

18 January 2024

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

FILE REF: SHA/26091

DECISION MAKING BODY: NHS Greater Manchester
Integrated Care (“the
Commissioner”)

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

PHARMACIST: Stockport Healthcare Limited
 (“the Applicant”)

PREMISES: Wellington Road Pharmacy
236 Wellington Road South
Stockport
Cheshire
SK2 6NW

**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 I consider that, on the basis of the information provided to me, it is necessary to maintain the existing level of service provision and that not enough information has been provided for me to consider that maintaining the existing level of service provision is not a realistically achievable outcome. Although this leaves an undesirable situation, where the Applicant continues to provide 50 core opening hours without a direction being in place, I consider the lack of information does not enable me acting reasonably to make a determination of the days and times of the 40 core opening hours.
- 1.2 I consider that the only option open to me is therefore to confirm the action taken by the Commissioner to refuse the application.

A copy of this decision is being sent to:

Rushport Advisory LLP on behalf of Stockport Healthcare Limited
NHS Greater Manchester Integrated Care

Advise / Resolve / Learn

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

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 reduce the total number of core opening hours.
- 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).

The Applicant's proposals

- 2.9 The Applicant in its application indicates that it currently has core opening hours totalling 50 hours per week.
- 2.10 The Applicant seeks to reduce the total number of core opening hours by closing on Saturdays and Sundays. The opening hours from Monday to Friday would remain the same at 9am to 1pm and 2pm to 6pm, a total of 40 core hours.

Assessment

- 2.11 In this case, the Applicant provided the following information in its application form and supporting information dated 21 September 2023:
- 2.11.1 “This is an application to permanently change core opening hours.
- 2.11.2 Current opening hours for these premises:

Monday	09:00 – 13:00 14:00 – 18:00
Tuesday	09:00 – 13:00 14:00 – 18:00
Wednesday	09:00 – 13:00 14:00 – 18:00
Thursday	09:00 – 13:00

	14:00 – 18:00
Friday	09:00 – 13:00 14:00 – 18:00
Saturday	10:00 – 13:00 16:00 – 18:00
Sunday	10:00 – 13:00 18:00 – 20:00

2.11.3 Proposed core opening hours for these premises:

Monday	09:00 – 13:00 14:00 – 18:00
Tuesday	09:00 – 13:00 14:00 – 18:00
Wednesday	09:00 – 13:00 14:00 – 18:00
Thursday	09:00 – 13:00 14:00 – 18:00
Friday	09:00 – 13:00 14:00 – 18:00
Saturday	Closed
Sunday	Closed

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

2.11.5 As soon as possible – and if a specific date is required then by 1 November 2023.

2.11.6 Please see attached support letter”

Letter from Rushport Advisory LLP dated 21 September 2023

2.11.7 “I act for Stockport Healthcare Limited in the above application and have been instructed by my client to submit this letter in support of their request to amend their core opening hours.

2.11.8 As the ICB will be aware, my client made a previous application to reduce core hours that was refused by the ICB. Having taken advice my client recognises that the information provided did not address the legal test and was inaccurate in places and my client has therefore decided to start the process again rather than go through the appeal process.

2.11.9 **Background**

2.11.10 My client purchased this pharmacy from Lloyds at the end of April 2023. The sale was based on the pharmacy dispensing approximately 12,500 items per month on average. Unfortunately, after my client took over the pharmacy, 3 of the 4 care homes that were being serviced decided to seek an alternate provider as they wanted a national operator rather than an independent pharmacy operator to service their care homes.

2.11.11 The loss of this business and the associated drop off in other items numbers, which has become common place during the sale of multiple owned

pharmacies to independents, now means that the pharmacy is dispensing only 4,500 items per month, with 400 of these being from the remaining care home.

2.11.12 As the Committee will be well aware, since the middle of 2022 all people and businesses have experienced a dramatic increase in costs for everything from utility bills to staff costs. At the same time pharmacy funding has remained frozen with the global sum not changing to reflect any of the increased costs that pharmacy contractors now face.

