

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

91 HIGH STREET, BURNTISLAND, KY33 9AA

Applicant and Appellant:	Mr Yaseen Yousaf, Tick Pharmacy
Health Board:	NHS Fife
PPC Decision Issued:	20 October 2016
Panel Case Number:	NAP63(2016)

Decision of the Chairman of the National Appeal Panel

1. Background

- 1.1 This is an appeal against the decision of the Pharmacy Practices Committee ("the PPC") of NHS Fife ("the Board") which decision was issued on 20 October 2016.
- 1.2 Mr Yaseen Yousaf t/a Tick Pharmacy ("the Applicant" or "the Appellant") made an application for inclusion in the pharmaceutical list of the Board to provide pharmaceutical services in respect of the premises at 91 High Street, Burntisland, KY3 9AA ("the Premises"), said application dated 21 September 2015.
- 1.3 The application was initially heard by the Board at its PPC meeting held on 11th January 2016 and following upon the Decision of which, the applicant appealed on various grounds to the National Appeal Panel ('NAP') which decided that certain points of the appeal were found in that *inter alia* the then PPC failed to adequately explain the facts to the provisions of the Regulations or its reasoning relating thereto. The NAP remitted the decision back to the Board in terms of its decision dated 8th April 2016 advising it to constitute a fresh PPC to determine the issue.
- 1.3 The current PPC, under delegated powers of the Board, held a hearing on 29 September 2016 and took evidence from the Applicant and interested parties and considered supporting documentation, and following upon which it determined that the existing level of service provided by other contractors to the neighbourhood was currently adequate and that it was accordingly neither necessary nor desirable to grant the application for provision of pharmaceutical services in the neighbourhood in which the Premises were located by persons whose names are included in the Pharmaceutical list. It accordingly unanimously refused the application.

2. Grounds of Appeal

- 2.1 The Appellant submitted a letter to the Board dated 3 November 2016 appealing said decision on grounds which may be summarised as follows:
 - 2.1.1 Generally, that there had been a failure by the PPC to properly narrate the facts or reasons upon which their determination of the application was based and that there had been a failure to explain the application by the PPC of the provisions of the Regulations to those facts. Further, that the decision of the PPC was erroneous, it had not exercised its judgement fairly nor provided reasons in explaining their decision and that they had erred in their interpretation of the Regulations.
 - 2.1.2 Specifically, the PPC had not indicated why the evidence of the Applicant had not been accepted. The PPC had allowed "new evidence" by Lloyds Pharmacy indicating an increase in their staff and staff hours whereas at the previous hearing relating to this application there had been a suggestion that Lloyds had been stretched in their provision of services. The consideration of new evidence relating to Lloyds opening hours was unfair in particular the opening hours and increased staff levels as these could be withdrawn at any time and would provide any interested party an opportunity to examine the previous minutes and rectify any perceived underlying issues.
 - 2.1.3 The Minutes indicated (12/16) that the Community Council reported that since the last PPC one of the GP practices has changed remarkably in that it is now extremely busy with an upsurge in appointments. This point had neither been discussed nor acknowledged by the PPC.
 - 2.1.4 The chair has reported as having reminded the PPC members that discussions but be based on the evidence presented "today at the hearing". The Appellant considers that all the evidence preceding the hearing and future developments ought to have been taken into account and that accordingly the advice of the chair was likely to confuse the PPC in reaching its conclusion.
 - 2.1.5 The PPC members during the course of the hearing stated variously that ".....the
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current service is bordering on inadequate”, “an additional pharmacy would be desirable but cannot be justified at this time”, “.....it would appear that the current services are inadequate”, “.....veering towards the services being inadequate”. The chair is reported to have stated that “.....the Pharmaceutical Council found the service to be satisfactory”.

