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

261-263 Bilsland Drive, Ruchill, Glasgow G20 9RE

Applicants & Appellants: C D Chem Ltd
Board: NHS Greater Glasgow & Clyde
PPC Decision issued: 3rd June 2016
Panel Case Number: NAP 58 (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 of NHS Greater Glasgow & Clyde ("the PPC") which was issued on 3rd June 2016.

1.2 C D Chem Ltd (the "Applicants" or "Appellants") made application for inclusion in the pharmaceutical list of NHS Greater Glasgow & Clyde ("the Board") to provide pharmaceutical services in respect of the premises at 261-263 Bilsland Drive, Ruchill, Glasgow ("the Premises") said application dated 12th February 2016.

1.3 The PPC under delegated powers of the Board held a Hearing on 12th May 2016 and took evidence from the Applicants and interested parties and considered supporting documentation and following upon which it determined that the provision of pharmaceutical services at the Premises was neither necessary nor desirable in order to secure provision of pharmaceutical services in the neighbourhood in which the Premises are located standing that the current provision was adequate and accordingly refused the application.

2 Summary Of Grounds of Appeal and Discussion

2.1 Failure to determine the application within 6 weeks.

The appellants assert that the Board failed to determine the application within 6 weeks. In terms of Schedule 3, para 3(4) of the Regulations, the PPC:

"shall, subject to sub-paragraph (5), make a determination on the application within 6 weeks of the date that they received the consultation analysis report under regulation 5A."

Sub-paragraph (5) provides:

"A 6 week determination period under sub-paragraph (4) may be
extended in exceptional circumstances and in such an event the Board must inform the applicant and any other person or body notified under paragraph 1 or 2A, of the extended time period and the reasons for it.”

Whilst the appellants are correct to note that a determination should be made within 30 days the Board is expressly given the discretion to extend that time period in exceptional circumstances. In this case, the Board elected to exercise its discretion to extend the relevant time period on the grounds that it could not be established whether the Maryhill Pharmacy, which was entitled to respond to the application, had received notification of the application. It was incumbent upon the Board, in terms of Schedule 3, paragraph (1) of the Regulations, to ensure that the pharmacy in question had received notification of the application and was given the opportunity to respond. I consider that it was entirely appropriate that the exception provided for by the Regulations was utilised by the Board to ensure that proper procedure was followed and that Maryhill Pharmacy was given proper notice of the application. Accordingly, I consider this ground of appeal to have no merit.

2.2 Decision to refuse to allow submissions by Community Council (‘CC’)

What seems to have happened is that the CC received notification of the application and claim that they duly made representations within 30 days but the Board did not receive them. The CC have stated in a subsequent e-mail communication (out of time) that the copy of their representations was never filed and was subsequently mislaid. In terms of Schedule 3 (2) any person notified by the Board of the Application may make representations within 30 days of such notification. No such representations were received by the Board within that period and, accordingly, the Board was entitled to have the CC’s representative excluded from the Hearing. Notwithstanding, the Chair permitted a letter from the CC in support of the application to be tabled at the
Hearing. In passing, there was no ‘special concession’ exercised in
favour of Maryhill Pharmacy where the Board had initially omitted
to forward to them the appropriate notice of the Application and
where the period of time was extended to remedy the defect.

3.3 Failure to intimate decision within 5 days

In terms of Schedule 3, paragraph (4) the Board is required to
intimate the decision of the PPC within 5 days of receiving the
decision. As the appellants note the relevant date for the purposes
of this application was 3 June 2016. Whilst the appellant states that
he did not receive notification until 6 June 2016 the Board advise
that the notification was duly issued on 3 June 2016. It is intimation
rather than receipt which is required to take place within 5 days in
terms of the Regulations. I am, therefore, content that the
determination of the PPC was issued timeously.

In any event, I do not consider any delay to constitute a ground of
appeal which the National Appeal Panel may consider. This ground
of appeal is forwarded on the basis that a failure to intimate the
determination timeously constitutes a procedural defect in terms of
Schedule 3, paragraph (5)(2B)(a) which provides that an appeal may
be made if “there has been a procedural defect in the way the
application has been considered by the Board”. Accordingly, this
ground of appeal is limited to procedural defects which form part of
the consideration of the application. The procedural defect
complained of by the appellant, if there be one, relates to the
intimation of the determination – not to the consideration of the
application.

There is good reason for any procedural defect in the
administrative rules surrounding the issuing of the determination
not to form a ground of appeal. Put simply, any such procedural
defect could not undermine the fairness or procedural propriety of
the decision making process as the determination had already been
made.

Accordingly, I do not consider the ground of appeal advanced by
the appellant to be open to the National Appeal Panel to consider as it does not fall within the specified grounds of appeal set out in the Regulations.

3.4 Communications Regarding Site Visit

The appellant appears to assert that there has been a procedural defect on the basis that the PPC did not phone the landlord to seek to arrange access to the proposed pharmacy premises, instead sending a text message. It is not at all clear on what basis the appellant asserts that this constitutes a procedural defect. Although I understand it is common and usual practice, the PPC is under no obligation to carry out a site visit. It is certainly not unusual to omit to inspect the Premises. As such, there can be no procedural defect associated with a failure to properly arrange one.

