

1 February 2024

FILE REF: SHA/26102

DECISION MAKING BODY: Lancashire and South Cumbria
ICB (“the Commissioner”)

PHARMACIST: Doctors Pharmacy Limited
 (“the Applicant”)

PREMISES: ASPIRE PHARMACY,
9 RAILWAY ROAD,
ORMSKIRK,
L39 2DN

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

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

**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 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.
- 1.2 Therefore I substitute the decision of the Commissioner to reject the change of hours application, with the decision to grant the change of hours application, without a direction.

A copy of this decision is being sent to:

Temple Bright on behalf of Doctors Pharmacy Limited
Lancashire and South Cumbria ICB

Advise / Resolve / Learn

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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 keep the total number of core opening hours the same while offering a different distribution of these hours during the week.
- 1.2 The Commissioner has refused the application. The Applicant seeks to appeal to NHS Resolution.

2. Consideration

Rights of appeal

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

Opening hours

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

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

Alteration of core opening hours

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

Alteration of supplementary opening hours

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

The Applicant's proposals

- 2.9 The Applicant in its letter of appeal indicates that it currently has core opening hours totalling 100 hours per week.
- 2.10 The Applicant wishes to:
- 2.10.1 Open until midnight Monday to Friday rather than closing at 11pm; and
- 2.10.2 Close on a Sunday rather than opening from 11am to 4pm.

Assessment

- 2.11 In this case, the Applicant provided the following information in its application form dated 9 August 2023:
- 2.11.1 “This is an application to permanently change core opening hours.
- 2.11.2 Current opening hours for these premises:

Monday	07:00 – 23:00
Tuesday	07:00 – 23:00
Wednesday	07:00 – 23:00
Thursday	07:00 – 23:00

Friday	07:00 – 23:00
Saturday	07:00 – 22:00
Sunday	11:00 – 16:00

2.11.3 Proposed core opening hours for these premises:

Monday	07:00 – 24:00
Tuesday	07:00 – 24:00
Wednesday	07:00 – 24:00
Thursday	07:00 – 24:00
Friday	07:00 – 24:00
Saturday	07:00 – 22:00
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: 27 September 2023.

2.11.5 Granting this application would continue to maintain the existing level of pharmaceutical service provision for the people of Ormskirk and the surrounding areas.

2.11.6 We have carried out a survey of patients using our pharmacy on a Sunday [Appendix B]. Over the last 5 Sundays, we have counted the number of patients using our pharmacy, the service they accessed and how they travelled to the pharmacy. The results show that, on average, only 3 people use the pharmacy each Sunday. Almost all of those patients used the pharmacy to purchase an OTC medicine, with only 2 out of the 15 patients presenting a prescription.

2.11.7 In terms of the method of travel used by patients, 80% (12 patients) had travelled to the pharmacy by car, with the remaining 20% (or 3 patients) having walked.

2.11.8 There is, therefore, very little demand for our service on a Sunday.

2.11.9 Those patients that do use our pharmacy on a Sunday can easily access Morrisons Pharmacy at Park Road, Ormskirk, L39 3RB. Morrisons Pharmacy is open from 11am to 5pm (so longer hours than we currently provide).

2.11.10 Morrisons Pharmacy is located only 450 meters [sic] from our pharmacy, or a 6-minute walk. It has a large, free car park, making it easily accessible. There is also a direct Bus Service (2A) which operates on hourly basis on a Sunday between the hours of 9 am – 5 pm.

2.11.11 The location of our pharmacy compared to the Morrisons Pharmacy is shown in the map below. [Appendix A].

2.11.12 Further afield, there are 2 other pharmacies which currently provide pharmaceutical cover in the area on a Sunday as follows:

1. Fishlocks Pharmacy (9 mins driver [sic] /4.1 miles away) – 56 Liverpool Road, Burscough, Ormskirk, L40 4BY between the hours of 0830 – 2100

