

22 March 2024

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FILE REF: SHA/26128

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DECISION MAKING BODY: LINCOLNSHIRE INTEGRATED
CARE BOARD (“the
Commissioner”)

PHARMACIST: ASK CHEMIST (FKF52)
 (“the Applicant”)

PREMISES: 13 FORBES ROAD,
BOSTON, LINCOLNSHIRE
PE21 0PD

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

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

Outcome

- 1.1 I consider that, on the basis of the information provided to me, it is necessary to maintain the existing level of service provision and that not enough information has been provided for me to consider that maintaining the existing level of service provision is not a realistically achievable outcome. Although this leaves an undesirable situation, where the Applicant continues to provide over 42 core opening hours without a direction being in place, I consider the lack of information does not enable me acting reasonably to make a determination of the days and times of the 40 core opening hours.
- 1.2 I consider that the only option open to me is therefore to confirm the action taken by the Commissioner to refuse the application

A copy of this decision is being sent to:

Ask Chemist – Applicant
East Midlands Primary Care Contracting Team on behalf of the 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 reduce the total number of core opening hours 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 application indicates that it currently has core opening hours totalling 42.75 hours per week.
- 2.10 The Applicant wishes to:
 - 2.10.1 not close at lunchtime and close half an hour earlier in the evening on Mondays;
 - 2.10.2 reduce lunchtime closing to half an hour, and close half an hour earlier in the evening on Tuesdays, Wednesdays and Thursdays;
 - 2.10.3 reduce lunchtime closing to one hour and close half an hour earlier in the evening on Fridays; and
 - 2.10.4 Saturday – not open at all (rather than for four hours as at present).

Assessment

2.11 In this case, the Applicant provided the following information in its 'Application to change core opening hours' dated 5 October 2023:

2.11.1 "This is an application to permanently change core opening hours.

2.11.2 Current opening hours for these premises:

Monday	09:00 to 13:00 14:15 to 18:00
Tuesday	09:00 to 13:00 14:15 to 18:00
Wednesday	09:00 to 13:00 14:15 to 18:00
Thursday	09:00 to 13:00 14:15 to 18:00
Friday	09:00 to 13:00 14:15 to 18:00
Saturday	09:00 to 13:00
Sunday	Closed

2.11.3 Proposed core opening hours for these premises:

Monday	09:00 to 17:30
Tuesday	09:00 to 13:00 13:30 to 17:30
Wednesday	09:00 to 13:00 13:30 to 17:30
Thursday	09:00 to 13:00 13:30 to 17:30
Friday	09:00 to 13:00 14:00 to 17:30
Saturday	Closed
Sunday	Closed

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

2.11.4.1 ASAP.

2.11.5 We have assessed the patients attending the pharmacy and found that only a minimum number of patients attend the pharmacy after 17:30 and Saturdays. Asda pharmacy is open 9:00 to 21:00 six days a week and 10:00 to 16:00 on Sundays. So patients have a pharmacy to obtain medication and advise in emergencies. There is also difficulties in finding locums in the Boston area. We offer a free delivery service so if anyone is urgent for their medication we can always deliver it out to them in case they cannot attend the pharmacy to collect medication."

2.12 In a letter to the Applicant dated 23 November 2023 the Commissioner stated:

2.12.1 "Thank you for your application to make a permanent change to the core opening hours at Ask Chemist, received on 05 October 2023.

2.12.2 The Pharmaceutical Services Regulations Committee (PSRC) met on 21 November 2023 and a decision was made to refuse the request to change the core opening hours at the above pharmacy from ASAP.

- 2.12.3 The committee felt the pharmacy had not met Regulation 26 (2) as the pharmacy did not demonstrate within the application a change to the needs of the people in its area, or other likely users of the pharmacy.
- 2.12.4 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

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

2.13 In an email to NHS Resolution dated 22 December 2023 the Applicant stated:

2.13.1 "We would like to appeal against this decision and would like to amend the core hours to Monday-Friday 9:00-13:00 and 14:00-18:00.

