

24 January 2024

**FILE REF:** SHA/26114

8<sup>th</sup> Floor  
10 South Colonnade  
Canary Wharf  
London  
E14 4PU

**DECISION MAKING BODY:** WEST MIDLANDS ICB  
("the Commissioner")

Tel: 0203 928 2000  
Email: [nhsr.appeals@nhs.net](mailto:nhsr.appeals@nhs.net)

**PHARMACIST:** CHEMYCARE STETCHFORD LIMITED  
("the Applicant")

**PREMISES:** 48 KENPAS HIGHWAY  
COVENTRY  
CV3 6BP

**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:

Rushport Advisory LLP on behalf of the Applicant Chemycare Stetchford Ltd  
West Midlands ICB

**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 increase the total number of core opening hours from 40 to 49 core hours while offering a different distribution of these hours during the week and no longer providing pharmaceutical services on a Sunday.
- 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 letter of appeal indicates that it currently has core opening hours totalling 40 hours per week.
- 2.10 The Applicant wishes to:
- 2.10.1 Extend opening hours on a weekday morning by opening from 9am to 1pm in place of 9am to 12pm;
  - 2.10.2 Change opening hours on a weekday afternoon by opening at 2pm to 7pm in place of 5.30pm to 9pm on Monday, Tuesday, Wednesday and Friday, and in place of 6pm to 9pm on a Thursday;
  - 2.10.3 Change opening hours on a Saturday by opening from 9am to 1pm in place of 9am to 12pm and 6pm to 9pm; and
  - 2.10.4 Not to open on Sunday in place of 12pm to 2pm.

#### Assessment

- 2.11 In this case, the Applicant provided the following information in its application form and supporting information dated 8 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 – 12.00 |
|--------|---------------|

|           |                                |
|-----------|--------------------------------|
|           | 17.30 – 21.00                  |
| Tuesday   | 09.00 – 12.00<br>17.30 – 21.00 |
| Wednesday | 09.00 – 12.00<br>17.30 – 21.00 |
| Thursday  | 09.00 – 12.00<br>18.00 – 21.00 |
| Friday    | 09.00 – 12.00<br>17.30 – 21.00 |
| Saturday  | 09.00 – 12.00<br>18.00 – 21.00 |
| Sunday    | 12.00 – 14.00                  |

2.11.3 Proposed core opening hours for these premises:

|           |                                |
|-----------|--------------------------------|
| Monday    | 09.00 – 13.00<br>14.00 – 19.00 |
| Tuesday   | 09.00 – 13.00<br>14.00 – 19.00 |
| Wednesday | 09.00 – 13.00<br>14.00 – 19.00 |
| Thursday  | 09.00 – 13.00<br>14.00 – 19.00 |
| Friday    | 09.00 – 13.00<br>14.00 – 19.00 |
| Saturday  | 09.00 – 13.00                  |
| 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 is allowed.

2.11.6 The proposed change of hours requested would increase our core hours from 40 to 49 hours and maintain an adequate service provision of service for both public and current patients.

2.11.7 Change in patient habits and investigation of current trends, in conjunction with neighbouring surgery opening hours have shown the benefits of guaranteed opening hours between 12:00 -17:30/18:00 Monday -Friday.

2.11.8 Our main surgery Sky Blue Medical Group is open until 17:00 Mon to Friday and closed Saturday and Sunday.

2.11.9 After reviewing Weekday late hours 19:00 to 21:00 & Saturday after 13:00 & Sunday hours over a 4 week period, we have concluded a reduction in hours at these times would maintain the existing service level provision as there is very little demand for pharmaceutical services between these times and on these days. We do not have any substance misuse clients and the majority of the pharmaceutical activities are completed Monday-Friday before 19:00. Our audit shows that barely any patients visit the pharmacy on a Saturday after 13:00 or Sunday and after 19:00 Weekdays.

2.11.10 The current locum rates and business overheads result in net loss for the business which makes it unsustainable financially especially on weekday late nights, Saturdays afternoons & Sundays. These current opening hours are

unnecessary when taking into account demand for pharmaceutical services as shown by our audit.

2.11.11 Currently service from other pharmacies within a mile range shows 2 other pharmacies to provide pharmacy services on a Saturday after 13:00 and Sunday. Listed below:

2.11.11.1 Earlsdon pharmacy- CV5 6EP Sat 9-5.30 pm

2.11.11.2 Boots Pharmacy- CV4 7EH Sat 9.30-5pm & Sun 10-4

2.11.12 There is also one pharmacy within 1.8 miles that is open till 9pm seven days per week

2.11.12.1 Wellbeing Pharmacy CV4 9DR.”

2.11.12.2 [Data collection information weekdays from week commencing 31 July 2023 to week commencing 21 August 2023 and data collection for weekends from 5 August 2023 to 27 August 2023.]

2.12 In a letter to the Applicant dated 16 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 it has been refused.

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

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

2.12.4 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—

2.12.4.1(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

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

2.12.5.1(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.

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

2.12.7 **The existing level of provision would not be maintained, and a sustainable level of adequate service provision would not be maintained.**

2.12.8 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](mailto:nhsr.appeals@nhs.net) or:

2.12.9 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 November 2023 the Applicant stated:

2.13.1 “I act for Chemicare [sic] Stetchford Limited and have been instructed by my client to submit this appeal against the decision of the ICB to refuse the above application to amend core hours.

