not affect viability. (**Ground 2’**)
  - 2.2.2. The Chair of the PPC in discussion with other members of the PPC had initially considered the neighbourhood was Saline (**Ground 3’**)
  - 2.2.3. The Chair in discussion had reservations about viability but no evidence had been provided and thus “could have influenced his subsequent decision” (**Ground 4’**)
  - 2.2.4. A lay member had mentioned that 1500 dwellings would be moving to the neighbourhood but a pharmacy member had stated that it could only consider the current situation whereas in fact the PPC could consider future developments (**Ground 5’**)
  - 2.2.5. A Pharmacist member was incorrect in stating that the PPC required to answer the question as to whether Fife Health Board had sufficient capacity to support a pharmaceutical service to that part of Fife. (**Ground 6’**)
  - 2.2.6. The PPC was wrong in stating that the Applicant had given evidence to the effect that 3000 prescriptions would transfer to the new pharmacy and thus the Applicant had been misquoted (**Ground 7’**)
  - 2.2.7. No reason was given to reject the Application.(**Ground 8’**)

### **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 notices 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 Grounds of Appeal**

#### **4.1 Ground 1 .**

To my recollection I have not experienced a communication from a Board's Director of Pharmacy indicating opposition to an Application. In terms of paragraph 3(1) (d) of Schedule 3 of the Regulations a 'Board shall have regard to any information available to [it] which, in its opinion, is relevant to consideration of the application 'This does on the face of it give the Board a very wide discretion. However this communication (an internal email) from the Director of Pharmacy which was published to members of the PPC indicates, albeit on limited information, that he could ' not support the application at this time'. Nevertheless it was sufficiently clear that the Director was opposed to this application. The PPC is an independent body which is charged with the responsibility of coming to a decision on behalf of the Board on the evidence before it but it has in its possession this email from its Director of Pharmacy. The PPC makes reference to the Director's views in the course of its discussions. The Director is an employee and officer of the Board and therein lies at the very least a perception of bias and in my opinion the PPC could not be other than influenced by his views. In the circumstances I regard this as a procedural irregularity and accordingly sustain this ground of appeal. In view of what I state and direct in my Disposal below whilst it is not necessary for me to comment on the other grounds of appeal I propose to do so by way of assistance to the current and future members of the PPC.

#### **4.2 General Comments on Second Appellants Grounds of Appeal**

- 4.2.1 The object of the scheme under which the Regulations apply are set out in section 27 of the National Health Service act 1978 which is intended to ensure that everyone has ready access to prescribed drugs and medicines and that the Regulations must be looked at in that light .The particular Regulation which underpins the PPC's responsibilities is Regulation 5(10) .Whilst its terms seem to impose a restriction upon the number of pharmacies that might be permitted to operate in a particular area and thus establish a potentially anti-competitive regime , it must be assumed that this

is not the intention of the Regulations. Rather they are designed to pursue the object of the scheme set out in section 27 albeit that such pursuit may result in one pharmacy not being permitted to operate if the effect of that operation is to either undermine an adequacy of provision to persons in its vicinity ( 'viability') or if the current provision to a defined neighbourhood is currently adequate and accordingly it is neither necessary or indeed desirable to grant an application to operate a pharmacy .This is primarily a matter of facts and circumstances more suited to resolution by a committee of the type established under the Regulations rather than through a rigorous and detailed legal or linguistic analysis. As has been stated many times to Appellants in the past – the PPC is an expert Tribunal and must be afforded a reasonable degree of deference in its decisions unless it is clear that the PPC has misdirected itself on any crucial issue.

- 4.2.2 The National Appeal Panel requires to resolve a number of questions including : has the PPC taken into account an irrelevant consideration or ignored a relevant one ? Has it reached a decision on any aspect of the appeal which no reasonable panel could have reached? Has the PPC committed any errors in these respect? Did the panel carefully define the boundaries of the neighbourhood in a manner which reflected the submissions made? Has the PPC discussed the critical question of adequacy? Has it produced a reasoned decision as to why it has decided as it has? There are numerous adminicles of evidence which play a part in a PPC coming to a decision including written and oral presentations, maps, documents, site visits etc. As stated, addressing adequacy is a question of fact for the PPC to resolve rather than one which can be determined purely on legal reasoning ; it must consider what is meant by adequacy necessity and desirability in securing that adequacy ; it must have in mind not a protection of existing pharmacies or of preserving a particular pharmacy's established trade but the object of the rule set out in section 27 to secure the adequacy of provision to persons in the relevant area. If adequate provision exists in a neighbourhood no new pharmacies may be permitted and the panel has to consider whether there has been sufficient evidence to establish that. Whilst there appears on the face of it sufficient evidence to justify the view that there is a current adequacy of provision in this case and that was the view of the majority yet such was not the view of the dissenting members of the PPC. The PPC is the master of the facts in this particular and it has taken a decision that there is a sufficient adequacy however its reasons are not at all clear.
- 4.2.3 Mention was made of the contractor pharmacist having taken the view, not accepted by the other members, that following Lord Nimmo Smith's decision that only Saline should be considered as the neighbourhood. This, I believe, is a misunderstanding of Lord Nimmo-Smith's Opinion when applied to the current case and, if taken to its logical conclusion, 'neighbourhood' could be the address of the premises itself. I am grateful to the contribution of the representative of Dears Pharmacy who made reference to the Northern Irish case in relation to an appeal involving a branch of Boots in Bangor and particularly the Opinion of Lord Carswell who set out with simple clarity what the PPC should consider in addressing the concept of neighbourhood .The fact that this is a Northern Irish case is irrelevant as the Regulations are quite obviously similar and may offer guidance to a PPC . What has to be clearly understood by a PPC is that there is no single measure that may be used as a determinant as long as it has been argued, discussed and justified. I consider that the PPC has sufficiently dealt with this aspect of the decision and has provided adequate reasons for its definition of neighbourhood.
- 4.2.4 As to viability (to which I have referred above) a possible reduction in income by an existing pharmacy caused by the opening of an additional pharmacy is not of itself a relevant consideration unless it could affect the continued viability of other pharmacies serving the neighbourhood and thus affecting the security of the adequate provision of pharmaceutical services. It is not for the PPC to demonstrate