2.13.2 Supplementary hours Monday-Friday 9:00-18:00.

2.13.3 The following pharmacies are open on Saturdays in Boston within 1 mile of 13 Forbes Road:

Co-op pharmacy Parkside
9:00-12:30

Asda pharmacy
9:00-21:00

Lloyds pharmacy South Square
9:00-13:00

Boots Boston
9:00-17:30

2.13.4 Public transport is available to all of these pharmacies on Saturdays.

2.13.5 There is also a great difficulty in booking locum pharmacists to cover half a day Saturday and when we find one they are charging us higher hourly rates.

2.13.6 We also offer a free delivery service and deliver for all our patients who require a delivery service therefore if anyone is unable to collect their medication then we will deliver it to them.

2.13.7 Please consider our appeal as we are struggling to keep the pharmacy open on Saturdays due to a shortage of locum pharmacists in the Lincolnshire area and the pharmacy is not busy at all on Saturdays to justify us opening. So many pharmacies across UK have recently closed down due to financial pressures.

2.13.8 We also have to look at ways to cut down our costs to make sure we do not end up closing down. On Saturdays we do not make sufficient sales to cover staff costs let alone all the other expenses involved. We hardly have any patients who are walking in with prescriptions to dispense or in need of any other pharmacy services on a Saturday. Please do consider our appeal, since we are really struggling to find a pharmacist to cover Saturday."

- 2.14 In a letter to NHS Resolution dated 2 February 2024 the Commissioner stated:
- 2.14.1 “Thank you for your letter dated 8 January 2024; The East Midlands Primary Care Team on behalf of Lincolnshire Integrated Care Board would like to make the following representations:
- 2.14.2 Schedule 4, Part 3 paragraph 26(1) states that an NHS Pharmacist may apply to the commissioner for it to change the days on which or times at which the pharmacy are obliged to provide pharmaceutical services at the pharmacy premises in a way that:
- 2.14.2.1 Reduces the total number of hours for which the pharmacy is obliged to provide pharmaceutical services at those premises each week.
- 2.14.2.2 Keeps the total number of hours the same.
- 2.14.3 Schedule 4, Part 3 paragraph 26(2) states that where the pharmacy makes an application under paragraph (1), as part of that application the pharmacy must provide the commissioner with such information as the commissioner may reasonably request in respect of any changes to the needs of the people in its area or other likely users of the pharmacy, for pharmaceutical services that are material to the application.
- 2.14.4 An application to permanently change core opening hours (see attached) under regulation 26(1), at Ask Chemist was received on 5 October 2023. The application was considered at Pharmaceutical Services Regulations Committee (PSRC) on 21 November 2023 and the decision was made to refuse the request to change the core opening hours at the above pharmacy, as the committee felt that the application failed to provide information in respect of any changes to the needs of the people in the area, or other likely users of the pharmacy, for pharmaceutical services that are material to the application.
- 2.14.5 Chapter 36 paragraph 19 of the Pharmacy Manual April 2020 clearly states that when determining the application to change core hours the decision maker (PSRC) must bear in mind that applications to change core opening hours should only be approved where they reflect a change in the needs of people in the area, or other likely users of the premises, for pharmaceutical services. As the application did not show any engagement or consultation with patients then the only option available to the PSRC was to refuse the application.
- 2.14.6 Although the commissioner sympathises with regards to the pharmacy's workforce issues, the arrangements and the number of the pharmacists employed either as permanent, or relief pharmacists or as locums procured to cover core contracted as well as supplementary hours offered by a pharmacy are a commercial consideration of the pharmacy.
- 2.14.7 I would like to take this opportunity to respond to any further representations provided by Ask Chemist, 13 Forbes Road, Boston, Lincolnshire, PE21 0PD.”
- 2.15 The Applicant has not provided any final observations.
- 2.16 I note the following:
- 2.16.1 The Applicant's core opening hours total 42.45 hours and the Applicant proposes to reduce the total number of core hours to 40 and redistribute those 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.