- 2.1.6 There was no reference by the PPC to access to other pharmacies, in particular whether they were easy to reach by foot and argued that they were located in completely different neighbourhoods.
- 2.2 The grounds of appeal of the Community Council (‘ second named Appellants’) dated 25 November 2016 may be summarised as follows:
- 2.2.1 That there had been a procedural defect in the way the Application had been considered by the board in that there was nothing in Regulation 5(10) “which gives the Panel discretion to terminate their deliberations on a finding of adequacy” and that “adequate”, “desirable” and “necessary” are not mutually exclusive. Further, two of the panel members appeared to be confused in that they had advised the panel during the private discussions but did not give evidence which could be questioned, nor did they take part in the final decision albeit it appeared from the minutes that they took a different view from the main members. Either they were part of the Panel, in which case they were entitled to vote, or they were not, in which case their evidence should have been open to question by all parties.
- 2.2.2 It was noted that the Area Pharmacy Committee concluded that additional pharmacy services in Burntisland were “desirable” but not necessary. The Community Council argued that that is a test set by the Regulations and that accordingly approval is appropriate. From the written record of the PPC discussion, it appears that the PPC took into account only the information which was represented verbally and that there was no record of them having taken into account the written submission of the APC.
- 2.2.3 In the six bullet points on p 12 of the Minutes of the PPC in which the Panel shows the framework for their decision, the PPC had wrongly equated queuing time (which was reduced) with delivery time, which in the view of the Community Council, remains unacceptable.

3. Evidence of the parties to the hearing

- 3.1 The evidence of the Applicant may be summarised as follows:-
- 3.1.1 The Applicant referred to his paper presentation and in which he defined the neighbourhood as being the town of Burntisland in its entirety accessed by Aberdour Road, Cowdenbeath Road, Kinghorn Loch Road and Kinghorn Road. He referred to the key themes from the Consultation Analysis Report (CAR) including a high level of support for an additional pharmacy from those who had responded, that there was an expectation that a new pharmacy would reduce waiting times and queues for prescriptions and that the choice of a new pharmacy would bring an advantage to patients. He indicated that the existing pharmacy of Lloyds was “stretched” in that there were long waiting times for prescriptions and that that pharmacy wasn’t able to cope with current demand. It was serving a population of approximately 6,500 patients with 9000 items per month each of which was high for one pharmacy
- 3.1.2 The Burntisland Community Council favoured an additional pharmacy and correspondence from their chairman reported 4 days delay with patients requesting a repeat prescription, that Burntisland’s population had grown by 17% compared to 5% for Fife as a whole and that the existing pharmacy was operating from a space which was physically strained.
- 3.1.3 The town comprises 8 data zones, one of which is in the 15% of most deprived in Scotland. Planning permission had been granted for the old Alcan Chemicals Plant Site comprising 296 houses and that planning permission had been granted for a £2.5m regeneration of Burntisland’s East Dock. Other pharmacy contractors are located outside the town in Kinghorn (2.3 miles distant) and Aberdour (2.8 miles distant).

3.1.4 In response to questions by the interested parties and the members of the PPC the Applicant considered that 55 responses to the CAR from a population of 6,500 was good and added that the survey from the Community Council had a considerable response (500). He added that he had not seen the Community Council's report but had spoken to the Community Council in depth regarding the survey. He acknowledged that the survey had been effected some 12 months previously. The Applicant stated that whilst he did not know the size of Lloyds dispensary he considered it to be long and narrow (a point which was not acknowledged as being inadequate by the representative from Lloyds). The applicant was unable to state what the opening hours were of Lloyds Pharmacy. The Applicant confirmed that the new Pharmacy would be built in a convenience store and that he would be able to provide the services being offered.

3.1.5 The square footage of the proposed Premises would be 1,000 and that this would include the attic area at 500 square feet. The Applicant stated that the population was increasing due to developments which resulted in a shift in "adequacy" and in the analysis in the developments which had been approved are in progress, the Applicant was uncertain but "thought they were". A member of the PPC had put to the applicant that the Pharmaceutical Care Plan stated that there were no gaps in the pharmaceutical services in Burntisland but the Applicant had refuted this in that there was a gap in the method of delivery in incomplete orders being dispensed and referred to the Community Council Survey for support. He went on to state that the NAP had highlighted that the PPC had not asked the council to provide evidence of this at the previous meeting. The Applicant believed that the GPs considered there to be an inadequacy of service. On being pressed further, he stated that the GPs had mentioned the growing population and that had confirmed that had only been in a brief conversation. He stated that he spoke to one GP at a medical practice which does not currently exist. The Applicant mentioned out of stock items but confirmed that he believed it could be a general problem but that there were usually some wholesale suppliers who would have vital stock items.

