

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

24 Main Street, Kirknewton, EH27 8AH

Applicants:	Fergal Coffey & Partners
Appellants:	Lindsay & Gilmour Pharmacy
Pharmacy Practices Committee:	NHS Lothian
PPC Decision Issued:	4th April 2014
Panel Case Number:	39 (2014)

Decision of the Chairman of the National Appeal Panel

1. Background

- 1.1 Fergal Coffey & Partners ("the Applicants") made an application for inclusion in the Pharmaceutical List of NHS Lothian in respect of the premises at 24 Main Street, Kirknewton, EH27 8AH, said Application dated 27th September 2013.
- 1.2 The Pharmacy Practices Committee of the Board of NHS Lothian ("the PPC") under delegated powers of the Board convened a meeting held on 25th March 2014 in order to consider the evidence from both the Applicants and the Interested Party and the papers submitted by each and the Health Board and others and following upon which, after consideration, the PPC issued their decision dated 4th April 2014 that the existing pharmaceutical services in the neighbourhood defined by it were not adequate. The PPC considered it necessary in order to secure adequate provision of pharmaceutical services in the neighbourhood in which the premises were located that the Application be granted.

2. Grounds of Appeal

- 2.1 By Letter of Appeal dated 24th April 2014 The Red Band Chemical Company Limited trading as Lindsay & Gilmour Pharmacy ("the Appellants") lodged Grounds of Appeal against said Decision.
- 2.2 The Appellants' Grounds of Appeal may be summarised as follows:-
 - 2.2.1 The PPC failed to properly narrate the facts or reasons upon which their determination of the Application was based relating to the Regulations. Minutes were brief and provided little detail of the discussions and the reasoning behind the Decision.
 - 2.2.2 Whilst the PPC made reference to "pharmacies outwith their neighbourhood" their definition of inadequacy referred to residents requiring to "cross a major road (the A71) and travel a considerable distance (2.3 miles)". This description relates solely to the Appellant's pharmacy located in East Calder. Insufficient cognisance had been paid to the large number of pharmacies located in the areas surrounding Kirknewton, each of which provides services to the population of Kirknewton in varying degrees.
 - 2.2.3 The Minutes received were watermarked "DRAFT" throughout. It is not clear whether this is indeed a draft version of the Minutes or a final approved version. The Minutes are incomplete in light of the number of grammatically typographical errors e.g. paragraph 73 which refers to "RSPCG Checks" when a representative of Lindsay & Gilmour had referred to "RPSGB inspections". The Minutes are accordingly not complete.

3. The Evidence of the Parties

- 3.1 The evidence of the Applicants at the Hearing held on 25th March 2014 may be summarised as follows:-
 - 3.1.1 Mr Coffey on behalf of the Applicants defined his neighbourhood, as being the village of Kirknewton bounded on the north and north west by the A71 and to the south and east by a line of a residential development to which the village of Kirknewton extends, the village being surrounded by open fields. The north and north west boundaries may be considered a natural boundary as the boundary of farmland to the south and east to which the boundary of the village extends in a west to east direction meeting the Linburn Road which forms the boundary to the east. Houses lying north of the rail line and south of the A71 would be included in the neighbourhood. It was a neighbourhood in its own right. The Community is served by a railway station, primary school, Post Office and garage, minimarket, a fast food takeaway, a church and a licensed premises as well as several other businesses. There were in addition two community halls.
 - 3.1.2 Whilst there was no community pharmacy within the neighbourhood at the heart of the Application was the issue surrounding adequate provision of pharmaceutical services

to the neighbourhood. The neighbourhood population was approximately 2,217 and whilst noting the Area Pharmaceutical Committee's observation that this population falls below the average population serviced by a pharmacy of 4,500, that figure was an average and should not be considered a threshold for the establishment of a pharmacy.