2.11.13 Despite having only just purchased this pharmacy my client now cannot continue to run it as it is now loss making, but with the announcement of new pharmacy Regulations from 25 May 2023 my client will be able to keep the pharmacy open if the ICB is able to agree this proposed change to core opening hours.

2.11.14 Proposed Change and Rationale

2.11.15 The Core Hours for this pharmacy are somewhat unusual and force my client to be open on Saturday and Sunday when there is little or no demand for pharmaceutical services and when all GP surgeries within the area of Wellington Road Pharmacy are all closed. Sunday hours are particularly expensive to secure staff cover for as they are considered antisocial hours.

2.11.16 My client is therefore asking that the hours reflect the demand for services locally by opening Monday to Friday 9am to 6pm (closed 1pm to 2pm).

2.11.17 This change would improve their ability to staff the pharmacy (thus reducing costs) whilst maintaining proper access to pharmaceutical services for patients at times when it is needed most.

2.11.18 My client has permitted me to provide the Committee with attached extract from their most recent accounts for this branch. The accounts cover the 2 month period from 1 May 2023 to 30 June 2023 and is the latest date that accurate information is available for.

2.11.19 As the ICB will note, the pharmacy is now loss-making and my client is unable to sustain these losses going forward. Put simply, if the pharmacy is forced to continue with its current trading hours my client will have no option other than to close down.

2.11.20 As the Committee will note from page 5 of the accounts, the pharmacy has a very low turnover for over the counter sales (listed as "other income") of around £2,000 per month, or between £60 and £70 per day. This further shows the very small number of walk-in patients who purchase any items and this is especially the case at weekends when surgeries are closed. The position is the same for services such as support for self-care and other NHS services, with weekends being particularly quiet.

2.11.21 The accounts also make no provision for payment for the services that are provided centrally for the pharmacy (which would increase the loss if they were included) and obviously provide no income for the owners work and in fact costs them money each month.

2.11.22 Location

2.11.23 The pharmacy is located relatively close to Stockport town centre and there are a significant number of pharmacies nearby. One of the closest pharmacies (Hillgate Pharmacy) is open 7 days per week including Sunday hours from 6am to 8pm (according to the NHS website) and is less than half a mile from my client's pharmacy. Well Pharmacy at Higher Hillgate is also open on Saturday

mornings from 9am to 12pm. In fact, there are 6 pharmacies (including my client's) within a 0.5 mile radius with the area being significantly over provided for in terms of pharmacy coverage.

2.11.24 These pharmacies provide all the services currently provided by my client's pharmacy and so adequate access to those services will be maintained even with the change in hours.

2.11.25 We ask that the Committee approves this change as it will maintain a sustainable level of adequate service provision for the people in the area of the pharmacy as the existing level of service is no longer realistically achievable.

2.11.26 Overall this proposal maintains provision when it is genuinely needed and it is submitted that instances like this are exactly why the Department of Health has relaxed the legal test in respect of permitting 40 hour pharmacies to change their hours without having to show a change in needs in the local population."

2.12 In a letter to the Applicant dated 5 October 2023 the Commissioner stated:

2.12.1 "Further to your application to change the core opening hours at the above address, I am writing to confirm that the application has been considered by the NHS Greater Manchester Pharmaceutical Services Regulations Committee (PSRC) and that it has been **refused**.

2.12.2 Schedule 4, Part 3, Paragraph 24(1) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended, sets the regulatory test:

"(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

(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."

2.12.3 When considering the application, the PSRC noted the extensive information provided relating to the financial challenges faced by the pharmacy, which indicated that the contractor was focussing on demonstrating that the application met condition (b) above.

2.12.4 However, the PSRC noted a lack of information relating to patient need, which would have assisted its considerations around whether the proposed core hours would offer an adequate level of service provision where maintaining the current level is either unnecessary or unachievable. The PSRC noted the statement that *"there is little or no demand for pharmaceutical services and when all GP surgeries within the area of Wellington Road Pharmacy are all closed"*, and that dispensing activity had dropped. However there was no information provided with regards to e.g. footfall in respect of patients seeking Essential Services other than dispensing, nor for patients who choose to access Advanced or Locally Commissioned Services from the pharmacy on Saturdays and Sundays.

