

24 April 2025

REF: SHA/26389

**APPEAL AGAINST SOUTH YORKSHIRE ICB
DECISION TO REFUSE EXEL PHARMACY LIMITED
APPLICATION FOR CHANGE OF OWNERSHIP FROM
MANOR COMMUNITY PHARMACY LIMITED T/A
VANTAGE PHARMACY IN RESPECT OF 2 RIDGEWAY
ROAD, MANOR TOP, SHEFFIELD, S12 2SS**

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Tel: 020 3928 2000
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1 Outcome

- 1.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, quashes the decision of the Commissioner and redetermines the application.
- 1.2 The Committee determined that the application should be granted

A copy of this decision is being sent to:

Exel Pharmacy Ltd
Manor Community Pharmacy Limited
Primary Care Support England (on behalf of NHS South Yorkshire ICB)
Community Pharmacy South Yorkshire

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1 The Application

By application dated 11 July 2024, Exel Pharmacy Ltd (“the Applicant”) applied to South Yorkshire ICB (“the Commissioner”) for a change of ownership from Manor Community Pharmacy Limited in respect of Vantage Pharmacy, 2 Ridgeway Road, Manor Top, Sheffield, S12 2SS. In support of the application it was stated:

1.1 “I/we propose to carry on at the above premises, the business in the course of which the above owner is providing pharmaceutical services at the above premises.”

1.2 Opening Hours

1.3 Core opening hours

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Total
09:15 – 17:30	09:15 – 17:30	09:15 – 17:30	09:15 – 13:00	09:15 – 17:30	09:15 – 12:30	closed	40

1.4 Total opening hours

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Total
09:00 – 18:00	09:00 – 18:00	09:00 – 18:00	09:00 – 17:30	09:00 – 18:00	09:00 – 16:30	closed	52

1.5 The Applicant confirmed that Essential Services (paragraph 3 to 22, Schedule 4) were to be provided.

1.6 The Applicant confirmed that the pharmacy premises will have a consultation room that meets the requirements of paragraph 28A, Schedule 4 of the Regulations.

1.7 In response to why the application should not be refused pursuant to Regulation 31, the Applicant stated “N/A – this is a change of ownership”.

- 1.8 The Applicant confirmed by ticking “Yes” that the services they are undertaking to provide are the same as those that the current owner is providing.
- 1.9 The Applicant confirmed by ticking “No” that there would not be any interruption to service provision.

2 The Decision

The Commissioner considered and decided to refuse the application. The decision letter dated 6 November 2024 states:

- 2.1 “We have considered the above application, and I am writing to confirm that it has been refused. Please see the enclosed report for the full reasoning.
- 2.2 You have a right of appeal to the Secretary of State against South Yorkshire ICB’s decision. Should you choose to appeal then you should either complete the online form available on the NHS Resolution website or 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
- 2.3 Primary Care Appeals, NHS Resolution, 8th Floor 10 South Colonnade, Canary Wharf, London, E14 4PU”

DECISION REPORT

- 2.4 “I can confirm that the application has been refused on the grounds that Regulation 31 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 applies.
- 2.5 Regulation 31 states that where a pharmacy contractor is providing or has undertaken to provide pharmaceutical services in the premises to which the application relates, or adjacent premises, and the services in the application are deemed to be part of the same service as the existing services, the application must be refused.
- 2.6 After reviewing Companies House, it has been confirmed that Exel Pharmacy Ltd (the Applicant) and Manor Community Pharmacy Ltd (the current owner) have the same directors at the point of the writing the Committee Report. The directors are named Oluwakemi Olatundun Fabiya, Temitao Adeleke Fabiya, Adebola Mayowa Popoola and Olusegun Matthew Popoola. This confirms there is a degree of shared control and ownership and thus in virtue of Regulation 31, the application must be refused.
- 2.7 Right of Appeal
 - 2.7.1 Exel Pharmacy Ltd”

3 The Appeal

In an undated letter, received on 15 November 2024 the Applicant appealed against the Commissioner’s decision. The grounds of appeal are:

- 3.1 “We are writing to appeal the decision of the South Yorkshire ICB to refuse our application for change of ownership from Manor Community Pharmacy, Sheffield to Exel Pharmacy Limited on the grounds of misapplication of regulation 31.
- 3.2 Our grounds of appeal are as follows:

- 3.2.1 The original decision for refusal was incorrect based on available evidence. Kindly find attached a similar case that the Appeals Committee [sic] decided to overturn the decision of the ICB [provided at Appendix A for Committee], as the Committee concludes that regulation 31 has been incorrectly applied.
- 3.2.2 Regulation 31 has been misapplied in our case as well.
- 3.2.3 There is no other legal frame work for change of ownership for contractors who acquires [sic] a new contract by share sale to change to either the parent company, or to a new legal entity.
- 3.3 We hope to hear from you soon.”

