

28 February 2025

REF: SHA/26432

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

Tel: 020 3928 2000
Email: nhsr.appeals@nhs.net

**APPEAL AGAINST KENT AND MEDWAY ICB DECISION
TO REMOVE AVANA HEALTHCARE LTD (FKG490)
FROM THE PHARMACEUTICAL LIST AT 25 BOORMAN
WAY, ESTUARY BUSINESS PARK, WHITSTABLE,
KENT, CT5 3SE IN ACCORDANCE WITH REGULATION
74**

1 Outcome

- 1.1 I am of the view that under NHS Resolution's powers, as set out in paragraph 9(5) of Schedule 3 to the Regulations, I may either confirm the decision of the Commissioner or substitute for that decision any decision that the Commissioner could have taken when it took that decision.
- 1.2 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm the decision of the Commissioner that the Appellant's premises are to be removed from the relevant pharmaceutical list.

A copy of this decision is being sent to:

Gordons Solicitors, on behalf of the Appellant
Kent and Medway Integrated Care Board

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1 The Decision Letter

A letter dated 26 November 2024 was sent from South East Commissioning Hub on behalf of Kent and Medway ICB ("the Commissioner") to Avana Healthcare Ltd 25 Boorman Way, Estuary View Business Park, Whitstable, Kent, CT5 3SE (FKG49). The letter states:

- 1.1 "Further to my previous letters on this matter and the oral hearing on 20 November 2024, the Pharmaceutical Services Regulations Committee for Kent and Medway Integrated Care Board have considered all the evidence and have decided that the above premises are to be removed from the pharmaceutical list for the area of Kent Health and Wellbeing Board.
- 1.2 Please see attached decision report.
- 1.3 You have a right of appeal to the Secretary of State against this decision. Should you choose to appeal then you should send 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 to:
- 1.4 Primary Care Appeals, NHS Resolution, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU"

Decision report

- 1.5 **"Kent & Medway Integrated Care Board**
- 1.6 **Pharmaceutical Services Regulations Committee**
- 1.7 **Decision Report following the Oral Hearing held on Wednesday 20 November 2024 (via MS Teams) to consider the removal of the particular premises of Avana Healthcare Limited from the pharmaceutical list for the Kent Health and Wellbeing Board Area**
- 1.8 **Present (Panel):**
- 1.9 (JB) Head of Primary Care – Pharmacy & Optometry South East Commissioning Hub (Chair),
- 1.10 (TSSB) Lay Member
- 1.11 (LM) Deputy Director, Primary Care Commissioning, Kent & Medway ICB
- 1.12 **In Attendance:**

- 1.13 (TM) Senior Pharmacy Commissioning Manager, South East Commissioning Hub
- 1.14 (SW) Pharmacy Commissioning Manager, South East Commissioning Hub
- 1.15 Following the Oral Hearing held on the 20 November 2024 to consider the removal of the listing of particular listed chemist premises of Avana Healthcare Limited t/a Avana Healthcare Limited, 25 Boorman Way, Estuary View Business Park, Whitstable, Kent, CT5 3SE from the pharmaceutical list for the Kent Health and Wellbeing Board Area, the Panel met to make the decision about whether to:
 - 1.15.1 Remove the listed chemist premises
 - 1.15.2 Not remove the listed chemist premises
- 1.16 **Consideration**
- 1.17 The Committee considered the representations submitted in writing on 11 November 2024 seeking an extension to the 6 month period and those made at the Oral Hearing by [MP] and [PP] from Avana Healthcare Limited. [MA] from Community Pharmacy Kent was in attendance to support Avana Healthcare Limited.
- 1.18 Avana Healthcare Limited made representations on the following points at the Oral Hearing:
 - 1.18.1 They acknowledged that Regulation 74 sets out a clear timeframe but would like to seek an extension, if possible, because of unusual circumstances that have been out of their control.
 - 1.18.2 They were of the understanding that the landlord was seeking a change of ownership and thought that was happening, however, at a late stage they were informed the change of ownership wasn't going to happen. This then gave them a short timeframe to get the premises ready.
 - 1.18.3 To be ready to open the pharmacy they would need at least 28 days but due to the Christmas period it might be a little longer, however, they would definitely be able to open by the end of January 2025.
 - 1.18.4 They acknowledged that services had not be provided at the premises since 23 April 2024.
- 1.19 **Decision**
- 1.20 Having considered the facts of the position as set out in a letter to Avana Healthcare Limited on 23 October 2024, the representations submitted in writing on 11 November 2024 and the representations made at the Oral Hearing, the Panel reached the decision that Avana Healthcare Limited t/a Avana Healthcare Limited, 25 Boorman Way, Estuary View Business Park, Whitstable, Kent, CT5 3SE should be removed from the pharmaceutical list for the area of the Kent Health and Wellbeing Board.
- 1.21 The reason being:
 - 1.21.1 No pharmaceutical services have been provided at the listed chemist premises since 23 April 2024 i.e. for a period of six months. Regulation 74(3) states the ICB must remove the listed chemist premises from the pharmaceutical list in such circumstances."