2.13.2 **Background**

2.13.3 My client recently purchased this pharmacy from Lloyds as part of Lloyds sell-off or closure of all their branches nationwide. Whilst my client had hoped to be able to run the pharmacy profitably, the reality of the first 2 months of trading has shown a loss of over £12,000 in August 2023 and nearly £9,000 in September 2023 (latest Management Accounts available).

2.13.4 As PCA will be aware, prior to May 2023 a contractor operating a 40 hour NHS pharmacy was only permitted to amend their core hours where they could demonstrate a change of need for pharmaceutical services.

2.13.5 Similarly, those operating 100 hour pharmacies were not permitted to reduce their core hours below 100 and had to demonstrate a change in need for any re-arrangement of those hours.

2.13.6 Hundreds of pharmacies have closed in recent years. Between July 2017 and July 2023, the number of operating pharmacies in England fell by 914 from 11,723 to 10,809 with the rate of closures increasing significantly in recent time. The Pharmaceutical Journal reported on 3 November 2023 that;

2.13.6.1 *Chronic underfunding of the community pharmacy sector has continued to take its toll, with a net loss of 295 pharmacies across Great Britain since our previous analysis in March 2022. The number of community pharmacies in England has fallen for the fifth consecutive year.*

2.13.6.2 *Boots — which is still the largest multiple by far, with over 2,000 branches — announced in June 2023 that 300 of its pharmacies would close over the next year, in addition to the 200 branches that had closed since 2019.*

2.13.6.3 *While some pharmacies are changing hands, many are closing permanently. Every integrated care board (ICB) area in England has experienced a fall in the number of community pharmacies per capita over the past five years. Birmingham and Solihull ICB has seen the biggest change, from 2.6 pharmacies per 10,000 people in 2018 to 2.0 in 2023*

2.13.6.4 <https://pharmaceutical-journal.com/article/feature/community-pharmacy-in-britain-a-changing-market>

2.13.7 The amendment Regulations were brought into place after significant lobbying of the DoH from organisations such as Community Pharmacy England (“CPE”) formally known as the PSNC, and other industry groups.

2.13.8 The amendment Regulations permit 100 hour pharmacies to reduce their total opening hours to 72 (subject to exceptions) and do away with the need for 40 hour pharmacies (and 100 hour pharmacies) to show evidence of a change in need to re-distribute or reduce their core hours. The new Regulations appear to be an attempt to stem the tide of closures and keep pharmacies open where

possible with CPE describing the changes as being related to “workforce and cost pressures”.

#### 2.13.9 The New Legal Test

2.13.10 The new legal test removes the requirement for a contractor to show a change in patient need in order to amend their core opening hours. Schedule 4, Part 3, Paragraph 24(1)(b) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 will be the most common consideration in applications of this type and states that changes in hours are permitted subject to the ability of the ICB to;

2.13.10.1(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.]*

2.13.11 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;

2.13.11.1a. Adequate service provision for... People in that area and

2.13.11.2b. Adequate service provision for... other likely users of the pharmacy premises

2.13.12 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.

2.13.13 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. The word “adequate” does not mean perfect, or exemplary and is a normal word that, whilst having previously been used in the 2005 Regulations, can be easily understood.

2.13.14 Considering the second part of regulation 24(1)(b) it states that a change can be permitted where “maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome.”

2.13.15 This permits application to be granted in two scenarios, considered below;

#### 2.13.16 1. Maintaining the existing level of service provision is unnecessary

2.13.17 Whilst we do not wish to stray back to consideration of the old “necessary or desirable” test that used to apply in England and still applies in Scotland and Northern Ireland, it is worth remembering from judicial guidance that necessity was a much higher bar than desirability. It would be sufficient for an Applicant to provide evidence that showed that whilst it may be desirable to have certain hours, say Saturday afternoon, the low usage of services and other available pharmacies meant that these hours were not necessary.

#### 2.13.18 2. Maintaining the existing level of service provision is not a realistically achievable outcome

2.13.19 We submit that it is not realistic to expect a pharmacy contractor to continue operating a pharmacy at a loss. However, that should also not be the threshold that the decision maker uses when making decisions. A contractor should be entitled to make a reasonable profit for the service they provide. Pharmacy contractors, especially independents, often take no, or a very small salary, and rely on dividends to pay their basic living expenses. Those dividends are payable from profits.

2.13.20 It is not realistic to expect a contractor to be unable to afford make a living whilst at the same time demanding that they provide more hours of service than is financially possible.

2.13.21 As already stated above, the reality of the first 2 months of trading for my client has shown a loss of over £12,000 in August 2023 and nearly £9,000 in September 2023 (latest Management Accounts available) and even if the “legal” costs were removed (as they are non-recurring) the pharmacy remains loss making. The Management Accounts show both the relevant month and also the cumulative year to date figure beside them.

