

4 March 2025

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FILE REF: SHA/26414

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

COMMISSIONER: GREATER MANCHESTER ICB

PHARMACIST: HM ODELL LTD
("the Applicant")

PREMISES: 601 GORTON ROAD,
STOCKPORT,
SK5 6NX

**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 42¾ hours 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:

HM Odell Ltd
Greater Manchester ICB

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

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

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

1 Introduction

- 1.1 The Applicant has applied to the Commissioner to change the days and times at which it is obliged to provide pharmaceutical services at the above premises. The Applicant seeks to reduce the total number of core opening hours.
- 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).

2. Application

In this case, the Applicant provided the following information in its application form and supporting information dated 16 August 2024:

- 2.1 “This is an application to permanently change core opening hours.
- 2.2 Current opening hours for these premises:

Monday	9am – 6pm (closed for lunch 1pm – 2:15pm)
Tuesday	9am – 6pm (closed for lunch 1pm – 2:15pm)
Wednesday	9am – 6pm (closed for lunch 1pm – 2:15pm)
Thursday	9am – 6pm (closed for lunch 1pm – 2:15pm)
Friday	9am – 6pm (closed for lunch 1pm – 2:15pm)
Saturday	9am – 1pm
Sunday	Closed

2.3 Proposed core opening hours for these premises:

Monday	9am – 6pm (closed for lunch 1pm – 2:00pm)
Tuesday	9am – 6pm (closed for lunch 1pm – 2:00pm)
Wednesday	9am – 6pm (closed for lunch 1pm – 2:00pm)
Thursday	9am – 6pm (closed for lunch 1pm – 2:00pm)
Friday	9am – 6pm (closed for lunch 1pm – 2:00pm)
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 01/10/2024

2.5 Pharmacy services will remain the same, we do not have many patients come in on Saturdays and to ensure patients are not affected by this we will offer deliveries to every patient throughout the week ensuring they receive their medication. I have also considered those patients who need are in need of pharmacy services on the weekend such as Pharmacy first or emergency supply. For these patients nearby pharmacies are open on Saturdays which offer the same services (windmill pharmacy, Tesco pharmacy & Gorton pharmacy), therefore patient care is not affected.

2.6 We will maintain as necessary the existing level of service provision for people in the area of the pharmacy

2.7 Note:

2.8 In the email it says I have included the wrong opening times according to the pharmaceutical list, I am unable to locate this list. The hours stated on this form are the hours continued from the previous owner and is the hours stated on DOC and NHS website. If this is incorrect please forward the list to me and I will change the form, Thank you."

3. The Decision

In a letter to the Applicant dated 6 November 2024 the Commissioner decided to refuse the application. The Commissioner stated:

3.1 "HM Odell Ltd's application to reduce the core opening hours of the above community pharmacy has been considered by the NHS Greater Manchester Integrated Care Board's Pharmaceutical Services Regulations Committee (the PSRC).

3.2 The applicant to redistribute their 40 core hours from the hours below.

3.3 [See tables above at 2.2 and 2.3]

3.4 In order to be granted, the application must meet the requirements of paragraph 26(2A), Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (the 2013 regulations).

“(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.”

