

15 October 2024

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FILE REF: SHA/26256

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DECISION MAKING BODY: NOTTINGHAM &
NOTTINGHAMSHIRE
ICB
("the Commissioner")

PHARMACIST: SILVERDALE PHARMACY (FRF42)
("the Applicant")

PREMISES: 44 MONKSWAY,
SILVERDALE,
NOTTINGHAM
NG11 7FH

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 40 hours and 30 minutes 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:

Silverdale Pharmacy
Nottinghamshire ICB

NHS
Resolution

FILE REF: SHA/26256

8th Floor
10 South Colonnade
Canary Wharf
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E14 4PU

Advise / Resolve / Learn

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

1 Introduction

- 1.1 The Applicant has applied to the Commissioner to change the days and times at which it is obliged to provide pharmaceutical services at the above premises.
- 1.2 The Commissioner has refused the application. The Applicant seeks to appeal to NHS Resolution.

Rights of appeal

- 1.3 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").
- 1.4 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

- 1.5 A pharmacy's opening hours may be categorised as:
- 1.5.1 "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
- 1.5.2 "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

- 1.6 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:
- 1.6.1 the proposed core opening hours in respect of the premises; and
 - 1.6.2 the total proposed opening hours for the premises (having regard to both the proposed core opening hours and any supplementary opening hours).
- 1.7 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.
- 1.8 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

- 1.9 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.
- 1.10 There is no specific right of appeal to NHS Resolution in respect of notices given under paragraph 23(6)(a).

The Applicant's proposals

- 1.11 The Applicant in its letter of appeal indicates that it currently has core opening hours totalling 40 hours per week. However the Applicant's application form shows that the Applicant has weekly core hours of 40 hours and 30 minutes.
- 1.12 The Applicant wishes to:
- 1.12.1 Close on Friday 27 December 2024 rather than open from 9am to 1pm and 2pm to 6.30pm.

2. Application

In this case, the Applicant provided the following information in its application form and supporting information dated 23 April 2024:

- 2.1 "This is an application to make a one off change to core opening hours.
- 2.2 Current opening hours for these premises:

Monday	9am to 1pm 2pm to 6pm
Tuesday	9am to 1pm 2pm to 6pm
Wednesday	9am to 1pm 2pm to 6pm
Thursday	9am to 1pm 2pm to 6pm
Friday	9am-1pm 2pm- 6.30pm
Saturday	Closed

Sunday	Closed
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2.3 Proposed core opening hours for these premises:

Monday	9am to 1pm 2pm to 6pm
Tuesday	9am to 1pm 2pm to 6pm
Wednesday	9am to 1pm 2pm to 6pm
Thursday	9am to 1pm 2pm to 6pm
Friday	Closed (one off on 27/12/24)
Saturday	Closed
Sunday	Closed

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

2.4.1 N/A

2.5 This is a one-off change just for the Christmas week. Only closed on 27/12/24.

2.6 There will be minimal impact to users of our services and we will ensure that all of our work is completed either side of the closed date. The pharmacy is on a small residential estate and there will be suitable nearby services for urgent medication on the given date. We will ensure that all of our deliveries are made prior to the closure and patients are informed well in advance. We will work extended hours to make up for any shortfall in opening hours."

3. The Decision

In a letter to the Applicant dated 20 June 2024 the Commissioner decided to refuse the application. The Commissioner stated:

3.1 "Thank you for your application to make a one-off change to the core opening hours at Silverdale Pharmacy, received on 23 April 2024.

3.2 The Pharmaceutical Services Regulations Committee (PSRC) met on 18 June 2024 and a decision was made to refuse the request to the one off change to the core opening hours to close the pharmacy on 27 December 2024. The National Health Service (Pharmaceutical and Local Pharmaceutical Services) regulations 2013 states that and NHS pharmacist must ensure that pharmaceutical services are provided at the pharmacy premises for 40 hours each week.

3.3 The refusal was due to the fact that the committee felt the pharmacy had not demonstrated how the proposed core hours would either 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; or Maintain a sustainable level of adequate service provision for the people in the area of the pharmacy, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome. In pursuant to Regulation 24(1) subject to paragraph 26(2A).