2. Asda Pharmacy (15 mins drive/7.1 miles away) – Ormskirk Road, Liverpool, L10 3LN between the hours of 1030 – 1630

2.11.13 It is also becoming increasingly difficult for us to secure pharmacist cover on a Sunday. We have had instances in the past whereby we have been very close

to putting in a notification of a temporary closure due to lack of locums and/or staff however have been able to get it covered last minute by asking friends/family or weekday staff to help out, our resources are very stretched now and can foresee us having to notify the area team of temporary closures going forward as it is not feasible for the pharmacy to continue opening on a Sunday. Hence in reference to the amended regulations – paragraph 24, part 11 B schedule 4 – it is no longer feasible for the pharmacy to continue to open on a Sunday as this is an unrealistic achievable outcome. By reallocating resources to peak-demand periods or more critical services during the week, we can enhance the overall patient experience. Ensuring sufficient staff availability during busier hours will result in shorter waiting times, better service quality, and increased patient satisfaction. This will further support patient care and increase accessibility. Instead of spreading resources thinly across all operating hours, this would allow for better resource allocation during peak periods when patient volumes are high. This would ensure that patients receive prompt attention and care, leading to improved health outcomes. We will be able to focus on proactive healthcare by reallocating resources from Sunday hours to other areas, such as medication counselling, health screenings, or wellness programs, we can actively contribute to preventive healthcare initiatives. This shift would enable pharmacists to spend quality time with patients, promoting medication adherence, and providing essential healthcare information.”

- 2.12 In a letter to the Applicant dated 26 September 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 was considered at the Pharmaceutical Services Group on 20 September 2023 and it was determined that it has been REFUSED.
 - 2.12.2 The Group determined that there was not sufficient evidence provided to reflect a change in the needs of people in the area, or other likely users of the premises, for pharmaceutical services.
 - 2.12.3 The application maintains the 100 core hours, but in a configuration that reduces access on Sunday.
 - 2.12.4 The Applicant has provided reasoning in support of the application that centres on ceasing access on Sunday, mainly with the view that there is very little activity at their premises, though admitting that some users do present prescriptions.
 - 2.12.5 There is no evidence provided that the increased hours on weekdays (extended to 12 midnight) are required/supported by access by users.
 - 2.12.6 There is no reference to any impact on COVID medicines supply and palliative care services, currently supported and provided by the premises.
 - 2.12.7 The expectation of services being available at other premises in the area should not be relied upon.
 - 2.12.8 Whilst the Group was sympathetic to workforce challenges, it felt that there are other opportunities to explore, such as the reduction of hours to the new minimum of 72 hours/week.”
- 2.13 In a letter to NHS Resolution dated 20 October 2023 Temple Bright on behalf of the Applicant stated:

2.13.1 “I act for Doctors Pharmacy Limited. My client is included in the pharmaceutical list for premises trading as Aspire Pharmacy, 9 Railway Road, Ormskirk, L39 2DN (“the Pharmacy”).

2.13.2 On behalf of my client I write to appeal a decision of NHS England to refuse my client’s application for a change of core hours of the Pharmacy. The decision was notified to my client by letter dated 26th September 2023.

2.13.3 My client’s ground of appeal is that NHS England failed to apply the correct legal test in its determination of this application. In particular, NHS England stated: *“There is no evidence provided that the increased hours on weekdays (extended to 12 midnight) are required/supported by access by users”*; however, that is not the legal test that NHS England was required to apply to this application – in short it was not necessary for my client to show that the additional hours from Monday to Friday were required and NHS England therefore misdirected itself as to the relevant regulatory test.

2.13.4 As NHS Resolution will be aware, an application to change core hours is determined having regard to, amongst other things, the matters set out in paragraph 24(1) of schedule 3 to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. Paragraph 24(1) provides as follows:

“(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.”

2.13.5 By application dated 10th August 2023, my client submitted an application to NHS England to change its core hours as follows:

2.13.6 Current core hours

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
0700 – 2300	0700 – 2300	0700 – 2300	0700 – 2300	0700 – 2300	0700 – 2200	1100 – 1600

2.13.7 Proposed amended core hours

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
0700 – 2400	0700 – 2400	0700 – 2400	0700 – 2400	0700 – 2400	0700 – 2200	Closed

2.13.8 My client asserted that granting its application would maintain, as necessary, the existing level of service provision for people in the area of the Pharmacy or other likely users of the Pharmacy premises, and/or would 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 unnecessary.