2 The Appeal

In a letter dated 23 December 2024 addressed to NHS Resolution, Gordons Partnership Solicitors on behalf of Avana Healthcare Limited's ("the Appellant") appealed against the Commissioner's decision. The grounds of appeal are:

2.1 "We act for Avana Healthcare Limited and have been instructed to appeal against the decision to remove the premises of Avana Healthcare Ltd at 25 Boorman Way, Estuary View Business Park, Whitstable, Kent, CT5 3SE from the pharmaceutical list for the Kent Health and Wellbeing Board Area.

2.2 Context

2.3 Our client Avana Healthcare Limited ("AHL") was notified that it would be removed from the pharmaceutical list on 26 November 2024. A summary of the events leading up to the decision to remove is as follows: our client, AHL, purchased East View Pharmacy from a company in administration. East View Pharmacy is co-located with a GP surgery, Whitstable Medical Practice. A change of ownership application was submitted by our client AHL, granted and a notice of commencement of services sent to the relevant ICB. However, discussions with the medical practice resulted in an agreement that the medical practice would open and run the pharmacy. A legal entity Whitstable Pharma Ltd ("WPL") was set up by an individual approved by the medical practice to make the necessary regulatory applications. Although the change of ownership to WPL was granted, no notice of commencement was filed because the practice decided not to pursue that arrangement. Unfortunately, that was not the concluded position until 27 September 2024 when Whitstable Pharma Limited emailed the ICB to withdraw the application. Although the medical practice was contacted by the ICB informally about the lack of provision of services, our client was not informed by the ICB of the intention to remove because of cessation of services, nor were enforcement process such as breach notices or remediation notices served on our client prior to the issue of a formal notification on 23 October. A detailed chronology is set out below:-

2.4 Chronology

- 2.5 27th July 2023 – The landlord forfeits the lease and pharmacy ceases providing services.
- 2.6 20th Dec 2023 - Avana Healthcare Limited (AHL) purchases East View Pharmacy (EVP) (and another pharmacy in the Kent HWB area) from E-Nova Healthcare (in administration). The change of ownership application is granted.
- 2.7 16th April 2024 – Notice of commencement submitted by AHL.
- 2.8 23rd April 2024 - AHL added to Pharmaceutical List.
- 2.9 3rd May 2024 - AHL agrees to sell to a third party company known to the Medical Practice which is Whitstable Pharma Ltd (WPL). A change of ownership application is submitted in favour of WPL. Significant delays in processing of this application.
- 2.10 24th Sept 2024 - (WPL) – FTP granted.
- 2.11 25th Sept 2024 – Change of ownership is granted to WPL.
- 2.12 27th Sept 2024 – WPL emails ICB to withdraw the application. Whitstable Medical Practice contact AHL to open the pharmacy.

- 2.13 8th Oct 2024 - ICB confirms withdrawal of the change of ownership application made by WPL.
- 2.14 23rd Oct 2024 - ICB write to inform removal of AHL from the Pharmaceutical List under Regulation 74.
- 2.15 27th Oct 2024 - Appeal hearing - Zoom Call with ICB.
- 2.16 15th Nov 2024 - AHL email ICB to confirm that the pharmacy can open by 2nd Dec 2024.
- 2.17 23rd Nov 2024 - ICB letter to confirm removal and rights of appeal to NHS Resolution.