the viability of a proposed pharmacy; that is simply one factor and not necessarily a determining factor that the PPC must consider when assessing whether it is necessary or desirable to grant the application.

- 4.2.5 I have to say in passing that the second named Appellants have used phrases to suggest that a member's view "has undoubtedly affected the decision" and "which would have undoubtedly influenced [members'] decision"; the second named Appellants should not make such wild assumptions it being a matter for each member of the PPC to weigh up the evidence as they see fit in coming to their decision. As I have stated above the PPC is an expert Tribunal and is expected to understand the issues put before them.
- 4.2.6 In coming to a decision it is perfectly proper and unchallengeable for a panel to discuss the issues before them and whereas initially a member may take one view as to the extent of the neighbourhood or other factors leading to a decision, such discussion is merely that and each member may be sufficiently persuaded to adopt another view prior to reaching a decision. There is, accordingly, no merit in grounds of appeal 3 & 4 and which I would have rejected.
- 4.2.7 On my reading of the Minutes of the Meeting of the PPC a member was quoted as stating that Mr Chisholm of the Community Council had suggested that 1500 people would be moving into the neighbourhood and that the PPC could only consider the current situation I can find no evidence of Mr Chisholm having stated such in his submission. The Community Council had identified a site that 'could accommodate' 40 affordable homes. Mr Chisholm had mentioned 55 affordable homes had been completed some years before and that there were an additional 75 private homes already built. The Applicant had mentioned a figure of 150 new homes but without evidence of their situation or, indeed, their certainty. It is unlikely but is not known whether and to what extent the evidence regarding new housing (if it be such) had any effect in the decision making process of the PPC.
- 4.2.8 The Contractor Pharmacist was incorrect in advising the PPC that the question that the Committee had to answer was whether or not NHS Fife currently has sufficient capacity to provide a Pharmaceutical service in the neighbourhood. I agree with the comments of the Second named Appellants in this regard. It is the Legal Test embodied in Regulation 5(10) and to which I have made more detailed comment above which requires to be applied. It is not clear whether these remarks had any influence on the members of the PPC but it would have been helpful were the PPC to have clarified this point.
- 4.2.9 A member of the Panel had asked the Applicant during the course of the hearing, whether 2000 was the minimum population and 3000 prescription items was what she would need in order to make a new pharmacy viable; the applicant had confirmed that this was correct and reported that she had used the comparison figure of 1800 population which previously was the figure used for the Essential Small Pharmacy scheme which no longer exists and that the applicant further stated that an average pharmacy could prescribe between 4000-6000 items per month whereas Oakley ( Dears Pharmacy ) dispenses between 11,000 and 12,000 . She did not consider that if her Pharmacy acquired all 3000 items that it would affect the viability of the Oakley

Pharmacy. It is not clear what the PPC's view was in relation to this evidence and it should have set these out.

4.2.10 The Decision was lacking in clarity in that there were no reasons given for its considering that the current provision was adequate. To state that the existing service was adequate 'for the reasons set out above' is regrettably not sufficient. Anyone reading the Decision would find a number of reasons both for and against the application in the various statements 'above' by individual members of the PPC. It was clear that there were some shared concerns regarding the adequacy of the existing services but these were never effectively articulated and that it was evident that there was some disagreement among the voting members whether the threshold of adequacy had been achieved. On the other hand on the casting vote of the Chair it was considered that the current service was adequate. One voting member had felt that the current service was 'marginally inadequate'. It has to be emphasised that there is no such concept. Either a service is adequate or inadequate. If the PPC decides that the service is adequate that is the end of the matter and it sets out its reasons for so deciding. If the PPC considers the existing service is inadequate it requires to then consider whether the application is either necessary or desirable in order to secure adequate provision of Pharmaceutical Services in the future. In the circumstances I would have sustained ground of appeal 8.

## **5 Disposal**

5.1 For the reasons set out in my response to Ground 1 as the process in decision making has been tainted by the perception of bias, I shall require the application to be considered of new by a freshly constituted Panel.

## **6.**

6.1 I fully accept and appreciate that it is deeply irritating for the Board to be required to address a decision again especially so when so many members of the PPC are giving of their own time and that the Regulations which they require to consider can occasionally be opaque and difficult to comprehend. It had been intended to provide an updated refresher course prior to the pandemic which was performance shelved. It is hoped that one may be rescheduled soon.

J Michael D Graham

Interim Chair

16<sup>th</sup> August 2022