- 2.13.9 The Pharmacy is located on Railway Road in Ormskirk and is co-located with Beacon Surgery. The pharmacy dispenses an average of approximately 14,800 items per month, with around half of those originating from Beacon Surgery. Beacon Surgery is open from 8.30am to 6pm Monday to Friday and is closed on Saturday and Sunday.
- 2.13.10 The Pharmacy is located approximately 150 metres from The Elms Practice and Ormskirk Medical Practice which are both on Derby Street. The Pharmacy is located approximately 350m from Parkgate Surgery, which is on St Helens Road. All three of those surgeries are open from 8am to 6.30pm Monday to Friday and are closed on Saturday and Sunday. Approximately 44% of the Pharmacy's prescriptions originate from those three surgeries.
- 2.13.11 The Pharmacy is located on an "edge of town centre" location, with Ormskirk town centre to the south and west. It is therefore not located in the main shopping centre of Ormskirk and has little "passing trade".
- 2.13.12 The general location of the Pharmacy is shown on the google streetview image below: [see Appendix C]
- 2.13.13 As a result of its co-location with the Beacon Surgery and its relatively quiet location, the great majority of the pharmacy's patients access the pharmacy during the opening hours of the surgeries (ie after they have seen their GP or visited the surgery for some other reason) or receive services remotely (through collection and delivery arrangements). Consequently, the Pharmacy has very few patients who access the Pharmacy outside of the surgery times and, in particular, on Sundays.
- 2.13.14 My client therefore applied to NHS England to re-distribute the Pharmacy's core hours to increase the opening hours during the working week and to remove the hours on a Sunday to take into account the pattern of usage of the Pharmacy by its patients.
- 2.13.15 In order to support its application, my client carried out a survey of the Pharmacy's usage on a Sunday. A copy of the survey results is attached to this appeal. [Appendix B]
- 2.13.16 The survey showed that, during the 5 weeks of the survey period, on average, only 3 people in total used the pharmacy each Sunday. Almost all those patients used the pharmacy to purchase an OTC medicine, with only 5 out of the 15 patients presenting a prescription, and only two of those being acute prescriptions. No patients used the Pharmacy to access any other pharmaceutical services.
- 2.13.17 As stated above, the Pharmacy dispenses an average of 14,800 prescription items per month.
- 2.13.18 This equates to an average of around 650 items per day during the working week. In contrast, the pharmacy saw an average of only one prescription a day on a Sunday during the survey period. Put another way, the number of prescriptions dispensed on a Sunday represented fewer than 0.03% of the total number of prescriptions dispensed by the Pharmacy during the survey period.
- 2.13.19 As stated above, no patients during the survey period accessed other pharmaceutical services, including services such as CPCS or NMS, on a Sunday.

- 2.13.20 Of those who did use the pharmacy, 12 patients had travelled by car, with the remaining 3 patients having walked. All of the patients who came to the Pharmacy with a prescription to be dispensed had travelled by car. In its decision, NHS England stated “there is no reference [in the application] to any impact on COVID medicines supply and palliative care services, currently supported and provided by the premises.”. In relation to the Covid medicine supply service for antiviral treatments, there is no condition that the service must be provided on a Sunday and antivirals are dispensed upon the presentation of a prescription. In that sense, the provision of this service is no different from dispensing services generally as detailed above. No prescriptions for the Covid medicine supply service have ever been received on a Sunday.
- 2.13.21 In terms of vaccination services (including for Covid), they are provided by way of prior appointment and, consequently, are scheduled for the times when the pharmacy is open and an appropriately trained member of staff is available. Those vaccinations would therefore be accommodated during the Pharmacy’s opening times (which would exclude Sundays were this application to be granted) without any patient difficulty.
- 2.13.22 In terms of palliative care services, whilst my client does participate in this scheme, it does not believe that the service has ever been provided on a Sunday.
- 2.13.23 For the purposes of paragraph 24(1) as set out above, it is therefore clear that my client’s Sunday hours are “unnecessary” (in accordance with paragraph 24(1)(a)). That is, since the Pharmacy is not being used on a Sunday to any meaningful extent for the provision of NHS pharmaceutical services, the provision that it offers on a Sunday cannot be considered “necessary” for the purposes of paragraph 24(1)(a).
- 2.13.24 My client’s Sunday hours are also not “necessary” in order to maintain a sustainable level of adequate service provision (for the purposes of paragraph 24(1)(b)) because the existing level of service provision for the people in the Ormskirk would be maintained even if my client’s application were to be granted since there is another pharmacy in Ormskirk which is open from 11am to 5pm on Sundays: Morrisons Pharmacy.
- 2.13.25 Morrisons Pharmacy is located only 450 metres from the Pharmacy, or a 6-minute walk as shown on the google maps image [see Appendix C]. This is a short walk along level terrain with no barriers for pedestrian access.
- 2.13.26 Morrisons Pharmacy is located within the Morrisons Supermarket and, as such, has a large, free car park making it easily accessible by car.
- 2.13.27 For those using public transport, there is also a direct bus service (2A) which operates on an hourly basis on a Sunday between the hours of 9am to 5pm.
- 2.13.28 Further afield, there are 2 other pharmacies that currently provide pharmaceutical service cover on a Sunday as follows:
1. Fishlocks Pharmacy (9 mins driver [sic] /4.1 miles away) – 56 Liverpool Road, Burscough, Ormskirk, L40 4BY between the hours of 0830 – 2100
 2. Asda Pharmacy (15 mins drive/7.1 miles away) – Ormskirk Road, Liverpool, L10 3LN between the hours of 1030 – 1630
- 2.13.29 In refusing my client’s application, NHS England stated “*The expectation of services being available at other premises in the area should not be relied upon*” but this is flawed logic. Were this an appropriate approach for NHS