The appellant's concern is that the difficulty in arranging a site visit may have prompted the PPC to ask questions about the nature of the appellants' rights to use the site. There is of course nothing improper about the PPC asking about the basis on which the appellants have secured the premises from which they propose to trade. Equally, there is no suggestion that the PPC did not accept that the appellants had secured the necessary rights to use the premises or indeed that it had any bearing on their decision. I am satisfied that there is no merit to this ground of appeal.

3.5 Evidence Provided by Mr Qayum

The appellants assert that there has been a failure by the PPC to properly narrate the evidence provided to it by Mr Qayum on behalf of Maryhill Pharmacy. Specifically, the appellants indicate that Mr Qayum was asked by the PPC to define what he considered to be the relevant neighbourhood but could only state that it should include Maryhill Road. It is further stated that this followed assistance by Mrs McElroy of Rowlands Pharmacy where, in terms of the Regulations, a party may be assisted by only one party.

In relation to the recording of evidence, it should be noted that the
decision of the PPC is not intended to provide a verbatim re-
statement of the evidence. It is not a transcript. It is intended to
provide a fair statement of the evidence received. On the
assumption that the appellant’s characterisation of the evidence
provided by Mr Qayum is correct (on which I express no view), I
consider that the decision of the PPC fairly reflects the evidence
provided. Mr Qayum’s submission, as stated by the appellant, was
that the neighbourhood should include Maryhill Road. This is
reflected in the decision of the PPC.

In relation to the discussions which it is said took place between Mr
Qauym and Mrs McElroy, there is no issue with parties conferring in
relation to their submissions – indeed it is to be expected. The
appellant makes reference to Schedule 3, paragraph 3(3) of the
Regulations which requires the PPC to permit any person making
representations to the PPC to be assisted by one person. This is not
applicable to discussions between parties and, in any event, does
not prevent the PPC from allowing more than one party to assist –
it simply requires the PPC to allow at least one party to assist.

3.6 Boundaries of Neighbourhood

The appellants assert that there has been a failure by the PPC to
properly narrate the facts and reasons for their decision on the
basis that having concluded that the canal which the appellant
stated formed the western boundary of the neighbourhood was not
a natural boundary it was not open to the PPC to conclude that the
canal to the northern boundary of the neighbourhood did
dconstitute physical boundary to the neighbourhood – to do so
would be contradictory.

I consider that the position adopted by the appellant fails to have
regard to the reasoning of the PPC in relation to why the canal to
the west of the proposed neighbourhood does not form a natural
barrier. The PPC is quite clear that the canal was not considered to
be a natural boundary because it is easily and regularly crossed by
the occupants of the neighbourhood. Little attention was devoted
to the canal at the northern boundary because there was no
dispute to the appellants’ proposal that it be treated as the northern boundary of the neighbourhood. It is, however, perfectly possible for a canal in one location to form a natural boundary but not in another. The ease with which it can be crossed is clearly a relevant factor – which has been identified by the PPC. As such, I consider there to be no lack of clarity in the decision of the PPC in this regard.

3.7 Necessary Characteristics of a Neighbourhood

The wording of the PPC’s Decision is arguably untidy. I agree with the appellants’ understanding that it does appear to suggest that certain things are necessary to establish a neighbourhood rather than simply indicators. Perhaps the PPC have not misunderstood that but the wording is not clear and has been effected with unfortunate brevity. I will deal with this issue at 4.1 below.

3.8 Consideration of Elderly/Infirm Crossing Canal

The appellants argue that the PPC has failed to properly narrate the facts and reasons for concluding that the canal to the western boundary of the neighbourhood as proposed by the appellants did not form a barrier to vulnerable groups and those with physical impairments. The PPC was cognisant of the arguments raised in this regard by the appellants – the appellants’ arguments are narrated in the decision and the PPC specifically states that regard was had to the appellants’ submissions. Against that background, the PPC’s reasoning is brief but clear. The decision states that the canal was easily crossed and that the local community clearly took access across the canal for the purposes of access to other essential services.

3.9 Consideration of Complaints

Finally, the appellants state that the PPC has failed to narrate the facts and reasons for its decision as it has failed to state whether it took into consideration the complaints received by the Health
Board identified by the freedom of information request carried out by the appellant. The decision is clear in the pre-amble to the decision that it had regard to this information. The PPC is not required to specifically address each item of evidence placed before it. It is apparent from the decision that the PPC concluded that the services currently provided were adequate on the basis of the volume of pharmacies available and the lack of any substantive support for the proposed new pharmacy from the local community. Nevertheless it is incongruous that specific reference is made to the denials that the existing pharmacies received complaints but not to the fact that there were complaints to the Health Board. I will deal with this issue at 4.2 below.

4 Decision

4.1 That there has been a failure by the PPC to sufficiently explain the application of the provisions of the Regulations to the facts adduced in that it has failed to explain the definition of neighbourhood as outlined in 3.7 above the PPC is advised to reconsider the issue with a view to remedying the defect.

4.2 The PPC is requested to reconsider and justify and clarify their reasoning for accepting the denials of complaints by the interested parties whilst making no reference to complaints to the Board

4.3 The Board is accordingly advised to reconvene the PPC as originally constituted at the earliest opportunity in order that these matters may be considered and a fresh decision issued to the applicants and all interested parties

(sgd) JMD Graham
Interim Chair
National Appeal Panel
28th September 20