3.2 The evidence of Mr Arnot of Lloyds Pharmacy may be summarised as follows:-

3.2.1 Mr Arnot argued that the Applicant had not gained the support of the residents of Burntisland in that the CAR had received 55 responses out of a population of 6,500 people, i.e. 0.8% of the population. He argued that such a low response indicated that the vast majority of the residents of Burntisland see no need for another pharmacy and that currently Lloyds provides an adequate service to the residents of Burntisland. He noted the terms of the letter from the chair of the community council and it had been his experience that all community councils support the application for a new pharmacy. Lloyds pharmacy had relocated from premises which they had occupied in 2001 to larger premises in 2008, and was then fitted out in such a way as to permit the pharmacy to adequately deal with any growth in the population of Burntisland. Between 2008 and 2013, the population grew by 443.

3.2.2 The majority of the new housing that the Applicant had referred to was private housing, many of which were large ceilinged four bedroom properties. He hazarded that the majority of the residents did not work in Burntisland and accordingly they would be able to access all kinds of services near their place of work. There was no secondary school in Burntisland with pupils traveling to Kirkcaldy. The latest independent Mystery Shopper report indicated a score of 90% and that the pharmacy was fully engaged in all core services with the addition of CMS and MAS. The pharmacy was rated as satisfactory on a recent Pharmaceutical Council inspection with no action points.

3.2.3 Mr Arnot also indicated waiting times for dispensing with averages for August and September 2016. He questioned whether the proposed pharmacy would be viable and which would be a relevant consideration for the PPC. The Applicant had stated at the original hearing that for the first two years of his proposed pharmacy, the viability of the proposed pharmacy would be dependent upon the performance of the convenience store in which it would be located and as there was a good sized Co-op and two further convenience stores in the High Street, the viability of a further

convenience store would be questionable . Mr Arnot further argued that the granting of the contract in Burntisland would have a seriously adverse effect on the future viability of Lloyds Pharmacy.

- 3.2.4 In response to questions by both the Applicant and members of the PPC, Mr Arnot stated that Lloyds Pharmacy could close if the Applicant's Application was granted but that would be dependent upon the percentage of custom they lost . He stated that a good response to the CAR would have been 7% which is the highest he has seen but that 55 / 6500 was the lowest he had seen. He confirmed that the average time for prescription dispensing was approximately ten minutes to include waiting time.
- 3.2.5 Mr Arnot stated that he had not been dismissive of the Community Council's Survey. He had not seen the survey but had already taken action by increasing opening hours. Staff had increased from 1 to 2 pharmacists two days a week with an extra 38 staff hours as well as a dispensing technician and that opening hours had been reviewed. On being asked about the level of complaints that had been received by Lloyds, Mr Arnot stated there had been one complaint regarding customer service and another from someone who had a disagreement at school with one of the staff and did not wish to be served by them. He had confirmed that the Mystery Shopper looked at prescription time, quality of service and interaction with staff. The percentage success rate for the two visits were 95 % and 90%.
- 3.2.6 Mr Arnot in commenting on the Community Council Survey stated that it had been carried out a year before, i.e. June / September 2015, and he believed that at that time Lloyds Pharmacy had been stretched but since then the pharmacy cover had increased by 3 days per week and staffing had also increased, as well as opening hours.
- 3.3 The evidence of Mr MacDonald, chair of the Community Council, may be summarised as follows:-
- 3.3.1 Mr MacDonald highlighted that there were three developments under way and one not listed: _
Greenmouth Hotel (underway),
Alcan Site (under construction),
Grange Farm (allocation)
Star Development Trust (survey initiated).
- 3.3.2 He stated that the Community Council Survey had responses from 500 people including 200 visitors and 300 people who had attended an open day at the school. There were no specific questions on pharmacy services. Visitors had left no comments. What was assumed to be locals' comments were adverse: "one pharmacy, very busy, long waiting times"; "second pharmacy needed"; "pharmacy inadequate for size of town". He acknowledged that since the last PPC one of the GP practices had changed remarkably, and it was now extremely busy in terms of size of appointments and a new GP in the practice. It was his opinion that people would want increased pharmaceutical services. In response to questions by the Applicant and interested parties, Mr MacDonald stated that the queues at Lloyds had diminished since the last PPC and there had been no further complaints. He felt that there may be a higher than average need for additional pharmaceutical services because of two social housing schemes and one area of multiple deprivation and another of new affordable housing attracting significant numbers of old and young residents. He had no specific numbers to hand. He agreed that the service had improved but had wondered whether this would be permanent. He had accepted the increased staffing levels. He was of the opinion that a bus service to the outskirts of Burntisland would be about 10 minutes plus waiting time.