England to take, it could never take into account services offered by existing pharmacies (including when determining an application for inclusion in the pharmaceutical list) because those services “could not be relied upon” since those existing pharmacies could close.

2.13.30 It is therefore submitted that this was not the correct approach for NHS England to take: NHS England should have determined my client’s application based on the provision of pharmaceutical services as it currently finds it in Ormskirk and the surrounding areas, which includes the fact that the hours that my client proposes to remove from its current core hours (on a Sunday) are covered by other pharmacies nearby and in the wider area and that those pharmacies are both easily accessible and able to provide the services which are available from the Pharmacy.

2.13.31 Finally, my client has found that it is becoming increasingly difficult for it to secure pharmacist cover on a Sunday. My client has had instances recently whereby it has been very close to putting in a notification of a temporary closure due to lack of locums and/or staff, and this has only been avoided by obtaining last minute cover by asking friends, family or weekend staff to help out. However, my client’s resources are becoming increasingly stretched and it can foresee having to notify the area team of temporary closures going forward as it is not feasible for the pharmacy to continue opening on a Sunday.

2.13.32 Even where locum cover can be found to a Sunday, it is not feasible financially. My client has to pay its dispenser a Sunday premium rate up to £15-£17 per hour; its locum pharmacists and those via agency all charge between £45 and £55 per hour plus an agency booking fee of £20 - £30 per booking; this in addition to the rising utility costs makes Sunday opening not financially viable and adds a strain to the overall business which is not sustainable.

2.13.33 In relation to these workforce challenges, NHS England stated: “Whilst the Group was sympathetic to workforce challenges, it felt that there are other opportunities to explore, such as the reduction of hours to the new minimum of 72 hours/week.” However, since the workforce challenges specifically relate to Sunday opening, and the reduction in hours provisions do not apply to Sundays, these provisions cannot assist with the workforce challenges being experienced by the Pharmacy.

2.13.34 In conclusion, therefore, my client’s application would maintain, as necessary, the existing level of pharmaceutical service provision and would 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 unnecessary for the reasons given above: the pharmacy is little used on a Sunday and that use could easily be accommodated during the proposed, amended opening times and by other pharmacies locally that are available to patients who may require access to pharmaceutical services during Sunday hours.

2.13.35 For the reasons given above, I therefore request that NHS Resolution upholds my client’s appeal and grants its application to vary the Pharmacy’s core hours.

2.13.36 I look forward to hearing from you.”

2.14 In a letter to NHS Resolution dated 10 November 2023 the Commissioner stated:

2.14.1 “Thank you for allowing NHS Lancashire and South Cumbria Integrated Care Board (“the ICB”) the opportunity to make representations on the above appeal.

