2 February 2024

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FILE REF:	**SHA/26110**
DECISION MAKING BODY:	**North East and North Cumbria ICB ("the Commissioner")**
PHARMACIST:	**Core Pharma Limited ("the Applicant")**
PREMISES:	**Houghton Pharmacy 31 Queensway Houghton le Spring DH5 8EL**

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 Core Pharma Limited
North East and North Cumbria ICB

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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 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 40 hours per week.

2.10 The Applicant wishes to:

2.10.1 Open from 9am to 1pm and 2pm to 6pm Monday to Friday rather than opening from 8am Monday and Tuesday, 8.30am Wednesday to Friday, and closing between 11am and 11.30am and 2pm to 4.30pm;

2.10.2 Close at 6pm Monday, Tuesday, Thursday and Friday rather than close at 6.30pm;

2.10.3 Close at 6pm on a Wednesday rather than close at 7.30pm; and

2.10.4 Close on a Saturday morning rather than opening from 8.30am to 11.30am.

Assessment

2.11 In this case, the Applicant provided the following information in its application form dated 17 August 2023 and supporting information of 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	8am – 11am 11:30am – 2pm 4:30pm – 6:30pm
Tuesday	8am – 11am 11:30am – 2pm 4:30pm – 6:30pm
Wednesday	8.30am – 11am 11:30am – 2pm 4:30pm – 7:30pm
Thursday	8.30am – 11am 11:30am – 2pm 4:30pm – 6:30pm
Friday	8.30am – 11am 11:30am – 2pm 4:30pm – 6:30pm
Saturday	8:30am to 11:30am
Sunday	Closed

2.11.3 Proposed core opening hours for these premises:

Monday	9am – 1pm 2pm – 6pm
Tuesday	9am – 1pm 2pm – 6pm
Wednesday	9am – 1pm 2pm – 6pm
Thursday	9am – 1pm 2pm – 6pm
Friday	9am – 1pm 2pm – 6pm
Saturday	Closed
Sunday	Closed

2.11.4 If this is a permanent change, please state below the date from which you would like the change to take effect: 1 October 2023."

2.12 In a letter from the Applicant's representative dated 9 August 2023 it was stated:

2.12.1 "I act for Core Pharma Limited in the above application and have been instructed by my client to submit this letter in support of their request to amend their core opening hours.

2.12.2 As the Committee will be well aware, since the middle of 2022 all people and businesses have experienced a dramatic increase in costs for everything from utility bills to staff costs.

2.12.3 At the same time pharmacy funding has remained frozen with the global sum not changing to reflect any of the increased costs that pharmacy contractors now face.

2.12.4 My client has considered closing this pharmacy as it is now loss making, but with the announcement of new pharmacy Regulations from 25 May 2923 my client now believes that they will be able to keep the pharmacy open if the ICB is able to agree this proposed change to core opening hours.

Proposed Change and Rationale

2.12.5 The Core Hours for this pharmacy are somewhat unusual and force my client to be open at times when there is no demand for pharmaceutical services. The current Core Hours are as follows;

2.12.5.1Monday 8-11am and 11.30-2pm and 4.30-6.30pm

2.12.5.2Tuesday 8-11am and 11.30-2pm and 4.30-6.30pm

2.12.5.3Wednesday 8.30-11am and 11.30-2pm and 4.30-7.30pm

2.12.5.4Thursday 8.30-11am and 11.30-2pm and 4.30-6.30pm

2.12.5.5Friday 8.30-11am and 11.30-2pm and 4.30-6.30pm

2.12.5.6Saturday 8.30-11.30am

2.12.6 These hours are also somewhat confusing for patients with variations in morning opening and evening closing times throughout the week.

2.12.7 The opening times before 9am and after 6pm Monday to Friday and also Saturday morning are very quiet with almost no patient activity.

2.12.8 My client's proposal is for a minimal change in hours that would improve their ability to staff the pharmacy (thus reducing costs slightly) whilst maintaining proper access to pharmaceutical services for patients.

2.12.9 The new proposed core hours would be Monday to Friday 9am to 1pm and 2pm to 6pm Monday to Friday.

2.12.10 During the COVID pandemic my client was permitted to amend their opening hours to the core hours proposed in this application and they found that the hours worked very well for both staff and patients.

2.12.11 My client also wishes to keep 3 supplementary hours on Saturday even though the pharmacy is very quiet on Saturday and there are several other nearby pharmacies that open on Saturday in any event.

2.12.12 My client has permitted me to provide the Committee with attached extract from their most recent accounts for this branch. The accounts cover the period from April 2021 to March 2022.

