

# 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**

**1A Hillhead Road, Tornagrain**

**Applicant: Tornagrain Healthcare Ltd**

**Appellant: Boots UK Ltd (“the Appellant”)**

**Health Board: NHS Highland (“the Board”)**

**PPC Decision issued: 20 October 2019**

**Panel case number: NAP 92 (2019)**

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

### **1. Background**

- 1.1. This is an appeal against the decision of the Pharmacy Practice Committee (“PPC”) of NHS Highland (“the Board”)
- 1.2. Tornagrain Healthcare Limited (“the Applicant”) 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 1A Hillhead Road, Tornagrain (“the Premises”), said Application dated 23 July 2019.
- 1.3. The PPC, under delegated authority of the Board, took evidence from the Applicant and Interested Parties at a Hearing which took place on 11 October 2019. It also considered as supporting documentation, and following upon all of which, it determined that the provision of pharmaceutical services at the Premises was desirable in order to secure the adequate provision of adequate pharmaceutical services in the neighbourhood.

### **2. Grounds of Appeal**

- 2.1 The Appellant’s principal ground of appeal follows upon the PPC’s decision that, whilst it was not necessary to grant the application, it was desirable to do so to make up for a present shortfall which might result in overprovision in the present time but it would secure adequacy for the future and in doing so the PPC did not base its decision on any available evidence.
- 2.2 In support of this contention the Appellant stated that the PPC was of the view that the need for pharmaceutical services in the neighbourhood was likely to increase and that the population growth was estimated to be around 10,000 in the next decade but had cited no evidence that there was a known population growth in that time nor any estimate as to when the point of securing adequacy would be achieved. It could not be reasonable to extrapolate to a period 10 years hence. In any event the estimate of population in the area of 10,000 achieved within 10 years was inconsistent with the figures in the NHS Highland Health Intelligence Team briefing HHIT which had been prepared for the Applicant’s application which had indicated that the growth to 10,000 residents would take 40-50 years. The paper suggests a population growth in the order of 2000 by 2032 increasing to 5000 within a 15 year period.
- 2.3 The Applicant had stated in its evidence that there would be an additional 5000 homes but in the master plan for the Tornagrain development produced in 2011 there would be an additional 4960 homes in a phased manner over a period of 35 years and that a variation to the timescales was applied for in 2007 delaying the completion of each phase by approximately 3 years resulting in completion of the total phase by 2049 at the earliest. Accordingly, that the predicted population growth and the development of houses was unlikely to be realised within the next decade. The PPC had no evidence upon which to base its decision.
- 2.4 The Appellant states that there were grounds for considering the viability of the proposed pharmacy notwithstanding that the PPC considered that it would be unlikely that it would close at a future date and that the PPC referred further to other evidence included in the Applicant’s business plan. However, on page 6 of the minutes the Applicant states that he would not attempt to set the details of the business case on the basis of it being commercially sensitive and not required by Regulation 5(10). In the circumstances the Appellant’s question the viability in view of a limited population currently, the lack of a business plan and future timescales.

### **3. Discussion**

**3.1.** Under the regulations, the available grounds of appeal against a decision of the Board are limited to circumstances in which there has been:

- 3.1.1. An error in Law by the Board in its application of the regulations
- 3.1.2. A procedural defect in the way the application has been considered by the Board;
- 3.1.3. A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based or
- 3.1.4. A failure to explain the application by the Board of the provision of these regulations to those facts

**3.2.** I am required to consider the notice of appeal and:

- 3.2.1. To dismiss the appeal if I consider that it discloses no reasonable grounds of appeal or is otherwise frivolous or vexatious
- 3.2.2. Remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out at points 3.1.2. to 3.1.4. have occurred or
- 3.2.3. In any other case convene the National Appeal Panel to determine the appeal

**3.3.** A principal consideration is whether or not the PPC has exercised its judgement fairly and given adequate reasons for it and that it does not otherwise offend against the grounds of appeal as set out in Schedule 3 paragraphs 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 that its reasoning does not give rise to any substantial doubt that it had erred in Law.

**3.4.** The oft-quoted decision of Lord Drummond-Young in *Lloyds Pharmacy Ltd v the National Appeal Panel* (2004) is relevant in relation to the appeal.