4 Summary of Representations

This is a summary of representations received on the appeal.

4.1 COMMUNITY PHARMACY SOUTH YORKSHIRE

- 4.1.1 “Thank you for your letter dated 29 November 2024 concerning the above appeal. Members of Community Pharmacy South Yorkshire considered this appeal and it is on behalf of them that I am responding.
- 4.1.2 In considering this appeal members were mindful of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.
- 4.1.3 They have asked me to make the following comments:
 - 4.1.3.1 The original decision made by South Yorkshire ICB and the subsequent appeal hinge on the interpretation of Regulation 31 of these regulations.
 - 4.1.3.2 The interpretation is a technical matter upon which Community Pharmacy South Yorkshire have no comments to make at this time.
 - 4.1.3.3 To the best of our knowledge the outcome of this appeal will have no bearing on patients or the provision of pharmaceutical services.
- 4.1.4 Please keep Community Pharmacy South Yorkshire informed of [sic] progress. We may like to comment further should the opportunity arise including attending and commenting at any oral hearing.”

4.2 BOOTS UK LTD

- 4.2.1 “Thank you for your letter dated 29 November 2024 informing us of the above appeal.
- 4.2.2 Boots UK Ltd have no comments to make but respectfully ask that NHS Resolution inform us of the decision in due course.”

5 Observations

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

6 Consideration

- 6.1 The Pharmacy Appeals Committee (“Committee”) appointed by NHS Resolution, had before it the papers considered by the Commissioner.
- 6.2 It also had before it the responses to NHS Resolution’s own statutory consultations.
- 6.3 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.
- 6.4 The Committee first considered Regulation 31 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”), which states:
- (1) A routine or excepted application, other than a consolidation application, must be refused where paragraph (2) applies.*
- (2) This paragraph applies where -*
- (a) a person on the pharmaceutical list (which may or may not be the applicant) is providing or has undertaken to provide pharmaceutical services (“the existing services”) from -*
- (i) the premises to which the application relates, or*
- (ii) adjacent premises; and*
- (b) NHS England is satisfied that it is reasonable to treat the services that the applicant proposes to provide as part of the same service as the existing services (and so the premises to which the application relates and the existing listed chemist premises should be treated as the same site).*
- 6.5 The Committee noted that in Part 5 of the application form, the Applicant had stated: “N/a – this is a change of ownership”.
- 6.6 The Committee noted that the Commissioner had sought to refuse the application on the provisions of Regulation 31. The Committee considered that, as the application was not a consolidation application, it must be refused if Regulation 31(2)(a) and 31(2)(b) were to apply.
- 6.7 The Committee noted there is no dispute between the parties that Manor Community Pharmacy Limited intended to change the ownership of the premises at 2 Ridgeway Road, Manor Top, Sheffield, S12 2SS to be under Exel Pharmacy Limited.
- 6.8 The Committee noted that there is no dispute between the parties that the directors of Manor Community Pharmacy Limited are the same as the directors of Exel Pharmacy Limited.
- 6.9 The Committee noted the comment in the appeal that the Applicant is of the opinion that Regulation 31 has been misdirected however did not specify which part of Regulation 31 it believed did not apply. However, the Committee noted that the language used in paragraph 2.6 in the Commissioner’s decision was reflective of the wording in Regulation 31(2)(a), regarding the type of premises to which Regulation 31(2)(a) applies. The Committee considered that Regulation 31(2)(a) does not refer to a point in time in the future but instead looks to the situation as it is when the decision maker is making their decision in respect of the application.
- 6.10 The Committee noted the Applicant’s appeal stated “there is no other legal frame work for change of ownership for contractors who acquires [sic] a new contract by share sale to change to either the parent company, or to a new legal entity”. Consequently, the

Committee considered that Regulation 31(2)(a) applied as a person on the pharmaceutical list, Manor Community Pharmacy Limited, is providing pharmaceutical services from the premises to which the application relates, i.e. Manor Pharmacy Limited t/a Vantage Pharmacy and that this was not disputed by either of the parties.

- 6.11 The Committee next considered whether Regulation 31(2)(b) applied.
- 6.12 The Committee was mindful of *R (Pharmacy Care Plus) v FHSU [2013] EWHC 824 (Admin)*. The Committee considered that this case would likely provide a guide to interpreting Regulation 31(2)(b). Having regard to it the Committee noted the following wording:

“it will almost always be an extremely relevant consideration to know whether or not there is any connection in terms of ownership and control between the entities who carry on the existing business and who propose to carry on the proposed new business. So, for example, if an existing business was owned by Company A and the proposed business was owned by Company B, and there was absolutely no connection at all in terms of ownership and control between the two of them, it would be difficult to see how they could be regarded as providing the same service, even if the services which they were going to provide were complementary to each other. In contrast, if they were both to be provided by exactly the same company, then that would also be an extremely relevant consideration going the other way.”