- 3.5 The application was assessed against the requirements of the above paragraph, and the PSRC's findings are set out below:
- 3.6 The contractor provided the statement below within their application:
- 3.7 The contractor did not provide any evidence such as an audit of recent prescriptions dispensed or OTC sales taken on a Saturday to support their statement “we have very few customers/patients come in on Saturdays”
- 3.8 The nearest pharmacy that would be open on a Saturday would be Windmill Pharmacy, which is 0.9 miles away and 21 minute walk away, 4 mins via car and 7 min via public transport.
- 3.9 [Map provided]
- 3.10 However, the PSRC also noted a lack of information relating to patient need, other than the statement provided “Pharmacy services will remain the same, we have very few customers/patients come in on Saturdays and to ensure patients are not affected by this we will offer deliveries to every patient throughout the week ensuring they receive their medication. I have also considered those patients who need are in need of pharmacy services on the weekend such as Pharmacy first or emergency supply. For these patients nearby pharmacies are open on Saturdays which offer the same services (windmill pharmacy, Tesco pharmacy & Gorton pharmacy), therefore patient care is not affected.
- 3.11 We will maintain as necessary the existing level of service provision for people in the area of the pharmacy”
- 3.12 In the absence of any supporting evidence in respect of the statement “we have very few customers/patients come in on Saturdays” the PSRC considered that it could not assess whether the proposed core hours changes would continue to offer “adequate service provision for the people in that area or other likely users of the pharmacy premises”. The PSRC therefore concluded that it was not able to satisfy itself that the application fully met condition (b).
- 3.13 The PSRC **refused** the application to redistribute the core hours to enable closure on a Saturday on a permanent basis.
- 3.14 **What happens now?**
- 3.15 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 receiving this notice by email to nhsr.appeals@nhs.net or by post to:

3.15.1 Primary Care Appeals, NHS Resolution, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU”

4. **The Appeal**

In an undated letter to NHS Resolution, received 6 December 2024, the Applicant appealed against the Commissioner’s decision. The grounds of appeal are:

4.1 **“Request/Appeal to close the pharmacy on Saturdays**

4.2 **Why Closing the Pharmacy Would Not Affect Patients**

4.3 I have attached a four week audit [copy provided] which was conducted from 09/11/24 to 30/11/24. I have converted the table into a word document and attached it to the email.

4.4 This audit did not account for phone calls after the first week, as these requests could have been handled on weekdays when the surgeries were open, and phone consultations could have been conducted at any pharmacy.

4.5 The Audit did not include those customers who came to the pharmacy to buy shop items as these items are not urgent and there is an Asda which sell the same items. Asda is around a 4-5 minute walk.

4.6 The Audit did include patients who came in to the pharmacy to collect their medications, buy OTC products and pharmacy first/111 referrals.

4.7 Distance to nearby pharmacies which are open on Saturdays–

4.7.1 Windmill Pharmacy (1.0 miles – 4 minutes in car- 17 minute walk)

4.7.2 Tesco Pharmacy (0.9 miles – 5 minutes in car – 21 minute walk)

4.7.3 Gorton Pharmacy (0.8 miles – 6 minutes in car – 22 minute walk)

4.7.4 Asda (for shop lines) (170yd - 4 minute walk)

4.8 The audit indicates that the majority of patients are able to collect their medications during weekdays or prefer to have them delivered during the week. Many of the patients who visit the pharmacy on Saturdays also come in during the week. Saturdays tend to be quieter, requiring only one staff member in addition to the pharmacist. Given that weekdays can be busier, it would be more advantageous to shorten lunch breaks during the week rather than remain open on Saturdays, as the extended lunch breaks can sometimes cause inconvenience for patients.

4.9 While we understand that closing our pharmacy may raise some concerns, we would like to reassure our patients that they will continue to have access to the medications and services they need. There are several key factors that ensure patients will not be adversely affected:

4.9.1 Delivery Services: We offer convenient medication delivery options directly to patients' homes, so those who rely on our pharmacy will continue to receive their prescriptions without disruption. Whether it's for routine medications or

urgent needs, our delivery system is designed to ensure timely and safe access to all necessary medications.

- 4.9.2 Nearby Pharmacies: There are several other pharmacies in close proximity, many of which are able to fill prescriptions and offer services similar to ours. We have established relationships with local providers, and patients will not have to travel far to receive the same quality of care as according to the audit majority of patients own a vehicle or know someone who can drive them.
- 4.9.3 Transfer of Prescriptions: If needed, we can assist with transferring prescriptions to another local pharmacy, making the transition seamless for patients. We are committed to ensuring that there is no lapse in care or service for our community members.
- 4.9.4 Continuity of Care: We will work closely with other healthcare providers to make sure that there is no disruption in ongoing treatments or care plans. Whether it's for chronic conditions or short-term prescriptions, patients can rest assured that their needs will be addressed.
- 4.10 In conclusion, if we are close our pharmacy on Saturdays, we will remain committed to patient care and convenience. With delivery services and nearby pharmacies available, we believe that the closure will have minimal impact on patient access to medications and services.
- 4.11 I hope you will consider all of these points when making your decision. Thank you for taking the time to review this."