2.12.13 These accounts do not show the real impact of wage inflation as that has become significantly worse since March 2022, but they do show that the pharmacy moved from a £6,319 profit in 2021 it suffered a loss of nearly £30,000 in the year to March 2022.

2.12.14 Till sales (ie the amount customers spend on medicines and healthcare products) has fallen significantly and this appears to be a result of patients having less disposable income after essentials such as food and utilities.

2.12.15 This position is now worse and my client has few options available to them to control costs.

Location

2.12.16 The pharmacy is located relatively close to the town centre, but still serves its own local population.

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

2.12.18 Overall this proposal maintains provision and whilst it is never ideal to lose opening hours we submit that instances like this are exactly why the Department of Health has relaxed the legal test in respect of permitting 40 hour pharmacies to change their hours without having to show a change in needs in the local population.

2.12.19 We look forward to hearing from you in due course."

2.13 In a letter to the Applicant dated 26 October 2023 the Commissioner stated:

2.13.1 "The Pharmaceutical Services Regulations Committee (PSRC), which met on 25th October 2023, has determined its assessment of your application to change your core hours, pursuant paragraph 26 of Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 - Application to amend Core Hours:

2.13.2 Schedule 4, Part 3, Paragraph 26 (1)(b) - Change the days on which or times at which P is obliged to provide pharmaceutical services during the core opening hours at P's pharmacy premises in a way that keeps that total number of hours the same. The application has met this criterion.

2.13.3 Schedule 4, Part 3, Paragraph 26 (2) and Schedule 4, Part 3, Paragraph 24: Where Pharmacist 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:

24(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

24(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 maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome

2.13.4 The application has not met the criterion of 26(2) or 24(1)(a)&(b) – The panel agreed the application did not provide enough evidence to maintain the existing level of service provision or maintain a sustainable level of adequate service. The panel also agreed that the evidence supplied showed there is activity during the times you wish to close.

2.13.5 Schedule 4, Part 3, Paragraph 26 (3): determination within 60 days. This criterion has been met.

2.13.6 Schedule 4, Part 3, Paragraph 26 (4-11): These regulations relate to directing pharmacy hours and is not applicable to this application.

2.13.7 Schedule 4, Part 3, Paragraph 26 (12): this paragraph deals with the date on which the pharmacy can implement the changes to the opening hours. In view of PSRC's decision, this is not applicable.

2.13.8 Regulation 65: This has been considered but none of the criteria are applicable to this application.

2.13.9 PSRC considered the application and for reasons noted above your application has been rejected.

2.13.10 Your core opening hours remain therefore, as below:

Monday	08:00 – 11:00; 11:30 – 14:00; 16:30 – 18:30
Tuesday	08:00 – 11:00; 11:30 – 14:00; 16:30 – 18:30
Wednesday	08:30 – 11:00; 11:30 – 14:00; 16:30 – 19:30
Thursday	08:30 – 11:00; 11:30 – 14:00; 16:30 – 18:30
Friday	08:30 – 11:00; 11:30 – 14:00; 16:30 – 18:30
Saturday	08:30 – 11:30
Sunday	Closed
Total	40 Hours

2.13.11 You have the right of appeal to the Secretary of State against our decision. Should you choose to appeal, then you should send in writing a concise and reasoned statement of the grounds for your appeal within 30 days of the date of this letter to nhsr.appeals@nhs.net or NHS Resolution (Primary Care Appeals), 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU.

2.13.12 May I take the opportunity to thank you for your application. If you have any queries in relation to the content of this letter, please do not hesitate to contact [CD], Primary Care Manager, whose contact details are included in the letterhead."

2.14 In a letter to NHS Resolution dated 1 November 2023 the Applicant's representative stated:

2.14.1 "I act for Core Pharma 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.

Background

2.14.2 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.

2.14.3 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.

2.14.4 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 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.

2.14.5 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 the PSNC describing the changes as being related to "workforce and cost pressures".

The New Legal Test

2.14.6 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 to;

(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]

2.14.7 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;

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

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

2.14.8 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. As a result, "adequate" provision for people in the area or likely users of the pharmacy premises can be provided from all relevant pharmacies and not just the Applicant's pharmacy.

2.14.9 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.

2.14.10 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"

2.14.11 This permits application to be granted in two scenarios, namely;

Maintaining the existing level of service provision is unnecessary

2.14.12 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 Norther 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 maintain certain hours, the low usage of services and other available pharmacies meant that those hours were not necessary and adequate provision could still be maintained in the relevant area.

Maintaining the existing level of service provision is not a realistically achievable outcome

2.14.13 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 applies. 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.

