

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

63 Laighstonehall Road, Hamilton, South Lanarkshire, ML3 8PD

Applicants and Appellants:	Mrs Khuram Akram and Mubashar Khan t/a Mint Pharmacy
Pharmacy Practices Committee:	NHS Lanarkshire
PPC Decision Issued:	25th November 2013
Panel Case Number:	37 (2013)

Decision of the Chairman of the National Appeal Panel

1. Background

- 1.1 Mint Pharmacy (a partnership), 58 Burnbrae Road, Bonnyrigg, Midlothian, EH19 3FS ("the Appellants" or "the Applicants") made an application for inclusion in the Pharmaceutical List of NHS Lanarkshire ("the Board") to provide pharmaceutical services in respect of premises at 63 Laighstonehall Road, Hamilton, ML3 8PD and which application was dated 18th July 2013.
- 1.2 The Pharmacy Practices Committee of the Board ("the PPC") convened on the 6th November 2013 in order to determine the Application and following upon which they issued their Decision refusing the Application on 25th November 2013.

2. Grounds of Appeal

- 2.1 The Appellants have appealed following upon the Decision of the Board by letter dated 12th December 2013 and the grounds may be usefully summarised as follows:

- 2.1.1 The PPC did not fully consider the issue of neighbourhood in that they chose to include surrounding areas for which there was no supporting evidence, considering, as they did, "the flow of people and traffic" and it had failed to include areas which evidence had been supplied for such flow. In particular the PPC had stated that "...the entire length of Earnock Burn was not used as Woodford and Wellhall Roads were defined as part of the neighbourhood due to the flow of people and traffic" and viewed Earnock to the north and Woodhill Green to the south as separate communities. The Appellant expressed concern that the evidence adduced by them was not fully acknowledged by the PPC.
- 2.1.2 The PPC in determining the neighbourhood stated that it contained three primary schools, a community facility, a lifestyle centre and a Phillips factory. However, it was the Appellant's contention that the lifestyle centre fell outwith the PPC's defined neighbourhood being based south of the "unnamed burn" on Neilsland Road. For the PPC to include the Phillips factory was puzzling as the Earnock Burn had been used as a western boundary, a denser natural barrier existing eastward at Woodford Road along the Earnock Burn.
- 2.1.3 The PPC had estimated the population to be around the 6,000 figure for its defined neighbourhood, whereas the population was 5,000 for the Appellant's initially proposed neighbourhood. It was their evidence that there was no foreseeable development in the Appellant's proposed neighbourhood and the figures had clearly shown that it had increased in population and that there would be an increased burden upon current contractors.
- 2.1.4 The PPC had found that there were no pharmacies within the neighbourhood as defined by them and that many of the existing pharmacies were within walking distance of GP services and major food and other retail outlets. The Appellants state that the PPC failed to acknowledge the evidence in relation to access being difficult for the population of their proposed neighbourhood.
- 2.1.5 The PPC failed to acknowledge the evidence that the Appellants' proposed neighbourhood would cater for both income and health deprived members of the population and that current contractors were not providing an adequate service in their neighbourhood and that a typical journey would be a lengthy minimum of 1.5 hours to the town centre which created access problems.
- 2.1.6 The PPC considered that the majority feedback received seemed to be more about convenience than adequacy of services. The Appellants reject this considering that in the majority of feedback was a message of necessity and lack of provision in their area.
- 2.1.7 The PPC overlooked the evidence provided in relation to walkable access to pharmacies, claiming that this would be on long, partially lit, non built up areas and not along the routes best supported by crossings but rather busy roads and roundabouts.

Photographic evidence of such was presented to the PPC. This did not sit comfortably with the PPC's comment (at 9.3.7) that "existing services could be deemed adequate as they provide a breadth and range of NHS contract services in line with contemporary standards and were easily accessible and available to the residents... including vulnerable members..." The Appellants claimed the PPC to have been wrong to neglect the evidence of the income deprivation and the lack of access by vulnerable patients.

