

2 June 2025

REF: SHA/26618

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**APPEAL AGAINST HUMBER AND NORTH YORKSHIRE ICB
DECISION NOT TO GIVE THIRD PARTY APPEAL RIGHTS TO
HAXBY GROUP PHARMACY LTD IN RESPECT OF THE DECISION
TO GRANT AN APPLICATION BY THE PHARMACY GROUP
CORPORATION LTD FOR INCLUSION IN THE PHARMACEUTICAL
LIST OFFERING TO MEET A CURRENT NEED AT Y030
POSTCODE WITH BEST ESTIMATE SITES BETWEEN: WATER
LANE AND PETERSWAY ALONG THE A19 (CLIFTON), 6/6A
COMPTON STREET, CLIFTON, YO30 6LE, 2 COMPTON STREET,
CLIFTON, YO30 6LE, INSIDE YORK MEDICAL GROUP - WATER
LANE, YO30 6PS**

1 Outcome

- 1.1 Haxby Group Pharmacy Ltd is a person with third party appeal rights against the decision of the Commissioner set out in its letter dated 7 May 2025 (and notified to Haxby Group Pharmacy Ltd by letter dated 7 May 2025).

A copy of this decision is being sent to:

Rushport Advisory LLP, on behalf of Haxby Group Pharmacy Ltd
The Pharmacy Group Corporation Ltd
PCSE on behalf of Humber and North Yorkshire ICB
York Health and Wellbeing Board
Community Pharmacy North Yorkshire

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1 The Application

By application dated 17 November 2024, The Pharmacy Group Corporation Ltd (“the Applicant”) applied to the Humber and North Yorkshire ICB (“the Commissioner”) for inclusion in the pharmaceutical list offering to meet a current need at Y030 postcode with best estimate sites between: Water Lane and Petersway along the A19 (Clifton), 6/6a Compton Street, Clifton, YO30 6LE, 2 Compton Street, Clifton, YO30 6LE, inside York Medical Group - Water Lane, YO30 6PS.

2 Process

The Commissioner gave notice of the notifiable application in accordance with the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”) by cover letters dated 8 January 2025, 13 February 2025 and 20 February 2025. This is a summary of representations made to the Commissioner by Rushport Advisory LLP, on behalf of Haxby Group Pharmacy Ltd, in an email dated 13 February 2025 (i.e. within 45 days as set out in the Regulations):

- 2.1 “My client notes this application and submits that the application from Haxby Group Pharmacy Limited should be preferred. Please keep us updated with any correspondence or decision.”

3 The Decision

The Commissioner considered and decided to grant the application by The Pharmacy Group Corporation Ltd. The decision letter dated 7 May 2025 did not give a right of appeal to any party.

- 3.1 “Humber and North Yorkshire ICB has considered the above application, and I am writing to confirm that it has been granted. Please see the enclosed report for the full reasoning.”

Decision report

- 3.2 “Humber & North Yorkshire (HNY) Integrated Care Board (ICB) has considered the above application, and I am writing to inform you that it has been granted as all the elements of the Regulation 13(2) were met.
- 3.3 **Regulation 13(2) those matters are:**
- 3.4 **(a)whether it is satisfied that it would be desirable to consider, at the same time as the applicant’s application, applications from other persons offering to meet the current need mentioned in paragraph (1) that the applicant is offering to meet;**
- 3.5 In relation to Regulation 13(2)(a), the ICB is satisfied that it would be desirable to consider, at the same time as the applicant’s application, applications from other persons offering to meet the current need mentioned in paragraph (1) that the applicant is offering to meet
- 3.6 **(b)whether it is satisfied that another application offering to meet the current need mentioned in paragraph (1) has been submitted to it, and it would be desirable to consider, at the same time as the applicant’s application, that other application;**
- 3.7 In relation to Regulation 13(2)(b), the ICB is satisfied that another application offering to meet the current need mentioned in paragraph (1) has been submitted to it, and it would be desirable to consider, at the same time as the applicant’s application, that other application
- 3.8 **(c)whether it is satisfied that an appeal relating to another application offering to meet the current need mentioned in paragraph (1) is pending, and it would be desirable to await the outcome of that appeal before considering the applicant’s application;**
- 3.9 This not applicable [sic]
- 3.10 **d)whether it is satisfied that, since the publication of the relevant pharmaceutical needs assessment, there have been changes to the needs for pharmaceutical services in the area of the relevant HWB that are such that refusing the application is essential in order to prevent significant detriment to the provision of pharmaceutical services in that area;**
- 3.11 In relation to Regulation 13(2)(d), the ICB is satisfied that since the publication of the relevant PNA, there have been changes to the need for pharmaceutical services in the Clifton area of York. It is not satisfied that refusing the application is essential in order to prevent significant detriment to the provision of pharmaceutical services in that area
- 3.12 **(e)whether it is satisfied that—**
- (i)granting the application would only meet the current need mentioned in paragraph (1) in part, and**
- (ii)if the application were granted, it would be unlikely, in the reasonably foreseeable future, that the remainder of that need would be met;**
- 3.13 In relation to Regulation 13(2)(e)(i) the ICB is satisfied that granting the application would only meet the current need in part and (ii) it is not satisfied that if the application were granted, it would be unlikely, in the reasonably foreseeable future, that the remainder of that need would be met