2.13.22 The NHS may of course find that the reduction in hours would not “maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises” and feel it is necessary to refuse an application to change hours even if this leads to the closure of the pharmacy. They could then urge the HWB to identify a need for a pharmacy in the same area and hope that another contractor was willing to provide the service they felt was necessary. However, the decision maker must at least consider what is really adequate when it is clear that a contractor providing the current services does so at either a loss or a profit that is so small that they cannot continue to operate.

#### **2.13.23 ICBs Approach to the New Regulations**

2.13.24 Against this backdrop we have seen many applications to redistribute or reduce core hours.

2.13.25 What is becoming clear is that ICBs are not dealing with these applications in comparable ways. In some areas ICBs have permitted reductions and redistributions of core hours and in those cases, Primary Care Appeals is not seeing the decisions as there are no appeal rights to other parties. However, in other comparable cases, ICBs appear to be looking for reasons to refuse applications rather than asking if the evidence provided meets the legal test. We submit that this distinction in approach is important.

2.13.26 In addition, it is worth considering the legal threshold for evidence to be accepted, which is the “balance of probability” rather than “beyond reasonable doubt”, or “sure”. An Applicant does not have to prove anything beyond doubt but should provide sufficient evidence to enable the decision maker to make a decision based on the balance of probability.

2.13.27 The decisions maker should be considering whether the evidence provided demonstrates that the application meets the requirements of the legal test on the balance of probabilities, rather than looking for a reason to refuse an application.

2.13.28 In this case the ICB decision letter states as reasons for refusal that;

2.13.29 *The existing level of provision would not be maintained*

- 2.13.30 It is not disputed that the hours of service provision would change and my client's focus is therefore on part (b) of the legal test and in its decision letter the ICB refuses the application under part (b) stating that,
- 2.13.31 *A sustainable level of adequate service provision would not be maintained.*
- 2.13.32 The ICB provides no reasons for reaching this conclusion. In addition, the ICB makes no reference whatsoever to the information that was provided by my client to demonstrate that part (b) of the test was met and the ICB's decision letter does not correctly identify the legal test and states that it is,
- 2.13.33 *(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. [sic]*
- 2.13.34 My client provided data that showed that there was minimal or no use of services on Saturdays after 1pm or on Sundays. Many NHS services record zero use during these times with a maximum of 2 patients using any service during the times that the pharmacy seeks to close. We submit that this evidence demonstrates clearly that "adequate" service provision would be maintained even with the removal of the proposed hours and that "maintaining the existing level of service provision is unnecessary" due to low usage.
- 2.13.35 In addition, and as per our commentary above, the Committee may wish to consider whether or not patients "in that area" could access service provision from alternate pharmacies in the area. Whilst the term "area" is not defined and may vary depending on location, it is reasonable to consider pharmacies in a 1 to 2 mile radius and sometimes beyond that. The NHS website shows 5 pharmacies (other than my client's) within a 1 mile radius. Earlsdon Pharmacy (1 mile away) opens 9am to 5.30pm on Saturdays and Boots at Cannon Park Centre (also 1 mile away) opens 7 days per week including 9.30am to 5pm on Saturday and 10am to 4pm on Sunday.
- 2.13.36 The attached map shows the range of pharmacies available in this area (including beyond 1 mile radius) so the Committee can see the number and location of alternate pharmacies.
- 2.13.37 That evidence, attached here, showed that;
- 2.13.37.1 1. There were small numbers of patients using the pharmacy during the hours that my client proposed to remove as core hours.
- 2.13.37.2 2. The pharmacy is loss making and not a viable business.
- 2.13.37.3 3. That my client believed that the amended opening hours requested would permit the pharmacy to remain open and operate for hours that provided (along with other pharmacies) an adequate service in the relevant area.
- 2.13.37.4 4. That other pharmacies in the area provided services during the times that my client proposed to close.
- 2.13.37.5 5. That it was not necessary to maintain the current level of service provision as there was very low, or no, use of NHS services during the hours that my client proposed to reduce.
- 2.13.38 We submit that this demonstrates that adequate service provision for the people in the area or other likely users of the pharmacy premises would be maintained if my client's application were approved.

2.13.39 In addition, the accounts for the business and details provided to the ICB about the use of services show that maintaining the existing level of service provision is both unnecessary and not a realistically achievable outcome.

2.13.40 We look forward to hearing from you in due course.”

2.13.41 [Copy of letter of authority, map of pharmacies in the surrounding area, list of opening times of pharmacies, Applicant's accounts from September 2021 to September 2023, data collection information gathered in August 2023.]

2.14 In an email to NHS Resolution dated 17 November 2023 the Commissioner stated:

2.14.1 “We have attached the application paper that was presented to the meeting, redacted agenda for the meeting, decision that was sent to the contractor, application sent by the contractor and redacted minutes for the meeting.

2.14.2 We have no further comments.”

#### **Pharmacy Services Regulations Committee (PSRC) [Report]**

2.14.3 Applicant: Chemycare pharmacy – FK235

2.14.4 Type of Application: Change of core hours (40 hours pharmacy)

2.14.5 Application Summary: Application under paragraph 26(1)(b), Schedule 34 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended (the 2013 regulations), to maintain the pharmacy's 40 core opening hours but to change the days and times of them resulting in a redistribution of 40 Hours.