3.4 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

3.5 If you have any questions, please do not hesitate to contact me.”

4. **The Appeal**

In an email to NHS Resolution dated 2 July 2024 the Applicant appealed against the Commissioner’s decision. The grounds of appeal are:

- 4.1 “I would like to appeal the decision to refuse the request to the one off change to the core opening hours to close the pharmacy on 27 December 2024.
- 4.2 I acknowledge the points made by the committee regarding maintaining an existing level of service provision and feel that I can demonstrate how we can minimize the impact of this. Below I have outlined the steps that we will take to facilitate the one-off change.
- 4.3 We will open extended hours on 23/12/24 and 24/12/24 to make up the shortfall in hours for the week to fulfill contractual 40 hours of the week. Each day we will open 8am to 8pm to make up for the 8 hours (4 hours added onto each day).
- 4.4 We will inform our patients of the change well in advance so that they are aware of the change and can time their collections appropriately.
- 4.5 We will inform the surgeries well in advance so that prescriptions are directed accordingly to other pharmacies for acute patients.
- 4.6 We operate from a small isolated residential estate mainly handling repeat medication requests which means that our workload can be planned and fulfilled beforehand.
- 4.7 Based on previous years experience I believe that this particular requested day will not be busy unlike the run up to Christmas and nearby pharmacies will be open for any urgent medication issues which we can signpost towards closer to the time.
- 4.8 We always pride ourselves on customer service and have a patient centred approach to everyone that we deal with. We regularly go above and beyond to facilitate healthcare in our local community and I believe that this one day closure would be of minimal impact.
- 4.9 I am hoping that this request will be granted as I feel it is important for my team to have a break through what has been an exhausting year. We will ensure that service provision is maintained throughout the rest of the Christmas period and we are prepared to make up the shortfall by opening for additional hours. I would not be making this request if we felt it would be to the detriment of our patients and the local community.”

5. **Representations**

In a letter to NHS Resolution dated 9 August 2024 the Commissioner stated:

- 5.1 “Thank you for your letter dated 11 July 2024; The East Midlands Primary Care Team on behalf of Northamptonshire Integrated Care Board [sic] would like to make the following representations.
- 5.2 The National Health Service (Pharmaceutical and Local Pharmaceutical Services) regulations 2013 states:

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

24(1) Subject to paragraph 26(2A), where the commissioner 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. people in that area or other likely users of the pharmacy premises, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome.

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

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

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

(3) The commissioner may only direct that an NHS pharmacist (P) may provide pharmaceutical services at premises for less than 40 hours in any week if it is satisfied that the provision of pharmaceutical services in its area is likely to be adequate to meet the need for such services at times when P is not providing pharmaceutical services.

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

Determination of pharmacy premises core opening hours instigated by the NHS pharmacist.

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) Except where sub-paragraph (2A) applies, where P makes an application under sub-paragraph (1), as part of that application P must provide the commissioner with such

information as the commissioner may reasonably request in respect of the matters that the commissioner must seek to ensure pursuant to paragraph 24(1).

- 5.3 An application to make a one off change to the core opening hours, closing on 27 December 2024 only, at Silverdale Pharmacy, 44 Monksway, Silverdale, Nottingham, NG11 7FH was received on 23 April 2024 and the decision was made to refuse the application as the pharmacy has not demonstrated how the change would impact patients need and where they will extend opening hours to cover the shortfall.
- 5.4 A decision letter was sent to the pharmacy on 20 June 2024 and the letter confirmed the decision of the committee, detailing the reasons surrounding the refusal of the application.
- 5.5 The pharmacy have stated within their appeal that they intend to extend their opening hours on 23 December and 24 December to a total of 8 hours. Although this ensures that the pharmacy provides the requisite 40 hours per week, this does not mitigate the loss of access to patients specifically on the 27 December.
- 5.6 The pharmacy has also stated they would notify patients and local GP practices of the closure so as to ensure planned prescriptions could be dealt with in advance, however, this does not mitigate unplanned prescriptions for patients who would usually access this pharmacy.
- 5.7 I would like to take this opportunity to respond to any further representations provided by Silverdale Pharmacy, 44 Monksway, Silverdale, Nottingham, NG11 7FH."