- 2.14.2 I can confirm that the inclusion of Doctors Pharmacy Pharmacy Limited [sic] in the pharmaceutical list for the area of Lancashire Health and Wellbeing Board in respect of Aspire Pharmacy is subject to the 100 hours condition as defined in regulation 65(2) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended (the 2013 regulations).
- 2.14.3 As background, Doctors Pharmacy Limited (“the appellant”) applied to the ICB to change the days on which or times at which it is obliged to provide pharmaceutical services at Aspire Pharmacy (“the pharmacy”), 9 Railway Road, Ormiskirk, L39 2DN. The application was made under paragraph 26(1)(b), Schedule 4 of the 2013 regulations, as the appellant is seeking to keep the total number of core opening hours the same, but to change the timing of them.
- 2.14.4 The application was made to the ICB on 8th September 2023 and in it the appellant is seeking to:
- Close completely on a Sunday, reducing pharmacy provision by 5 hours
 - Make these hours up by closing 1 hour later Monday to Friday.
- 2.14.5 The appellant provided information to support its claim “that the proposed core opening hours will maintain as necessary the existing level of service provision for people in the area of the pharmacy, or other likely users of the pharmacy premises”. The crux of this information is that the appellant claims that very few people access pharmaceutical services between 11.00 and 16.00 on Sundays but acknowledges that there is still a level of demand for services between those times. However, those people could, in the appellant’s opinion, access another pharmacy at those times.
- 2.14.6 The appellant undertook a survey on how people travelled to the pharmacy on five Sundays in July 2023. No information was provided on how the survey was undertaken, or whether those five Sundays are representative of the usual demand for services on that day. For that reason it questions the robustness of the survey and the validity of the findings.
- 2.14.7 Based on its findings, the appellant then went on to state that people seeking pharmaceutical services would be able to access the other pharmacies in the area.
- 2.14.8 The ICB noted that if the application was granted, then the appellant would, in due course, be able to apply under paragraph 26(1)(a), Schedule 4 of the 2013 regulations to reduce the total number of core opening hours to not less 72 per week. As part of that application, the appellant would not be required to open on Sundays, whereas if an application to reduce the total number of core opening hours had been submitted instead of this application, then the appellant would have been required to maintain the current five core opening hours.
- 2.14.9 In its appeal letter to NHS Resolution dated 20th October 2023 the appellant claims that the ICB erred in its decision. Whilst the decision letter did not reference the current wording of paragraph 24(1), Schedule 4 of the 2013 regulations following the amendments made to it which took effect from 25 May 2023, I would like to assure both the appellant and NHS Resolution that it had regard to the current wording. In hindsight the letter should have made that clearer. In any event the ICB has now been afforded the opportunity to make representations on the grounds of the appeal and can therefore correct this oversight.
- 2.14.10 In its grounds for the appeal the appellant reiterates that there are enough service providers which are easily accessible and that these service providers

would maintain the existing service level in the area for users and likely users of pharmaceutical services. What the appellant has failed to do is explain how remaining open until 24.00 Monday to Friday, would maintain as necessary the existing level of service provision for people in the area of the pharmacy or other likely users. No evidence has been provided to demonstrate that there is any existing level of service at those times. Nor has the appellant demonstrated any need for pharmaceutical services at those times, whereas evidence has been provided of demand for pharmaceutical services at the times the appellant is proposing to close.

2.14.11 The ICB has noted that the appellant is now claiming that the proposed core opening 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.

2.14.12 In relation to the matters set out in paragraph 24(1)(b), Schedule 4 of the 2013 regulations, the ICB invites NHS Resolution to determine that it is not necessary to grant the application as there is no evidence to demonstrate that the appellant's proposed core opening hours are required in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome. The appellant's own information shows that service provision is required at the times it is proposing to close, it would be a realistically achievable outcome to provide essential services and the advanced services that the appellant currently provides.

2.14.13 Should NHS Resolution not be persuaded to refuse the application, the ICB makes the following comments in relation to the matter in paragraph 24(1)(a), Schedule 4 of the 2013 regulations.

2.14.14 The ICB and now NHS Resolution must be satisfied that the proposed core opening hours are such as to maintain as necessary the existing level of service provision. The changes that the appellant is proposing are as follows.

- To close at 24.00 Monday to Friday instead of 23.00
- To close completely on a Sunday instead of opening 11.00 – 16.00

2.14.15 The only information that the appellant has provided to support the application is that demand for pharmaceutical services between 11.00 and 16.00 is lower than they would like, and that people who currently use the pharmacy at these times could go to another pharmacy instead. The latter is based on a limited survey, the methodology for which has not been provided, nor has any rationale as to why those five weekends were chosen.

2.14.16 No information has been provided to demonstrate that remaining open until 24.00 Monday to Friday is such as to maintain as necessary the existing level of service provision. The appellant has provided no information to demonstrate that it could engage locums to cover those hours, and the ICB would imagine that the rates charged by locums to work at those hours of the morning [sic] would be similar to working Sundays between 11.00 and 16.00 which is when most pharmacies would have opening hours if they opened on that day and is therefore more likely to be seen as being "in-hours".

2.14.17 The ICB notes that the NHS (Pharmaceutical and Local Pharmaceutical Services) (Amendment) Regulations 2013 were laid in Parliament on Thursday 27 April 2023. The appellant then started to survey people who attended the pharmacy in July and submitted the application on the 8th September 2023. The appellant has not previously applied under paragraph 26(1)(b), Schedule 4 of the 2013 regulations to redistribute the core opening hours of the pharmacy.