- 3.14 It was clear that most of the services as identified in the supplementary statements would be provided and PSRC were satisfied that the remainder of the need would be met in the reasonably foreseeable future. In addition, all the core hours as identified in the supplementary statements would be provided
- 3.15 **(f)whether—**
- (i)it is satisfied that granting the application would only meet the current need mentioned in paragraph (1) in part, but**
- (ii)it considers that, if the application were granted, it would not be unlikely, in the reasonably foreseeable future, that the remainder of that need would be met;**
- 3.16 In relation to Regulation 13(2)(f)(i) the ICB is satisfied that granting the application would only meet the current need in part and (ii) it is satisfied that if the application were granted, it would not be unlikely, in the reasonably foreseeable future, that the remainder of that need would be met
- 3.17 It was clear that most of the services as identified in the supplementary statements would be provided and PSRC were satisfied that the remainder of the need would be met in the reasonably foreseeable future. In addition, all the core hours as identified in the supplementary statements would be provided
- 3.18 **(g)whether it is satisfied that—**
- (i)the current need mentioned in paragraph (1) was for services other than essential services, and**
- (ii)granting the application would result in an increase in the availability of essential services in the area of the relevant HWB;**
- 3.19 In relation to Regulation 13(2)(g)(i) the ICB is satisfied that the current need was for services other than essential services and (ii) the ICB is satisfied that granting this application would result in an increase in the availability of essential services in the area of the relevant HWB
- 3.20 **(h)whether it is satisfied that, since the publication of the relevant pharmaceutical needs assessment, the current need mentioned in paragraph (1) has been met by another person who is providing, or is due to be met by another person who has undertaken to provide, either in the area of the relevant HWB or in the area of another HWB, NHS services;**
- (i)whether the application needs to be deferred or refused by virtue of any provision of Parts 5 to 7.**
- 3.21 In relation to Regulation 13(2)(h)(i) the ICB is not satisfied that the current need has been met by another person and therefore the application does not need to be deferred or refused.
- 3.22 No appeal rights are granted.”

4 The Appeal

In a letter dated 15 May 2025 and addressed to NHS Resolution, Rushport Advisory LLP, on behalf of Haxby Group Pharmacy Ltd, appealed against the decision of the Commissioner not to give them third party rights of appeal. The grounds of appeal are:

- 4.1 **“Applications for inclusion in the pharmaceutical list;**
- 4.2 **1. Haxby Group Pharmacy Limited - CN - YO30 6BA - CAS-344843-C6F5V9**
- 4.3 **2. The Pharmacy Group Corporation Ltd - ICN - Best Est - YO30 - YO-CAS-343578-X7V5L3**
- 4.4 I act for Haxby Group Pharmacy Limited and write to appeal the refusal of application 1 above and the grant of application 2 listed above.
- 4.5 **Preliminary Issue re Appeal Rights**
- 4.6 As the Committee will note from the attached decision letters, the Commissioner has given appeal rights to my client in respect of applications [sic] 1 which were submitted by my client and refused, but not in application 2.
- 4.7 Despite pointing out their error to the Commissioner they have refused to grant appeal rights to my client in respect of application 2.
- 4.8 My email to and subsequent reply from the Commissioner are attached. My client was entitled to appeal rights both as a third party who is on the pharmaceutical list, was notified about application 2 and made substantial representations on application 2 **and** due to the fact that the Commissioner considered the applications together and relation to one another.
- 4.9 The Commissioner's reply focuses solely on the issue of my client having made representations on application 2 and (wrongly) determined that the Commissioner “*did not feel that the representation submitted was a reasonable attempt to adequately express their (Haxby's) grounds for opposing the application.*”
- 4.10 I have attached the representations made on application 2 and trust that the Committee will agree that the representations (which are detailed given that both parties were applying under the same regulation) properly expressed my client's grounds for opposing application
- 4.11 Regrettably the Commissioner has failed to deal in any way with the issue of “Third Party Appeal Rights to the Secretary of State where an application is granted” and my submission to the commissioner is copied below for completeness.
- 4.12 **Third party rights of appeal to the Secretary of State where an application is granted**