2.1.8 The Appellants make reference to the Schedule 4 of the Regulations, in particular, Paragraph 6(1) that "all members present" shall consider an application and in considering would discuss and scrutinise such an application. The Appellants feel that a decision had already been taken by the entire panel rather than just those entitled to vote. In particular the Appellant's make reference to Paragraph 9.3.7 that in "weighing up the differing views on the evidence provided and presented during the Hearing, the Committee agreed that the existing services could be deemed adequate". This then stated that the PPC had already "agreed" on a decision before the non-voting members had withdrawn from the Panel for voting to take place. The Panel had not "discussed and considered" rather it had taken a "decision".

2.1.9 Pharmacy applications have been granted in respect of premises which are nearer neighbouring pharmacies than the premises which was subject to the current application.

3. The Evidence of the Parties

3.1 The evidence of Mr M Khan on behalf of Mint Pharmacy may be summarised as follows:

3.1.1 Mr Khan indicated that his neighbourhood could be described as follows:- To the north: Earnock Burn from west to east crossing between Wellhall Road and Chantinghall Road. To the east – Chantinghall Road from Wellhall Road to the green woodland area at Millgate Road and to the west – Muttonhall Road between the two strips of green woodland to the south – around Fairhill and Woodhead but the entire locality to the south is such a large area that he found it difficult to determine at what point the neighbourhood boundary could be identified. His initial proposed neighbourhood was the southern boundary as being green woodland strip from the cross over at Chantinghall Road and Millgate Road towards the west until it met Muttonhall Road. In the neighbourhood envisaged by this latter boundary there were three primary schools but in the extended neighbourhood encompassed the larger area to incorporate a fourth primary school in Woodhead. If the larger area was accepted there were many facilities including convenience stores, Indian takeaway, hairdressers, coffee sandwich shop, community centre, library and other facilities. He made reference to further regions in which there were approximately 11,000 residents. These are bound by the centralised amenities with the direction of daily travel being into the locality of the proposed site.

3.1.2 He made reference to the demographics of the area. Further, the areas around Fairhill, Lower Woodhead and Lighthstonehall fall into the 0-20% quintile of health deprivation whereas the surrounding areas vary in deprivation in the 20-40% quintiles and as to income it ranks in the lower quintile than the surrounding areas. An extensive survey was carried out by the Applicants who met with the Parents Council head at St Peters Primary School and some residents had some concerns about the affect of methadone supervision on the premises but generally there was support for the application. During the year, the Applicants effected leaflet drops and encouraged feedback which they believed gave a better representation of how residents feel.

3.1.3 He stated that there were no pharmaceutical services providers within the initial proposed neighbourhood and within the extended regions of Lighthstonehall, Little Earnock, Fairhill and Woodhead and people required to travel 22 minutes to the nearest pharmacy by walking. Bus intervals are every 30 minutes. A typical roundtrip would be at least 1.5 hours to the town centre with a £3 return fair. The two nearest pharmacies are on Hillhouse Road (Boots) and off Mill Road at Lower Waters (Boots). There is an obvious geographic barrier between the areas and the route lacks pedestrian crossings at busy roundabouts. Residents would travel to the amenities