- 2.14.18 It is of note that the appellant has not chosen to seek to reduce the core opening hours of the pharmacy which would have gone some way to reducing the reliance on locums and the costs associated with that. Indeed the appellant will continue to open the pharmacy outside of the proposed core opening hours in order to provide a private service. Should the application be granted the ICB is of the opinion that, having got rid of the pharmacy's core opening hours after Sundays, the appellant could then seek to reduce the pharmacy's opening hours on Monday to Friday.
- 2.14.19 The ICB invites NHS Resolution to dismiss the appeal and uphold the decision to refuse the application."
- 2.15 In a letter to NHS Resolution dated 7 December 2023, Temple Bright on behalf of the Applicant stated:
- 2.15.1 "I write further to your letter of 28th November 2023 and in order to respond to representations made on my client's appeal by NHS England.
- 2.15.2 Taking each of the matters raised by NHS England in turn, my client comments as follows.
- 2.15.3 NHS England states that it did apply the correct regulatory test, but that this was not reflected in its decision letter. In support of this assertion, it is assumed, NHS England has provided the minutes of the meeting where my client's application was considered. Those minutes state that *"The Group determined that there was not sufficient evidence provided to reflect a change in the needs of people in the area, or other likely users of the premises, for pharmaceutical services."* As NHS Resolution will be aware, this statement reflects the old regulatory test, demonstrating that NHS England did, in fact, fail to apply the correct legal test.
- 2.15.4 NHS England questions how my client's survey was undertaken. I am instructed that the survey was undertaken by pharmacy staff by recording each interaction as it presented to the pharmacy as per the template; the data was tallied and the summary was transferred over to a digital format to make it easy to read. My client considers that the 5 Sundays that were surveyed are representative of normal Sunday demand which is consistent throughout the year. Those 5 Sundays were selected simply because they were the 5 Sundays leading up to my client's application being submitted to NHS England.
- 2.15.5 NHS England is correct that a person included in the pharmaceutical list in respect of 100-hour premises may give notice to reduce those hours to no less than 72 hours per week provided that certain conditions are met. However, this is not relevant to NHS England's determination of my client's application and it is not clear from NHS England whether this was a matter that NHS England (erroneously) had regard to.
- 2.15.6 In respect of the change of hours, my client is not required by the regulations to explain "how remaining open until 24.00 Monday to Friday would maintain as necessary the existing level of service provision". There can be no concern in relation to an application that seeks to increase service provision, because that would clearly have no potential detrimental effect on patients.
- 2.15.7 In respect of my client's application, NHS England should only really have been concerned with any potential effect (and my client asserts there would be none) of removing the Sunday opening hours.
- 2.15.8 Similarly, the regulations do not require my client to demonstrate that there is a need for additional service provision from Monday to Friday. NHS England's

assertion that this is a requirement in the regulations appears to be a misplaced reference to the old regulatory test which, of course, is no longer in force.

2.15.9 Paragraph 24(1)(b) does not require my client to demonstrate that it is “necessary to grant the application”, nor that the proposed hours are “required”. In asserting that this is a requirement, NHS England appears to have misunderstood the relevant regulatory test.

2.15.10 NHS England further states that “The appellant’s own information shows that service provision is required at the times it is proposing to close”. Again, this is not the relevant regulatory test. My client is not required by the regulations to demonstrate that service provision is not required.

2.15.11 For the avoidance of doubt, my client’s application (and appeal) demonstrates that:

- The application would “maintain as necessary the existing level of service provision”. My client asserts that its pharmacy is little used on a Sunday (as evidenced by the survey data), such that its Sunday hours are not necessary in order to maintain the existing level of service provision.
- In the alternative, the application would maintain a sustainable level of service provision in circumstances where maintaining the existing level of service provision is unnecessary because there are other pharmacies nearby that are open on a Sunday.

2.15.12 My client does not apply on the basis that demand for pharmaceutical services on a Sunday is “lower than they would like” but is based on actual usage of my client’s pharmacy and service provision in the local area.

2.15.13 My client has already addressed the locum issues in its letter of appeal and does not wish to repeat matters contained in previous correspondence.

2.15.14 I look forward to hearing from you in due course.”

2.16 In order to make a fair and expeditious determination, NHS Resolution has exercised its discretion under Paragraph 7, Schedule 3 of the Regulations, and asked the Commissioner to clarify the opening hours of the Morrisons, Fishlocks and Asda pharmacies, referred to by the Applicant, in terms of core and/or supplementary hours.