2.18 **The Regulations**

- 2.19 The NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”) cover market exit, and the relevant provisions relating to the removal of the pharmacy on the basis of cessation of service are set out below:

2.20 **“Removal of listings: cases relating to death, incapacity or cessation of service**

Regulation 74(1) Subject to paragraphs (2) and (4), if an NHS chemist (C)—...

(b) in the case of an NHS pharmacist, ceases to carry on a retail pharmacy business;...

NHS England must remove C from the relevant pharmaceutical lists.

...

(3) If NHS England determines that C has not, during the preceding 6 months, provided pharmaceutical services at chemist premises (“the particular premises”) listed in a particular pharmaceutical list—

(a) if there are other chemist premises listed in that pharmaceutical list in relation to C, NHS England must remove the listing of the particular premises from that list; ...

*(5) Before taking a decision to remove C, or chemist premises listed in relation to C, from a pharmaceutical list under paragraph (1) or (3), **NHS England must—***

*(a) **give notice to C ... of the decision that is minded to take;** [emphasis added]*

(b) as part of that notification, advise C ...that they may make—

(i) written representations to NHS England with regard to that action, provided they notify NHS England with those representations within 30 days beginning with the date of the notification by NHS England, and

(ii) oral representations to NHS England with regard to that action, provided—

(aa) they notify NHS England of their wish to do so within 30 days beginning with the date of the notification by NHS England, and

(bb) C (or the representative or executor, or someone representing the representative or executor) attends the hearing that NHS England arranges for

the purpose of hearing those representations, which NHS England must give C reasonable notice of; and

(c) consult any Local Pharmaceutical Committee whose area includes the chemist premises that NHS England is minded to remove from the pharmaceutical list.” (emphasis added).

2.21 Grounds of Appeal

- 2.22 The Kent & Medway Integrated Care Board, Pharmaceutical Services Regulations Committee determined that Avana Healthcare Limited, 25 Boorman Way, Estuary View Business Park, Whitstable, Kent, CT5 3SE should be removed from the pharmaceutical list for the area of the Kent Health and Wellbeing Board. The basis for the decision was that *“No pharmaceutical services have been provided at the listed chemist premises since 23 April 2024 i.e. for a period of six months. Regulation 74(3) states the ICB must remove the listed chemist premises from the pharmaceutical list in such circumstances.”*
- 2.23 Our client appeals on the basis that the ICB misdirected itself in finding that it was obliged to remove the listed chemist premises in circumstances where the required regulatory notification was not given appropriately.
- 2.24 It is our clients case that although the provisions in Regulation 74(1) and (3) of the Regulations are mandatory ie; NHS England *“must remove the listing of the particular premises...”* this should be read with the mandatory requirement under Regulation 74(5)(a) that the ICB should give effective notice of the decision that it is minded to take; *“NHS England must—(a) give notice to C ... of the decision that is minded to take;”*
- 2.25 Here the ICB gave notice on 23 October 2024 (a copy of the letter is attached) indicating that as AHL had not provided services for the previous six months the ICB must remove the remove the [sic] chemist premises listed from the pharmaceutical list. They then go on to say they are “minded” to remove AHL from the list. However, at the date of sending the letter the six months had already elapsed and it can be seen from [sic] the wording of the ICB’s eventual decision that it was not a decision that was under consideration but one where the ICB had already formed the view that their mandatory obligation to remove had already occurred.
- 2.26 Given the ICB was under an obligation to give notice of the decision when it was under contemplation, the notice should have either been given before six months had elapsed or the ICB should have given a further period of time in which provision of services could have commenced and indicated removal would take place after that period.
- 2.27 Notice should have been given with enough time for there to be consultation with the LPC and for meaningful representations from the concerned NHS Chemist to be made as set out in the Regulations. The timing of the notification was an extremely important consideration in this case as AHL was very close to being able to commence the provision of services. Had proper notification been given then it is arguable that by the time the six-month period had expired, and proper notification had been given, the pharmacy would have been providing services.
- 2.28 It is our client’s case that the ICB was not obliged to remove AHL until the correct notification process has been completed ie: a process that gave notice before removal became mandatory. Therefore, the determination by the ICB that it must remove the chemist premises was wrong as it had not followed the mandatory process to put it in the position where it could lawfully remove the premises from the pharmaceutical list.

