

20 December 2023

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10 South Colonnade
Canary Wharf
London
E14 4PU

FILE REF: SHA/26084

DECISION MAKING BODY: NHS STAFFORDSHIRE AND
STOKE-ON-TRENT ICB

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

PHARMACIST: CLINPHARM PLUS LTD (“the Applicant”)

PREMISES: 11 UPPER BROOK ST
RUGELEY
WS15 2DP

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL
SERVICES) REGULATIONS 2013 [“THE REGULATIONS”]**

**SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]**

Outcome

- 1.1 Based on the information provided, I am not satisfied that the pharmaceutical services provision that would result from the Applicant’s proposed hours would maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises. I am satisfied that maintaining the current level of service is a realistically achievable outcome and therefore the Applicant cannot rely on paragraph 24(1)(b).
- 1.2 The action taken by the Commissioner to refuse the application is confirmed.

A copy of this decision is being sent to:

Clinpharm Plus Ltd
NHS Office of the West Midlands, Partnership of ICBs

Advise / Resolve / Learn

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1 Introduction

- 1.1 The Applicant has applied to the Commissioner to change the days and times at which it is obliged to provide pharmaceutical services at the above premises. The Applicant seeks to keep the total number of core opening hours the same while offering a different distribution of these hours during the week.
- 1.2 The Commissioner has refused the application. The Applicant seeks to appeal to NHS Resolution.

2. Consideration

Rights of appeal

- 2.1 Where the Commissioner has determined an application under paragraph 26 of Schedule 4 of the Regulations and has granted it in part only or has taken an action that has the effect of refusing it, paragraph 26(9) provides a right of appeal to the Secretary of State for Health and Social Care (“the Secretary of State”).
- 2.2 The Secretary of State has directed NHS Resolution to determine such appeals. As an authorised officer of NHS Resolution, I have considered the appeal and have determined it, in accordance with my delegated powers.

Opening hours

- 2.3 A pharmacy's opening hours may be categorised as:
- 2.3.1 “core opening hours” (at the hours during which the pharmacy must be open by virtue of paragraph 23(1) of Schedule 4 of the Regulations), which may incorporate a direction of the Commissioner requiring fewer or greater than 40 hours and at set times and days; or

- 2.3.2 “supplementary” opening hours (other hours during which the pharmacy premises are open which are in addition to the core hours), pursuant to paragraph 23(3) of Schedule 4 of the Regulations

Alteration of core opening hours

- 2.4 In accordance with paragraphs 1(7)(c) and 1(7)(d) of Schedule 2 of the Regulations, the pharmacy must provide, as part of an application for entry in the pharmaceutical list:
- 2.4.1 the proposed core opening hours in respect of the premises; and
- 2.4.2 the total proposed opening hours for the premises (having regard to both the proposed core opening hours and any supplementary opening hours).
- 2.5 The Commissioner maintains pharmaceutical lists that include the days on which and times at which, at those premises, the listed person is to provide those services during the core opening hours and any supplementary opening hours of the premises.
- 2.6 The days on which or times at which a pharmacy is obliged to provide pharmaceutical services at the premises may only be altered by the pharmacy on application under paragraph 26(1) of Schedule 4 of the Regulations, so long as the effect of that application is to reduce the total number of hours for which a pharmacy is obliged to provide, or keep the total number of hours the same.

Alteration of supplementary opening hours

- 2.7 Supplementary opening hours may be altered by the pharmacy giving notice to the Commissioner, in accordance with paragraph 23(6)(a) of Schedule 4 of the Regulations, without the need to make an application to the Commissioner.
- 2.8 There is no specific right of appeal to NHS Resolution in respect of notices given under paragraph 23(6)(a).

Clinpharm Plus Ltd proposals

- 2.9 The Applicant in its application indicates that it currently has core opening hours totalling 40 hours per week.
- 2.10 The Applicant wishes to:
- 2.10.1 Open Monday to Thursday 9am to 5pm rather than 9am to 1pm and 2.30pm to 5.30pm as it currently does;
- 2.10.2 Open on Friday 9am to 2pm rather than 9am to 1pm and 2.30pm to 5.30pm as it currently does; and
- 2.10.3 Open on Saturday 9am to 12pm rather than 9am to 12pm and 3pm to 5pm as it currently does.