2.14.6 They are requesting to increase opening hours Monday to Friday with a significant reduction on Saturday and close on Sunday.

2.14.7 Application:

2.14.8 Present Core Opening Hours

| Monday                     | Tuesday                    | Wednesday                  | Thursday                   | Friday                     | Saturday                   | Sunday      | Total |
|----------------------------|----------------------------|----------------------------|----------------------------|----------------------------|----------------------------|-------------|-------|
| 09:00-12:00<br>17:30-21:00 | 09:00-12:00<br>17:30-21:00 | 09:00-12:00<br>17:30-21:00 | 09:00-12:00<br>17:30-21:00 | 09:00-12:00<br>17:30-21:00 | 09:00-12:00<br>18:00-21:00 | 12:00-14:00 | 40    |

2.14.9 Proposed Core Opening Hours

| Monday                     | Tuesday                    | Wednesday                  | Thursday                   | Friday                     | Saturday    | Sunday | Total |
|----------------------------|----------------------------|----------------------------|----------------------------|----------------------------|-------------|--------|-------|
| 09:00-13:00<br>14:00-19:00 | 09:00-13:00<br>14:00-19:00 | 09:00-13:00<br>14:00-19:00 | 09:00-13:00<br>14:00-19:00 | 09:00-13:00<br>14:00-19:00 | 09:00-13:00 |        | 49    |

2.14.10 Chemycare Pharmacy's inclusion in the pharmaceutical list for the area of Coventry HWB is subject to the 40 hours condition set out in regulation 65 of the 2013 regulations. The condition is that the premises must be kept open for at least 40 hours per week for the provision of pharmaceutical services.

2.14.11 The applicant is seeking to increase the total number of core opening hours and to change the timing of them.

2.14.12 The application has been made under paragraph 26(1)(b), Schedule 4 of the 2013 regulations.

**2.14.13 “Determination of pharmacy premises core opening hours instigated by the NHS pharmacist**

2.14.14 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—

2.14.14.1(a) reduces the total number of hours for which P is obliged to provide pharmaceutical services at those premises each week; or

2.14.14.2(b) keeps that total number of hours the same.

2.14.15 (2) 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).”

2.14.16 The applicant provides the following services:

2.14.16.1Advanced services- None

2.14.16.2Enhanced services -None

**2.14.17 Application Details:**

2.14.18 The applicant has provided the following information in support of their application.

2.14.19 [See paragraphs 2.11.6 to 2.11.12.1 above.]

**2.14.20 Provision of Primary Medical Services in the area:**

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

2.14.22 There are 2 surgeries listed:

| Practice Name          | Practice Address                                                              | Opening hours                            | Distance from pharmacy |
|------------------------|-------------------------------------------------------------------------------|------------------------------------------|------------------------|
| Sky Blue Medical Group | Green Lane Medical Centre,<br>Green Lane, Coventry, West<br>Midlands, CV3 6EA | M, T, W, F 08:30-17:00<br>TH 08:30-12:30 | 0.3 miles              |
| Phoenix Family Care    | 103 Leamington Road,<br>Coventry, CV3 6GQ                                     | Monday to Friday 08:00-<br>18:30         | 0.8 miles              |

**2.14.23 Other Prescribers (from NHS.UK)**

| Practice Name       | Practice Address                                            | Opening hours                             | Distance from pharmacy |
|---------------------|-------------------------------------------------------------|-------------------------------------------|------------------------|
| University Hospital | Clifford Bridge Road,<br>Coventry, Warwickshire,<br>CV2 2DX | 24 hours (for anyone 18<br>years or over) | 4.7 miles              |

**2.14.24 Pharmaceutical Services within 1 mile distance of the Pharmacy**

2.14.25 *NB: Whilst those providers may have supplementary opening hours given that they can be reduced or changed with five weeks' notice core opening hours only are included below.*

| FCODE | Name                | Address                                               | Core Hours                                                                                       | Dispense Appliances | Advanced / Enhanced               | Distance  |
|-------|---------------------|-------------------------------------------------------|--------------------------------------------------------------------------------------------------|---------------------|-----------------------------------|-----------|
| FM838 | Styvechale Pharmacy | 84 Baginton Road, Styvechale, Coventry, CV3 6FQ       | M-F 09:00-13:00, 14:00-18:00                                                                     | Yes                 | NMS<br>Contraception<br>BP<br>Flu | 0.7 miles |
| FG097 | Chemycare Pharmacy  | 103 Leamington Road, Coventry, CV3 6SQ                | M 08:30-13:00, 14:30-18:30;<br>T, W, F 08:30-13:00, 14:00-18:30;<br>TH 08:30-13:00               | Yes                 | NMS<br>Contraception<br>BP<br>Flu | 0.8 miles |
| FPE13 | Dhaliwal Chemist    | 373 Green Lane, Coventry, CV3 6EJ                     | M, T, W, F 09:00-13:00, 14:00-18:00<br>TH, S 09:00-13:00                                         | Yes                 | NMS<br>Flu                        | 0.9 miles |
| FW396 | Earlsdon Pharmacy   | 19-21 Earlsdon Street, Coventry, CV5 6EP              | M-F 09:00-12:30, 15:00-18:30<br>S 09:00-11:30, 15:00-17:30                                       | Yes                 | NMS<br>Contraception<br>BP<br>Flu | 1 mile    |
| FF533 | Boots Pharmacy      | Cannon Park Centre, Lynchgate Road, Coventry, CV4 7EH | M, T, F 09:30-14:00, 15:00-17:00<br>W, TH 09:30-14:00, 15:00-17:30<br>S 09:30-14:00, 15:00-17:00 | Yes                 | NMS<br>Contraception<br>Flu       | 1 mile    |