6. Observations

In a letter to NHS Resolution dated 21 August 2024 the Applicant stated:

- 6.1 "Thank you for your email. These are the final comments I wish to make about the application.
- 6.2 I feel that by offering to make up any shortfall in hours we would be fulfilling our contractual obligations and I have done my best to demonstrate this in my previous email.
- 6.3 I acknowledge the points about mitigating for loss of patient access and unplanned prescriptions and will remark on each point.
- 6.4 With regards patient access, this would be of minimal impact as based on my 12 year experience at this pharmacy we get very few patients between Xmas and New years. Whilst I appreciate that I cannot account for everyone, I am certain that this one day would not cause a massive impact. Also, by offering extended hours on the days leading up to Xmas we are more likely to help our community and improve patient access for when it is actually needed. It is not to [sic] dissimilar to when GP practices close for training on a regular basis which we have never done in the past.
- 6.5 With regards unplanned or acute prescriptions, I also believe that there would be minimal impact as I have mentioned that we are situated on a small residential estate over a mile away from any GP practice mainly dealing with repeat prescriptions. On an average day we get around 5 unplanned prescriptions which if we don't download the patients will be able to pick up elsewhere. We will make all of the GP practices that we deal with aware of the planned closure so that they can direct patients accordingly. There are many nearby pharmacies situated within close proximity to the surgeries that would be able to deal with the small number of unplanned prescriptions.
- 6.6 Finally, I would just like to say that this small request which would mean a lot to myself and my team who have worked tirelessly throughout the year serving our local community. I do not feel that it is too much to ask for a one-off request to be honoured

considering that we will be making up the hours. As previously stated, we would not be making this request if we felt it would be to the detriment of our patients and local community.”

7. Consideration

7.1 I note the Applicant's core opening hours total 40 hours and 30 minutes and the Applicant proposes to redistribute those core opening hours pursuant to paragraph 26 of Schedule 4.

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

7.3 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.

7.4 Paragraph 26(1) states:

“26.— (1) An NHS pharmacist (P) may apply to NHS England 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.”

7.5 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 NHS England with such information as NHS England may reasonably request in respect of the matters that NHS England must seek to ensure pursuant to paragraph 24(1).

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

7.7 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.

7.8 Paragraph 24(2) states:

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

(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.

- 7.9 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 paragraph 24(1)(b) if that is required.
- 7.10 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.
- 7.11 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.
- 7.12 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.
- 7.13 The existing level of service provision has been outlined by the Applicant, in its own core hours provision, and by an indication that pharmacies in the local area are open.
- 7.14 I have next considered whether it is necessary to maintain the existing level of service provision.
- 7.15 The Applicant is applying to change the days and times that services are provided. Taking Friday 27 December 2024 as an example, the level of service provision at the Applicant's premises on a Friday 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.
- 7.16 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.
- 7.17 The Applicant has made following comments regarding users of its pharmacy on the day in question:

- 7.17.1 *"With regards patient access, this would be of minimal impact as based on my 12 year experience at this pharmacy we get very few patients between Xmas and New years."*
- 7.17.2 *"With regards unplanned or acute prescriptions, I also believe that there would be minimal impact as I have mentioned that we are situated on a small residential estate over a mile away from any GP practice mainly dealing with repeat prescriptions. On an average day we get around 5 unplanned prescriptions which if we don't download the patients will be able to pick up elsewhere."*
- 7.18 It is clear that there are people using the pharmacy at the times the Applicant wishes to close, albeit potentially low in numbers. I consider that it is relevant to have information as to why persons are using the pharmacy at these times. 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.
- 7.19 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.
- 7.20 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. I note the Applicant has provided no information 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 Friday 27 December 2024.
- 7.21 Had I have been able to consider that the characteristics of other pharmacies, e.g. where they are located, their access, the services provided and the times they are open, and concluded that the level of service provision is maintained for people in the local area or other likely users of the pharmacy, then I may have been able to grant the application under paragraph 24(1)(a).
- 7.22 The Applicant has provided no information regarding access to other pharmacies for those who currently access its own pharmacy and how they might travel to find alternative pharmaceutical services. It is likely that there are a mix of people who drive to the Applicant's pharmacy, walk or use public transport. The Applicant has not described in respect of other pharmacies in the area, how far away those pharmacies are, if there are any barriers to access, if there is parking available, or the frequency of any public transport.
- 7.23 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 have been helpful to have this information to be certain that the existing level of service provision would be maintained via local pharmacies.
- 7.24 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.
- 7.25 I note the Applicant's comment: *"We will open extended hours on 23/12/24 and 24/12/24 to make up the shortfall in hours for the week to fulfill contractual 40 hours of the week. Each day we will open 8am to 8pm to make up for the 8 hours (4 hours added onto each day)."* However this was not what the Applicant initially applied to do or considered by the Commissioner so I have not taken this into account.

- 7.26 I have decided that it is necessary to maintain the current service provision but, due to the cumulative effect of:
- 7.26.1 a lack of information about the services being provided during the hours the Applicant is proposing to close; and
- 7.26.2 a lack of information regarding access to alternative pharmacies in the area,
- I am not satisfied that there will be maintenance of the existing level of service provision, whether by virtue of other pharmacies in the area.
- 7.27 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”.*
- 7.28 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.
- 7.29 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 in respect of this criteria.
- 7.30 The wording of paragraph 24(1)(b) is such that maintaining existing service levels must not be realistically achievable before considering a sustainable level of adequate provision. I consider that this sets a fairly high bar as to the level of difficulty that the Applicant must find themselves in. Whilst I appreciate the Applicant's rationale for making the application i.e. to give his staff a break 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 the Applicant cannot rely on paragraph 24(1)(b).
- 7.31 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.
- 7.32 I am therefore minded not to agree the change of the Applicant's core opening hours.
- 7.33 In determining an application made under paragraph 26(1) of Schedule 4 of the Regulations, paragraph 26(4) indicates that the Commissioner must:
- 7.33.1 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;
- 7.33.2 confirm any existing direction in respect of the times at which the pharmacist must provide pharmaceutical services at the pharmacy premises; or
- 7.33.3 either:
- 7.33.3.1 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

7.33.3.2 in a case where there is no existing direction, issue no direction,

- 7.34 The rationale behind the Commissioner's decision to refuse the Applicant's application was that it would fail the first test i.e. that the proposed core opening hours are such as to maintain as necessary the existing level of service for people in the area of the pharmacy premises or other likely users of them as agreeing the application would result in a reduction of the level of service for people in the area. The Commissioner also considered that the Applicant had failed to provide any data or evidence to support its assertions regarding the maintenance of a sustainable level of adequate service provision for the people in the area of the pharmacy premises or other likely users of them, in circumstances where maintaining the existing level of service provision is either unnecessary or not a realistically achievable outcome.
- 7.35 I note that there is no suggestion from either party that a current direction has been issued to the Applicant regarding their core opening hours, nor has any evidence been provided to suggest otherwise. In this instance, I have proceeded on the basis that the Commissioner has not issued a direction in relation to the Applicant's core opening hours.
- 7.36 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.
- 7.37 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.
- 7.38 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 7.7 above.
- 7.39 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.
- 7.40 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.
- 7.41 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).

- 7.42 I have indicated that I am minded not to agree the change of the Applicant's core opening hours on the basis of a lack of information on various points. That would usually mean I would confirm the decision of the Commissioner albeit for slightly different reasons. But that would leave me in the unwelcome position of making a determination that the Applicant must continue to provide services for more than 40 hours a week without a direction.
- 7.43 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.
- 7.44 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.

8. Determination

- 8.1 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 40 hours and 30 minutes 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.
- 8.2 I consider that the only option open to me is therefore to confirm the action taken by the Commissioner to refuse the application.

**Head of Appeals
NHS Resolution**