

**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**

4 Blackford Road, Paisley, PA2 7EN

<b>Applicant and Appellant:</b>	Brogan Healthcare Ltd
<b>Health Board:</b>	NHS Greater Glasgow & Clyde ("the Board")
<b>PPC Hearing:</b>	19 March 2018
<b>Panel Case Number:</b>	NAP76 (2018)

### **Decision of the Chair of the National Appeal Panel**

#### **1. BACKGROUND**

- 1.1. Brogan Healthcare Ltd, 2/1 57 Millwood Street, Glasgow, G4 1JS (the “Applicant” or “Appellant”) submitted an application to the Board to be included in the pharmaceutical list of the Board to provide pharmaceutical services from and in respect of premises at 4 Blackford Road, Paisley, PA2 7EN (“the premises”). The application was dated 18 September 2017.
- 1.2. The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 19 March 2018. The PPC decided that as the current provision of services in the neighbourhood defined by the PPC was adequate, it was neither necessary nor desirable for pharmaceutical services to be provided at the premises in order to secure the adequate provision of pharmaceutical services in the neighbourhood.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellant to the Board on 30 April 2018.

#### **2. GROUND OFS OF APPEAL**

- 2.1. The Appellant’s grounds of appeal may be summarised as follows:
  - 2.1.1 The Appellant objects to the PPC’s determination of neighbourhood, specifically challenging its reasons for such determination arguing sufficient weight was not given to the Applicant’s evidence.
  - 2.1.2 That the PPC was inconsistent in its use of the statistics obtained from the Consultation Analysis Report (“CAR”) and as such failed to properly narrate the facts and its reasons for its decision and erred in law or procedure in its inconsistent use of the data gleaned from the report or given inappropriate weight to the statistics given by one of the interested parties and that it had failed to give sufficient weight to aspects of the CAR which were supportive of the Applicant’s case.
  - 2.1.3 That the PPC interpreted too many comments in the CAR as being matters of convenience rather than inadequacy and accordingly gave insufficient reasons on the issue of adequacy. Further, the PPC in commenting on the fact that existing contractors provided a delivery service the PPC failed to narrate that it had considered the Applicant’s arguments regarding the importance of social interaction and benefits of walking especially for the isolated and elderly. In addition the Appellant claims that the PPC whilst referring to the Scottish Government’s publication “Achieving Excellence” with regard to digital aspects it had failed to narrate that it had considered the Applicant’s point about the required “anticipatory approach” and in particular the statement contained in the report that “we want more people to use the community pharmacy as a first port of call”. The PPC had not sufficiently considered the question of access.
  - 2.1.4 In erroneously including and placing emphasis upon the delivery service offered by existing pharmacies this amounted to an error in law by the PPC in that a delivery service is not a contracted service under the provisions of NHS Pharmaceutical Services and thus fatal to the PPC’s decision or otherwise a fundamental procedural error.
  - 2.1.5 The PPC failed to narrate why it placed more emphasis on the statistics provided by an interested party said statistics being based on the 2011 census figures whereas the Applicant had provided more up to date data from the small area population estimate from 2016. The PPC

also failed to give due weight to government publications predicting that the number of 75 year olds would rise by 25% in the next 10 years. This was an error in law.

2.1.6 As to the issue of car parking the PPC had failed to narrate that they had considered the concerns expressed by the Applicant regarding viability of car parking.

2.1.7 The PPC had permitted Mr Arnott to speak on behalf of one of the interested parties. The Regulations state that anyone appearing in the capacity of counsel, solicitor or paid advocate should not be permitted to speak on behalf of another interested party. The Appellant alleged that Mr Arnott is an employee on a zero hours contract and it appeared that he attended as a paid advocate.