#### 2.14.26 Distance Selling Premises and Dispensing Appliance Contractors

2.14.27 There are 12 Distance Selling Premises in the Coventry & Warwickshire ICB area and nationally there are approximately 390 Distance Selling Premises providing Essential Services across England without face-to-face contact at, or in the vicinity of, the premises.

2.14.28 There is 1 Dispensing Appliance Contractors in the Coventry & Warwickshire ICB area.

#### 2.14.29 Local Hours Plan

2.14.30 None in place.

#### 2.14.31 Temporary Suspensions of Pharmaceutical Services

2.14.32 There have been no unplanned closures reported for any of the pharmacies referenced in this report within the last 6 months.

#### 2.14.33 Local Pharmaceutical Committee Representations

2.14.34 No comments received.

#### 2.14.35 Pharmaceutical Needs Assessment

2.14.36 The following is taken from the Coventry and Warwickshire pharmaceutical needs assessment.

2.14.37 Page 67 of the PNA states that almost all of Warwickshire is within a 15-minute drive to a pharmacy, the exceptions being in South and Southeast of Stratford-on-Avon District, which are rural areas.

2.14.38 The majority of Coventry is within a 5-minute drive to a pharmacy and all of Coventry is within a 15- minute drive.

2.14.39 In the public survey, when asked the question “are you able to access a pharmacy at times that are convenient to you?” 39% responded “Yes always”, 47% responded “most of the time”, 11% responded sometimes and 2% responded “never”.

2.14.40 The most convenient time to visit a pharmacy as indicated in the public survey was between 9am and 1pm on Saturday (75%), followed by between 9am and 1pm on a Monday to Friday (61%), and between 1pm and 6pm on a Monday to Friday (48%). 28% said after 6pm Monday to Friday, with between 2%-4% indicating either before 9am or after 6pm on a Saturday or Sunday. 25-54-year-olds are less likely to agree that opening hours are always convenient for them whilst 75+ are more likely to say that opening hours are always convenient for them. As of 1st June 2022, 137 out of the 197 community pharmacies in Coventry and Warwickshire are open on a Saturday (69.5%). 51 of these pharmacies are in Coventry, 23 in Nuneaton and Bedworth Borough, 21 in Warwick District, 18 in Stratford-on-Avon District, 15 in Rugby Borough, and 9 in North Warwickshire Borough. Of those pharmacies open on a Saturday, 64 of them are closed by 1pm. After 1pm the other 73 remain open with gradual closure over the remainder of the day.

**2.14.41 Matters for Committee to consider.**

2.14.42 Paragraph 24, Schedule 4 of the 2013 regulations sets out the matters that the committee is to have regard to when determining this application. It is to be noted that the application only has to satisfy one of the matters in paragraph 23(1), Schedule 4, not both of them.

**2.14.43 “Matters to be considered when issuing directions in respect of pharmacy premises core opening hours**

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

(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) 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.

(3) The NHSCB may only direct that an NHS pharmacist (P) may provide pharmaceutical services at premises for less than 40 hours in any week if it is satisfied that the provision of pharmaceutical services in its area is likely to be

adequate to meet the need for such services at times when P is not providing pharmaceutical services.

(4) Except in the case of premises that have (at any time) been subject to a direction under regulation 65 or regulation 65 of the 2012 Regulations (core opening hours conditions), the NHSCB may only direct that P must provide pharmaceutical services at premises for more than 40 hours in any week where it is satisfied that P is to receive reasonable remuneration in respect of the additional opening hours for which P is required to provide pharmaceutical services (and any additional remuneration payable in accordance with a determination made as mentioned in regulation 91(6) in respect of those hours is “reasonable remuneration” for these purposes).

(5) Sub-paragraph (4) does not apply in circumstances where the direction is in respect of any premises in respect of which a 100 hours condition applies or has ever applied, or in respect of which a direction that replaced (at any distance in succession) a 100 hours condition applies.”

#### 2.14.44 “Committee Decision

2.14.45 Committee agreed with the recommendation to **refuse** the application as it didn’t meet paragraph 24(1)a or 24(1)b of the regulation. The existing level of provision would not be maintained, and a sustainable level of adequate service provision would not be maintained.

#### 2.14.46 Appeal rights to the applicant.”

2.15 In a letter to NHS Resolution dated 12 December 2023 the Applicant stated:

2.15.1 “Thank you for your letter and attachments of 12 December 2023. I act for Chemycare Pharmacy and have been instructed by my client to submit these comments in relation to the DMB representations.

2.15.2 Whilst we acknowledge that this appeal is a *de novo* consideration of the application it is nevertheless worth noting the manner in which the ICB misdirected itself when considering my client’s application as this is the first time that we have had sight of the redacted minutes for the meeting.