- more likely in the town centre or in Oakland Place.
- 3.1.4 He took the view that the services being provided into the area were not adequate. There were numerous pharmacies catering into the neighbourhood however, the approach on which patients get delivery and those which do not, made it difficult for those patients who are unwell with young children and less mobile. There was a two month waiting list for MDS trays. Parking in the town centre is difficult, patients would require to pay for parking. There is free parking further down the town centres but patients would require to walk back to the old part of the town where the pharmacies are situated.
- 3.1.5 Mr Khan's position was that the Application would secure adequacy, especially so that the neighbourhood indicated the highest possible quintile in health deprivation. A pharmacy would provide all services available including free collection and delivery, EMAS, CMS, compliancy etc.
- 3.1.6 The southern portion of Hamilton has a considerable population of approximately 16,000. New homes were being built which will increase the population. Existing pharmacies are extremely busy. Access to other pharmacies is not appropriate and in the circumstances it would be necessary and desirable to grant the application to secure adequate provision in the neighbourhood.
- 3.1.7 In response to questions the Applicant stated that whilst there is no specific mention of data zones in the application as there were seven data zones covering the area he estimated the population as being around 5,900. He confirmed that the facilities within the neighbourhood would be a gym, library, community centre, two churches, two large stores, a takeaway hairdressers, betting shop, Post Office and four primary schools albeit the Post Office would be on one of the boundaries. The Applicant stated that they felt that the residents of Virginia Grove would be considered neighbours of those in Penbury Crescent. The Applicants acknowledged that responses to leaflets dropped came from a small area of the neighbourhood concentrated around the site of the proposed pharmacy as there had been only one leaflet drop in that area.
- 3.1.8 The Applicants did acknowledge during the course of the Hearing that there had been some confusion regarding the proposed neighbourhood which appeared to have altered from the original application and they were prepared to stick to the proposed neighbourhood as determined in the original application which identified the southern boundary as being the green woodland strip from the cross over at Chantinghall Road at Millgate Road towards the west to Muttonhall Road.
- 3.1.9 The Appellants further explained the northern and southern boundaries that Earnock Burn was a physical boundary with no walkway into Earnock Gardens and that Wellhall Road was not used as there was a large factory located there and that the tree barrier was sufficient as it was a bigger boundary. The Applicants acknowledged that the bus journey to the town centre was ten minutes but that the round trip including walking time from the far end of Highstonehall Avenue and waiting for prescriptions would take 1.5 hours, which he did not regard as adequate.
- 3.1.10 It was suggested to the Applicants that the responses received from the public notice and surveys were more about convenience than adequacy of pharmacy services to which the Applicants responded that there was a patient focused approach to care in their pharmacies and the impact of a pharmacy on health was not always realised by the community. There was considerable health deprivation in the neighbourhood.
- 3.1.11 The Applicants accepted that all other pharmacies are located near the surgeries but did not consider that this would affect the viability of the proposed pharmacy as there was a sufficient population in the neighbourhood to render it viable in that income would come from repeat prescriptions and patients who wish to avoid waiting at pharmacies closest to the surgeries and general businesses. The Applicants further acknowledged that further developments were currently being built in Hamilton although not in the proposed neighbourhood.