Assessment

- 2.11 In this case, the Applicant provided the following information in its application form and supporting information dated 25 July 2023:

“This is an application to permanently change core opening hours.

Current opening hours for these premises:

Monday	09:00 – 13:00 14:30 – 17:30
Tuesday	09:00 – 13:00 14:30 – 17:30
Wednesday	09:00 – 13:00 14:30 – 17:30
Thursday	09:00 – 13:00 14:30 – 17:30
Friday	09:00 – 13:00 14:30 – 17:30
Saturday	09:00 – 12:00 15:00 – 17:00
Sunday	CLOSED

Proposed core opening hours for these premises:

Monday	09:00 – 17:00
Tuesday	09:00 – 17:00
Wednesday	09:00 – 17:00
Thursday	09:00 – 17:00
Friday	09:00 – 14:00
Saturday	09:00 – 12:00
Sunday	CLOSED

If this is a permanent change, please state below the date from which you would like the change to take effect:

“27 Oct 2023”

Please provide information that demonstrates that your proposed core opening hours will:

- either maintain as necessary the existing level of service provision for people in the area of the pharmacy, or other likely users of the pharmacy premises; or
- maintain a sustainable level of adequate service provision for the people in the area of the pharmacy, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome.

“As can be seen there is no loss of hours during the week just changes between core & supplementary hours which will maintain as necessary the existing level of service provision in the area of the pharmacy, or other likely users of the premises. In addition, this will maintain a sustainable level of adequate service provision for the people in the area, of the pharmacy. The Saturday hours have been reduced due to the fact there is no/little demand and finding locum covers is becoming ever more difficult and to avoid applying for closures in the future and affect patient care we are ensuring continuity of service. Document / information attached in email or in the contents of the email provide evidence of needs and affects [sic] on patients if any.”

2.12 In the covering email dated 27 July 2023 the Applicant stated:

“Find attached our application to amend our core & Supplementary hours. Overall, we are looking to redistribute &/or Reduce the weeks supplementary and core hours. Below and attached information will allow the ICB to make an informed decision.

1. The local surgeries (1 mile radius) open and close as follows: (info from NHS.UK) – See attached

2. Out of hours close at: (info from NHS.UK) Urgent care – attached nhs UK
3. CPCS Urgent Medicine data – as attached
4. CPCS Minor illness Data - as attached
5. Attachments and Purpose of Attachment is to support application for approval
6. Extended care service/dms – as attached

All data from pharmoutcomes

1. Local pharmacies - list attached from NHS.UK – This shows there is no loss of service in the locality.

2. Walk In & Urgent Care Centre information – This is located over 7.1 miles away and we do not receive any prescriptions from the Urgent Care. Again other local pharmacies are open.”

2.13 In a letter to the Applicant dated 12 September 2023 the Commissioner stated:

“Further to your application to change the core opening hours at the above address, I am writing to confirm that it has been refused.

Committee agreed to refuse the application as it doesn’t meet paragraph 24(1)a or 24(1)b of the regulation.

In considering the two specific matters set out in paragraph 24(1), Schedule 4 of the 2013 regulations:

24.—(1) Subject to paragraph 26(2A), where NHS England issues a direction for setting any days or times for opening hours under this Part, or determines them without issuing a direction, it must in doing so seek to ensure that the days and times at which pharmacy premises are open for the provision of pharmaceutical services in the area in which the premises that are the subject of the direction are located are such as—

(a) to maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises; or

Not met – The existing level of provision would not be maintained.

(b) to maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises, in circumstances where maintained.

Not met – A sustainable level of adequate service provision would not be maintained.