- 2.17 By email dated 14 March 2024 in reply to NHS Resolution's emailed enquiry to them of 8 March 2024, the Commissioner confirmed that *"there has been no directions in place for this pharmacy from the ICB."* I am therefore satisfied that no current direction has been issued to the Applicant regarding their opening hours pursuant to Regulation 65(4) and (5) of the Regulations.
- 2.18 The Regulations, which came into force on 1 April 2013, have been amended a number of times. Certain amendments, relating to pharmacy premises opening hours, came into force with effect from 25 May 2023.
- 2.19 I note that the ICB had determined the application using the regulatory test in force before 25 May 2023 indicating that the Applicant must demonstrate a change in the needs of patients or other likely users. I note that the application to change the hours was made by the Applicant on 5 October 2023 and a decision was made by the Commissioner on 23 November 2023. The decision was appealed to NHS Resolution by email of 22 December 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. The Commissioner should note the correct test as shown below at 2.23.
- 2.20 The Applicant has sought to change the days and times at which it is obliged to provide pharmaceutical services under paragraph 26 of Schedule 4, Part 3, "Hours of opening".
- 2.21 Paragraph 26(1) states:
- "26.— (1) An NHS pharmacist (P) may apply to the NHSCB for it to change the days on which or times at which P is obliged to provide pharmaceutical services during core opening hours at P's pharmacy premises in a way that—*
- (a) reduces the total number of hours for which P is obliged to provide pharmaceutical services at those premises each week ...; or*
- (b) keeps that total number of hours the same."*
- 2.22 I have first considered paragraph 26(2) of Schedule 4 of the Regulations, which reads as follows:
- "Except where sub-paragraph (2A) applies, where P makes an application under sub-paragraph (1), as part of that application P must provide the NHSCB with such information as the NHSCB may reasonably request in respect of the matters that NHS England must seek to ensure pursuant to paragraph 24(1).*
- 2.23 Paragraph 24(1) reads as follows:
- "24 (1) Subject to paragraph 26(2A), where NHS England issues a direction for setting any days or times for opening hours under this Part, or determines them without issuing a direction, it must in doing so seek to ensure that the days and times 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.*
- 2.24 Paragraph 24(2) states:
- (2) In considering the matters mentioned in sub-paragraph (1), the NHSCB –*

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

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

- 2.25 I will start by considering the application of paragraph 24(1)(a) and whether the proposed hours are such as to maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises. I will then consider the application of 24(1)(b) if that is required.
- 2.26 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.
- 2.27 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.
- 2.28 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.
- 2.29 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.
- 2.30 I have next considered whether it is necessary to maintain the existing level of service provision. As the Applicant is looking to reduce the number of hours per week that services are provided, then from a pure "number of hours of service provision each week" perspective, the existing level of service provision would not be maintained such that consideration of whether it is necessary to maintain the level of service provision is needed.
- 2.31 In addition, 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.
- 2.32 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.
- 2.33 I note the Applicant has made only limited reference to patients using its pharmacy during the week on days and times that the Applicant wishes to change. In its application the Applicant stated: *"We have assessed the patients attending the*

pharmacy and found that only a minimum number of patients attend the pharmacy after 17:30 and Saturdays.”

- 2.34 In its appeal letter, the Applicant further states that: *“We hardly have any patients who are walking in with prescriptions to dispense or in need of any other pharmacy services on a Saturday.”*
- 2.35 It is clear that there are people using the pharmacy at the times the Applicant wishes to close during the week and on Saturdays. However it is difficult to draw conclusions about the necessity of maintaining the existing level of service provision if there is no information on what specific services, if any, are being provided at those times. The Applicant’s comments do not refer to the number that attended the pharmacy during the week or on Saturdays and does not differentiate between those who were coming to collect a prescription, for example, and those that were coming to seek advice or access a further pharmaceutical service or a non-pharmaceutical service.
- 2.36 Without this information it is difficult to make an assessment of whether it is necessary to maintain the existing level of service provision and this in turn makes it difficult to apply paragraph 24(1)(a). I consider it reasonable to take the position that unless I am provided with evidence to the contrary, I should consider that it is necessary to maintain the existing level of service provision.
- 2.37 Having determined that it is reasonable to assume that maintaining the existing level of service provision is necessary, I now need to consider if, despite the changes to hours, there is maintenance of the existing level of service provision. The Applicant cannot maintain this as it is changing its hours but I note the 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 insofar as Saturdays are concerned. These are Co-op, Asda, Lloyds and Boots. The Applicant has provided information to show the opening hours of Asda during weekdays.
- 2.38 If I consider that the characteristics of other pharmacies, e.g. where they are located, their access, the services provided and the times they are open, means that the level of service provision is maintained for people in the local area or other likely users of the pharmacy, then I am able to grant the application under paragraph 24(1)(a).
- 2.39 The Applicant has provided very limited information regarding access to those pharmacies for those who currently access its own pharmacy and how they might travel to find alternative pharmaceutical services. On appeal, the Applicant has stated: *“The following pharmacies are open on Saturdays in Boston within 1 mile of 13 Forbes Road”* and refers to the Co-op, Asda, Lloyds and Boots pharmacies.
- 2.40 It is worth noting that characteristics of the persons using the pharmacy might be relevant here as well as from where they start their journey to the pharmacy. If they live close by, walk a few minutes to the pharmacy and walk back home, then even an additional 10-20 minute walk to the next nearest pharmacy might be considered as not maintaining the level of service provision to users of the pharmacy. I do not consider that every single individual need should be considered at length in this regard but it would be helpful to have this information to be certain that the existing level of service provision would be maintained via local pharmacies.
- 2.41 I have already noted the Applicant’s reference to distance at point 2.39 above but there is no information regarding the nature of the journeys for those persons on foot.
- 2.42 I note the Applicant’s comment on appeal that *“Public transport is available to all of these pharmacies on Saturdays.”* The Applicant has not provided any information with regard to the frequency of, or the route taken by the public transport. Nor has the Applicant commented similarly in respect of the availability of public transport during the times it proposes to close its pharmacy during the week.