3.2 The evidence of Mr N Wicks on behalf of WEB Pharmacy may be summarised as follows:-

- 3.2.1 He identified the more appropriate neighbourhood to be:- on the west Earnock Road leading into Wellhall Road running west to the east to Union Street. To the north – Chantinghall Road and Mill Road running along until it meets the A723 (Strathaven Road, Low Waters Road). To the east: the A723, Strathaven Road. To the south: the boundary of the neighbourhoods are the fields that run along the southern edge from the A723 to Earnock Road. He considered that the Applicants' neighbourhood could not be considered a neighbourhood for all purposes in that it encompassed different areas such as Chantinghall, Laighstonehall and Earnock. The population within the Applicant's proposed neighbourhood would not stay within it in order to conduct the daily fabric of their lives. There are few facilities within the Applicants' neighbourhood and people within it are already making journeys to access facilities such as Post Office, banks and their GP. Whilst difficult to determine a precise population he considered the population to be less than 5,000.
- 3.2.2 The neighbourhood defined by him has one pharmacy located within it (Boots – Mill Road) and a further one on its boundary at Wellhall Road. His pharmacy deliver prescriptions from various surgeries across Hamilton into the neighbourhood as well as looking after a number of MDS tray patients from their bespoke MDS facility located in the upstairs of the pharmacy at Brandon Street. This facility has further available capacity. There are a further six pharmacies within a one mile radius of the proposed location making eight in total within a short distance. All pharmacies are easily accessible by car and public transport. There are a multitude of bus services in the area, many of which run into Hamilton town centre four or five times an hour. There is a service which leaves from Laighstonehall Road five times an hour and takes fourteen minutes to get into central Hamilton.
- 3.2.3 The streets in the area are well lit making accessing the pharmacies outwith the neighbourhood a relatively short walk, which, in any case, would be under 15 minutes. Those living near the south eastern boundary of the Applicants neighbourhood would have a longer walk (and subsequent journey time) to reach the proposed premises and then they would access the existing pharmacy at Hillhouse Road. There have been no complaints to the Health Board regarding the existing pharmacy provision and insofar as waiting times are concerned, the average waiting time in his pharmacy is approximately ten minutes. He regarded the population within the neighbourhood as defined by him as being just under 10,000. He also stated that should the application be granted he considered the impact of losing 10% of prescriptions as well as MDS trays as substantial.
- 3.3 The evidence of Mr Tom Arnott of Lloyds Pharmacy Limited may be summarised as follows:-
- 3.3.1 Mr Arnott took issue with the Applicants' argument that as there were no pharmaceutical services provided in their definition of neighbourhood, the current pharmaceutical services were thereby inadequate. The definition of the Applicants' neighbourhood was confusing in that the northern boundary was delineated by Earnock Burn whereas the southern boundary is not delineated by an existing burn which runs from Cameron Crescent virtually all the way to Muttonhall Road. He regarded the proposed premises as not being in the centre of the neighbourhood with two convenience stores, two takeaways and a hairdressers. There was no Post Office and no bank. The impression given was that the neighbourhood was defined with the sole intention of excluding existing pharmacies and that there were in fact four pharmacies within one mile of the proposed premises (two of which were within 0.6 miles).
- 3.3.2 The Applicant stated that there are 5,000 in the proposed neighbourhood but only 77 responses 13 of which showed no address and 3 from outwith the neighbourhood. He considered the population estimate of 5,000 to be excessive. He reminded the PPC that the Area Pharmaceutical Committee did not support the Application as they considered the existing services as adequate.
- 3.3.3 Mr Arnott stated that the neighbourhood as defined by him would be the town of Hamilton as everyone within the proposed neighbourhood would be accessing services all over Hamilton.

3.4 The evidence of Mr C Tait of Boots UK Limited may be summarised as follows:-

- 3.4.1 Mr Tait believed the neighbourhood difficult to define and the distances from other pharmacies rendered them reasonably accessible. The proposed premises to Boots Burnbank the distance was 0.8 miles, to Boots Mill Road 0.8 miles and to Boots Hillhouse Road 0.5 miles. The journey times on foot took between ten and fifteen minutes. The time to travel by bus from the proposed site to Hamilton town centre was eight minutes and buses ran this route every 30 minutes.
- 3.4.2 The feedback of the services was generally very good. His view was that however the neighbourhood was defined there had been no evidence of inadequacy. Mr Tait stated that schools catchment areas were not very useful to assist in defining a neighbourhood as this only indicated where children went to school. He was unable to define a neighbourhood. He considered that the waiting time at all Boots pharmacies under ten minutes and he had no evidence to support the Applicants' assertion that patients would require to wait up to 45 minutes for a prescription.

4. The PPC's Decision

- 4.1 When coming into its Decision the PPC had taken into account inter alia the oral evidence of the parties, the papers submitted by them or on their behalf and the location of the proposed pharmacy and demographic information and all other matters referred to in paragraph 8 of the Minutes of the Hearing.
- 4.2 As to the definition of **neighbourhood** the PPC considered that a number of factors were taken into account including those resident in it, natural and physical boundaries, general amenities such as schools/shopping areas, the distance that residents required to travel to obtain pharmaceutical services as also the availability of public transport. The PPC considered that the burns to be good natural boundaries but they did not consider the entire length of Earnock Burn to be appropriate as Woodfoot and Wellhall Roads were defined as part of the neighbourhood due to the flow of people and traffic. The burn at the western boundary was used instead of Highstonehall Road/Charing Drive, in order to include Skye Wynd, Coll Lea and Tiree Grange in the neighbourhood. The PPC viewed Earnock to the north and Woodhill to the south as separate communities.
- 4.3 The PPC's neighbourhood contained three primary schools, a new community facility, South Lanarkshire Lifestyle Centre and the Phillips factory. There was also a Post Office on the boundary. The neighbourhood was therefore defined as follows:
- To the north – Earnock Burn to Woodfoot Road and then Wellhall Road to the junction of Chantinghall Road.
- To the east – Chantinghall Road following an unnamed burn south from Chantinghall Bridge.
- To the south – the unnamed burn through Neilsland Park to Muttonhall Road.
- To the west – the tributary of Earnock Burn across the Kennedies.
- 4.4 The PPC thereafter considered the question of **adequacy** and in particular the adequacy of existing pharmaceutical services in (and to) the neighbourhood and whether the granting of the application was necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood. In doing so, the PPC accepted the Applicants' population of 5,000 in the smaller original neighbourhood proposed by them and estimated a population as defined by it to be 6,000 and took the view that the resident population was unlikely to increase in the foreseeable future. Whilst there were no contracted pharmacies within the neighbourhood it was acknowledged that there were twelve pharmacies (5 Lloyds, 6 Boots and 1 WEB) which were within reasonable proximity, readily accessible by public and private transport and currently provided services to the neighbourhood. Many of these were within walking distance of GP services, major food and other retail outlets and all provided a whole range of pharmaceutical services and none of the existing pharmacies had any capacity issues.