- 2.12.5 In the absence of such information alongside the financial information provided, the PSRC considered that it could not assess fully whether the proposed core hours changes would continue to offer “adequate service provision for the people in that area or other likely users of the pharmacy premises”. The PSRC therefore concluded that, based on the information provided, it was not able to satisfy itself that condition (b) was fully met.
- 2.12.6 Stockport Healthcare Ltd has a right of appeal to the Secretary of State against this decision. 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 by email to nhsr.appeals@nhs.net or by post to Primary Care Appeals, NHS Resolution, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU.”
- 2.13 In a letter to NHS Resolution dated 10 October 2023 Rushport Advisory LLP on behalf of the Applicant stated:
- 2.13.1 “I act for Stockport Healthcare Limited in the above application and have been instructed by my client to submit this letter of appeal against the decision of the ICB to refuse my client’s request to amend their core opening hours.
- 2.13.2 The letter refusing the request was received on 5 October 2023 and is attached with this appeal.
- 2.13.3 In summary, my client has requested this change under Schedule 4, Part 3, Paragraph 24(1)(b) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 which permits the change applied for subject to the ability to;
- 2.13.4 *(b) ...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. [emphasis added and discussed below]*
- 2.13.5 The ICB states in their decision letter that they noted;
- 2.13.6 “the extensive information provided relating to the financial challenges faced by the pharmacy, which indicated that the contractor was focussing on demonstrating that the application met condition (b) above”
- 2.13.7 This observation is correct.
- 2.13.8 The decision letter then goes on to discuss “patient need”, which we say was addressed by my client as they stated that there was “little or no demand for pharmaceutical services and when all GP surgeries within the area of Wellington Road Pharmacy are all closed”.
- 2.13.9 However, in order to further assist the Committee with this appeal my client has provided me with the numbers of patients handing in prescriptions during the hours that they now propose to close and also a total of those seeking any other type of NHS pharmaceutical service.
- 2.13.10 We ask the Committee to note that my client records the receipt of these prescriptions, but in the majority of cases the relevant items are not collected until the following week. However, my client is unable to provide a breakdown of the collection dates as these are not recorded.
- 2.13.11 The table below covers each Saturday and Sunday during the month of September 2023.

Months	Total number prescriptions	Total number patients for any other NHS service
Sept 2 10am to 1pm, 4pm to 6pm	6	0
Sept 3 10am to 1pm, 6pm to 8pm	4	2
Sept 9 10am to 1pm, 4pm to 6pm	5	1
Sept 10 10am to 1pm, 6pm to 8pm	6	1
Sept 16 10am to 1pm, 4pm to 6pm	8	2
Sept 17 10am to 1pm, 6pm to 8pm	7	1
Sept 23 10am to 1pm, 4pm to 6pm	6	1
Sept 24 10am to 1pm, 6pm to 8pm	5	3
Setp [sic] 30 10am to 1pm, 4pm to 6pm	6	1

2.13.12 To put these figures in context, this represents 52 prescription items out of 4,500 per month which is 1.1% of total prescription items over 9 days which represents 30% of the days that the pharmacy was open in that month. Whilst it is undeniable that there was some very limited use of the pharmacy it is clearly very small in context, but costs a significant amount to staff and operate.

The Regulatory Test

2.13.13 Schedule 4, Part 3, Paragraph 24(1)(b) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 which permits the change applied for subject to the ability to;

2.13.14 (b) *...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.*

2.13.15 We highlight the wording “for the people in that area or other likely users of the pharmacy premises” as it is very clear that the Regulations require consideration of;

2.13.15.1 Adequate service provision for... People in that area and

2.13.15.2 Adequate service provision for... other likely users of the pharmacy premises

2.13.16 The Regulations do not say “adequate service provision from the pharmacy making the application” and no such restriction is placed on the Committee when considering these applications and “adequate” provision for people in the area or likely users of the pharmacy premises may also come from other pharmacies.

2.13.17 We say that this interpretation makes sense as it allows for different decisions to be made in areas where there are easily accessible alternate pharmacies for patients to use compared to areas where the particular pharmacy may be

the only viable option for patients to access and its loss may affect the overall adequacy of service provision. For this reason my client has dealt with access to other pharmacies in their application and those details are copied again below.

