

National Appeal Panel

Constituted under

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)
(SCOTLAND) REGULATIONS 2009 (AS AMENDED)**

DECISION

of the

CHAIR

of

THE NATIONAL APPEAL PANEL

In the application relating to

23 Greenock Road, Bishopton, PA7 5JN

Applicant: Logan Gray Ltd

Appellant: Logan Gray Ltd

Health Board: NHS Greater Glasgow & Clyde (“the Board”)

PPC Decision Issued: 17 November 2021

Panel case number: NAP101 (2021)

NAP101(2021)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. This is an appeal against the decision of the Pharmacy Practices Committee (“the PPC”) of the Board which was taken at a meeting of the PPC on 27 October 2021 in relation to the application by Logan Gray Ltd (“the Applicant”). The decision of the PPC was subsequently issued on 17 November 2021.
- 1.2. The PPC refused the application. A letter of appeal has been submitted by Logan Gray Ltd (“the Appellant” and/or “the Applicant”).

2. Grounds of appeal

- 2.1. The note of appeal sets out five grounds of appeal. They are that the PPC:
 - 2.1.1. erred in Law by failing to take into account the effect of future developments on the adequacy of the existing provision;
 - 2.1.2. erred in Law by failing to take account of the fact that the Consultation Analysis Report (“the CAR”) was out of date;
 - 2.1.3. erred in Law by failing to take account of alleged interference in the CAR by an existing provider;
 - 2.1.4. allowed a procedural defect by failing to issue a decision within six weeks of receipt of the CAR; and
 - 2.1.5. failed to properly narrate the facts or reasons upon which the decision was based

3. Decision

- 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 of 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 [“schedule 3 para 5 (2B)(b)"]; or
 - 3.1.4. a failure to explain the application by the Board of the provisions of these regulations to those facts [“schedule 3 para 5 (2B)(c)”]
- 3.2. I am required to consider the notice of appeal and:
 - 3.2.1. to dismiss the appeals if I consider that they disclose no reasonable grounds or are otherwise is 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 in 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

4. Consideration of Points of Appeal

Ground of appeal 1

- 4.1. The Appellant asserts that the PPC failed to take account of likely future developments in the neighbourhood in its consideration of the adequacy of the existing service. In particular, the Appellant considers that the PPC failed to have proper regard to the submission made to it that 1682 houses were scheduled to be completed within 2-3 years and that this would place an increased burden on the existing services.
- 4.2. It is well established that the PPC is required to consider not just whether the existing services are adequate at the time of the application but whether existing services will be adequate in light of anticipated future developments. The question is, therefore, whether the PPC duly did so.
- 4.3. The particular concern raised by the Appellant is that the PPC stated in its decision that the anticipated development of 1682 houses in 2-3 years "could not be corroborated". The Appellant objects to this statement on the basis that the submission was supported by the Renfrewshire Finalised Housing Land Audit 2019. On that basis the Appellant asserts that not only could the figures be corroborated, but that they had been corroborated.
- 4.4. It may be that the point the PPC was seeking to make was that these figures were necessarily an estimate and that there could be no certainty that the anticipated building would have actually materialised in the anticipated timescale, particularly as the report relied upon appears to have been prepared 2-3 years before the decision was taken. However, if that is the case, it has not been clearly set out.
- 4.5. Had the PPC subsequently addressed the issue of future provision clearly and fully this issue may have been adequately clarified. However, in reference to this argument, the PPC states it considered it to be a theoretical argument and not based on evidence around existing services. This brief statement does not state the PPC's reasoning for concluding not only that the existing services were adequate but that they would be adequate in light of the anticipated future developments. The PPC should consider the existing capacity in service and the likely change in demographics and population size caused by any known development and assess if in its view, the service will remain adequate to service that changed need. This is a challenging task and, to some extent, is necessarily theoretical. However, it is something that the PPC is required to engage with and to explain its reasoning.
- 4.6. For these reasons, although I do not consider the PPC to have erred in Law, I do consider that they have failed to adequately explain the facts and reasons for their decision.

Ground of appeal 2

- 4.7. The second ground of appeal is that the CAR is out of date, having been completed approximately 2 years before the hearing. On this basis the Appellant submits that the weight given to the CAR ought to be low.
- 4.8. I do not accept this ground of appeal. The CAR is an integral part of the information to which the PPC requires to have regard when making its decision. This is made clear from the fact that the PPC is required not simply to have regard to the CAR but to summarise its content in their decision. It is not open to them to simply disregard it due to the passage of two years.
- 4.9. In order for the PPC to limit the regard they had to the CAR due to the passage of time, the PPC would need to have received compelling information and submissions to specifically explain why the CAR was no longer representative of the position. It is notable that when addressing the CAR in its submissions, the Appellant did not raise the issue of its age or specifically set out what had changed in the period since it was finalised.
- 4.10. For these reasons I do not consider there to be any merit to this ground of appeal.