4. The PPC's Decision

- 4.1 After each party summed up their position and prior to their departure from the hearing, the chair noted that all parties believed they had received a full and fair hearing.
- 4.2 That PPC were noted to have considered all submissions, including the evidence presented
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to them, and took cognisance of the Pharmaceutical Care Services Plan and the CAR. In addition, they were noted to have sight of other documentation including a map of the area indicating the location of the proposed pharmacy, existing GP surgeries and pharmacies, written representations and others.

- 4.3 In determining the **neighbourhood**, the PPC had noted that this was not a matter of contention and that all agreed it was Burntisland in its entirety and defined it as being bound by the north by The Binn; to the east by Linwell Court heading North to the B923 and The Binn; to the south by the Forth Estuary extending from Ross Brae to Linwell Court; and the west by Ross Brae heading north to the A921 Bendameer Road to Grange Farm, A909 and The Binn.
- 4.4 As to **adequacy** the PPC took note of existing pharmaceutical services; some members considered the current services to be bordering on inadequate following the PPC discussing the level of service and the delay between taking prescriptions and them being dispensed. The PPC had noted the survey undertaken by the Community Council that the current pharmacy experienced problems by customers but that this was considered to be an unreliable complaint system, making it difficult to measure service satisfaction. As also did it consider the CAR and noted that 55 responses had been received with a majority of these respondents being dissatisfied with the current service which they considered to be inadequate. In discussions regarding the proposed opening hours in that there was no guarantee that the Applicant would continue those hours were the Application granted equally did the PPC note that the current pharmacy, Lloyds, could alter their opening hours. The chair reminded the members of the PPC that their discussions required to be based on the evidence presented at the hearing. Another member of the PPC was of the view that an additional pharmacy whilst desirable it could not be justified at this time. The PPC did consider that there had been a lack of communication between Lloyds and the Community but that since a new manager had taken over this had improved. It was noted that there had been an increase of around 1500 in the population that had not taken deaths into account. The PPC discussed waiting times and had noted the evidence of the parties and the advice of its members as also did they consider the CAR notwithstanding the low response to it. It considered the evidence of the Applicant regarding the current provision of service being stretched and accordingly inadequate as well as Mr Arnot's evidence of the measure of quality between prescriptions ,NHS registration figures, and their current statistics and the GPC and Mystery Shopper's inspections being regarded as satisfactory. Whilst there appeared some disquiet initially at the current level of adequacy on further discussion the members acknowledged the need to assess the current services available under the following criteria: the range of services, opening hours, quality of professional services available, safety, customer focus and future developments, in respect of each of which they considered that the current service was indeed adequate. Accordingly the PPC was satisfied that the provision of pharmaceutical services at the Premises of the Applicant was neither necessary nor desirable to secure adequate provision of pharmaceutical services in the neighbourhood.

Discussion and Reasons for Decision

- 5.1 In terms of the National Health Service (Scotland) Act 1978 and the Regulations, an application for inclusion in the pharmaceutical list to provide pharmaceutical services in respect of premises shall be granted by the Board after procedures set out in Schedule 3 of the Regulations are followed if the Board is satisfied that it is necessary or desirable to grant an application in order to secure in the neighbourhood in which the premises are located the adequate provision by persons included on the list of the services specified in the application. The Board has to be satisfied that such provision is necessary and desirable in order to secure adequate provision in the neighbourhood. In this connection, the Board must have regard to the pharmaceutical services already provided in the neighbourhood and any information available to the PPC which in its opinion is relevant to the consideration of the application, the CAR, the PCP and the likely long-term sustainability of the services to be provided.
- 5.2 The grounds of appeal are limited to areas where the PPC has erred in law in its application of the provisions of the Regulations, if there has been a procedural defect in the way it has considered the application, that there has been a failure by the PPC to narrate the facts or reasons from which their determination of the application has been based or that there has been a failure to explain the application by the PPC of the provisions of the Regulations to those facts. Has the PPC exercised its judgement fairly and has it given adequate reasons for

it? Is the decision intelligible and is it adequate? Is there any doubt as to why it has come to that particular decision? Has it erred in law?