2.17 The Commissioner provided the following information –

2.17.1 Morrisons Pharmacy – Sunday opening – 11am – 5pm are supplementary hours only;

2.17.2 Fishlocks Pharmacy – Sunday opening – 8.30am to 9pm are core hours; and

2.17.3 Asda Pharmacy – Sunday opening – 10.30am to 4.30pm are core hours.

2.18 I note the following:

2.18.1 The Applicant’s core opening hours total 100 hours and the Applicant proposes to redistribute those 100 core hours pursuant to paragraph 26 of Schedule 4. The Applicant seeks to provide services as per its proposed changes in the table at 2.11 above.

2.19 The Applicant proposes to:

2.19.1 Open between 11pm and 12pm (midnight), Monday to Friday rather than being closed; and

- 2.19.2 Close on Sunday between 11am and 4pm when it would otherwise be open.
- 2.20 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.
- 2.21 The application to change the hours was made by the Applicant on 9 August 2023 and a decision was made by the Commissioner on 26 September 2023. The decision was appealed to NHS Resolution by letter of 20 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.
- 2.22 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".
- 2.23 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.*
- 2.24 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).*
- 2.25 Paragraph 26(2A) is for an application for a direction in respect of a pharmacy that was included on the list as an excepted application that was going to provide services for 100 hours a week. The Applicant is currently included on the pharmaceutical list to provide pharmaceutical services for 100 hours a week, therefore paragraph 26(2A) may apply in this instance and I have first considered this.
- 2.26 Paragraph 26(2A) states:
- In the case of an application for a direction under sub-paragraph (4) that has the effect of reducing, in the case 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, the total number of core opening hours to 72 or above, but without changing any or all of the following—*
- (a) the core opening hours on a Monday to Saturday at times between 5pm and 9pm;*
- (b) the core opening hours on a Sunday at times between 11am and 4pm, other than by way of the inclusion of, or a change to, a rest break which—*
- (i) is no longer than one hour, and*
- (ii) starts at least 3 hours after the start of the pharmacy's opening hours and ends at least 3 hours before the end of the pharmacy's opening hours; and*

(c) the total number of core opening hours on a Sunday,

NHS England must grant that application, and paragraph 24(1) does not apply to such an application.

2.27 The Applicant is seeking to keep the pharmacy open for 100 hours but redistribute those hours during the week. Given that the Applicant is not proposing to reduce the total number of core opening hours to 72 or above but wishes to maintain opening hours of 100 core hours a week, this application does not fall to be considered under paragraph 26(2A).

2.28 As paragraph 26(2A) does not apply in this instance, 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).

2.29 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 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.

2.30 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.

2.31 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.

2.32 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.

2.33 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.

- 2.34 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.
- 2.35 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.
- 2.36 I have next considered whether it is necessary to maintain the existing level of service provision. It could be argued that as the Applicant is not looking to reduce the number of hours each week that services are provided, then from a pure "number of hours of service provision each week" perspective, the existing level of service provision is maintained such that consideration of whether it is necessary to maintain the level of service provision is not needed.
- 2.37 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.
- 2.38 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.
- 2.39 The Applicant provided to the Commissioner, with its application, the results of a survey which it carried out in July 2023 to establish how those accessing pharmaceutical services, at the times that the Applicant proposes to close, travelled to the pharmacy and what services they accessed.
- 2.40 The survey showed a low number of people using the pharmacy at the relevant times.
- 2.41 In its representations on appeal, the Commissioner stated that *"no information was provided on how the survey was undertaken, or whether those five Sundays are representative of the usual demand for services on that day. For that reason it questions the robustness of the survey and the validity of the findings."*
- 2.42 In response, the Applicant's representative stated that *"the survey was undertaken by pharmacy staff by recording each interaction as it presented to the pharmacy as per the template; the data was tallied and the summary was transferred over to a digital format to make it easy to read. My client considers that the 5 Sundays that were surveyed are representative of normal Sunday demand which is consistent throughout the year. Those 5 Sundays were selected simply because they were the 5 Sundays leading up to my client's application being submitted to NHS England."*
- 2.43 From the information provided, it is clear that there are some people using the pharmacy at the times the Applicant wishes to close, albeit low in numbers and therefore I consider it is necessary to maintain the existing level of service provision.