2.15.3 When considering my client’s application, the ICB considered the location of other pharmacies, which we agree is required. However, page 9 of the attachment from the DMB shows that the only core hours for these other contractors were considered. Respectfully, it cannot be correct for the ICB to refuse to consider pharmacy opening hours that could be relevant to its decision simply because those hours might change in the future. This would be analogous to an Applicant in a regulation 18 application asking the Committee to discount the hours of all existing pharmacies that were not core hours. Such a request would quite rightly be seen as ridiculous. If some future event happens that creates a gap in service provision then the HWB can and should identify the gap in the PNA.

2.15.4 As a result of proceeding on this basis, the ICB did not even consider the Sunday opening hours offered by Boots at Cannon Park Centre, which is located 1 mile from my client’s pharmacy. Nor did they consider Saturday opening from Styvechale Pharmacy.

2.15.5 In addition, the ICB completely disregarded all pharmacies that were not within 1 mile of my client’s pharmacy, for example ASDA which is open from 9am to 9pm Monday to Saturday and 10am to 4pm on Sunday. Even if ASDA had been within 1 mile the ICB would still have not considered most of their opening

hours (including late nights, Saturday and Sunday) as the ASDA as it is not a 100 hour pharmacy and does not have core Sunday (or likely Saturday) hours.

- 2.15.6 We believe it is commonly accepted that patients would find it perfectly reasonable, or “adequate”, to travel to the likes of an ASDA (9 minutes by car from my client’s pharmacy) within their town for late night or Sunday provision of services and this is common across the country. There is no defensible reason to simply discount the existence of such pharmacies and the ICB does not do this when considering applications under other regulatory tests such as regulation 18. In fact, the ICB regularly quotes drive times of 15 minutes or 20 minutes as being acceptable for access to pharmacies for the local population. Even in this application the ICB quotes from the relevant PNA (page 18 DMB attachment) and states;
- 2.15.7 *Page 67 of the PNA states that almost all of Warwickshire is within a 15-minute drive to a pharmacy, the exceptions being in South and Southeast of Stratford-on-Avon District, which are rural areas.*
- 2.15.8 *The majority of Coventry is within a 5-minute drive to a pharmacy and all of Coventry is within a 15- minute drive.*
- 2.15.9 If the ICB believes that being within a 15 minute drive of a pharmacy is relevant, then why was it not considered relevant in this case where there are a large number of pharmacies within a 15 minute drive and some within a 15 minute walk?
- 2.15.10 The minutes then state at page 11 of the DMB attachment;
- 2.15.11 **Recommendations:**
- 2.15.12 ***It is recommended that the application to amend Core Opening Hours is refused, as if it were to be approved, there would be no Sunday provision of Core Hours in any pharmacy within a mile***
- 2.15.13 It is clear from this that despite quoting the Regulations the DMB simply applied their own legal test. For example, the DMB does not even consider whether maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome (as required by regulation 24(1)(b)) and does not discuss the evidence provided to them.
- 2.15.14 My client provided data that showed that there was minimal or no use of services on Saturdays after 1pm or on Sundays. Many NHS services record zero use during these times with a maximum of 2 patients using any service during the times that the pharmacy seeks to close. We submit that this evidence demonstrates clearly that “adequate” service provision would be maintained even with the removal of the proposed hours and that “maintaining the existing level of service provision is unnecessary” due to low usage. Adequate does not mean perfect or ideal.
- 2.15.15 Whilst quoting the evidence provided by my client in the minutes, at no point does the Committee discuss the evidence that was provided and instead appears to seek a rationale for refusing the application. It is as if the DMB has decided that if an Applicant seeks to cease trading on a Sunday then this will only be permitted if another pharmacy offers core Sunday hours and is located within a 1 mile radius. In other words, the DMB is making up its own rules for expediency rather than grappling with individual circumstances.
- 2.15.16 Finally, we wish to point out that this is the first time that we have seen the minutes that explain the decision letter or we would have made the above

representations in our letter of appeal. It would be helpful if ICBs would provide the minutes along with the decision letter as they do in most other cases.

2.15.17 We look forward to hearing from you in due course.”

2.16 I note the following:

2.16.1 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 also seeks to add a further 9 core hours per week. The Applicant seeks to provide services as per its proposed changes in the tables at 2.11 above.

2.17 The Applicant proposes to:

2.17.1 Extend opening hours on a weekday morning by opening from 9am to 1pm in place of 9am to 12pm;

2.17.2 Change opening hours on a weekday afternoon by opening at 2pm to 7pm in place of 5.30pm to 9pm on Monday, Tuesday, Wednesday and Friday, and in place of 6pm to 9pm on a Thursday;

2.17.3 Change opening hours on a Saturday by opening from 9am to 1pm in place of 9am to 12pm and 6pm to 9pm; and

2.17.4 Not to open on Sunday in place of 12pm to 2pm.

2.18 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.

2.19 The application to change the hours was made by the Applicant on 8 September 2023 and a decision was made by the Commissioner on 16 October 2023. The decision was appealed to NHS Resolution by email of 10 November 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.