Ground of appeal 3

- 4.11. The third ground of appeal is that the PPC did not take account of evidence submitted which indicated that the existing pharmacy in the neighbourhood had encouraged negative responses to the CAR.
- 4.12. I consider this ground of appeal to be misconceived. First, the PPC did consider the evidence submitted by the Applicant in this regard. It sets this out in paragraph 10.16 of its decision and concludes that there was no evidence of any inappropriate conduct. The Applicant may disagree with that conclusion however, that is not a valid ground of appeal.
- 4.13. Further the evidence relied on by the Applicant did not provide any indication that the existing provider had improperly sought to secure negative responses to the CAR. The Facebook post relied on by the Applicant sets out the existing provider's position on the Applicant and asks "if you have an opinion on this then please fill out the attached survey". All the existing provider can be said to have done is to set out its position and to encourage in neutral language local residents to participate. I can see nothing wrong with them having done so.
- 4.14. I accordingly refuse this ground of appeal on the basis that it discloses no reasonable grounds.

Ground of appeal 4

- 4.15. The fourth ground of appeal is that the PPC failed to provide its decision within six weeks of receipt of the CAR and failed to give notice of any decision to extend that period due to exceptional circumstances. The Appellant asserts that this is a procedural defect.
- 4.16. Paragraph 3(4) of schedule 3 of the Regulations requires the Board to make a determination on the application within six weeks of receipt of the CAR. An extension of this timescale can be made in exceptional circumstances. If it chooses to do so, it must inform the parties of the extended time period and the reasons for the extension.
- 4.17. The Appellant submits that the decision was not made within the six week period and no notice was given of the extension or reasons for it. On this basis, the Appellant asks the National Appeal Panel to remit the application back to the PPC and direct that they undertake a new joint consultation before reconsidering the application.
- 4.18. In my experience the Board will rarely, if ever, issue a decision within six weeks of receiving the CAR. There may be procedural issues which give rise to this, but I also consider that the Regulations themselves make this almost inevitable. The Regulations require:
- a) the Board to have regard to the CAR when considering the application [paragraph 3 schedule (1)(e)];
 - b) the Board to give all parties reasonable notice of a meeting at which oral representations are to be received [schedule 3, paragraph 3] (NB – strictly speaking the Board is entitled to make a decision on the application without hearing oral submissions but, in my experience, this is very rare.); and
 - c) issue a determination within six weeks of receiving the CAR

The net effect of these provisions of the Regulations is that the Board cannot consider the matter until the CAR has been received (as it requires to consider the CAR as part of the decision making process). After the CAR has been received, the Board is then required to give all parties reasonable notice of any meeting at which oral representations are to be made. What constitutes reasonable notice is not specified but I would anticipate that parties would expect a number of weeks notice to be given to them in order to arrange to appear and prepare submissions. The result of this is that the Regulations give the Board a very limited time window in which to convene the PPC, make arrangements for the meeting, give parties notice of that meeting and issue a determination. Even if there had been a hearing within this time

window, the slightest disruption or issue with availability would prevent it doing so. It may well be said that this is catered for by the ability of the Board to prorogate the timescales in exceptional circumstances. However, it seems unlikely that minor procedural or availability issues are what was envisaged by “exceptional circumstances”. As a result, the Regulations appear to place the Board in a practically impossible situation.

- 4.19. A further issue which requires to be considered is that the Regulations require the consultation which sits behind the CAR to be carried out in the 90 days prior to the submission of the application [Regulation 5(A)(3)]. As such the remedy suggested by the Appellant i.e. that a fresh CAR is carried out prior to reconsidering the application would also result in a procedural defect as the consultation would not have been carried out in the 90 days prior to submission of the application.
- 4.20. I am conscious that the Regulations require me to remit the matter back to the Board in the event that I consider there has been a procedural defect. I am sympathetic with the position of the Applicant and, indeed, on the face of it there may well have been a procedural defect. However, in the event that there was a procedural defect it is one which (a) occurs routinely almost inevitably as a product of the way in which the Regulations have been drafted and (b) to which there appears to me there would be no remedy which would itself not create a procedural defect.
- 4.21. For these reasons, I shall refuse this ground of appeal.

Ground of appeal 5

- 4.22. The fifth ground of appeal is an objection to the format of the decision of the PPC. The decision, as is common, takes the form of a detailed note of the evidence and submissions made to the PPC and a briefer note of the consideration of that evidence and reasoning of the PPC. The Appellant considers that this form of decision is one which inherently fails to properly narrate the facts and reasons for the decision.
- 4.23. I reject this ground of appeal as being frivolous and disclosing no real ground of appeal. The decision sets out in full the evidence heard and then sets out its reasoning. There have been occasions previously when the PPC’s reasoning following the narration of evidence has been thin and relied over heavily on the summation of evidence to give the decision context. However, the simple format of the decision does not excuse the Appellant from having to read the decision carefully and seek to understand it. If having done so, the Appellant is unable to properly identify the reasons for the decision then it must set out specifically where the reasoning is deficient. A blanket objection to the form of the decision because it is difficult to understand is not a tenable ground of appeal.

5. Disposal

- 5.1. For the reasons set out above, I shall remit the matter back to the PPC to set out its reasoning for concluding that the anticipated development within the neighbourhood is not such as to render the existing service inadequate for the future needs of the neighbourhood. On doing so the PPC should specifically address whether it accepts that there are likely to be 1682 houses built in the next 2-3 years and, if not, why it does not accept that submission.
- 5.2. I shall dismiss the remaining grounds of appeal for the reasons set out above.

(sgd) J M D Graham
Interim Chair
National Appeal Panel
22 April 2022