- 3.1.3 Mr Coffey stated that from the SNS data, Kirknewton had a typical age profile for a Scottish Village ranked in the top 30% in the ratings as to how affluent an area is. Whilst appearing relatively well off the statistics indicate that the neighbourhood falls to the lowest 50/60% of areas in terms of assessing health. It had an above average population in terms of affluence but an average population in terms of health care needs, which he concluded was as a result of difficulties faced by the residents in accessing health care services. Kirknewton ranked in the worst 20% in the deprivation index relating to geographic access to services. This scoring is usually found in the remote and rural areas in the Highlands and Islands.
- 3.1.4 There are neither pharmaceutical services nor GP nor support services within the village. The nearest pharmacies are Lindsay & Gilmour in East Calder, Lloyds in Dedridge and Balerno Pharmacy. Walking or cycling from the central point in the village would entail a journey distance to the nearest pharmacy of 2.2 miles. This is an unreasonable distance to expect a population to walk, as also would it be treacherous given that it would be along a busy main road crossing and both the railway track and the A71 trunk road and entail a round trip of 4.4 miles. 17% of households have no access to a car, 46% have access to only one vehicle which it is reasonable to assume would be used for any commute to work. There was a higher percentage of children in the village compared to the Scottish average being 27% and 17% respectively.
- 3.1.5 Kirknewton is serviced by two infrequent bus services leaving from Kirknewton every hour. Neither stops in the Main Street of East Calder. A round trip to the nearest pharmacy using public transport would take well over an hour without taking into account waiting times at the pharmacy. His view was that this was inadequate in providing patients of Kirknewton with access to pharmaceutical services.
- 3.1.6 Currently prescriptions are delivered to Kirknewton's Post Office by the East Calder pharmacy and held for onward distribution to patients within the Community. Although Mr Coffey acknowledged that the prescription service to the Post Office had been in operation for three decades, the demand was different now. This is not an adequate pharmaceutical service. Particularly given that the core elements of the community pharmacy contract and those such as the Minor Ailment Service, and the Chronic Medication Service would require access to a pharmacist. Further, three pharmacies in close proximity to Kirknewton were not situated in the areas where residents of Kirknewton would normally travel and there was nothing in the vicinity of these pharmacies in terms of retail outlets or other services that could not be accessed within Kirknewton.
- 3.1.7 The nearest pharmacy to Kirknewton currently provides services to an average population of 10,685 in Kirknewton, Calder and East Calder, although Mr Coffey acknowledged that other pharmacies in the area would provide a service to this population. There is a substantial development planned for the Calderwood core development area and houses in Seven Wells, East Calder. These are future developments which will have an impact on the provision of pharmaceutical services. The Seven Wells development comprises 83 houses and the Calderwood development between East Calder and Kirknewton is one of the largest development areas in Scotland where outline planning permission was granted for 2,800 homes, phase 1 of which commenced in December 2013 with three house builders starting the first 275 houses. This would result, on a conservative estimate, when these developments are complete, in a projected population of Kirknewton and East Calder of over 17,500, serviced by one pharmacy contractor. Whilst these developments are not within the Applicants defined neighbourhood, they would undoubtedly cause changes to the pharmaceutical practice in the area and the standard of adequate pharmaceutical provision will develop over time and will impact on the level of pharmaceutical services and the level of access to those services received by the

people of Kirknewton.

- 3.1.8 Mr Coffey agreed under questioning by Ms Williams on behalf of the Interested Party that the population of Kirknewton could access pharmaceutical services elsewhere, for example, supermarkets in Linvingston and The Gyle.

3.2 The evidence of the Appellants may be summarised as follows:-

- 3.2.1 Ms Yvonne Williams on behalf of the Appellants considered that the Application did not meet the criteria as being necessary or desirable to secure adequate provision of pharmaceutical services to the population. She indicated that whilst Lindsay & Gilmour in East Calder is the closest pharmacy to Kirknewton it is not the only pharmacy providing services to the population in that there were four pharmacies located within four miles and a further four within five miles providing all the services into Kirknewton. She stated that these pharmacies are accessible to patients by bus and car from Kirknewton. She advised that Kirknewton had a higher than national average car ownership at 80.8% including higher than national multiple car ownership. There was ample parking at the majority of pharmacies including that of Lindsay & Gilmour. The population is used to travelling by both bus and car to East Calder to access medical services as well as those further afield.
- 3.2.2 She stated that the current average figure of prescriptions per person per annum is 18.2 which would represent that Kirknewton patients would account for 36,400 prescriptions per annum. Lindsay & Gilmour in East Calder dispense approximately one third of these indicating that a substantial number of prescriptions were being sought elsewhere from other pharmacies.
- 3.2.3 Lindsay & Gilmour in East Calder whilst located outside the neighbourhood provide pharmaceutical services to the neighbourhood on a daily basis offering a full range of pharmaceutical services including a Minor Ailments Service, Public Health Service, Acute Medication Service and Chronic Medication Service. Further, they offer a twice daily acute and repeat prescription and collection service from East Calder Medical Practice which is the medical centre serving the majority of Kirknewton residents, as do they provide a free delivery service to patients in the neighbourhood, many of whose prescriptions have been delivered the same day.
- 3.2.4 Ms Williams was of the view that she did not consider that a pharmacy in the proposed location would be viable and that even if services were currently inadequate the new pharmacy would not secure adequate provision. It would not attract much in the way of custom from outwith the neighbourhood. If the population of Kirknewton is used to travelling outwith the neighbourhood for work, shopping, leisure facilities she did not consider that any inadequacy in existing services had been demonstrated.
- 3.2.5 Ms Williams acknowledged that there was a risk in the Post Office giving the wrong bag to patients and considered this to be slight and could happen in any pharmacy. If a pharmacy thought that advice might be required they would phone the patient. She acknowledged that the arrangement with the Post Office did not entirely fit in with the aspirations outlined in the Wilson Barber Review and Prescription for Excellence but it was important that patients were aware that there was a facility whereby they could have contact with a pharmacist. With regards to confidentiality issues with the Post Office Ms Williams stated that the repeat prescription would be inside a sealed bag and so confidentiality issues were minimised and that, further, there was nothing specific in so far as the training of Post Office staff was concerned. She confirmed that the East Calder Medical Practice had not yet been set up with the Chronic Medication Service.
- 3.2.6 On an enquiry by a member of the PPC whether if the General Pharmaceutical Council should decide that the service from the Post Office could no longer be delivered Ms Williams stated that there would be a home delivery instead but that the Post Office was subject to "RSPCG checks" and that there had been no issues. She also stated that she considered that the proposed pharmacy would be viable with an average of 18 prescriptions per year per patient amounting to 3,000 per month in Kirknewton.