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

2.14.15 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. The ICB 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. However, the decision maker must at least consider what is realistic 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.

ICBs Approach to the New Regulations

2.14.16 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, some ICBs appear to be looking for reasons to refuse applications rather than asking if the evidence provided meets the legal test.

2.14.17 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.

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

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

The panel agreed the application did not provide enough evidence to maintain the existing level of service provision or maintain a sustainable level of adequate service.

2.14.20 It is unclear what the ICB means by this. My client provided information from their accounts as well as information about the use of services that was requested by the ICB. The ICB are aware of the pharmacies in the town centre and their opening hours. It is not clear why the ICB considered this provision to be inadequate and the location and opening hours of other pharmacies is discussed further below.

2.14.21 In addition, the decision letter states that,

The panel also agreed that the evidence supplied showed there is activity during the times you wish to close.

2.14.22 My client has at no stage claimed that there was no activity during the core opening hours that they sought to remove. More importantly, the legal test contains no such requirement. Instead of approaching the application by reference to a higher standard which is *ultra vires* the ICB should have considered the evidence provided.

2.14.23 That evidence, attached here, showed that;

1. There were small numbers of patients using the pharmacy during the hours that my client proposed to remove as core hours.

2. The pharmacy was now loss making and no longer a viable business.

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.

4. The proposed new hours had worked well for the pharmacy and patients when they were permitted during the COVID pandemic.

2.14.24 In relation to Saturday opening hours, we would like to point out that Whitfield Pharmacy in Houghton Le Spring is located in the town centre, 0.6 miles from my client's pharmacy. This is the closest pharmacy to my client's pharmacy and is open on Saturday from 9am to 12.30pm. There are 4 other pharmacies that the NHS website shows as trading within a 1 mile radius of my client's pharmacy and are shown on the attached map. These include Hopes Pharmacy on Newbottle Street which is also open 9am to 1pm on a Saturday. My client is also proposing to continue providing Saturday morning opening under supplementary hours and believes that this will be possible if the changes to core hours are permitted. My client is concerned that the lack of profitability may continue and they may need to remove Saturday supplementary hours if this were the case and simply wishes to be honest with the Committee about their proposals.

2.14.25 In relation to the proposed Monday to Friday alteration of core hours these would effectively amount to opening 30 minutes later (60 minutes on Monday and Tuesday) and closing 30 minutes earlier (other than Wednesday where my client currently opens until 7.30pm). As my client has shown, there is very little use of the pharmacy during these times. It is unclear why such core hours were ever suggested in the first place, but they cause very significant issues with staffing and are not sustainable and no local surgeries are open after 6pm. The reality is that whilst my client currently has breaks in their core hours, they do not close during those breaks as they are the busier times for the pharmacy. The new proposed hours are a sensible suggestion, without 30 minute breaks in the morning and longer breaks in core hours in the afternoons.

2.14.26 The above 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.

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

2.14.28 We look forward to hearing from you in due course."

2.15 On invitation for representations, the Commissioner provided to NHS Resolution a copy of the minutes from the PSRC meeting of 25 October 2023, the application form, as well as supporting information from Rushport Advisory LLP.

2.16 In a letter to NHS Resolution dated 11 December 2023 the Applicant's representative stated:

2.16.1 "Thank you for your letter and attachments of 7 December 2023. I act for Core Pharma Limited and have been instructed by my client to submit these comments in relation to the DMB representations.

2.16.2 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.

2.16.3 As the Committee will note, the Primary Care Manager is minuted as stating;

CD advised of the regulations met by the application. Based on assessment, CD recommends PSRC approves this application.

2.16.4 However, the Clinical Advisor, [MA] is then minuted as stating;

MA outlined that there is no reassurance of maintaining the existing level of service provision and that the applicant has not provided sufficient robust evidence about level of service provision. MA recommends the application is refused, advising that the applicant needs to reflect on what their applying for and talk to other pharmacies in the area.

2.16.5 It is clear from this that the Clinical Advisor either did not understand the Regulations or was acting *ultra vires*. There is no requirement for an Applicant to maintain the existing level of service provision.

2.16.6 Further and perhaps even more surprisingly, whilst the Clinical Advisor stated that, "*the applicant has not provided sufficient robust evidence*", the evidence that was provided was specifically requested by the ICB. In other words, the Clinical Advisor is stating that the evidence his Committee requested would not be considered to be sufficient evidence in any event.

2.16.7 We simply do not understand what the Clinical Advisor is referring to when he advises that the Applicant should "*reflect on what their]sic] applying for and talk to other pharmacies in the area*", but this certainly does not reflect any part of the legal test and my client has been perfectly clear what they are applying for.