5. Representations

In a letter to NHS Resolution dated 23 December 2024 the Commissioner stated:

- 5.1 "Thank you for your letter dated 11th December 2024 with regards to the above appeal received from HM Odell Ltd.
- 5.2 We originally received a request from HM Odell Ltd on 2nd September 2024 to amend their core hours by distributing the hours during the week and requesting to close on Saturdays. A response was provided to the contractor on 25th September 2024, this response stated that the incorrect form was used, the current opening hours provided in the form were incorrect and an update on the guidance relating to the date of commencing given on the form and the required timescales for these decisions. The contractor was asked to provide the correct form with correct open hours by 26th September 2024 in order for the request to be added to the agenda for PSRC on 27th September 2024.
- 5.3 Unfortunately no updated form was received by the deadline given and the panel were unable to make a formal decision on the request at PSRC on 27th September 2024. The information below it taken directly from the minutes of the meeting.
- 5.4 "The PSRC determined that this application cannot be actioned, as the core hours are incorrect and to resend then it will be considered. Wanted to start 2nd October, but has been advised otherwise."
- 5.5 A further request was taken to PSRC on 24th October 2024 for discussion. The Panel's decision was to refuse the application, below is the outcome taken directly from the minutes of the meeting.

- 5.6 “The applicant wanted to redistribute their 40 core hours from 09:30-18:00 Monday to Friday (closed for lunch 13:00-14:15), Saturday 09:00-12:45, Sunday closed to 09:00-18:00 Monday to Friday (closed for lunch 13:00-14:00), Saturday and Sunday closed.
- 5.7 The PSRC **refused** the application due to the lack of evidence provided to support the application and the decision letter is attached.”
- 5.8 The contractor was notified of this decision, the letter was dated 6th November 2024.
- 5.9 We note that the contractor has included with their appeal an audit of activity, however this was not presented as part of the application to PSRC.”

6. Observations

No observations were received in response to the representations.

7. Consideration

- 7.1 I note the following:
- 7.1.1 The Applicant's core opening hours total 42¾ hours as taken from its application form (not 40 hours as stated by the Commissioner) and the Applicant seeks to change the days on which and times at which the Applicant is obliged to provide pharmaceutical services at its pharmacy premises in a way that reduces the total number of hours for which the Applicant is obliged to provide pharmaceutical services.
- 7.1.2 The Applicant seeks to reduce the total number of core opening hours by closing on Saturdays, and redistribute some of those hours over Monday – Friday.
- 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 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 of the hours that pharmacies in the local area are open, albeit limited.
- 7.14 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 each week that services are provided, then from a pure "number of hours of service provision each week" perspective, the existing level of service provision would not be maintained.
- 7.15 Therefore 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 I note the Applicant's comment that *"Saturdays tend to be quieter, requiring only one staff member in addition to the pharmacist. Given that weekdays can be busier, it would be more advantageous to shorten lunch breaks during the week rather than remain open on Saturdays, as the extended lunch breaks can sometimes cause inconvenience for patients."*
- 7.18 The Applicant has provided the results of a survey which it carried out in November 2024 to establish what services patients were accessing at the times that the Applicant proposes to close. Further the Applicant posed the question "What would you do if we closed on Saturdays?"
- 7.19 The survey was conducted on Saturdays during November 2024 and showed a low number of people using the pharmacy at the relevant times. The Applicant states that the *"audit did not account for phone calls after the first week, as these requests could have been handled on weekdays when the surgeries were open, and phone consultations could have been conducted at any pharmacy."* Also *"the audit did not include those customers who came to the pharmacy to buy shop items as these items are not urgent and there is an Asda which sell the same items."* *"The Audit did include patients who came in to the pharmacy to collect their medications, buy OTC products and pharmacy first/111 referrals."*
- 7.20 It is clear that there are people using the pharmacy at the times the Applicant wishes to close, therefore I consider that it is necessary to maintain the existing level of service provision.
- 7.21 The Applicant contends that many patients who come in on Saturdays also come in during the week, however no information has been provided to support this assertion. The Applicant continues by stating that many patients are able to collect their medications during weekdays or prefer to have them delivered during the week, however I am mindful that pharmaceutical services are not limited to obtaining prescriptions and so I will need to consider other services offered.
- 7.22 I 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 according to the Applicant are open during the times that the Applicant is proposing to close, namely Asda, Gorton Pharmacy, Tesco Pharmacy and Windmill Pharmacy.