4. The PPC's Decision

- 4.1 The Committee are noted as having taken into account all relevant factors concerning the issues of neighbourhood, adequacy and existing pharmaceutical services and, in addition to the oral submissions put before them. The PPC took into account all written representations from supporting documents submitted by the Applicant and the Interested Party and those who were entitled to make representations. The written representations received and considered by the Committee included a letter from the Area Pharmaceutical Committee, a letter from Messrs Lindsay & Gilmour Pharmacy, a letter from John Connelly of Deans Pharmacy, a joint email from Councillors Frank Toner and Dave King and an email from Marion Christie of West Lothian CHCP. Further, the PPC also considered the location of the nearest existing pharmaceutical services, those of the nearest existing medical services, the maps detailing the location of other pharmacies and GP surgeries, deprivation categories and population density, information regarding the number of prescriptions dispensed by the pharmacies nearest the proposed premises, information regarding the number of prescriptions dispensed that were issued from GP surgeries closest to the premises and pharmacy profiles of the nearest pharmacies detailing opening hours, premises facilities and services offered and the NHS Lothian Pharmaceutical Care Services Plan.
- 4.2 Insofar as the **neighbourhood** was concerned, the PPC took into account a number of factors in defining it including those who were resident in it, that it had natural and man made boundaries, the presence of schools, shops and the distance by which residents were required to travel to obtain pharmaceutical and other services and considered the neighbourhood comprised of the village of Kirknewton in its entirety and bounded on the north and north west by the A71 and to the south and east by the line of a residential development to which the village of Kirknewton extends. The village itself is surrounded by open fields. The boundary to the north and north west may be considered a natural boundary as was the boundary of farmland to the south and east until it met Linburn Road, which formed the boundary to the east. The village has the appearance of a neighbourhood in its own right. The PPC also noted that the community is served by a railway station, a primary school, Post Office, garage, mini-market, a fast food takeaway, church and licensed premises as well as several other businesses and two community halls. The PPC regarded the services within the village as being sufficient for day to day needs and that the population was large enough for Kirknewton to be considered a neighbourhood of its own standing.
- 4.3 The PPC then turned to considerations of **adequacy** of the existing pharmaceutical services in the neighbourhood and whether the granting of the Application was necessary or desirable in order to secure adequate provision of pharmaceutical services in that neighbourhood. In doing so the PPC took account of the evidence provided by the Applicant and Interested Party and made available to it from other sources. There were no community pharmacies in the neighbourhood and that pharmaceutical services were currently being provided from pharmacies outwith the neighbourhood.
- 4.4 The PPC are reported as having considered that the existing services were not adequate as the neighbourhood of Kirknewton could not access appropriate pharmaceutical services without having to cross a major road (A71) and travel a considerable distance (2.2miles). Further, public transport links were poor and comments from the public consultation related to extended waiting times for prescriptions to be dispensed were noted. It was also considered that the need for patients to make repeated visits to pharmacies outwith their neighbourhood added to the inadequacy of existing services. There was a sizeable and growing elderly population within the neighbourhood with no GP service within it and no prospect of such in the near future and that the provision of a pharmacy would provide, in addition to other pharmaceutical services, an entry point into primary health care services and, accordingly, it was considered that it was necessary to grant the application standing the inadequacy.