2.20 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”.

2.21 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.”*

2.22 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).*

2.23 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.*

2.24 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.*

2.25 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.

2.26 The Applicant provides the following reasoning for its application:

*“The proposed change of hours requested would increase our core hours from 40 to 49 hours and maintain an adequate service provision of service for both public and current patients.*

*Change in patient habits and investigation of current trends, in conjunction with neighbouring surgery opening hours have shown the benefits of guaranteed opening hours between 12:00 -17:30/18:00 Monday -Friday.*

*Our main surgery Sky Blue Medical Group is open until 17:00 Mon to Friday and closed Saturday and Sunday.*

*After reviewing Weekday late hours 19:00 to 21:00 & Saturday after 13:00 & Sunday hours over a 4 week period , we have concluded a reduction in hours at these times would maintain the existing service level provision as there is very little demand for pharmaceutical services between these times and on these days. We do not have any substance misuse clients and the majority of the pharmaceutical activities are completed Monday-Friday before 19:00. Our audit shows that barely any patients visit the pharmacy on a Saturday after 13:00 or Sunday and after 19:00 Weekdays.*

*The current locum rates and business overheads result in net loss for the business which makes it unsustainable financially especially on weekday late nights, Saturdays afternoons & Sundays. These current opening hours are unnecessary when taking into account demand for pharmaceutical services as shown by our audit.”*

- 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 total hours that pharmacies in the local area are open (i.e. both core and supplementary opening hours).
- 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. Further the Applicant is proposing to increase its core hours from 40 to 49.
- 2.32 However, the Applicant is applying to change the days and times that services are provided. Taking Sunday as an example, the level of service provision at the Applicant's premises on a 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.
- 2.33 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.
- 2.34 The Applicant has stated in its representations:
- "My client provided data that showed that there was minimal or no use of services on Saturdays after 1pm or on Sundays. Many NHS services record zero use during these times with a maximum of 2 patients using any service during the times that the pharmacy seeks to close. We submit that this evidence demonstrates clearly that "adequate" service provision would be maintained even with the removal of the proposed hours and that "maintaining the existing level of service provision is unnecessary" due to low usage. Adequate does not mean perfect or ideal."*

- 2.35 I have considered the data collected by the Applicant in August 2023 – shown below. I have taken the liberty of adding in a total to show by date and pharmaceutical service the numbers of patients availing of these services during the times the Applicant is proposing to no longer be open. i.e. Weekdays from 19:00 to 21:00, Saturdays after 13:00 and Sundays 12:00 to 14:00.

| Date         | Rx forms | Rx items | Self Care | Sign Posting | Disposal of unwanted Meds | Healthy lifestyle advice | Total |
|--------------|----------|----------|-----------|--------------|---------------------------|--------------------------|-------|
| Mon 31/07/23 | 1        | 1        | 0         | 0            | 0                         | 0                        | 2     |
| Tue 01/08/23 | 0        | 0        | 1         | 0            | 0                         | 0                        | 1     |
| Wed 02/08/23 | 0        | 0        | 1         | 0            | 0                         | 0                        | 1     |
| Thu 03/08/23 | 1        | 1        | 1         | 0            | 0                         | 0                        | 3     |
| Fri 04/08/23 | 1        | 2        | 0         | 0            | 0                         | 0                        | 3     |
| Sat 05/08/23 | 2        | 2        | 1         | 0            | 0                         | 0                        | 5     |
| Sun 06/08/23 | 1        | 1        | 1         | 0            | 0                         | 0                        | 3     |
| Mon 07/08/23 | 1        | 1        | 0         | 0            | 0                         | 0                        | 2     |
| Tue 08/08/23 | 1        | 1        | 1         | 0            | 0                         | 0                        | 3     |
| Wed 09/08/23 | 0        | 0        | 0         | 0            | 0                         | 0                        | 0     |
| Thu 10/08/23 | 0        | 0        | 1         | 1            | 0                         | 0                        | 2     |
| Fri 11/08/23 | 1        | 1        | 0         | 0            | 0                         | 0                        | 2     |
| Sat 12/08/23 | 1        | 1        | 0         | 0            | 0                         | 0                        | 2     |
| Sun 13/08/23 | 1        | 1        | 1         | 1            | 0                         | 0                        | 4     |
| Mon 14/08/23 | 0        | 0        | 1         | 0            | 0                         | 0                        | 1     |
| Tue 15/08/23 | 1        | 1        | 0         | 0            | 0                         | 0                        | 2     |
| Wed 16/08/23 | 1        | 2        | 1         | 0            | 0                         | 0                        | 4     |
| Thu 17/08/23 | 0        | 0        | 0         | 1            | 0                         | 0                        | 1     |
| Fri 18/08/23 | 1        | 1        | 1         | 1            | 0                         | 0                        | 4     |
| Sat 19/08/23 | 1        | 2        | 1         | 1            | 0                         | 1                        | 6     |
| Sun 20/08/23 | 1        | 1        | 1         | 0            | 0                         | 1                        | 4     |
| Mon 21/08/23 | 1        | 2        | 1         | 0            | 0                         | 0                        | 4     |
| Tue 22/08/23 | 0        | 0        | 0         | 1            | 0                         | 0                        | 1     |
| Wed 23/08/23 | 0        | 0        | 1         | 0            | 0                         | 0                        | 1     |

