

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

**93C UPHALL STATION ROAD,
PUMPHERSTON. EH53 0NU**

Applicant and Applicant: F & F Coffey Ltd

Health Board: NHS Lothian ("the Board")

PPC Decision Issued: 17 July 2024

Panel case number: NAP 128 (2024)

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 dated 17 July 2024, in relation to the application of F & F Coffey Ltd.
- 1.2. The application was originally made on 8 May 2023. The application was considered at a meeting of the PPC on 17 July 2024. The PPC issued its decision to refuse the application at or around the same time. The Applicant now appeals that decision.

2. Ground of Appeal

- 2.1. The Applicant, now the Appellant, advances one ground of appeal, namely, that there has been a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based.

3. Legislative framework

Appeals

- 3.1. The Regulations provide, at paragraph 5(2B) of Schedule 3, a limited right of appeal against a decision of the Board. These are errors in law in terms of the application of the Regulations and are as follows:
 - 3.1.1. A procedural defect in the way the application has been considered by the Board;
 - 3.1.2. A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; or
 - 3.1.3. A failure to explain the application by the Board of the provisions of these Regulations to those facts.

Consideration by the Chair

3.2. The Regulations provide, at paragraph 5 of Schedule 3, that as Chair I am required to consider the notice of appeal and:

3.2.1. To dismiss the appeal if I consider that they disclose no reasonable grounds or are otherwise is frivolous or vexatious; or

3.2.2. Remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out in points 3.1.1 to 3.1.3 have occurred or;

3.2.3. In any other case, convene the National Appeal Panel to determine the appeal.

PPC: Legal test and determination of applications

3.3. The Regulations provide, at Regulation 5(10), the relevant test to be applied by the Board when considering an application to be on the Pharmaceutical list. That test, which has in its previous comparable iteration been the subject of judicial treatment is, put simply, whether the present services are inadequate and, if so, whether the application is necessary or desirable in order to secure adequate provision. If the answer is yes to both of these questions the Board is to grant the application.

3.4. The Regulations provide, at paragraph 3(1) of schedule 3, those matters that the Board shall have regard to in considering an application. These matters include current service provision, representations received by the Board, the consultation analysis report (“CAR”), the pharmaceutical care services plan (prepared by the Board for its area annually), the likely long term sustainability of the services to be provided by the applicant and any other relevant information available to the Board.

4. Consideration

- 4.1. The ground of appeal relates to whether there has been a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based.
- 4.2. This is with reference to what the Appellant characterises as the “catch all” statement found at paragraph 29.9 of the Minutes of Meeting of the PPC dated 17 July 2024. That paragraph provides the following:

“The Committee was mindful that determination of adequacy would be a question applied to the facts and evidence revealed and established, and its conclusion reached would be after exercising appropriate judgement. It gave careful consideration to the evidence it had received from the applicant, the CAR responses, the interested parties, the Medical Practices, its PPC member visits to the site; and it heard advice from contractor and non-contractor pharmacist members of the panel about the issues identified in the hearing and their knowledge of equivalent service delivery matters elsewhere in Scotland.”

- 4.3. A similar concluding paragraph is provide at paragraph 30.3. It provide:

“Taking account of all the representations made, and the information revealed by the CAR and submitted orally and in writing the Committee determines that it is necessary to reject the application.”

- 4.4. Ordinarily I would agree with the Applicant that paragraphs like these, catch all paragraphs, are insufficient when it comes to discharging the duty to give reasons, or as it is framed in the Regulations, the requirement to properly narrate the facts and reasons upon which their determination of the application was based. Paragraph 3(6)(c) also provides that the Board’s determination must include the reasons for the its decision.

- 4.5. However, paragraph 29.12 does, in my view, provide sufficient reasons. In particular that the Board rejected, on the evidence before it as mentioned above, the view that the services to the neighbourhood were inadequate. This was primarily based on the facts that there were eight pharmacies within a three mile radius.
- 4.6. The consideration of adequacy also discloses, at paragraph 29.8, that the PPC approached the issue of adequacy in the correct way and with reference to the relevant legal test.
- 4.7. The relevant case law (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) has made it clear that the decision maker should view adequacy as a binary test. Either the pharmaceutical services available in a neighbourhood are, at the time of considering the application, adequate, or they are not. The decision maker should not view adequacy as a matter of degree or on a spectrum. The ability to make improvements to, or some other possible configuration of, pharmaceutical services would feature on such a spectrum but neither automatically means that existing services are inadequate.
- 4.8. The PPC considered that although an additional pharmacy might be convenient for those living in the neighbourhood and that it would therefore represent an improvement for them, it did not follow that the existing services were inadequate. This ground of appeal is not therefore upheld.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is unsuccessful as it discloses no reasonable grounds of appeal in terms of the Regulations.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

7 October 2024