- 2.43 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 cumulative effect of:
- 2.44.1 a lack of information about the services being provided during the hours the Applicant is proposing to close; and
- 2.44.2 the lack of information regarding access to alternative pharmacies,
- I am not satisfied that there will be maintenance of the existing level of service provision, whether by virtue of other pharmacies in the area or by the Applicant swapping hours to longer opening over lunchtimes during the week.
- 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 I note that the Applicant has stated in its application that *“There is also difficulties in finding locums in the Boston area.”* On appeal the Applicant stated *“There is also a great difficulty in booking locum pharmacists to cover half a day Saturday and when we find one they are charging us higher hourly rates.”* Also *“Please consider our appeal as we are struggling to keep the pharmacy open on Saturdays due to a shortage of locum pharmacists in the Lincolnshire area and the pharmacy is not busy at all on Saturdays to justify us opening.”* 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, I consider that no evidence has been put forward to support the Applicant's statement that it is difficult to find locums at an economically viable rate. No evidence of costs for locums at different times has been provided. No evidence of what efforts have been undertaken to source locums has been provided. There is no explanation as to why locums rather than employees have to be used. I also note that the pharmacy has not provided any suggestion that the pharmacy has been closed due to a failure to secure viable locum cover which might suggest maintaining service provision at the relevant hours is not realistically achievable. The Applicant appears to be saying it is not sustainable to keep paying locums to cover these hours but it has not presented evidence that suggests these fees are compromising the economic viability of its operations at the weekend or otherwise.
- 2.49 The wording of paragraph 24(1)(b) is such that maintaining existing service levels must not be realistically achievable before considering a sustainable level of adequate provision. I consider that this sets a fairly high bar as to the level of difficulty that the Applicant must find themselves in. I do not consider that sufficient evidence has been provided to indicate that the economic and practical viability of the current opening hours has been compromised. The use of the word *“struggling”* by the Applicant suggests that it has been achievable, but difficult. 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).