2.16.8 After this the Lay Member, [AD] is minuted as stating;

AD pointed out that supplementary hours on Saturdays would still mean paying someone. There is footfall on a Saturday too.

2.16.9 Again this shows a misunderstanding of the legal test and also of what my client applied for. My client would prefer to offer some Saturday hours, but also recognises that with the current financial position of the pharmacy that these hours may not be sustainable. My client has been completely honest and transparent about their financial position. By changing to supplementary hours this would allow my client to make adjustments to those hours without having to go through this same process again with the ICB. Further, the offer of supplementary hours on a Saturday was only <u>one</u> part of the changes requested and it is the overall effect of the changes that reduces the costs of operating the pharmacy. By focussing on only one part of the requested changes the Lay Member simply missed the point of the application considered in its entirety. My client has always acknowledged that there was some footfall on Saturdays but that it is negligible. The Lay Member of the Committee appears to have been under the impression that having any activity meant that any proposed change should be refused.

2.16.10 The minutes then go on as follows;

AD included that Regulation 24.1a has not been met.

MA added that Regulation 24.1b also has not been met.

EM and KY agreed with AD and MA - even though not considerable, there is activity on these days, especially Saturday.

2.16.11 Again, the minutes paint a picture of a Committee that did not understand the test it was required to apply.

2.16.12 AD was correct that regulation 24(1)(a) had not been met, but this was not the basis on which the application was submitted. AD appears to have been under the misconception that there was a requirement to meet regulation 24(1)(a) when no such requirement exists.

2.16.13 Then MA adds that regulation 24(1)(b) had not been met, but none of the comments attributed to any member of the Committee ever addressed regulation 24(1)(b).

2.16.14 In other words, the Committee overruled their advisor without understanding the legal basis for their decision or the requirements of the Regulations and at no point does the Committee consider the evidence that was provided and instead appears to seek a rationale for refusing the application.

2.16.15 We note that whilst the other members of the ICB Committee chose to agree with the two other members mentioned above, they at least acknowledge that activity is “not considerable” during the hours that my client wishes to change. It is somewhat frustrating that this acknowledged fact was not considered by the Committee alongside the evidence provided to the ICB at their own request as this should really have led to a different outcome in this case and avoided further financial losses for my client.

2.16.16 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.

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

2.17 I note the following:

2.17.1 The Applicant's core opening hours total 40 hours and the Applicant proposes to redistribute those 40 core opening hours pursuant to paragraph 26 of Schedule 4. The Applicant seeks to provide services as per its proposed changes in the table at 2.11 above.

2.18 The Applicant proposes to:

2.18.1 Open from 9am to 1pm and 2pm to 6pm Monday to Friday rather than opening from 8am Monday and Tuesday, 8.30am Wednesday to Friday, and closing between 11am and 11.30am and 2pm to 4.30pm;

2.18.2 Close at 6pm Monday, Tuesday, Thursday and Friday rather than close at 6.30pm;

2.18.3 Close at 6pm on a Wednesday rather than close at 7.30pm; and

2.18.4 Close on a Saturday morning rather than opening from 8.30am to 11.30am.

2.19 The Regulations, which came into force on 1 April 2013, have been amended a number of times. Certain amendments, relating to pharmacy premises opening hours, came into force with effect from 25 May 2023.

2.20 The application to change the hours was made by the Applicant on 17 August 2023 and a decision was made by the Commissioner on 26 October 2023. The decision was appealed to NHS Resolution by letter of 1 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.

2.21 The Applicant has sought to change the days and times at which it is obliged to provide pharmaceutical services under paragraph 26 of Schedule 4, Part 3, "Hours of opening".

2.22 Paragraph 26(1) states:

"26.— (1) An NHS pharmacist (P) may apply to the NHSCB for it to change the days on which or times at which P is obliged to provide pharmaceutical services during core opening hours at P's pharmacy premises in a way that—

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

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

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

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

2.24 Paragraph 24(1) reads as follows:

"24 (1) Subject to paragraph 26(2A), where NHS England issues a direction for setting any days or times for opening hours under this Part, or determines them without issuing a direction, it must in doing so seek to ensure that the days and times 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.

2.25 Paragraph 24(2) states:

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

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

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

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

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

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

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

2.30 The existing level of service provision has been outlined by the Applicant, in its own core hours provision, and by an indication of the hours that pharmacies in the local area are open.