It was open to the ICB to conclude that the premises should not be removed until the appropriate process had been followed.

- 2.29 In all the circumstances, we would ask you to allow our client's appeal. Pursuant to Schedule 3, paragraph 9(5) we ask you to quash the decision of the Pharmaceutical Services Regulations Committee for Kent and Medway Integrated Care Board and substitute a decision that the premises should not be removed from the pharmaceutical list. If there is an oral hearing to determine this matter our client would want to attend and be represented."

3 Summary of Representations

No representations were received by NHS Resolution in response to the appeal.

4 Consideration

- 4.1 The Appellant seeks to appeal against the decision of the Commissioner to remove its premises from the pharmaceutical list under Regulation 74(3) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations").
- 4.2 I note that the Notification of removal from the pharmaceutical list is dated 26 November 2024. The Notification states that:
- 4.2.1 *"No pharmaceutical services have been provided at the listed chemist premises since 23 April 2024 i.e. for a period of six months. Regulation 74(3) states the ICB must remove the listed chemist premises from the pharmaceutical list in such circumstances."*
- 4.3 It is not disputed that prior to the Notification being issued there was a letter of intention to remove sent to the Appellant on 23 October 2024. The Appellant has provided a copy of that letter which I note invited representations and the offer for the Appellant to make oral representations.
- 4.4 I note there is a discrepancy as to when oral representations were heard. The Appellant states that on 27 October 2024 an *"Appeal hearing - Zoom Call with ICB"* was held but makes no reference in its Chronology to a hearing on 20 November 2024. The Commissioner, in its decision of 26 November 2024 states *"the Oral Hearing held on the 20 November 2024."* I note however the Appellant is not listed as being in attendance on 20 November 2024. I therefore conclude, from the information before me that the Commissioner and the Appellant had a meeting on 27 October 2024 which was then discussed by representatives from the ICB to make their final decision on 20 November 2024 and that this resulted in the Notification letter on 26 November 2024.
- 4.5 The Appellant states:
- 4.5.1 *"Notice should have been given with enough time for there to be consultation with the LPC and for meaningful representations from the concerned NHS Chemist to be made as set out in the Regulations. The timing of the notification was an extremely important consideration in this case as AHL was very close to being able to commence the provision of services. Had proper notification been given then it is arguable that by the time the six-month period had expired, and proper notification had been given, the pharmacy would have been providing services."*
- 4.6 The Appellant further states:

4.6.1 *“the ICB was not obliged to remove AHL until the correct notification process has been completed ie: a process that gave notice before removal became mandatory. Therefore, the determination by the ICB that it must remove the chemist premises was wrong as it had not followed the mandatory process to put it in the position where it could lawfully remove the premises from the pharmaceutical list. It was open to the ICB to conclude that the premises should not be removed until the appropriate process had been followed.”*

4.7 Regulation 74(5) states:

“(5) Before taking a decision to remove C, or chemist premises listed in relation to C, from a pharmaceutical list under paragraph (1) or (3), NHS England must—

(a) give notice to C (or, in appropriate circumstances, a person whom NHS England reasonably believes is representing C or is an executor of C) of the decision that NHS England is minded to take;

(b) as part of that notification, advise C (or the representative or executor) that they may make—

(i) written representations to NHS England with regard to that action, provided they notify NHS England with those representations within 30 days beginning with the date of the notification by NHS England, and

(ii) oral representations to NHS England with regard to that action, provided—

(aa) they notify NHS England of their wish to do so within 30 days beginning with the date of the notification by NHS England, and

(bb) C (or the representative or executor, or someone representing the representative or executor) attends the hearing that NHS England arranges for the purpose of hearing those representations, which NHS England must give C reasonable notice of; and

(c) consult any Local Pharmaceutical Committee whose area includes the chemist premises that NHS England is minded to remove from the pharmaceutical list.”

4.8 The Appellant contends that neither a remedial notice nor breach notice have been issued prior to the letter of 23 October 2024 which, as the Appellant points out, is 6 months from 23 April 2024 (the date that the Appellant was added to the Pharmaceutical List). However, I am of the view that Regulation 74 does not specify that the Commissioner must issue any of these notices prior to the action of notifying the relevant party of its intention to remove its premises from the pharmaceutical list.