### **3. EVIDENCE OF THE PARTIES**

3.1. The evidence of the Applicant may be summarised as follows:

3.1.1 Mrs Jacqueline Bradley appearing for the Applicant advised that the premises would benefit from on street parking with a designated disabled parking bay. It was situated in a neighbourhood which contained schools, convenience shops, a hospital, hospice, hotel/bar and others which would categorise an area as being a neighbourhood for the purpose of the Regulations. The neighbourhood comprised three localities, Hunterhill, Dykebar and Hawkhead, contained a mixture of natural, social and geographical boundaries which she defined as lying on the North from Cathcart Terrace following the natural boundary of the White Cart River to Ben Lawers Drive, to the East from Ben Lawers Drive crossing over the A726 Hurlet Road around Dykebar to Huntley Terrace, to the South from Huntley Terrace following up to Saucelhill Park at Ardgowan Avenue and to the West from Ardgowan Avenue to Hunterhill Avenue to Hunterhill Road back onto Barrhead Road to Cathcart Terrace. She acknowledged that the Area Pharmaceutical Committee ("APC") disagreed with the boundaries.

3.1.2 She outlined the proposed services and opening hours of the proposed pharmacy which she stated were more than some of the other pharmacies currently serving the neighbourhood. There were currently no services within and required to be accessed out-with the neighbourhood. This was not in accord with the Scottish Government's vision "Achieving Excellence in Pharmaceutical Care: a Strategy for Scotland (2017)", the intention being that people ought to use the community pharmacy as "the first port of call". She had stated that there were no General Practitioners within the neighbourhood boundaries defined. She made reference to the Minor Ailments Service ("MAS") and a Chronic Medication Service ("CMS") under the Pharmacy First proposals. These initiatives bring to bear greater pressure on pharmacists and questioned whether adequate pharmaceutical care could be consistently delivered if existing pharmacists were under pressure.

3.1.3 She made reference to the distances to other pharmacies and to the current size of the population of those contained within her proposed boundaries. This was estimated at 6,163, an increase of 6.55% from the 2011 census figures and based on a similar percentage increase the projected population in 2021 would be 6,532. She made reference to proposed residential developments which she stated would increase the population in the next 1-2 years by approximately 2,000-2,500. She made reference to the National Clinical Strategy for Scotland wherein there was suggested that 75 year olds were said to increase by 25% in the next 10 years and by 60% in the next 20 years and that statistics obtained from Renfrewshire Council the number of households in Renfrewshire with a person aged 75 and over was said to increase by 78% between the years 2012 and 2037. The elderly were the greatest users of healthcare services and overall 14% of the population of the neighbourhood were aged 75 and over. She questioned whether the existing pharmacies could cope with an ageing population. She referred

further to statistics relating to multiple deprivation and its effect on the proposed neighbourhood.