- 6.13 The Committee noted that the language used by Davies J was not such that if the services were to be provided by the same company this should be definitive but rather that it would be an “*extremely relevant consideration*”. The Committee considered, therefore, that where an applicant is making a routine or excepted application, other than a consolidation application, and the premises to which the application relates, or adjacent premises, are run by the same directors, then the starting point should be that the application should not be granted under Regulation 31(2)(b). This is on the basis that the connection between the existing and proposed pharmacies would be such that, in most circumstances, the condition set out in Regulation 31(2)(b) would be met.
- 6.14 The Committee considered that this is not an irrebuttable presumption and that circumstances might arise whereby, despite the close connection, the application may not need to be refused. The Committee specifically noted that Regulation 31(2)(b) includes a reasonableness element. It is not, therefore, merely factual but provides for some level of discretion in its application. The Committee therefore proceeded to consider the reasoning set out by the Applicant.
- 6.15 The Applicant had stated that “*there is no other legal frame work for change of ownership for contractors who acquires [sic] a new contract by share sale to change to either the parent company, or to a new legal entity.*”
- 6.16 The Committee noted that Regulation 75(1) provides that:

75.–(1) If, as a consequence of a change of ownership application or a consolidation application, an NHS chemist (C) is no longer to be the person listed in a pharmaceutical list in relation to a particular pharmacy premises—

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

(b) if there are no other chemist premises listed in that pharmaceutical list in relation to C, subject to regulation 76, NHS England must remove C from that pharmaceutical list.

- 6.17 The Committee considered that where a successful change of ownership application is made, and the notice of commencement is made under Schedule 2 paragraph 34, then, when the Commissioner updates the relevant pharmaceutical list, the preceding entity must be replaced by the incoming. The Committee considered that a change of ownership application will not allow for the continued existence of the pharmacy that is to be changed. The Committee noted that the notice of commencement was necessary for the new owners to be included in the pharmaceutical list; it could not begin to provide services without it. The Committee considered that, if there was no notice of commencement, the existing pharmacy owners would continue to provide services, and the new pharmacy owners would not. The Committee concluded that the combined operation of paragraph 34 of Schedule 2 and Regulation 75 was such that either the new owner could operate, or the old owner could operate, but would not permit both owners to operate at the same time.
- 6.18 The Committee applied this understanding to the wording of Regulation 31(2)(b) and noted that this was consistent with NHS Resolution's published guidance on Regulation 31. That guidance notes that the Department of Health guidance clearly indicated the intent of Regulation 31:
- “The purpose of this regulation is to prevent a contractor from applying for multiple inclusions in a pharmaceutical list at the same address with no benefit to patients.”
- 6.19 The Committee considered that this elaborated on the point that the operation of Regulation 31 was to prevent there being two pharmacies operating at the same location.
- 6.20 Following this the Committee then considered if it would be reasonable to treat the proposed services as part of the same service as the existing services in accordance with the wording of Regulation 31(2)(b). The Committee considered that, despite there being the same directors for both Manor Community Pharmacy Limited and Exel Pharmacy Limited, this mandated removal from the pharmaceutical list under Regulation 75 and Schedule 2 paragraph 34 needed to be accounted for. The Committee noted that the application of Regulation 75 was automatic, mandated and specific. It considered that the existing services would have to, by necessity, cease when the new owner was entered into the pharmaceutical list, as they would no longer be on the pharmaceutical list and so no longer be able to operate under the Regulations. The Committee therefore concluded that there would not be two operational pharmacies, as a result of Regulation 75, aligning with the understood intention of Regulation 31.
- 6.21 The Committee also noted that existing guidance on Regulation 31 did not refer to any determinations that were pure change of ownership applications, as is the case in this appeal. The Committee considered that other routine or excepted applications that do not mandate the removal of the existing owner should, by necessity, be treated entirely differently to the current appeal. The Committee considered that if there was any possibility for the continued service provision by the existing contractor this would result in it requiring the application to be refused. The Committee also considered that each change of ownership needed to be considered on its own facts as there may be certain circumstances that lead to it being reasonable to determine that Regulation 31(2)(b) is satisfied and the application should be refused.
- 6.22 The Committee considered that it is not required to refuse the application pursuant to Regulation 31 as, due to the mandatory requirement to remove Manor Community Pharmacy Limited from the pharmaceutical list, it would not be reasonable to treat the services currently being provided by Manor Community Pharmacy Limited as part of

the same services that would be provided by Exel Pharmacy Limited, under the application.