|                 |           |           |           |          |          |          |           |
|-----------------|-----------|-----------|-----------|----------|----------|----------|-----------|
| Thu<br>24/08/23 | 1         | 2         | 0         | 1        | 0        | 0        | 4         |
| Fri<br>25/08/23 | 1         | 1         | 1         | 0        | 0        | 0        | 3         |
| Sat<br>26/08/23 | 2         | 2         | 2         | 0        | 0        | 0        | 6         |
| Sun<br>27/08/23 | 2         | 2         | 2         | 1        | 0        | 1        | 8         |
| <b>Total</b>    | <b>23</b> | <b>28</b> | <b>20</b> | <b>8</b> | <b>0</b> | <b>3</b> | <b>82</b> |

- 2.36 Having reviewed this information I note that during the data collection period in August 2023 there were 82 patients who received one form of pharmaceutical service or another. There was only one day, Wednesday 9 August 2023, where no pharmaceutical service was provided during the hours the Applicant is proposing to close. I am mindful that it is difficult to put this data into context as we do not know how many patients the Applicant sees each day. However, based upon the information before me the data shows a clear use of people using the pharmacy at the times the Applicant wishes to close, albeit low in numbers.
- 2.37 I consider, in relation to paragraph 24(1)(a), that 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.
- 2.38 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 proposing to change its hours. I have information from both parties as to the level of service provision with regard to other pharmacies in the area. The Applicant takes into account total opening hours of existing pharmacies. The Commissioner has only considered the total core hours of the existing pharmacies. The Regulations indicate that I may take supplementary opening hours into consideration. However I am mindful that supplementary hours may be altered by the pharmacy by giving notice to the Commissioner in accordance with paragraph 23(6)(a) of Schedule 4 without the need to make an application to the Commissioner. On this basis, I have not placed weight on the provision of pharmaceutical services outside of the core hours offered by other pharmacies in the area. I note the position of the nearest pharmacies in relation to the Applicant's pharmacy and that this information has not been disputed by the Commissioner. There are 13 pharmacies within a two mile radius of the Applicant's pharmacy. Of these, Wellbeing and Asda are open between 19:00 and 21:00 on weekdays and from 18:00 to 21:00 on Saturdays. Wellbeing and Asda and two Boots pharmacies open between 12:00 and 14:00 on Sundays.
- 2.39 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).
- 2.40 I have not been provided with information regarding access to those pharmacies for those who currently access the Applicant's pharmacy and how they might travel to find alternative pharmaceutical services on the days at times at which the Applicant now wishes to close. There will be people who drive to the Applicant's pharmacy and those who walk. The Applicant has provided a map of pharmacies in the area indicating how far away certain pharmacies are but it is not confirmed whether there is parking available or what bus routes are available.
- 2.41 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.

- 2.42 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.
- 2.43 I have decided that it is necessary to maintain the current service provision but, due to a lack of information about patient access to the existing pharmacy services being provided during the hours the Applicant is proposing to close, I am not satisfied that there will be maintenance of the existing level of service provision, whether by virtue of other pharmacies in the area or by the Applicant changing its hours.
- 2.44 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”.*
- 2.45 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.
- 2.46 I note that the Applicant has stated *“The current locum rates and business overheads result in net loss for the business which makes it unsustainable financially especially on weekday late nights, Saturdays afternoons & Sundays.”* 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.
- 2.47 On the point of whether maintaining the existing level of service provision is not a realistically achievable outcome, I consider that no evidence of costs for locums at different times has been provided. The Applicant appears to be saying it is not sustainable to keep paying locums to cover these hours but it has not presented evidence that suggests these fees are compromising the economic viability of its operations at the weekend or otherwise. There is no locum ‘cost’ in the management accounts provided to me.
- 2.48 I note that, the accounts provided to me show Lloyds’ year to date figures at August 2022 alongside the August and September 2023 year to date figures for the Applicant. I note from the NHS and OTC sales cumulative figures for Lloyds to August 2022 that on average they achieved £61,000 per month compared to the Applicant’s two month average of £60,339.. At current rates, purchasing costs *might* exceed the Lloyds figures by £23,000 but that is speculation. Further, there are additional costs provided by the Applicant, in lines 16 to 39 which are not available in the 2022 accounts such as insurance and legal costs in September 2023 which appear to be one off payments. Also a line “Sundry 10”, line 45 in the August 2022 accounts which does not appear in the August or September 2023 accounts which makes it difficult to compare. Whilst a crude calculation by dividing the cumulative figure of Lloyds’ accounts can give an idea of an average month accounts, it would have been helpful to see the break-down of figures for the month in conjunction with the cumulative figures and an explanation of what the Applicant is evidencing. I am also mindful that I have not been provided with any evidence that the situation presented through the accounts is still ongoing. Separately, with the exception of rent and rates which are unlikely to change over the course of an accounting year, I am also puzzled as to how increasing the number of opening hours which will increase some other costs, including wages, and heating for example will help the Applicant in their plan to secure financial stability.

2.49 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.

2.50 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).

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**