- 3.1.4 She stated that there were logistical barriers to accessing existing services by bus for those without a car. Travelling by foot for some residents was not practicable. She stated that prescription numbers were increasing whilst adding to the existing strain on existing services which was further underscored by evidence that there was difficulty and delay in prescribing.
- 3.1.5 She made reference to the CAR in which 72% of the respondents stated that the proposed pharmacy would have a positive impact on the neighbourhood with 83.6% agreeing with the boundaries of the neighbourhood. There had been complaints noted in the CAR where it was reported that existing pharmacies were too far away and only 51.9% polled used a car to access pharmaceutical services. Others had reported challenges or issues in for example car parking, delay in prescribing, long queues at the existing pharmacies and 66% considered that existing services were currently inadequate.
- 3.1.6 In response to questions by the interested parties and members of the PPC, Mrs Bradley advised that she had excluded an area that comprised three pharmacies from her proposed neighbourhood as the Board had indicated that were they included it would make her neighbourhood too large. It stated that she was not aware of the numbers of the population aged 65 years or over more particularly whether that figure was 18%. She had confirmed that the responses to the CAR numbered 135 out of the population of over 6000. She had stated in response to a query regarding the lack of availability of some medicines that she was aware there had been national shortages across the network in the previous six months. She stated that the cause may be equally attributed to pharmacies using only a limited number of wholesalers. She was questioned about other developments proposed particularly in Hawkhead village which would result in a 50% increase in the datazone population. Mrs Bradley was unable to comment as to whether any of these new houses would be occupied by either new people moving into the area or relocating from elsewhere in the neighbourhood. She acknowledged that someone living near the southern boundary of her proposed neighbourhood would either walk or travel by car to the proposed premises and that buses were infrequent. Whilst uncertain of the distance involved she considered it would take 10-15 minutes to walk. In commenting on a question regarding the census information from 2011 which had stated that 95% of residents in the neighbourhood proposed in the application were in fair, good or very good health Mrs Bradley had stated that good health was subjective and not reflected in the prescription numbers. On further questioning in relation to the Board's "rejection" of the boundaries initially suggested by the Applicant, Mrs Bradley had conceded that the Health Board's role was to provide guidance.
- 3.2. The evidence of Mr Arnott of Lloyds Pharmacy Ltd may be summarised as follows:
  - 3.2.1 He stated that there were 10 existing pharmacies within one mile of the Applicant's proposed site, Paisley had 18 pharmacies with a population of approximately 76,000, East Kilbride with a similar population had 13 pharmacies. He argued accordingly that there were sufficient pharmacies providing services to the residents of Paisley. He considered that the Applicant's neighbourhood had been enlarged deliberately to increase the population figures and had found the boundaries delineated by the Applicant to be confusing. Were the PPC to agree to the APC's view there were four pharmacies within the neighbourhood. He considered that the western boundary had been constructed to exclude most of the existing pharmacies. He considered that for a resident of Ardgowan Avenue, a pharmacy in Blackford Road was no more accessible than the existing pharmacies. He considered that 135 responses out of a population of 6061 was low at only 2.3% and of those 1.9% lived within the Applicant's proposed neighbourhood. Only 33% considered the existing services to be inadequate and 54% had issues or challenges accessing any pharmacy. There had accordingly been little public support for the application. In response to questions from the Applicant, Interested Parties and Members of the PPC, Mr Arnott stated

that he could accept a response rate of 4% taking into account the possibility of other members in the household but did not consider that the response rate mattered in the circumstances and whilst other applications with a similar response rate had been granted there were equally others which had not.

3.3 The evidence of Mrs Cowle of Boots UK Ltd may be summarised as follows:

3.3.1 Mrs Cowle agreed with the neighbourhood defined by the APC which had used clear geographical features to define the boundaries and that whilst the identified neighbourhood had limited amenities the residents did not consider themselves to be living in isolation from existing services, there being good links by way of footpaths, roads and public transport. The PPC required to consider pharmaceutical services provided to the neighbourhood from pharmacies located out-with an identified neighbourhood and there were many to choose from and all of which provided an extensive and full range of pharmaceutical services with some incorporating evening hours and Sunday opening. Bus services were good with either hourly or half hourly services. Community transport was also available. She considered that the key message from the response to the CAR with quotes such as “handy”, “saves the hassle” and “closer to peoples’ homes” indicated convenience and not inadequacy. The APC found the area to “be well served in terms of pharmaceutical provision”.

3.3.2 In response to questions from the Applicant, Interested Parties and members of the PPC, Mrs Cowle stated that Boots had a plan in place to manage increasing demand which was based on patient safety and that Boots used a network of drivers for same day delivery.

3.4 The evidence of Mrs Williams of Well Pharmacy may be summarised as follows:

3.4.1 Mrs Williams considered that the proposed neighbourhood appeared to be manufactured to contain as large a resident population as possible and included a number of other distinct neighbourhoods including Blackhall, Charleston and Hawkhead. She considered the existing services to be adequate with ten pharmacies located within one mile of the proposed premises and that the Applicant had not demonstrated that the proposed pharmacy was to deliver any services not currently available to residents of the proposed neighbourhood. In response to questions from the Applicant, Interested Parties and members of the PPC, Mrs Williams acknowledged that the neighbourhood boundary had been difficult to define but had suggested Hawkhead should be excluded from the neighbourhood but could currently access services from one of the existing pharmacies. She added further, that the three stores being operated by Well Pharmacy had spare capacity to increase provision of core services as well as additional services.