**3.4.1** He stated that in applying the Legal Test, the first step that the decision maker requires to take is to identify the relevant neighbourhood which is not in dispute in the current circumstances and thereafter a two stage approach is applied. The PPC must consider whether the existing provision of pharmaceutical services in the neighbourhood is adequate and that if it decides that such provision is adequate that is the end of the matter and the application falls. If it decides that such provision is not adequate there is a second question i.e. whether the provision of pharmaceutical services at the premises is necessary or desirable in order to secure adequate provision. A deficiency in services must exist before an application may be granted and such deficiency requires to be identified before it is necessary to consider what may be done to provide a remedy. Lord Drummond Young states "...adequacy' is a simple concept in the sense that there is no room for different degrees of adequacy or a spectrum of adequacy. Either the pharmaceutical services available in a neighbourhood are adequate or they are not....The standard of adequacy is a matter for the decision maker (the PPC)". As stated the PPC is a specialist tribunal and can be expected to apply its knowledge of the pharmaceutical business to the task of determining the appropriate standard.

**3.4.2** Lord Drummond-Young continues "...it is in our opinion proper to have regard to probable future developments for two reasons. First, while the standard of adequacy in a particular neighbourhood will obviously change with time. The

relevant neighbourhood may change, for example through the construction of new housing developments or the movement of population out of inner city areas. Likewise changes inevitably occur in pharmaceutical practice and the standard of “adequate” pharmaceutical provision must accordingly develop over time....Regulation 5(10) uses the word “secure” in relation to the adequate provision of pharmaceutical services. That word seems to us to indicate that the decision maker can look to more than merely achieving a bare present adequacy of pharmaceutical provision. “Secure” suggests it should be possible to maintain a state of adequacy of provision into the future. That indicates that the decision maker must have some regard to future developments in order to ensure that an adequate provision can be maintained....[the PPC] must accordingly reach its conclusion on the adequacy of the existing provision on the basis of what is known at that time together with future developments that can be considered probable rather than speculative...and bear in mind that the critical question at this stage ought to be the adequacy of the existing provision not the adequacy or desirability of some other possible configuration of pharmaceutical services in the neighbourhood.” The decision goes on to state that the words “necessary or desirable” are intended to give some degree of flexibility in the manner in which a shortfall in provision is remedied and if the proposal under consideration does no more than make up the shortfall, that proposal will be always necessary” and that in some cases the proposal may go further and result in a degree of overprovision in which event the word “desirable” will permit the approval of such a proposal. If the (PPC) is satisfied that notwithstanding the overprovision the proposal is still desirable in order to secure adequacy. He further states that the question of whether a proposal is necessary or desirable in order to secure an adequate provision is a matter for the PPC as a specialist tribunal.

- 3.5.** The PPC has determined the Neighbourhood which, in terms of the Appeal, is not contentious. The PPC has, however, in the context of their deciding that the grant of the application was desirable, did so on the bases of the evidence of demographics, social environment, economic opportunities, health and wellbeing of the residents, and also that the population growth was estimated to increase significantly to around 10,000 “over the next decade or so”. The evidence upon this latter reason was based was that of the Applicant which, whilst unchallenged in examination by the Boots representative or members of the PPC, save that in her evidence, the Boots representative questioned (albeit accepting that outline planning permission had been granted for a new town in the neighbourhood) whether the timescales were realistic. Her view, suggested by reference to delays and planning consents, was that completion of the whole development would take around 35 years. The Members of the PPC had undertaken a site visit and had noted that building works had already commenced in the Neighbourhood and there were proposals for the building of a new Primary School in two years.

The concept of adequacy is not predicated on the issue of population alone. As Lord Drummond-Young had observed, the current delivery of pharmaceutical services and the standards of such delivery is relevant. There was, for example, evidence of poor uptake of eMAS in the existing pharmacy serving the Neighbourhood. E-MAS is a core service, and the poor uptake of it could, in my opinion, at the very minimum and not necessarily of itself, be an indicator of poor service.

- 3.6.** The PPC took into account issues of travel times and costs to existing pharmacies as well as costs of delivery of items to patients within the Neighbourhood, supporting the Applicant’s submission that this jurisdiction had resolved to remove prescription charges as being a tax on ill health.

**3.7.** As to the question of viability of the proposed pharmacy, the PPC had taken the view that, notwithstanding the planned developments, viability would be unaffected. It is noted that the Boots representative considered that the Neighbourhood could sustain a new pharmacy.

**4. Disposal**

**4.1.** In the circumstances narrated above, I dismiss the Letter of Appeal of the Appellant on the basis that it discloses no reasonable grounds nor prospects of success.

**(sgd.) J Michael D Graham**  
**Interim Chair**  
**17 February 2020**