30.—(1) A person with third party rights (as provided for in this paragraph) may appeal to the Secretary of State against a decision of the NHSCB [sic] to grant a notifiable application, or an application to which regulation 26(1), 27 or 28 applies, provided that the person notifies the Secretary of State with a valid notice of appeal within 30 days of the date on which that person was notified of the NHSCB's [sic] decision under paragraph 28.

(2) For the purposes of this Schedule, a person **(P1) is a person with third party rights if—**

(a) P1 is a person to whom sub-paragraph (3) applies; or

(b) **P1 was entitled to receive notification of the decision to grant the application by virtue of paragraph 28(5).** [Appellant's emphasis]

4.13 Para 28(5) states;

4.14 (2) Where the NHSCB [sic] has decided to consider 2 or more applications together pursuant to paragraph 22(3), it must give notice to each applicant of the decision taken with regard to each other application considered together with their application.

4.15 And para 22(3) states;

4.16 (2) Where appropriate, the NHSCB [sic] may if it thinks fit consider 2 or more applications together and in relation to each other, but where it does so, it must give notice to the applicants of its intention to do so (if it has not already done so under Part 3).

4.17 As para 28(5) and 22(3) apply in this case my client does have 3rd party appeal rights under para 30(2)(b) **and** under para 30(2)(a). [Appellant's emphasis]

4.18 **Basis for the Appeals**

4.19 It is submitted that the Commissioner has acted irrationally in making its decision and has granted an application which has no realistic possibility of meeting the identified need.

4.20 In addition, the Commissioner has failed to take into account the relevant consideration of opening hours and premises security.

4.21 In addition, the Commissioner has reached a conclusion not supported by the facts in relation to the services that the two Applicant's would provide.

4.22 I deal with each of these grounds below but will briefly first show that the need identified by my client is properly included within the relevant PNA.

4.23 **The Need Identified Within the PNA**

4.24 The HWB has identified a need for a pharmacy in Clifton in a number of different supplementary statements, the most recent of which is attached. My client's original applications referenced the original supplementary statements of February and April 2024.

4.25 The supplementary statement sets out the current need as required by the regulatory test.

4.26 The Committee will be aware that it refused applications with reference numbers SHA/26324, 26327 & 26331 which were made under regulation 18 as it determined that the need for a pharmacy had been identified within the PNA and that regulation 18 was therefore not the appropriate type of application to be made.

4.27 **The Appeal Grounds**

4.28 As detailed in my letter to the Commissioner dated 2 December 2024, there is no realistic possibility of the approval of application from The Pharmacy Group Corporation

Limited resulting in the opening of a pharmacy that will meet the need identified in the PNA.