You have a right of appeal to the Secretary of State against the issuing of this direction. Should you choose to appeal then you should send a concise and reasoned statement of the grounds for your appeal within 30 days of receiving this notice to nhsr.appeals@nhs.net or:

Primary Care Appeals
NHS Resolution
8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU”

- 2.14 In a letter to NHS Resolution dated 20 September 2023 the Applicant stated:
- “We have been refused changes to the pharmacy hours but no detailed information provided. Please consider this as an appeal. The NHS did not ask for any further information/clarification if what was provided was no [sic] sufficient.”
- 2.15 In an email to NHS Resolution dated 22 October 2023 the Applicant enclosed 31 patient surveys.
- 2.16 In an email to NHS Resolution dated 26 October 2023 the Applicant stated:
- “No further comments as it appears that the recommendations to grant was not reflected in the final review and approval.
- We hope that common sense prevails.”
- 2.17 I note the following:
- 2.17.1 The Applicant's core opening hours total 40 hours and the Applicant proposes to redistribute those 40 core opening hours pursuant to paragraph 26 of Schedule 4. The Applicant seeks to provide services as per its proposed changes in the table at 2.11 above.
- 2.18 The Applicant proposes to:
- 2.18.1 Open Monday to Thursday 9am to 5pm rather than 9am to 1pm and 2.30pm to 5.30pm as it currently does;
- 2.18.2 Open on Friday 9am to 2pm rather than 9am to 1pm and 2.30pm to 5.30pm as it currently does; and
- 2.18.3 Open on Saturday 9am to 12pm rather than 9am to 12pm and 3pm to 5pm as it currently does.
- 2.19 The Regulations, which came into force on 1 April 2013, have been amended a number of times. Certain amendments, relating to pharmacy premises opening hours, came into force with effect from 25 May 2023.
- 2.20 The application to change the hours was made by the Applicant on 27 July 2023 and a decision was made by the Commissioner on 12 September 2023. The decision was appealed to NHS Resolution by email of 20 September 2023. I am of the view that the application and subsequent appeal should be considered against the Regulations as amended with effect from 25 May 2023.
- 2.21 The Applicant has sought to change the days and times at which it is obliged to provide pharmaceutical services under paragraph 26 of Schedule 4, Part 3, “Hours of opening”.
- 2.22 Paragraph 26(1) states:
- “26.— (1) An NHS pharmacist (P) may apply to the NHSCB for it to change the days on which or times at which P is obliged to provide pharmaceutical services during core opening hours at P's pharmacy premises in a way that—*
- (a) reduces the total number of hours for which P is obliged to provide pharmaceutical services at those premises each week ...; or*
- (b) keeps that total number of hours the same.”*

- 2.23 I have first considered paragraph 26(2) of Schedule 4 of the Regulations, which reads as follows:

"Except where sub-paragraph (2A) applies, where P makes an application under sub-paragraph (1), as part of that application P must provide the NHSCB with such information as the NHSCB may reasonably request in respect of the matters that NHS England must seek to ensure pursuant to paragraph 24(1).

- 2.24 Paragraph 24(1) reads as follows:

"24 (1) Subject to paragraph 26(2A), where NHS England issues a direction for setting any days or times for opening hours under this Part, or determines them without issuing a direction, it must in doing so seek to ensure that the days and times as which pharmacy premises are open for the provision of pharmaceutical services in the area in which the premises that are the subject of the direction are located are such as –

- (a) to maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises; or*
- (b) to maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome.*

- 2.25 Paragraph 24(2) states:

(2) In considering the matters mentioned in sub-paragraph (1), the NHSCB –

(a) must treat any local pharmaceutical services being provided in its area as if they were pharmaceutical services being so provided, and

(b) may have regard to any pharmaceutical services that are being provided in its area during supplementary opening hours.

- 2.26 I will start by considering the application of paragraph 24(1)(a) and whether the proposed hours are such as to maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises. I will then consider the application of 24(1)(b) if that is required.

- 2.27 To properly assess the application against paragraph 24(1)(a), I need to determine the existing level of service provision. I then need to consider whether it is necessary to maintain the existing level of service provision. If it is necessary to maintain the existing level of service provision, I need to consider whether, despite the proposed change of hours, the existing level of service provision to people in the area or other likely users would be maintained, e.g. by nearby pharmacies being open and providing the same level of service provision.