3.5 The evidence of Mr Devanney of Barshaw Pharmacy may be summarised as follows:

3.5.1 He stated that the neighbourhood as defined by the Applicant was not a large distinct area lacking in pharmaceutical services and reiterated that Paisley as a whole had 17 pharmacies with at least 10 of these within about one mile of the proposed premises. There was more than adequate access to the existing pharmacies. He acknowledged, in response to a question by Mrs Bradley that his pharmacy was 1.6 miles by road from the proposed premises.

3.6 The evidence of Mr Mohammed of Abbey Chemists may be summarised as follows:

3.6.1 His view of neighbourhood was similar to that of Mr Devanney but suggested the following: North – by the White Cart River until Hawkhead Road; East – by Hawkhead Road down to the A726 Barrhead Road; South – along Barrhead Road and along the A726 as far as Cathcart Crescent and to the West – along Cathcart Crescent until the point it curved East then continuing North across the open field to White Cart River. He had stated that there was more than adequate parking in that there were 22 parking spaces for pharmacy customers, 20 general and two designated for disabled customers. He stated that the waiting times for a prescription was

about 10-15 minutes and which were monitored by audits although he did acknowledge that waiting times could be longer than 15 minutes at peak times.

#### **4. THE PPC DECISION**

4.1 All parties having summed up they left the hearing along with the Legal Adviser, Contracts Manager and Observers.

4.2 In addition to the oral evidence presented, the PPC are noted as having taken into account the fact that a joint site visit had been undertaken, that the map showing the location of the proposed pharmacy in relation to existing pharmacies and the surrounding area and datazones, other details of service provision and GP practices and prescription items, statistics, letters of support, Pharmaceutical Care Services Plan, the CAR and others.

4.3 In considering the **neighbourhood** it noted those as defined by the Applicant, Interested Parties and the APC and agreed with the APC that the neighbourhood should be defined as follows:

To the North by White Cart River until it met Hawkhead Road;

To the East by Hawkhead Road down the A726 Barrhead Road to Lochfield Road;

To the South by Lochfield Road-Neilston Road and

To the West by Neilston Road along Causeyside Street, Gordon Street, Mill Street to the White Cart River

4.4 The PPC acknowledged that, as suggested by the Applicant, the White Cart River was an obvious natural boundary to the North but considered the other boundaries to be somewhat contrived in that the Applicant had used Saucelhill Park as a natural boundary which the PPC did not consider it to be such as it involved a deviation from a major road (the A726) at Ardgowan Street which would require to be effected for the park to be located. The PPC considered its remaining boundaries provided a more natural boundary for the neighbourhood. The resultant neighbourhood incorporated the traditional communities of Blackhall, Hunterhall, Charleston and Lochfield all of which had similar housing stock. Hawkhead and Dykebar, were discreet areas of distinctly different housing type and as such were excluded from the neighbourhood. It considered that this neighbourhood contained amenities frequently used by residents including schools, churches, community centres, shops, parks, a medical centre, dentists and four pharmacies.

4.5 As to the **adequacy** of pharmaceutical services either within or serving the neighbourhood the PPC required to consider the various adminicles of evidence including that of the CAR. It had noted that in so far as the latter was concerned the response was small in regard to the population. Notwithstanding having considered the comments in more detail it was noted that the number of negative comments were broadly balanced by those which were more positive and that it was their view that the comments regarding the positive impact of the proposed pharmacy were more related to convenience rather than inadequacy of the current service provision.