- 4.29 In summary, the "Put and Call Options Agreement" submitted by The Pharmacy Group Corporation Limited is not legally binding and is meaningless.
- 4.30 To be valid, the agreement would require (amongst other things);
- 4.30.1 A final form of the lease (one has not been provided and the document refers to a "draft" lease" at Schedule 2)
- 4.30.2 A draft lease is not legally binding and the Put and Call Options Agreement is therefore meaningless.
- 4.30.3 To have a valid lease the exact premises / space within the medical centre must be identified. The list of schedules provided refers only to a site plan and does not provide a copy of the plan.
- 4.30.4 The Agreement states that;
- 4.30.4.1 *The Grantor owns the freehold/leasehold interest in the property at Clifton Health Centre, Water Lane, Clifton, York, YO30 6PS (the "Property").*
- 4.30.5 In fact, it is NHS Property Services ("NHSPS") that owns the freehold of the medical centre. Proof of this from the Land Registry is attached with this letter. We have considerable experience in dealing with leases where the property is owned by NHSPS, and it is standard for their leases to contain a strict prohibition on a tenant (in this case the medical practice) sub-letting any space within an NHS owned site. Instead, NHSPS would require the surrender of the GP lease and would then create 2 leases so that the pharmacy would become a tenant of NHSPS. Rushport has considerable experience of such arrangements and the lease negotiations with the pharmacy / GP practice / NHSPS in another case we are involved in have been ongoing for years without agreement.
- 4.30.6 My client has been in direct contact with NHSPS and whilst they have no desire to get involved in this appeal, they have asked my client to make it clear that York Medical Group do not own the property and do not have the authority to sublease any part of the property and that any applications to place a community pharmacy into the health centre, would need to be negotiated directly with NHS Property Services.
- 4.30.7 Where NHSPS grants leases to a pharmacy within existing medical centre space that it owns, it will require the doctors to surrender their own lease and create 2 separate leases, with one being given to the pharmacy and another to the GPs. This process takes many years to complete and whilst NHSPS took over many historic pharmacy leases they rarely are able to agree new leases due to the high rents that NHSPS charges pharmacy operators.
- 4.30.8 As a result of the [sic] these issues, it is impossible for the GP practice to grant a lease to The Pharmacy Group Corporation Limited and no realistic chance of The Pharmacy Group Corporation Ltd being able to operate from the premises they have specified.

- 4.31 Further, The Pharmacy Group Corporation Limited would be required to go through the process of planning and construction of premises, whereas my client's premises are ready to be used as a pharmacy in an area with a clear need for services.
- 4.32 **The Commissioner has reached a conclusion not supported by the facts in relation to the services that the two Applicant's would provide**
- 4.33 Schedule 2 Part 1 para 1 sets out the [sic] information to be included in applications for routine and excepted applications.
- 4.34 Para 8 states that;
- 4.35 (8) If A is seeking to provide directed services—
- 4.35.1 (a) details of the directed services to be provided;
- 4.35.2 (b) confirmation that A is accredited to provide the services, where that accreditation is a prerequisite for the provision of those services;
- 4.35.3 (c) confirmation that the premises are accredited in respect of the provision of the services, where that accreditation is a prerequisite for the provision of those services; and
- 4.35.4 (d) a floor plan showing the consultation area where A proposes to offer directed services (where relevant, unless one cannot be provided for reasons that are good cause).
- 4.36 "*directed services*" means additional pharmaceutical services provided in accordance with directions under section 127 of the 2006 Act.
- 4.37 Services commissioned locally are not directed services and these include both supervised consumption and needle exchange.
- 4.38 As the Committee will note the application form itself states as follows (with respect to services);
- 4.38.1 *Please note that enhanced services are those commissioned by NHS England or the relevant delegated integrated care board. Do not include services which are commissioned by the local authority/council or any other commissioner.*
- 4.39 As a result of the confusion this can cause, it has become commonplace for Applicants to add additional wording to application forms along the lines that my client used in their applications, namely;
- 4.39.1 **"WE WILL PROVIDE ALL SERVICES THAT ANY COMMISSIONER IS WILLING TO COMMISSION FROM US AS WELL AS PRIVATE SERVICES"**
[emphasis added]
- 4.40 In their decision letter the Commissioner repeats the phrase below on multiple occasions
- 4.40.1 *It was not clear in the application form which services were to be delivered and therefore PSRC were not satisfied or assured that the services identified in the supplementary statements would be delivered.*