4.9 With regard to the Appellant's suggestion that *“Notice should have been given with enough time for there to be consultation with the LPC and for meaningful representations from the concerned NHS Chemist to be made as set out in the Regulations”*, I note the Appellant was given 30 days to make written representations. Furthermore, I must assume that both parties agreed to a mutually convenient date for the zoom appeal hearing held on 27 October 2024.. Had the Appellant considered their position to have been prejudiced by attending a hearing so soon then I would have expected the Appellant to have insisted on a meeting after the 30 days from the date of the intention to remove letter. An oral hearing was arranged with a member of Community Pharmacy Kent in attendance.

- 4.10 The Commissioner, in its Notification dated 26 November 2024, refers to written representations from the Appellant dated 11 November 2024. I note the Appellant has made no reference to these written representations in its chronology. The Notification indicates that the Appellant sought an extension of time of at least 28 days but that it would definitely be open by the end of January 2025. The Appellant states that it emailed the Commissioner on 15 November 2024 to say it could open on 2 December 2024. It is unhelpful that neither party has provided any supporting information to evidence their respective positions.
- 4.11 Based upon the 23 October 2024 letter and the fact that the Appellant attended the hearing on 27 October 2024, I am satisfied that the Commissioner gave proper notice to the Appellant of its intention to remove its premises from the pharmaceutical list, in accordance with Regulation 74(5). Whilst the Appellant has argued that by 23 October 2024 the six months had passed and thus the matter could not be remedied, the Regulations do not include a timescale for the Commissioner to issue the intention to remove letter. Furthermore, in my view, the intention to remove letter serves the dual purpose of indicating the Commissioner's position and enabling the NHS chemist to provide information to rebut the Commissioner's position that pharmaceutical services have not been provided.
- 4.12 Regulation 74 "Removal of listings: cases relating to death, incapacity or cessation of service" of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (the "Regulations"), states:
- "74.(3) If NHS England determines that C has not, during the preceding 6 months, provided pharmaceutical services at chemist premises ("the particular premises") listed in a particular pharmaceutical list—*
- (a) if there are other chemist premises listed in that pharmaceutical list in relation to C, NHS England must remove the listing of the particular premises from that list; or*
- (b) if there are no other chemist premises listed in that pharmaceutical list in relation to C, NHS England must remove C from that list."*
- 4.13 The Appellant contends that *"the ICB misdirected itself in finding that it was obliged to remove the listed chemist premises in circumstances where the required regulatory notification was not given appropriately."* As I have already considered above, I am satisfied that the letter of 23 October 2024 notified the Appellant of its intent.
- 4.14 I am of the view that where a Commissioner takes a decision to remove premises from the pharmaceutical list on the basis that no pharmaceutical services have been provided for six months, the burden is on the Commissioner to be reasonably satisfied that, in fact, no pharmaceutical services have been provided. In this case, I note that there is no dispute that the Appellant did not provide pharmaceutical services at the pharmacy for a six month period prior to the Notification of removal.
- 4.15 As noted above, the Appellant stated that it emailed the Commissioner to *"confirm that the pharmacy can open by 2nd Dec 2024"*. The Notification states the Appellant said the *"pharmacy they would need at least 28 days but due to the Christmas period it might be a little longer, however, they would definitely be able to open by the end of January 2025."* However there is no provision in the Regulations to allow for an extension of time. The circumstances in this case are unfortunate but ultimately responsibility lies with the person listed on the Pharmaceutical List to ensure that services are provided at the relevant premises within 6 months from the date that it is added to the Pharmaceutical List.

- 4.16 On the basis of the limited information provided, I am satisfied that the Appellant has not provided pharmaceutical services from the relevant premises for at least a six month period.

5 Decision

- 5.1 I am of the view that under NHS Resolution's powers, as set out in paragraph 9(5) of Schedule 3 to the Regulations, I may either confirm the decision of the Commissioner or substitute for that decision any decision that the Commissioner could have taken when it took that decision.
- 5.2 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm the decision of the Commissioner that the Appellant's premises are to be removed from the relevant pharmaceutical list.

Head of Appeals
NHS Resolution