4.6 In considering the demand for pharmaceutical services in the proposed neighbourhood in the future, the PPC considered the impact of an ageing population on pharmaceutical services. It had noted the percentage of the population aged 65 and over was 16.72% and for those age 75 and over 6.74%. It had considered and accepted the evidence of Mr Arnott that there was currently 18% of the Applicant's neighbourhood's population aged 65 and over and that in 10 years time that age range was expected to increase by only 600 people.

- 4.7 The PPC had noted future building works and that Miller homes had commenced construction of 486 new homes at Hawkhead Road. The PPC was reassured by the evidence from the Interested Parties that there was spare capacity in the network to cope with increased demand both from new housing development and an ageing population.
- 4.8 The PPC commented upon the Scottish Government's publication "Achieving Excellence in Pharmaceutical Care: A Strategy for Scotland (2017)" and were satisfied that the strategy contained therein did not suggest that the number of pharmacies should necessarily be increased. Instead it was about the utilisation of digital technologies and development of the existing network and workforce to ensure capability and improve capacity for a sustainable pharmacy provision.
- 4.9 The neighbourhood defined by the PPC contained four pharmacies providing all core services and a wide range of non-core services. Further the PPC was aware that residents had access to many more pharmacies out-with the neighbourhood particularly in Paisley town centre. The PPC considered the demographic data indicating that 71% of the Applicant's neighbourhood population was economically active and that car/van ownership was 72% with a significant proportion of residents able to access pharmaceutical services by car. It considered that adequate bus services for residents to access existing pharmacy services was available and that for residents unable to travel to one of the existing pharmacies the PPC had noted that all contractors provided a delivery service.
- 4.10 It was the view of the PPC that the provision of pharmaceutical services in the neighbourhood as defined by it and the level of service provided by contractors in the neighbourhood was currently adequate and it was neither necessary nor desirable to grant the application.

## **5. DISCUSSION AND REASONS FOR DECISION**

- 5.1. The Regulations are governed by section 27 of the National Health Service (Scotland) Act 1978 wherein it is provided that it shall be the duty of every Health Board to make arrangements as to its area for the supply to persons in that area proper drugs and medicines which are ordered by a Medical Practitioner in pursuance of his functions in the health service in Scotland. An application made in any case for pharmaceutical services 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 these services specified in the application. Regulation 5(10) also refers.
- 5.2. In terms of paragraph 3(1) of schedule 3 of the Regulations, the PPC shall have regard to the pharmaceutical services already provided in the neighbourhood of the premises, of the pharmaceutical services to be provided in the neighbourhood at those premises, any information available to the PPC which, in its opinion, is relevant to the consideration of the application, the CAR, the Pharmaceutical Care Services Plan and the likely long term sustainability of the pharmaceutical services to be provided by the Applicant.
- 5.3. The grounds for 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 in the way the application has been considered, that there has been a failure by the PPC to properly narrate the facts and reasons upon which their determination of the application was based, or there has been a failure to explain the Application by the PPC by the provisions of the Regulations to those facts.