2.13.18 Further, it is submitted that a correct interpretation of the regulatory test highlights why the ICB focus on “information relating to patient need”, whilst potentially helpful, should not be determinative, as whilst in my client’s case the use of the pharmacy is very low in relation to the hours that they seek to remove, there may be other cases where the use is higher but where those patients can still be adequately served by other pharmacies. Each case should of course be determined on its merits, however this flexibility in approach permits sensible decisions to be made when the alternative for the ICB (at the initial stage) may well be to lose the pharmacy altogether – as would happen in this case.

2.13.19 We also submit that it would have been helpful for the ICB, after noting the extensive information provided in relation to financial challenges faced by my client, to have actually considered the value of that evidence and its clear relevance to the legal test and ability of the pharmacy to continue operating rather than simply refusing the application because some other information had not been provided to them in a form that they would have preferred. To put it another way, the ICB should not be apathetic to the very likely closure of a pharmacy and should at least consider if the information that was provided, in and of itself, meant that the application met the legal test irrespective if some additional information could have been provided.

2.13.20 **The remainder of this letter repeats the points made in the original application to the ICB.**

2.13.21 [See paragraphs 2.11.9 – 2.11.26 above]”

2.14 I note the following:

2.14.1 The Applicant’s core opening hours total 50 hours and the Applicant seeks to change the days on which or times at which the Applicant is obliged to provide pharmaceutical services at its pharmacy premises in a way that reduces the total number of hours for which the Applicant is obliged to provide pharmaceutical services.

2.14.2 The Applicant seeks to reduce the total number of core opening hours by closing on Saturdays and Sundays. The opening hours from Monday to Friday would remain the same at 9am to 1pm and 2pm to 6pm, a total of 40 core hours.

2.15 There is no suggestion by either party that a current direction has been issued to the Applicant regarding their opening hours pursuant to Regulation 65(4) and (5) of the Regulations.

2.16 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.

2.17 The application to change the hours is dated 21 September 2023 and a decision was made by the Commissioner on 5 October 2023. The decision was appealed to NHS Resolution by email of 10 October 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.

- 2.18 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”.
- 2.19 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.”*
- 2.20 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).*
- 2.21 I note that paragraph 26(2A) does not apply in this instance as a 100 hour condition does not apply, therefore I am of the view that paragraph 24(1) does apply to this application and it is on this basis that the Applicant applied to the Commissioner to amend its core opening hours. I have therefore proceeded to consider the application before me in accordance with paragraph 24(1).
- 2.22 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.*
- 2.23 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.*
- 2.24 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.

- 2.25 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.
- 2.26 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.
- 2.27 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.
- 2.28 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 on Saturdays and Sundays, being the days on which the Applicant wishes to close.
- 2.29 I have next considered whether it is necessary to maintain the existing level of service provision. As the Applicant is looking to reduce the number of hours per week that services are provided, then from a pure "number of hours of service provision each week" perspective, the existing level of service provision would not be maintained such that consideration of whether it is necessary to maintain the level of service provision is needed.
- 2.30 The level of service provision at the Applicant's premises on a Saturday and Sunday 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.
- 2.31 To determine whether it is necessary to maintain the existing level of service provision, I have had regard to the comments by the Applicant of 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.
- 2.32 The Applicant states in its application that "*there is little or no demand for pharmaceutical services*" on a Saturday and Sunday "*and when all GP surgeries within the area of Wellington Road Pharmacy are all closed.*" Further on appeal, the Applicant has provided information in relation to the numbers of patients handing in prescriptions during the hours that they now propose to close and also a total number of patients seeking any other type of NHS pharmaceutical service.
- 2.33 Albeit low in numbers, it is clear that there are people using the pharmacy at the times the Applicant wishes to close. Further 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.
- 2.34 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 evidence to the contrary, I should consider that it is necessary to maintain the existing level of service provision.