- 6.23 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:
- 6.23.1 confirm the Commissioner's decision;
 - 6.23.2 quash the Commissioner's decision and redetermine the application;
 - 6.23.3 if it considers that there should be a further notification to the parties to make representations, quash the Commissioner's decision and remit the matter to the Commissioner.
- 6.24 The Committee went on to consider whether there should be a further notification to parties as detailed at paragraph 19 of Schedule 2 of the Regulations to allow them to make representations if they so wished (in which case it would be appropriate to remit the matter to the Commissioner) or whether it was preferable for the Committee to redetermine the application, in relation to Regulation 26(1). However, as a change of ownership application under Regulation 26(1) is not a notifiable application, then paragraph 19 of Schedule 2 of the Regulations did not apply to this appeal. Consequently, paragraph 9(1)(a)(iii) did not apply and the Committee was unable to remit the decision to the Commissioner.
- 6.25 Given that the Committee had found that the application should not have been refused under Regulation 31, the Committee determined that the decision of the Commissioner must be quashed. The Committee noted that due to determining that Regulation 31 applied the Commissioner did not go on to consider the application of Regulation 26(1) in relation to the application. The Committee had therefore invited comments from all parties in relation to Regulation 26(1) but no further representations or observations had been received. The Committee therefore proceeded to consider Regulation 26(1) on the basis of the Applicant's original application, and any other relevant information, in relation to each condition.
- 6.26 The Committee noted Regulation 26(1) (*Change of ownership applications*) of the Regulations, which reads:
- "Section 129(2A) of the 2006 Act (regulations as to pharmaceutical services) does not apply to an application from a person who is not included in a pharmaceutical list for inclusion in the list, or from a person included in a pharmaceutical list for inclusion in that list also in respect of other premises than those already listed in relation to that person, if-*
- (a) *the applicant (X) is undertaking to provide pharmaceutical services at premises-*
 - (i) *that are already listed chemist premises, and*
 - (ii) *at which another person (Y) is providing pharmaceutical services;*
 - (b) *X is proposing to carry on at the listed chemist premises, in place of Y, the business in the course of which Y is providing pharmaceutical services at those premises;*
 - (c) *X is undertaking to provide the same pharmaceutical services as those that Y is providing; and*

- (d) *the provision of pharmaceutical service at the premises will not be interrupted (except for such period as NHS England may for good cause allow)."*

- 6.27 The Committee considered the position in relation to each condition.
- 6.28 The Committee noted that the Regulations are specific in the conditions an applicant must satisfy, if its proposed change of ownership is to succeed.
- 6.29 The Committee has considered each of these paragraphs in turn, applying them to the information provided in the application form, unless (in relation to any of those paragraphs) the Applicant has provided amended/updated information.

Regulation 26(1)(a)

- 6.30 The Committee noted there is no dispute that the application is in respect of listed chemist premises at 2 Ridgeway Road, Manor Top, Sheffield, S12 2SS. The Committee was satisfied that this was sufficient for the purposes of paragraph (a).

Regulation 26(1)(b)

- 6.31 The Committee noted the Applicant is proposing to carry on at the listed premises in place of Manor Community Pharmacy Limited t/a Vantage Pharmacy, the business in the course of which Manor Community Pharmacy Limited is providing pharmaceutical services at those premises.
- 6.32 The Committee was satisfied that this was sufficient for the purposes of paragraph (b).

Regulation 26(1)(c)

- 6.33 The Committee noted the Applicant intends to provide the services as those provided by the existing pharmacy. The Committee was satisfied that this was sufficient for the purposes of paragraph (c).

Regulation 26(1)(d)

- 6.34 On the information before it, the Committee was satisfied that were the actual change of ownership to take place, no interruption, as described in paragraph (d), would occur.

Consequences of satisfying paragraphs (a) to (d) of Regulation 26(1)

- 6.35 Being satisfied of the various matters set out in Regulation 26(1), the Committee considered that the application should be granted.

7 Decision

- 7.1 The Committee quashes the decision of the Commissioner and re-determines the application.
- 7.2 The Committee concluded that it was not required to refuse the application under the provisions of Regulation 31.
- 7.3 The Committee has determined that it should be granted on the following basis:
- 7.3.1 the Applicant is proposing to continue in place of the existing contractor, the business in the course of which that contractor is providing pharmaceutical services at the same premises;

- 7.3.2 the Applicant can provide the same pharmaceutical services as those that the existing contractor is providing;
 - 7.3.3 that the provision of pharmaceutical services will not be interrupted (except for such period as the Commissioner may for good cause allow).
- 7.4 The application is granted.

Case Manager
Primary Care Appeals