- 5.4. The principal issue is whether or not the PPC has exercised its judgement fairly and given adequate reasons for it and it does not otherwise offend against the grounds for appeal set out in Schedule 3 paragraph 5(2A) and 5(2B). It is important to note that the PPC comprises pharmacists and lay members who may be expected to understand the issues involved on the evidence before it. It is an expert tribunal. Equally, it must be understood that 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.
- 5.5. The Appellant has taken issue with the PPC's determination of neighbourhood in that it had failed to properly narrate why the East, West and South boundaries of the Applicant's proposed neighbourhood were "contrived" then proceeds to expand upon evidence given by the Applicant during the course of the hearing. The PPC heard evidence on neighbourhood boundaries not only from the Applicant but also from representatives of all Interested Parties. The Applicant was further questioned on the subject by members of the PPC. The PPC had the additional advantage of having conducted a group site visit. It is fair to assume that they were well apprised as to the matters informing their decision on neighbourhood. Mr Arnott of Lloyds had suggested that the Applicant's boundaries were "suspicious...as it conveniently excluded three pharmacies". The PPC in its definition felt that the Applicant's definition had been "contrived" and proceeded to explain why it considered it to be so. The PPC has set out its definition of neighbourhood and given adequate reasons for it and it need do no more than that. Accordingly I am of the view that there has been no procedural error or one in law in relation to the PPC's definition of neighbourhood.
- 5.6. In terms of schedule 3 paragraph 3(6), the PPC in its determination of an application must include a summary of the CAR and an explanation as to how the CAR was taken into account in arriving at the decision with reference to the test outlined under Regulation 5(10). The situation in this case is that there have been 125 responses from out of a population of over 6000 and referred to by the PPC as "disappointingly small" such that the PPC was unable to draw any firm conclusions from it. However the PPC state that having looked at the comments in more detail it was noted that the number of negative comments was broadly balanced by those which were more positive and that those which were positive were more about "convenience rather than inadequacy". Whilst I appreciate that the response rate was small the consideration and explanation of how the CAR was taken into account by the PPC is regrettably insufficient and I will deal with how that may be remedied in Clause 6 below. The provisions of the Regulations are prescriptive. They require a *summary* of the CAR and an *explanation* as to how it was taken into account. Specific examples drawn from the CAR and rational conclusions drawn from them would have been more appropriate. That is not to say, however, that the PPC requires to enter into the finest detail of the provisions of the CAR. That some respondents to the CAR were in favour and some against the PPC may draw inferences from each so long as it is able to justify its conclusion that will be enough to have discharged its duties. It must be understood, too, by the Appellant, that the CAR (which in this case has a very low percentage response rate) is not determinative. It is a matter for the PPC to weigh up all the evidence heard and seen by it in determining adequacy. It is clear that in other respects the PPC have sufficiently narrated its reasons as to the adequacy of the existing provision.
- 5.7. The Appellants state that the PPC failed to give sufficient weight to certain issues. The PPC may give such weight to evidence (which in this case has been generally extensive) as it deems appropriate and it may refer to it in broad brush terms only so long as its reasoning is clear. It is patent from the decision of the PPC that it has considered that there was adequate provision of pharmaceutical services in the neighbourhood to which the application related principally on the basis that pharmaceutical services were being provided by four existing pharmacies within the neighbourhood in addition to others outwith. In short, therefore, the reasons given by the PPC



are both intelligible and adequate (save for my earlier reference to the CAR ) and I accordingly reject the grounds of appeal.

5.8 There are two further issues that require to be commented upon

- (i) The reference by the PPC to non-contractual delivery of items. I agree with the Appellant that delivery is not a core requirement and that whilst it ought to have been acknowledged as such by the PPC nevertheless in the context of its discussions on access I would regard the PPC's reference to delivery as of minor moment and had no real bearing on the decision.
- (ii) The suggestion that Mr Arnott appeared as a "paid advocate" of one of the Interested Parties is entirely without foundation or evidence. There is no provision prohibiting one interested party to assist another whether present or not, indeed it is to be expected, and no possible prejudice could attach to the Applicant in these circumstances.

5.9 All other principal issues have been appropriately addressed by the PPC in determining adequacy and there is no need for me to go into these in any detail.

## **6. DECISION**

6.1 The PPC will require to reconvene to provide a summary of the CAR, the terms of which have been completed in accordance with Regulation 5A(4) and to provide an explanation as to how the CAR was taken into account in arriving at its decision.

6.2 The PPC will therefore require to re-issue an amended decision to all parties who may yet appeal against the decision within the appropriate time limit but that is only in relation to schedule 3 paragraph 3(6).

(sgd) J Michael D Graham

Interim Chair

23 July 2018