- 2.28 If I consider it unnecessary to maintain the existing level of service provision or that it is necessary to maintain the existing level of service provision but doing so is not a realistically achievable outcome, then I need to consider paragraph 24(1)(b) and determine whether the proposed change of hours are such that a sustainable level of adequate service provision would be maintained.

- 2.29 I therefore need to be provided with sufficient information to understand a range of matters, starting with the existing level of service provision. The references to days and times in paragraph 24(1) leads me to consider that the reference to "level" of service provision in paragraph 24(1)(a) is mainly focused on the days and times services are provided. I would point out that "level" of service provision could also refer to other characteristics of the service, such as types and range of services provided,

geographical access to services provided, other aspects of physical access aside from location, and the quality of services provided.

- 2.30 The existing level of service provision has been outlined by the Applicant, in its own core hours provision, and by an indication of the hours that pharmacies in the local area are open which it has obtained from NHS Choices.
- 2.31 I have next considered whether it is necessary to maintain the existing level of service provision. It could be argued that as the Applicant is not looking to reduce the number of hours each week that services are provided, then from a pure "number of hours of service provision each week" perspective, the existing level of service provision is maintained such that consideration of whether it is necessary to maintain the level of service provision is not needed.
- 2.32 However, the Applicant is applying to change the days and times that services are provided. Taking Saturdays as an example, the level of service provision at the Applicant's premises on a Saturday is not being maintained. Similarly, the level of service provision on a Friday afternoon is not being maintained. I consider it appropriate to determine if it is necessary to maintain the existing level of service provision and then, if deemed necessary, consider if the opening hours of other pharmacies mean that level is maintained.
- 2.33 To determine whether it is necessary to maintain the existing level of service provision, I have considered whether the Applicant has provided any information regarding those using the pharmacy. If I am satisfied that there is reliable evidence indicating no users of the pharmacy on/at the relevant days/times that the pharmacy wishes to close, this might support an argument that maintaining the existing level of service provision is not necessary.
- 2.34 The Applicant states in the application that there is "no/little demand" on Saturdays. The Applicant has provided 31 completed patient surveys in support of its application. The survey is limited in terms of quality, the quantity of responses and there is no indication of when and over what period it was carried out. On the responses, I note that two people have indicated that they would be affected by the Applicant reducing its hours on Saturdays and these were both collecting prescriptions at the time of completing the survey. I will consider access below.
- 2.35 It appears that there are some people using the pharmacy at the times the Applicant wishes to close. It is difficult to draw conclusions about the necessity of maintaining the existing level of service provision if there is only limited information on what services persons are using and on/at what days/times.
- 2.36 Without more detailed information it is difficult to make an assessment of whether it is necessary to maintain the existing level of service provision and this in turn makes it difficult to apply paragraph 24(1)(a). I consider it reasonable to take the position that unless I am provided with sufficient evidence to the contrary, I should consider that it is necessary to maintain the existing level of service provision.
- 2.37 Having determined that it is reasonable to assume that maintaining the existing level of service provision is necessary, I now need to consider if, despite the changes to hours, there is maintenance of the existing level of service provision. The Applicant cannot maintain this as it is changing its hours but I note the information provided by the Applicant with regard to other pharmacies in the area that, between them, have opening hours during the times that the Applicant is proposing to close, namely Boots and Morrisons.
- 2.38 If I consider that the characteristics of other pharmacies, e.g. where they are located, their access, the services provided and the times they are open, means that the level of service provision is maintained for people in the local area or other likely users of the pharmacy, then I am able to grant the application under paragraph 24(1)(a).