- 2.44 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 Morrisons, Fishlocks and Asda pharmacies.
- 2.45 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).
- 2.46 The Applicant has provided information regarding access to those pharmacies for those who currently access its own pharmacy and how they might travel to find alternative pharmaceutical services. There are a mix of people who drive to the Applicant's pharmacy and those who walk. The Applicant has described the pharmacies in the area indicating how far away they are and whether there is parking available.
- 2.47 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.
- 2.48 The Applicant states that Morrisons Pharmacy is located only 450 metres away from its pharmacy, or a 6 minute walk. The Applicant claims this is a short walk along level terrain with no barriers for pedestrian access. Further, the Applicant states that it has a large free car park, and there is a direct bus service (2A) which operates on an hourly basis on a Sunday between 9am and 5pm. Morrisons Pharmacy is said to be open on a Sunday from 11am to 5pm, however the Commissioner has confirmed that these are supplementary opening hours.
- 2.49 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 on a Sunday at the Morrisons Pharmacy in Ormskirk.
- 2.50 I note that Fishlocks and Asda pharmacies are located further afield at 4.1 miles (9 minute drive) and 7.1 miles (15 minute drive), and are said to be open on Sundays from 8.30am to 9pm and 10.30am to 4.30pm, respectively. The Commissioner has confirmed that these are core opening hours. During the survey period, those patients who attended the Applicant's pharmacy either walked or drove, and thus would drive to Fishlocks and Asda pharmacies.
- 2.51 In terms of the services accessed, the Applicant states that *"almost all those patients [from the survey] used the pharmacy to purchase an OTC medicine, with only 5 out of the 15 patients presenting a prescription, and only two of those being acute prescriptions. No patients used the Pharmacy to access any other pharmaceutical services."*
- 2.52 The Commissioner in its decision letter referred to there being *"no reference to any impact on COVID medicines supply and palliative care services, currently supported and provided by the premises"*.
- 2.53 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.

- 2.54 The Commissioner contends that “*the expectation of services being available at other premises in the area should not be relied upon.*” However from the survey provided, there were no patients accessing any advanced or enhanced services on a Sunday. I note that dispensing (and OTC services) form the everyday essential services as provided by a pharmacy.
- 2.55 I am therefore satisfied that patients would be able to access the same services from the alternative providers if the Applicant’s proposal to change its core hours were to be approved.
- 2.56 Based on the information provided, I am therefore satisfied that the existing level of service provision would be maintained by virtue of the existence of other local pharmacies.
- 2.57 The Applicant states that “*Ensuring sufficient staff availability during busier hours will result in shorter waiting times, better service quality, and increased patient satisfaction.*” In its representations, the Commissioner contends that “*there is no evidence provided that the increased hours on weekdays (extended to 12 midnight) are required/supported by access by users*”. On the information provided, I consider that there has been no level of service available between 11pm and 12pm midnight Monday to Friday which makes it difficult to agree with the Applicant’s assertions.
- 2.58 Under paragraph 26(10) “*The Secretary of State may, when determining an appeal, either confirm the action taken by the NHSCB or take any action that the NHSCB could have taken under sub-paragraph (4).*”
- 2.59 Paragraph 26(4) states:
- (4) When it determines the application, the NHSCB must—
- (a) issue a direction (which replaces any existing direction) which meets the requirements of sub-paragraphs [F391(4A),] (5) and (6) and which has the effect of either granting the application under this paragraph or granting it only in part;
- b) confirm any existing direction in respect of the times at which P must provide pharmaceutical services at the pharmacy premises, provided that the existing direction (whether issued under regulation 65, this Part, the 2012 Regulations, the 2005 Regulations or the 1992 Regulations) would meet the requirements of sub-paragraphs (5) and (6); or
- c) either—
- revoke, without replacing it, any existing direction in respect of the times at which P must provide pharmaceutical services at the pharmacy premises (whether issued under regulation 65, this Part, the 2012 Regulations, the 2005 Regulations or the 1992 Regulations), where this has the effect of granting the application under this paragraph or granting it only in part, or in a case where there is no existing direction, issue no direction.
- 2.60 With regard to paragraph 26(4)(a) I note that a direction is not in place for the Applicant to provide 100 core hours, as it was, and remains, a condition on inclusion for the Applicant to provide those hours.
- 2.61 For the above reasons, I am not confirming any existing direction in line with paragraph 26(4)(b).
- 2.62 Further, there is no direction to revoke in line with paragraph 26(4)(c).

- 2.63 The only option left to me is therefore to substitute the decision of the Commissioner to reject the change of hours application with the decision to grant the change of hours application, without a direction.

3. **Determination**

- 3.1 Based on the information provided, I am 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.
- 3.2 Therefore I substitute the decision of the Commissioner to reject the change of hours application, with the decision to grant the change of hours application, without a direction.

Head of Appeals
NHS Resolution