- 2.50 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 note the Applicant's comment on appeal that *"We hardly have any patients who are walking in with prescriptions to dispense or in need of any other pharmacy services on a Saturday."* I am of the view that I have not been provided with sufficient information to demonstrate how the proposed change of hours would maintain, as necessary, the existing levels of service provision.
- 2.51 I am therefore minded not to agree the change of the Applicant's core opening hours.
- 2.52 In determining an application made under paragraph 26(1) of Schedule 4 of the Regulations, paragraph 26(4) indicates that the Commissioner must:
- 2.52.1 issue a direction (which replaces any existing direction) which meets the requirements of sub-paragraphs (4A), (5) and (6) and which has the effect of either granting the application in whole or in part;
- 2.52.2 confirm any existing direction in respect of the times at which the pharmacist must provide pharmaceutical services at the pharmacy premises; or
- 2.52.3 either:
- 2.52.3.1 revoke, without replacing it, any existing direction in respect of the times at which the pharmacist must provide pharmaceutical services at the pharmacy premises where this has the effect of granting the application in whole or in part; or
- 2.52.3.2 in a case where there is no existing direction, issue no direction.
- 2.53 Prior to 1 April 2023, NHS England was responsible for the commissioning of pharmaceutical services. Integrated Care Boards have since taken on delegated responsibility for the commissioning of pharmaceutical services. Therefore it would have been NHS England who was responsible for issuing a direction in relation to the hours above 40 core hours.
- 2.54 Neither the Applicant nor the Commissioner have referred to a direction in place. Indeed, the latter has confirmed that no direction exists so I have proceeded on the basis that a direction has not been issued requiring the Applicant to open for the extra 2 hours and 45 minutes in respect of its core opening hours.
- 2.55 Applications to change core hours are determined in accordance with paragraph 26(4) of Schedule 4 of the Regulations. This causes me some difficulty as the Commissioner was required to determine the application in accordance with paragraph 26(4) under which there is no express option to simply refuse the application due to services being provided for more than 40 core hours despite there being no existing direction. Paragraph 26(4)(c)(ii) expressly states that I must, in a case where there is no direction, issue no direction.
- 2.56 I also note that the Regulations do not envisage this situation arising (i.e. a pharmacy providing more than 40 hours a week without a direction in place) and therefore there is no guidance in the Regulations to determine which of the days and times during which services are to be provided going forward constitute core opening hours, or put a different way, of the 40 hours that the Applicant is required to provide services, which are to be considered the core days and times. This leads to an unsatisfactory situation in which neither party is clear as to the days on which and times at which the 40 core opening hours are to be provided.

- 2.57 However, I consider that the amendments made to the Regulations provide the ability for me to make such a determination. Paragraph 24(1) now contains new wording in relation to days or times for opening hours - "[...]or determines them without issuing a direction". I have provided the complete extract at paragraph 2.23 above.
- 2.58 The inclusion of this wording indicates to me that the Commissioner does have a power to determine the days and times at which the 40 core opening hours are provided and this is without the need to issue a direction. This would not contradict paragraph 26(4)(c)(ii) as, there is no existing direction in place and there is no direction being issued. I therefore consider that this new wording allows the determination by the Commissioner of the days and times that the 40 core opening hours are provided.
- 2.59 I note that the rest of paragraph 24(1) and the legal test that needs to be considered alludes to a direction. However, given the novel nature of the situation where a pharmacy is clearly operating outside of 40 hours without a direction, and where each of these hours appears to be core hours, it would make sense that the Commissioner is able to determine the 40 core opening hours without a direction.
- 2.60 I therefore determine that the Commissioner was able to determine the Applicant's core hours, without issuing a direction as per paragraph 24(1) and by applying the legal test set out in paragraph 24(1).
- 2.61 I have indicated that I am minded not to refuse the change of the Applicant's core opening hours on the basis of a lack of information on various points. That would usually mean I would refuse the decision of the Commissioner. But that would leave me in the unwelcome position of making a determination that the Applicant must continue to provide services for more than 40 hours a week without a direction.
- 2.62 That is not satisfactory but, in this novel situation unforeseen by the Regulations, I consider that I have little choice. I cannot determine the 40 core opening hours on the basis of the information provided despite being enabled by the new wording in paragraph 24(1) to do so. I would urge the Applicant to gather information as to the use of the pharmacy at different days and times and apply again to change its core hours which should then enable the Commissioner to make an assessment of the most appropriate 40 core opening hours. The Commissioner can then make a determination by applying the legal tests in paragraph 24(1). Provided the level of information is adequate, the Commissioner can make that determination.
- 2.63 I consider I am unable to grant the application on the basis of lack of information as indicated earlier in this determination. The only option left to me is therefore to confirm the action taken by the Commissioner in refusing the Applicant's application but substituting the reasons with the reasons I set out earlier in this determination.

3. Determination

- 3.1 I consider that, on the basis of the information provided to me, it is necessary to maintain the existing level of service provision and that not enough information has been provided for me to consider that maintaining the existing level of service provision is not a realistically achievable outcome. Although this leaves an undesirable situation, where the Applicant continues to provide over 42 core opening hours without a direction being in place, I consider the lack of information does not enable me acting reasonably to make a determination of the days and times of the 40 core opening hours.
- 3.2 I consider that the only option open to me is therefore to confirm the action taken by the Commissioner to refuse the application.