- 2.39 It is worth noting that characteristics of the persons using the pharmacy might be relevant here as well as from where they start their journey to the pharmacy. If they live close by, walk a few minutes to the pharmacy and walk back home, but have mobility issues this could make an additional 5 minute walk to the next nearest pharmacy more difficult, and might be considered as not maintaining the level of service provision to users of the pharmacy. I do not consider that every single individual need should be considered at length in this regard but it would be helpful to have this information to be certain that the existing level of service provision would be maintained via local pharmacies.
- 2.40 The Applicant has provided information from NHS Choices regarding the addresses of nearby pharmacies and how far they are from the Applicant's pharmacy. There is confirmation of this information and details of services offered within the papers supplied by the Commissioner. I note that the distances involved in accessing alternative provision on a Friday or Saturday are short i.e. 0.1 or 0.2 miles for the three nearest pharmacies. However I note that if a patient was wishing to obtain smoking cessation or contraception, two services which the Applicant currently provides, they would have to travel 0.8 miles to Northwood Pharmacy. Further I note Northwood Pharmacy does not provide core hours on a Saturday. There is no information regarding physical access to these pharmacies for those who currently access the Applicant's pharmacy, or any information regarding the people who currently access the Applicant's pharmacy.
- 2.41 I am therefore struggling to be satisfied that the existing level of service provision would be maintained by virtue of the existence of other local pharmacies.
- 2.42 I have decided that it is necessary to maintain the current service provision but, due to the cumulative effect of:
- 2.42.1 the survey not assuring me that it is representative of the use of the pharmacy;
and
- 2.42.2 a lack of information about the access to alternative pharmacies in the area.
- I am not satisfied that there will be maintenance of the existing level of service provision by virtue of other pharmacies in the area.
- 2.43 I therefore next consider if I need to have regard to paragraph 24(1)(b) which states that I must seek to ensure that the changed hours are such as to:
- "maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome"*.
- 2.44 I have already determined that it is necessary to maintain the existing level of service provision so reference in paragraph 24(1)(b) to *"in circumstances where maintaining the existing level of service provision is ... unnecessary"* is not relevant.
- 2.45 I note that the Applicant has stated that *"finding locum covers is becoming ever more difficult"*. I consider that the Applicant is effectively relying on the second part of paragraph 24(1)(b), that maintaining the existing level of service provision is not a realistically achievable outcome. I consider that I need to determine if it is or is not a realistically achievable outcome and if I determine that it is, then I need to consider if the amended hours are such as to maintain a sustainable level of service provision.
- 2.46 On the point of whether maintaining the existing level of service provision is not a realistically achievable outcome, I consider that no evidence has been put forward to support the Applicant's statement that it is difficult to find locums at an economically viable rate. No evidence of costs for locums at different times has been provided. No

evidence of what efforts have been undertaken to source locums has been provided. There is no explanation as to why locums rather than employees have to be used. I also note that the pharmacy has not provided any suggestion that the pharmacy has been closed due to a failure to secure viable locum cover which might suggest maintaining service provision at the relevant hours is not realistically achievable.

- 2.47 The wording of paragraph 24(1)(b) is such that maintaining existing service levels must not be realistically achievable before considering a sustainable level of adequate provision. I consider that this sets a fairly high bar as to the level of difficulty that the Applicant must find themselves in. I do not consider that sufficient evidence has been provided to indicate that the economic and practical viability of the current opening hours has been compromised. The use of the word “*difficult*” by the Applicant suggests that it has not been easy, but that it has been achievable. I therefore consider that maintaining the existing level of service is a realistically achievable outcome and therefore the Applicant cannot rely on paragraph 24(1)(b).
- 2.48 I am mindful that the provision of pharmaceutical services is greater than the dispensing of prescriptions and that maintaining a level of service provision includes all services that the pharmacy may offer, including additional enhanced and advanced services that may be commissioned. I am of the view that I have not been provided with sufficient information to demonstrate how the proposed change of hours would maintain, as necessary, the existing levels of service provision.

3. **Determination**

- 3.1 Based on the information provided, I am not satisfied that the pharmaceutical services provision that would result from the Applicant’s proposed hours would maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises. I am satisfied that maintaining the current level of service is a realistically achievable outcome and therefore the Applicant cannot rely on paragraph 24(1)(b).
- 3.2 The action taken by the Commissioner to refuse the application is confirmed.

Head of Appeals
NHS Resolution