- 4.5 Whilst the PPC recognised that parts of the neighbourhood were areas of high deprivation they considered how a level of deprivation could be linked to adequacy. Pharmacists were being encouraged to be more involved with patients in providing minor ailment services. There was no evidence of any transport problem at the neighbourhood that would prevent residents accessing such services at existing pharmacies.
- 4.6 It was noted by the PPC that the responses to the public notice and survey could be identified as coming from one particular area and concentrated around the site of the proposed pharmacy (e.g. Stonehall Road, Laightstonehall Road, Neilsland Road) and that the majority of these appeared to be more concerned with convenience than adequacy of services. In the circumstances and weighing up the differing views of the evidence provided and presented, the PPC agreed that the existing services could be deemed adequate as they provided a breadth and range of NHS contract services in line with contemporary standards and easily accessible and available to the residents of the neighbourhood including vulnerable members of the community.
- 4.7 On the retiral of the non voting members, it was the Decision of the PPC that the provision of pharmaceutical services at the premises was neither necessary nor desirable in order to secure adequate provision of pharmaceutical services within the neighbourhood in which the premises were located by persons whose names were included in the pharmaceutical list and in the circumstances the application was rejected.

5. Discussion and Reasons for Decision

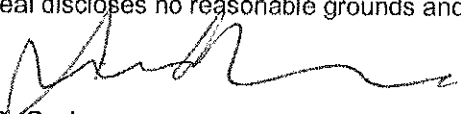
- 5.1 The Board is required by statute to effect arrangements in its area for the supply of proper and sufficient drugs and medicines and that these functions are carried out by pharmacists who require to make an application to the Board for such purpose, after which the Board may grant any such application 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 pharmaceuticals in that neighbourhood by a person whose name is included in the Pharmaceutical List. In doing so the Board must have regard to the pharmaceutical services already provided in the neighbourhood of the premises named in the Application and any information available to the Board which, in its opinion, is relevant to the consideration of the Application. Thereafter the Board may determine any application in such manner as it thinks fit and may hear oral representations at a hearing, as it has done in the current circumstances.
- 5.2 The Board delegates its powers to determine any such application to its PPC and in the event that a party is aggrieved by a PPC's determination it may appeal to the National Appeal Panel on grounds limited to areas where the PPC has erred in law in its application of the provision of the Regulations, that there has been a procedural defect or been a failure by the PPC to properly narrate the facts and reasons upon which the Determination of the Application was based or otherwise failed to explain its application to the facts.
- 5.3 The PPC is entitled to make a value judgment on both the issues of neighbourhood and adequacy which are the principal pillars upon which an application rests and in doing so they must effect a decision which is intelligible and adequate addressing the principal important controversial issues disclosing how these have been resolved. There is no need to go into every adminicle of evidence but the Decision must be understood by the parties to whom it is addressed, those parties being aware of the issues involved and the arguments narrated. A party has to be substantially prejudiced by the failure on the part of the PPC to provide an adequately reasoned decision.
- 5.4 The Appellants state that they had demonstrated by their evidence that the Fairhill and Woodhead areas had a good flow of people several times a day due to the usual local amenities being in their initially proposed neighbourhood and that the PPC had failed to acknowledge their evidence where it was inconsistent with its decision. The Appellants state that the neighbourhood proposed by the Committee contained inter alia the Phillips factory and the new community facility South Lanarkshire Lifestyle Centre. They state that the centre is south of the unnamed burn on Neilsland Road and that the Phillips factory falls beyond the western boundary as defined by the PPC. I have no way of knowing whether the former averment is correct but it would certainly appear that the Phillips factory does fall outwith the definition of the PPC's neighbourhood. Whilst careless, I do not consider that it drives to the root of or compromises the Decision. In neither of these facilities are there are resident