- 7.23 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).
- 7.24 The Applicant has provided some information regarding access to those pharmacies for those who currently access its own pharmacy and how they might travel to find alternative pharmaceutical services. The Applicant has considered a mix of people who drive to the Applicant's pharmacy and those who walk.
- 7.25 It is worth noting that characteristics of the persons using the pharmacy might be relevant here as well as from where they start their journey to the pharmacy. I do not consider that every single individual need should be considered at length in this regard but it would be helpful to have this information to be certain that the existing level of service provision would be maintained via local pharmacies.
- 7.26 According to the Applicant, the following pharmacies are open on Saturdays:
- 7.26.1 Windmill Pharmacy (1.0 miles – 21 minute walk, 4 minutes in car)
- 7.26.2 Tesco Pharmacy (0.9 miles – 5 minutes in car – 21 minute walk)
- 7.26.3 Gorton Pharmacy (0.8 miles – 6 minutes in car – 22 minute walk)
- 7.26.4 Asda (for shop lines) (170yd - 4 minute walk)
- 7.27 However I have not been provided with any details of the routes involved. I am therefore unable to determine whether the route on foot is suitable for all those needing to undertake the journey in order to access pharmaceutical services, for example whether there is sufficient street lighting, dropped kerbs and pedestrian crossings where necessary. Further, although comments from the survey included “*would drive to another pharmacy*”, I have not been provided with any information in relation to parking facilities at the alternative pharmacies for those with access to a car.
- 7.28 Further I do not have any information as to whether the hours provided on “Saturdays” are core hours, mindful that supplementary hours may be altered by the pharmacy giving notice to the Commissioner.
- 7.29 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.
- 7.30 I have decided that it is necessary to maintain the current service provision but, due to a lack of information regarding access to alternative pharmacies and what their core hours are, I am not satisfied that there will be maintenance of the existing level of service provision, by virtue of other pharmacies in the area.
- 7.31 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”.*

- 7.32 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.
- 7.33 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.
- 7.34 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 for example. 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).
- 7.35 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.
- 7.36 I am therefore minded not to agree the change of the Applicant's core opening hours.
- 7.37 In determining an application made under paragraph 26(1) of Schedule 4 of the Regulations, paragraph 26(4) indicates that the Commissioner must:
- 7.37.1 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;
 - 7.37.2 confirm any existing direction in respect of the times at which the pharmacist must provide pharmaceutical services at the pharmacy premises; or
 - 7.37.3 either:
 - 7.37.3.1 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
 - 7.37.3.2 in a case where there is no existing direction, issue no direction,
- 7.38 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 is possible that it would have been NHS England who was responsible for issuing a direction to the previous owner in relation to the hours above 40 core hours.
- 7.39 Neither the Applicant nor Commissioner have referred to a direction in place. Therefore I have proceeded on the basis that a direction has not been issued requiring the Applicant to open for the extra 2¾ hours in respect of its core opening hours.
- 7.40 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.

- 7.41 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.
- 7.42 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.
- 7.43 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.
- 7.44 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.
- 7.45 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).
- 7.46 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.
- 7.47 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.
- 7.48 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 42¾ 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**