- 2.35 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 undisputed information from 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 Hillgate and Well pharmacies.
- 2.36 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).
- 2.37 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. 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.
- 2.38 According to the Applicant, *"the pharmacy is located relatively close to Stockport town centre and there are a significant number of pharmacies nearby. One of the closest pharmacies (Hillgate Pharmacy) is open 7 days per week including Sunday hours from 6am to 8pm (according to the NHS website) and is less than half a mile from my client's pharmacy. Well Pharmacy at Higher Hillgate is also open on Saturday mornings from 9am to 12pm. In fact, there are 6 pharmacies (including my client's) within a 0.5 mile radius with the area being significantly over provided for in terms of pharmacy coverage.*
- These pharmacies provide all the services currently provided by my client's pharmacy and so adequate access to those services will be maintained even with the change in hours."*
- 2.39 However, other than distance, I have not been provided with any other information regarding the 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. 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.
- 2.40 I have decided that it is necessary to maintain the current service provision, but due to a lack of information regarding 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.
- 2.41 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"*.
- 2.42 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.

- 2.43 The Applicant states that *"Sunday hours are particularly expensive to secure staff cover for as they are considered antisocial hours."* And further *"This change would improve their ability to staff the pharmacy (thus reducing costs)"*. The Applicant also states that *"the pharmacy is now loss-making and my client is unable to sustain these losses going forward. Put simply, if the pharmacy is forced to continue with its current trading hours my client will have no option other than to close down."* 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.
- 2.44 On the point of whether maintaining the existing level of service provision is not a realistically achievable outcome, the Applicant has provided, in addition to the commentary I have referred to above, its management accounts which cover a two month period, from 1 May 2023 to 30 June 2023. I have considered whether this supports statements regarding the viability of the pharmacy.
- 2.45 On reviewing the accounts, I note that for the months May 2023 and June 2023, the pharmacy business made a loss. Further the Applicant states that *"the pharmacy has a very low turnover for over the counter sales (listed as "other income") of around £2,000 per month, or between £60 and £70 per day. This further shows the very small number of walk-in patients who purchase any items and this is especially the case at weekends when surgeries are closed. The position is the same for services such as support for self-care and other NHS services, with weekends being particularly quiet."*
- 2.46 However the accounts do not provide evidence that directly relates to the times at which the Applicant is proposing to close, instead simply showing the accounts over a two month period. I specifically note that the accounts provided do not provide adequate detail to indicate during what times the locum fees were incurred. This prevents me from establishing a correlative link between the locum fees and the hours the pharmacy is open for. To demonstrate that keeping the pharmacy open for its existing core hours is not realistically achievable, the Applicant must be able to demonstrate the correlation between the hours being changed and the purported issues. I do not consider that the accounts provide support for the Applicant's statements.
- 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. Whilst I am sympathetic to the difficulties that the Applicant claims to be facing in relation to the viability of the premises based on the accounts that have been provided for consideration, 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. 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.
- 2.49 I am therefore minded not to agree the change of the Applicant's core opening hours.
- 2.50 In determining an application made under paragraph 26(1) of Schedule 4 of the Regulations, paragraph 26(4) indicates that the Commissioner must:

- 2.50.1 issue a direction (which replaces any existing direction) which meets the requirements of sub-paragraphs (4A), (5) and (6) and which has the effect of either granting the application in whole or in part;
- 2.50.2 confirm any existing direction in respect of the times at which the pharmacist must provide pharmaceutical services at the pharmacy premises; or
- 2.50.3 either:
 - 2.50.3.1 revoke, without replacing it, any existing direction in respect of the times at which the pharmacist must provide pharmaceutical services at the pharmacy premises where this has the effect of granting the application in whole or in part; or
 - 2.50.3.2 in a case where there is no existing direction, issue no direction,
- 2.51 Prior to 1 April 2023, NHS England was responsible for the commissioning of pharmaceutical services. Integrated Care Boards have since taken on delegated responsibility for the commissioning of pharmaceutical services. Therefore it would have been NHS England who was responsible for issuing a direction to the previous owner in relation to the hours above 40 core hours.
- 2.52 I note that there is no suggestion from either party that a current direction has been issued to the Applicant regarding their opening hours, nor has any evidence been provided to suggest otherwise. In this instance, I have proceeded on the basis that NHS England has not issued a direction in relation to the Applicant's core opening hours.
- 2.53 Applications to change core hours are determined in accordance with paragraph 26(4) of Schedule 4 of the Regulations. This causes me some difficulty as the Commissioner was required to determine the application in accordance with paragraph 26(4) under which there is no express option to simply refuse the application due to services being provided for more than 40 core hours despite there being no existing direction. Paragraph 26(4)(c)(ii) expressly states that I must, in a case where there is no direction, issue no direction.
- 2.54 I also note that the Regulations do not envisage this situation arising (i.e. a pharmacy providing more than 40 hours a week without a direction in place) and therefore there is no guidance in the Regulations to determine which of the days and times during which services are to be provided going forward constitute core opening hours, or put a different way, of the 40 hours that the Applicant is required to provide services, which are to be considered the core days and times. This leads to an unsatisfactory situation in which neither party is clear as to the days on which and times at which the 40 core opening hours are to be provided.
- 2.55 However, I consider that the amendments made to the Regulations provide the ability for me to make such a determination. Paragraph 24(1) now contains new wording in relation to days or times for opening hours - "[...]or *determines them without issuing a direction*". I have provided the complete extract at paragraph 2.22 above.
- 2.56 The inclusion of this wording indicates to me that the Commissioner does have a power to determine the days and times at which the 40 core opening hours are provided and this is without the need to issue a direction. This would not contradict paragraph 26(4)(c)(ii) as, there is no existing direction in place and there is no direction being issued. I therefore consider that this new wording allows the determination by the Commissioner of the days and times that the 40 core opening hours are provided.
- 2.57 I note that the rest of paragraph 24(1) and the legal test that needs to be considered alludes to a direction. However, given the novel nature of the situation where a pharmacy is clearly operating outside of 40 hours without a direction, and where each

of these hours appears to be core hours, it would make sense that the Commissioner is able to determine the 40 core opening hours without a direction.

- 2.58 I therefore determine that the Commissioner was able to determine the Applicant's core hours, without issuing a direction as per paragraph 24(1) and by applying the legal test set out in paragraph 24(1). I note that the Commissioner applied the legal tests in paragraph 24(1) but refused the application on the basis *"that it could not assess fully whether the proposed core hours changes would continue to offer "adequate service provision for the people in that area or other likely users of the pharmacy premises"*.
- 2.59 I have indicated that I am minded not to agree the change of the Applicant's core opening hours on the basis of a lack of information on various points. That would usually mean I would confirm the decision of the Commissioner albeit for slightly different reasons. But that would leave me in the unwelcome position of making a determination that the Applicant must continue to provide services for more than 40 hours a week without a direction.
- 2.60 That is not satisfactory but, in this novel situation unforeseen by the Regulations, I consider that I have little choice. I cannot determine the 40 core opening hours on the basis of the information provided despite being enabled by the new wording in paragraph 24(1) to do so. I would urge the Applicant to gather information as to the use of the pharmacy at different days and times and apply again to change its core hours which should then enable the Commissioner to make an assessment of the most appropriate 40 core opening hours. The Commissioner can then make a determination by applying the legal tests in paragraph 24(1). Provided the level of information is adequate, the Commissioner can make that determination.
- 2.61 I consider I am unable to grant the application on the basis of lack of information as indicated earlier in this determination. The only option left to me is therefore to confirm the action taken by the Commissioner in refusing the Applicant's application but substituting the reasons with the reasons I set out earlier in this determination.

3. Determination

- 3.1 I consider that, on the basis of the information provided to me, it is necessary to maintain the existing level of service provision and that not enough information has been provided for me to consider that maintaining the existing level of service provision is not a realistically achievable outcome. Although this leaves an undesirable situation, where the Applicant continues to provide 50 core opening hours without a direction being in place, I consider the lack of information does not enable me acting reasonably to make a determination of the days and times of the 40 core opening hours.
- 3.2 I consider that the only option open to me is therefore to confirm the action taken by the Commissioner to refuse the application.

**Head of Appeals
NHS Resolution**