populations and otherwise in the Decision little importance was given to them nor upsets the general principal upon which the Decision was based.

- 5.5 There was a difference between the Appellants and the PPC as regards the figure for the population in that whilst the PPC was prepared to accept a population figure of 5,000 in respect of the Appellants' initial neighbourhood their estimate of 6,000 of the marginally enlarged neighbourhood is, in my view, not material. The PPC were entitled to draw on all the evidence they had before them and not just that of the Appellants. All parties had the opportunity of presenting their case and to question each Interested Party on their submissions. In addition, the PPC are obliged to have regard to the pharmaceutical services already provided in the neighbourhood, not only the proposed services but the existing services outwith the neighbourhood and serving the neighbourhood as also any representations made to it including that of the Area Pharmaceutical Committee and, as mentioned above, any information available to it which, in its opinion, is relevant to the consideration of the Application. It also considered that whereas the Appellants' defined neighbourhood was in an area of high deprivation it concluded that the existing pharmacy providers adequately served that neighbourhood, regardless of the Appellants' belief that the existing contractors were not providing an adequate service. The PPC did have evidence in relation to transport and, clearly that was a consideration in their minds in reaching their decision. As to the issue of whether the response to the Appellants' questionnaire was regarded by the PPC as raising matters of convenience rather than necessity, that was entirely a matter for the opinion of the PPC. They are an expert Tribunal and are entitled to draw their own conclusions on the somewhat narrow base of the respondents to the questionnaire.
- 5.6 It is not enough for the Appellant's to state that the PPC "failed to understand" accessibility and other issues. They are an expert Tribunal as I have stated. They did not "clearly overlook" the evidence. They conducted individually a site visit. They would have seen whether or not the area was partially lit, come busy rounds or otherwise and roundabouts and others and they would have had the benefit of the photographic evidence produced by the Appellants. Equally, it is not enough for the Appellants to state that the PPC failed to understand the difficulties of the population. The PPC had clearly considered all the evidence and came to a different conclusion than that of the Appellants on the basis that they considered that the current services in the neighbourhood were adequate on the evidence presented to them. The Appellants cannot re-open the evidence at this stage.
- 5.7 The Appellants have made reference to Paragraph 6(1) of the Regulations where they have indicated that the PPC is noted as having stated that in weighing up the differing views of the evidence provided and presented during the course of the Hearing the PPC had "agreed that the existing services could be deemed adequate" and that thereafter the non-voting members left the meeting and that the voting members voted to reject the Application. I see nothing wrong in this. There is an obligation on the PPC to consider the Application with all members present but that the Application may be determined only by a majority of votes of the members present who are entitled to vote. Clearly, here, the members of the PPC indicated that they were against the Application and left the meeting. The vote is the crucial issue. There is no obligation on the voting members, notwithstanding that the Committee had indicated that they were against the Application, to vote for or against the Application thereafter.
- 5.8 That other pharmacy applications have been granted in respect of areas which are closer to existing pharmacies is not relevant to this application.

6. Decision

- 6.1 In the circumstances and for the reasons stated above it is considered that the Notice of Appeal discloses no reasonable grounds and that the Appeal is accordingly dismissed.



J. Michael D. Graham
Interim Chairman
National Appeal Panel
21st March 2014