5. Discussion and Decision

- 5.1 The Regulations require to be looked at in light of the objects of the Scheme set out under the National Health Service (Scotland) Act 1978 and in particular Section 27 in that it shall be the duty of every Health Board to make, and in accordance with the Regulations, to make arrangements as to its area for the supply to persons who are in that area of:-

- 5.1.1 (1) proper and sufficient drugs and medicines...which are ordered for those persons by a medical practitioner in pursuance of his functions in the health service...
- 5.1.2 (2)(10) an application made in any case... shall be granted by the Board after procedures set out in Schedule 3 have been followed, only 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 pharmaceutical services in the neighbourhood in which the premises are located by a person whose name is included in the Pharmaceutical List...
- 5.1.3 Schedule 3 2(1) ...In considering an application to which Regulation 5(10) applies, the Board shall have regard to (a) the pharmaceutical services already provided in the neighbourhood of the premises named in the application by persons whose names are included in a Pharmaceutical List...(b) any information available to the Board which, in its opinion, is relevant to the consideration of the Application.
- 5.1.4 (2) The Board may determine any application in such manner as it thinks fit and may, if it considers that oral representations are necessary determine the Application for a hearing of any oral representations.
- 5.2 The provisions of the Act are largely replicated in the Regulations and in particular, Schedule 3 thereof. Part 1 provides that the Board shall give notice of the Application to various parties who particularly may have an interest in the Application and insofar as Part 2 is concerned, take reasonable steps to consult with persons to whom pharmaceutical services may be provided as a result of the Application by way of public consultation.
- 5.3 In Paragraph 3 the Board shall have regard to the Pharmaceutical Services already provided in the neighbourhood, any representations received by the Board (under Paragraph 1) and any information available to the Board which in its opinion is relevant to the consideration of the Application. It is important to note that the Board may, in accordance with this Schedule, determine any application in such a manner as it thinks fit
- 5.4 The Grounds of Appeal are limited to areas where the PPC has erred in law in its application of the provisions of the Regulations, that there has been a procedural defect or been a failure by the Board to properly narrate the facts and reasons upon which the determination of the Application was based or have failed to explain its application to the facts.
- 5.5 The principal point to address in the PPC's decision is whether and to what extent it has exercised its judgement fairly and given adequate reasons for it and that it does not otherwise offend against the Grounds of Appeal set out in Schedule 3, paragraph 2(A) and 2(B). It is important to note that the PPC comprises pharmacists and lay people who may be expected to understand the issues involved on the evidence before it. It is an expert Tribunal.
- 5.6 The PPC's Decision must be intelligible and it must be adequate. It must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal issues and its reasoning does not give rise to any substantial doubt that it had erred in law. Such adverse Inference will not readily be drawn. In addition to the oral evidence presented to it, the PPC has also noted that it had undertaken a group site visit noting the location of the proposed premises, neighbouring pharmacies, demographic information, the comments received from the Area Pharmaceutical Committee and other supporting documentation provided by the Applicants and Interested Party dealing with both issues of neighbourhood and adequacy. Extensive oral evidence was heard both from the Applicants and the Interested Party and to which reference was made in the PPC's Decision.
- 5.7 The Appellants principal Ground of Appeal is that the PPC failed to properly narrate the facts or reasons upon which their determination of the Application was based, that minutes were brief and provided little detail of the discussions and the reasoning behind the Decision. The PPC is entitled to make a value judgment on both the issues of the 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.

- 5.8 The Appellants in their Letter of Appeal say no more in this connection that the PPC has failed to properly narrate the facts or reasons and that its considerations were "uncommonly brief". They do not go on to state in what respect the Minutes were brief, and in what manner the facts or reasons were not properly narrated. The neighbourhood issue does not appear to have been controversial. It was addressed by the Applicants during the course of the hearing and was determined by the PPC in its decision and sufficient reasons have been given for its determination. Insofar as adequacy is concerned, the PPC are noted as having taken into account the evidence provided by the Applicant, the Interested Party and made available from other sources and that there were no community pharmacies in the neighbourhood and that such pharmaceutical services outwith the neighbourhood were serving it. The PPC gave reasons for lack of adequacy in that the population of Kirknewton would require to cross a major road, transport links were poor and that comments from the public consultation relating to extended waiting times for prescriptions were equally noted and repeated visits to pharmacies outwith the neighbourhood were considerations in their Decision as to the inadequacy of existing services provided to the neighbourhood. Further, the PPC has made reference to a sizeable and growing elderly population and no GP service with no prospect of such in the near future and as a result of which evidence, accordingly, the PPC considered it necessary to grant the Application. It is considered that the PPC gave adequate reasons for the Decision as to lack of adequacy of existing pharmaceutical services.
- 5.9 The Appellants make reference to Minutes having been received by them as being watermarked "DRAFT" throughout. This certainly did not appear on the papers provided and in any event, it is not regarded as critical to the Decision nor is it regarded as critical the grammatical/typographical errors referred to which are considered to be *de minimis*.
6. **Decision**
- 6.1 The Notice of Appeal discloses no reasonable grounds and, accordingly, for the reasons stated above, the Appeal is dismissed.

J. Michael D. Graham
Interim Chairman
National Appeal Panel
28th May 2014