- 4.41 In fact, my client was clear that they would provide all services, irrespective of which body commissioned them.
- 4.42 My client specifically clarified that both supervised consumption and needle exchange would be provided and did so by letter dated 7 April 2025 (attached).
- 4.43 Whilst this clarification was not new information, the Commissioner, if it felt that this was in fact new information, should have permitted the amendment under paragraph 9(1) of Schedule 2 of the Regulations which states:
- 4.43.1 “An applicant (A) must provide the following undertakings— (a) an undertaking to notify the NHSCB [sic] within 7 days of any material changes to the information provided in the application that occur before-
- 4.43.1.1 (i) the application is withdrawn,
- 4.43.1.2 (ii) while the application remains the subject of proceedings, the proceedings relating to the application reach their final outcome and any appeal through the courts has been disposed of, or
- 4.43.1.3 (iii) if the application is granted, A commences the provision of the services to which the application relates, whichever is the latest of these events to take place;”
- 4.44 The wording clearly envisages that the change will occur during the Commissioner’s consideration of the application rather than on appeal and that is what occurred in this case (even though it was a clarification rather than a change to the information provided).
- 4.45 As the Committee will be aware, there have been many decisions taken with respect to competing applications and we are not aware of any decision where services were considered a deciding factor. The Committee typically states that competing parties had all offered to provide all commissioned services and it is not possible to choose between parties on that ground. We say that should have applied in this case.
- 4.46 **Regulation 21A**
- 4.47 No party has sought to argue that granting either application creates an undesirable increase in essential services and the Supplementary Statement is clear about the need for this pharmacy within the Clifton Ward and the health needs of this area that has no pharmacy.
- 4.48 **Competing Applications**
- 4.49 The Committee will need to determine which of the two applications it approves as there is no need for more than one pharmacy to serve this area. Considering the relevant merits of each application we comments as follows.
- 4.50 1. Property
- 4.51 My client has secured property and a copy of their lease is attached.
- 4.52 2. Services

- 4.53 There is nothing to choose between the parties in relation to services as each party would provide all commissioned services.
- 4.54 3. Opening Hours
- 4.55 My client offers 61.5 core opening hours compared to 60.25 hours offered by the Pharmacy Group Corporation Limited.
- 4.56 Given that my client is the only Applicant with premises secured and the fact that The Pharmacy Group Corporation has no realistic chance of securing the premises identified and my client also offers longer core opening hours than The Pharmacy group Corporation Limited, my client's appeal against the refusal of their application and the appeal against the approval of the application submitted by The Pharmacy group Corporation Limited should both be allowed.
- 4.57 We look forward to hearing from you in due course."

5 Consideration

- 5.1 The Secretary of State for Health and Social Care has directed NHS Resolution to exercise the function of determining whether certain persons have rights of appeal on their behalf. I, as an authorised officer of NHS Resolution, have determined this appeal.
- 5.2 I have had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations"), and in particular paragraphs 30(1) and (2) of Schedule 2 which state:

30.—(1) A person with third party rights (as provided for in this paragraph) may appeal to the Secretary of State against a decision of NHS England to grant a notifiable application, or an application to which regulation 26(1), 27 or 28 applies, provided that the person notifies the Secretary of State with a valid notice of appeal within 30 days of the date on which that person was notified of NHS England's decision under paragraph 28.

(2) For the purposes of this Schedule, a person (P1) is a person with third party rights if—

(a) P1 is a person to whom sub-paragraph (3) applies; or

(b) P1 was entitled to receive notification of the decision to grant the application by virtue of paragraph 28(5).

- 5.3 Paragraph 28(5) states:

(5) Where NHS England has decided to consider 2 or more applications together pursuant to paragraph 22(3), it must give notice to each applicant of the decision taken with regard to each other application considered together with their application.

- 5.4 Paragraph 22(3) states:

(3) Where appropriate, NHS England may if it thinks fit consider 2 or more applications together and in relation to each other, but where it does so, it must give notice to the applicants of its intention to do so (if it has not already done so under Part 3).

- 5.5 I note that the Commissioner decided to consider Haxby Group Pharmacy Ltd's application for inclusion in the pharmaceutical list offering to meet a current need at 86 Clifton, York, YO30 6BA together and in relation to the Applicant's application (and other applications), and that it notified the applicants of its intention to do so by letters dated 13 and 20 February 2025
- 5.6 I am therefore satisfied that Haxby Group Pharmacy Ltd is a person to whom sub-paragraph 30(2)(b) applies and that it should have been given third party rights in accordance with the Regulations.
- 5.7 I note the wording of paragraph 30(5) that a notice of appeal under sub-paragraph (1) is only valid if it includes a concise and reasoned statement of the grounds of appeal. I am of the view that Haxby Group Pharmacy Ltd has complied with this requirement.

6 Decision

- 6.1 Haxby Group Pharmacy Ltd is a person with third party appeal rights against the decision of the Commissioner set out in its letter dated 7 May 2025 (and notified to Haxby Group Pharmacy Ltd by letter dated 7 May 2025).
- 6.2 The appeal will proceed in accordance with the provisions of Part 2 of Schedule 3 to the Regulations.

Head of Appeals NHS Resolution