2.31 I have next considered whether it is necessary to maintain the existing level of service provision. It could be argued that as the Applicant is not looking to reduce the number of hours each week that services are provided, then from a pure "number of hours of service provision each week" perspective, the existing level of service provision is maintained such that consideration of whether it is necessary to maintain the level of service provision is not needed.

2.32 The Applicant is applying to change the days and times that services are provided. Taking Saturday as an example, the level of service provision at the Applicant's premises on a Saturday 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 In its application form, the Applicant states that "*the opening times before 9am and after 6pm Monday to Friday and also Saturday morning are very quiet with almost no patient activity*." The Applicant provided information to the ICB, at the ICB's request, in relation to the days and times at which patients visited its pharmacy during August 2023. It also details what services patients were accessing.

2.35 From the information provided, it is clear that there are people using the pharmacy at the times the Applicant wishes to close, albeit low in numbers and therefore I consider that it is necessary to maintain the existing level of service provision.

2.36 I now need to consider if, despite the changes to hours, there is maintenance of the existing level of service provision. The Applicant cannot maintain this as it is changing

its hours but I note the information 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 Whitfield and Hopes pharmacies.

2.37 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).

2.38 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.

2.39 The Applicant states that "*Whitfield Pharmacy in Houghton Le Spring is located in the town centre, 0.6 miles from my client's pharmacy. This is the closest pharmacy to my client's pharmacy and is open on Saturday from 9am to 12.30pm*." However I note in the information provided by the ICB, which includes details of the addresses, opening hours and services offered by the existing pharmacies in the area, the hours provided on a Saturday by Whitfield Pharmacy are supplementary hours only.

2.40 The Applicant continues "*There are 4 other pharmacies that the NHS website shows as trading within a 1 mile radius of my client's pharmacy and are shown on the attached map. These include Hopes Pharmacy on Newbottle Street which is also open 9am to 1pm on a Saturday*." Again, the information provided by the ICB confirms that the hours provided by Hopes Pharmacy on a Saturday are supplementary hours only.

2.41 The Applicant is also offering to provide three supplementary hours on a Saturday "*even though the pharmacy is very quiet on Saturday and there are several other nearby pharmacies that open on Saturday in any event."*

2.42 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 Saturday provided by Whitfield and Hopes pharmacies, or by the Applicant itself.

2.43 Further, apart from distances, there is no information regarding physical access to these pharmacies for those who currently access the Applicant's pharmacy, or any information regarding the people who currently access the Applicant's pharmacy. 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.

2.44 I have decided that it is necessary to maintain the current service provision but, due to the lack of information regarding access to alternative pharmacies in the area, I am not satisfied that there will be maintenance of the existing level of service provision, whether by virtue of other pharmacies in the area.

2.45 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".

2.46 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.

2.47 The Applicant states that the current core hours "*cause very significant issues with staffing and are not sustainable and no local surgeries are open after 6pm."* Further, the Applicant has stated that the pharmacy was now loss making and no longer a viable business. 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.

2.48 On the point of whether maintaining the existing level of service provision is not a realistically achievable outcome, the Applicant has provided, in addition to the commentary I have referred to above, a document titled 'Income Statement For the year ended 31 March 2022'. I have considered whether this supports statements regarding the viability of the pharmacy.

2.49 I note that for the year 2022, the pharmacy business made a loss. However the accounts do not provide evidence that directly relates to the times at which the Applicant is proposing to close. I specifically note that the accounts provided do not provide detail in relation to staffing costs on the days or times that it is wanting to close and how this links with the business making a loss.

2.50 To demonstrate that keeping the pharmacy open for its existing core hours is not realistically achievable, the Applicant must be able to demonstrate the correlation between the hours being changed and the purported issues. I do not consider that the accounts provide support for the Applicant's statements.

2.51 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 difficultly that the Applicant must find themselves in. Whilst I am sympathetic to the difficulties that the Applicant claims to be facing in relation to the viability of the premises, based on the accounts that have been provided for consideration, I do not consider that sufficient evidence has been provided to indicate that the economic and practical viability of the current opening hours has been compromised. I therefore consider that maintaining the existing level of service is a realistically achievable outcome and therefore the Applicant cannot rely on paragraph 24(1)(b).

2.52 I am mindful that the provision of pharmaceutical services is greater than the dispensing of prescriptions and that maintaining a level of service provision includes all services that the pharmacy may offer, including additional enhanced and advanced services that may be commissioned. I am of the view that I have not been provided with sufficient information to demonstrate how the proposed change of hours would maintain, as necessary, the existing levels of service provision.

3. Determination

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

3.2 The action taken by the Commissioner to refuse the application is confirmed.

Head of Appeals
NHS Resolution