- 5.3 The question of neighbourhood has offered no opposition, it being accepted by all parties that the town of Burntisland is the neighbourhood.
- 5.4 The PPC was entitled to take into account all the evidence made available to it, including the CAR, the PCP, the evidence as presented to them, and all other papers referred to in paragraph 1/16 of the Minutes. It is correct that the NAP issued its decision on 8 April remitting the Application back to a fresh PPC in view of the deficiencies narrated in the PPC's decision of 26 January 2016. The Application was held before a fresh PPC. It was not prejudicial to the Applicant that Lloyds had chosen in the interim to take into account the deficiencies that were highlighted in the CAR and the Community Council Survey; it was entirely a matter for them and in any event it could not be regarded as disadvantageous to the Application. If anything, it might highlight (although this surprisingly was not discussed by the PPC) the issue of viability. The Appellant was correct in stating that the chair of the Community Council had advised the PPC in evidence that one of the GP practices had changed with the result being there had been a sudden upsurge of appointments within the GP practice and that this had not been acknowledged nor discussed by the PPC in its deliberations. What could be discussed by the PPC with such hearsay evidence and what, if any, weight could be given to it? Any upsurge of appointments (if there were any) may not necessarily result in a like increase in prescriptions and, in any event, the evidence of Lloyds was that they had increased their capacity both in personnel and hours. The advice of the chair of the PPC that its discussions should be based on the evidence presented as at the date of the hearing was essentially correct but coupled with the PPC's consideration of the papers referred to in para 1/16. As to the housing, it is clear from the decision of the PPC that it has taken into account future developments and associated future plans and considered that that had no current effect on the adequacy of the existing service. The Appellant makes reference to the pharmacies outwith the neighbourhood and that it was not acceptable for the PPC to state that there were other pharmacies that may be frequented by patients and to leave the matter at that without reference to difficulties in access. What the PPC stated, however, was that the current service in the neighbourhood was adequate and that, in any event, the PPC had noted that there were other pharmacies available within reasonable reach outwith the neighbourhood that were likely "to enhance the adequacy of available services".
- 5.5 it is agreed that the chair's remark that the Pharmaceutical Council found Lloyds services to be satisfactory is of its own entirely irrelevant in relation to Regulation 5(10) and that the decision of the PPC should be taken with the provisions of the Regulation in mind. However, the chair's remark was not fatal to the decision standing that the PPC went on to discuss various aspects of the scheme in coming to the decision. The Appellant expressed frustration at what was, after all, a verbatim report of the PPC's discussion where some members initially had formed the opinion that the current services were inadequate but the discussion of the members of the PPC was just that – a discussion. When they went on to consider the principal issues of range of services, opening hours, quality of professional services available, etc. that clearly concentrated their minds on the principle points that informed their decision on adequacy.
- 5.6 The PPC required to decide firstly whether the existing services are adequate or inadequate. If they are adequate, that is an end to the matter. There is no need to consider the question of necessity or desirability. Mr MacDonald of the Community Council in his letter of appeal indicated that the Area Pharmaceutical Committee concluded that new pharmacy services in Burntisland were "desirable" but not necessary. It is true that the penultimate paragraph of their conference call dated 19 October 2015 does appear to indicate that, but the APC goes on further to state that it could not support the Application. The PPC had sight of that response and it is accepted that it did not refer to it in its decision. Not every admixture of evidence, whether oral or written, requires to be referred to in the PPC's decision although certainly if evidence is given, particularly oral, and it is rejected by the PPC it should give reasons why it has done so on the principal issues. From this point of view the PPC's decision is not a fatal one. It has clearly referred to the evidence of each party.
- 5.7 Mr Garden and Mr Sadeeq of the PPC were pharmacist members and as such are not entitled to participate in the final vote in terms of Schedule 4 to the Regulations and whether or not they took a different view from the lay members is irrelevant. They are, however, entitled to

participate in the discussion in terms of said Schedule (para 6) prior to the vote being effected by the lay members.

6. Conclusion

- 6.1 For the reasons set out above, I conclude that the grounds of appeal set out by both Appellants disclose no reasonable grounds for appeal and accordingly dismiss the appeal in terms of paragraph 5(5)(a)(i) of Schedule 3 of the Regulations. In doing so, I am cognisant that the test set out in said paragraph is not a high bar for the Appellants to cross. In the circumstances, paragraphs 5(2)(A) and (2)(B) are not engaged.**

(Sgd. J M D Graham)

J Michael D Graham
Interim Chairman
National Appeal Panel
18th February 2017