

Neutral Citation No. [2004] NIQB 92

Ref: **HIGF5100**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **12/10/04**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

(Judicial Review)

BETWEEN:

E A BAIRD (NEWTOWNARDS) LIMITED

Applicant;

-and-

THE NATIONAL APPEAL PANEL

Respondent.

IN THE MATTER OF THE HEALTH AND PERSONAL SOCIAL SERVICES (NORTHERN IRELAND) ORDER 1972 AND THE PHARMACEUTICAL SERVICES REGULATIONS (NORTHERN IRELAND) 1997

HIGGINS J

[1] This is an application for judicial review of a decision of the National Appeal Panel (NAP) (the respondent) dated 18 June 2003, whereby it allowed an appeal by Boots the Chemist against the decision of the Pharmaceutical Practices Committee (the PPC) and thereby refused the application by E A Baird (Newtownards) Limited (the applicant) for inclusion in the pharmaceutical list for a site at Antrim.

[2] On 21 August 2003 the applicant applied to the Northern Health and Social Services Board for inclusion in the pharmaceutical list at a site referred to as 'The Development Site' and situated at Antrim Cineplex at Stiles Way/Fountain Hill, Antrim. The application disclosed that the premises are not yet constructed but that the site was already in the applicant's possession and that the applicant proposed to provide pharmaceutical services, namely, the dispensing of medicines and the supplying of drugs and appliances specified in the Drug Tariff as well as domiciliary oxygen services. The application was supported by a proof of evidence attached as an addendum to the application. This set out the reasons why the provision of pharmaceutical services was necessary or desirable to secure adequate pharmaceutical services in the neighbourhood of the proposed premises. The proposed site was identified as located centrally between two large housing estates in an area zoned as a development site by Antrim Borough Council. The pharmacy would be located adjacent to the Cineplex in an existing building that would be converted and operated separately from the Cineplex. The proof of evidence identified a neighbourhood for the proposed premises. This neighbourhood has a population of approximately 14,000 and comprises the three ward areas of Ballycraigy, Parkhall and Greystone, within which there is no pharmacy, though there are schools, churches, shops, off-licences and industrial estates. The boundaries of the neighbourhood were identified as the railway line which bisects the town, running northwest to southeast - the South and West Boundary; the ring road and the Town limit of development - the North Boundary; and the Town limit of development - the East Boundary. The last pharmacy to open in Antrim was in 1974. There are currently three pharmacies in the town, all of which are located in the town centre and to the west of the railway line. Boots the Chemist (Boots) and Antrim Chemists Limited manage two of the pharmacies.

[3] On 4 September 2002 the Head of Professional Pharmacy Services in the Central Services Agency wrote to Boots informing them of the applications. On 30 September 2002 Boots replied stating that they wished to make three comments. The first comment was in these terms -

We note that there are several established pharmaceutical contractors situated within adjoining neighbourhoods; (sic) all of which provide a comprehensive range of pharmaceutical services to the neighbourhood in question. We are not aware of any complaints with regards to the quality or availability of those services.

Boots requested the Health Board to reject the application as being neither necessary nor desirable for the reasons they put forward.

[4] On 2 October 2002 Antrim Chemists Limited wrote to the Central Services Agency objecting to the application. They highlighted various social

and criminal problems in the proposed area and disagreed with the suggestion that Antrim could be divided into different neighbourhoods. They contended that the proposed site was within the neighbourhood of the town centre.

[5] On 16 October 2002 the Local Pharmaceutical Committee of the Pharmaceutical Contractors Committee (NI) (the PCC) wrote to the Agency objecting to the application on the grounds that it was neither necessary nor desirable. No reasons for the objection were given.

[6] On 25 November 2002 the PPC approved the application. The PPC defined the boundary of the neighbourhood affected by the application as -

The Dublin Road/Ballymena Road to the West, the Ballycraig Road/Stiles Way to the Northeast and the Belmont Road/Belfast Road to the South.

The PPC concluded that the proposed pharmacy was necessary/desirable in order to secure adequate provision of pharmaceutical services in this neighbourhood.

[7] On 13 December 2002 Boots wrote to the Agency indicating that they wished to appeal the decision of the PPC on certain grounds. The second ground advanced in their letter was -

It is a fact that there are several established pharmaceutical contractors situated within adjoining neighbourhoods; (sic) all of which provide a comprehensive range of pharmaceutical services to the neighbourhood in question. No information has been supplied by either the Board or the applicant, with regard to any complaints about the quality, or availability of those services.

[8] Antrim Chemists Limited submitted objections on the appeal together with a report from planning consultants. The applicant also submitted further information for the appeal. This included a further report from their consultants. This report submitted that Antrim town, with a total population of 24,000, was too large to be considered a single neighbourhood, relying on the principles established in Re Boots' Application 1994 NI 11. In addition the report highlighted the fact that the population of the defined neighbourhood was 14,000 persons, none of whom had any access to a pharmacy within that neighbourhood.

[9] Part of the proposed development of the site included a new health centre and the report stated that the local doctors were happy to move to the site, in preference to their existing site. A letter from the Station Road Health

Centre confirmed this information and stated that the provision of an on-site pharmacy would improve the range of services to the community. A letter from Antrim Borough Council estimated the population east of the railway line to be in excess of 17,000. Information was also provided about new housing proposals for the area as well as a Social and Economic Impact Assessment prepared by other consultants.

[10] The appeal was heard by a National Appeal Panel (the NAP) on 11 June 2003, chaired by Mr B M Smyth. The Panel decided that an oral hearing was not necessary and the unanimous decision that the appeal should be allowed, was given on 18 June 2003. The NAP decided that the neighbourhood should be -

the Dublin Road/Ballymena Road to the West including the residential areas of Inishmoyne Green, Innishgarry Park, Massereene Gardens and Castle Park. Also to the North and East bounded by the M2 and to the South by the Antrim/Belfast Road.

[11] In reaching its decision the NAP stated that they scrutinised all the maps provided and concluded "that the railway line is not a major obstacle for people visiting the town centre and shouldn't be the only factor when determining the neighbourhood" and that "most people living in the outskirts of Antrim travel to the town centre in the normal course of their daily lives".

The reasons for allowing the appeal were stated as -

- (a) The Panel found that within the neighbourhood defined, 3 pharmacies already provide an adequate pharmaceutical service. An additional pharmacy was neither necessary nor desirable.
- (b) There was no strong evidence in the neighbourhood to suggest an inadequacy of pharmaceutical services.
- (c) Antrim is a compact town where most of the population travel to require [sic] their daily needs and other services.
- (d) There is easy accessibility to the Antrim town centre from all areas with public transport providing an adequate service.

[12] On 16 September the applicant issued proceedings for leave to apply for judicial review of that decision. The relief sought was -

- i. a declaration that the decision of the respondent was ultra vires and unlawful;

- ii. an order for certiorari to quash the decision of the respondent;
- iii. an order for mandamus to compel the respondent to adjudicate upon the application in a proper and lawful manner; and
- iv. such further and other relief as the Court may seem just and equitable.

[13] The Order 53 statement was supported by affidavits from Mr C Doyle, an employee of the applicant and Mr E Loughrey a planning consultant with the consultants engaged by the applicant. The former referred to the NAP chairman's length of tenure and questioned the policy of the NAP in refusing many such applications. The latter queried the allegedly "enormous" and "absurd" neighbourhood adopted by the NAP and, in paragraphs 9 and 10, referred to the population of towns identified as vicinities in court proceedings under the liquor licensing laws and a report of the Office of Fair Trading into pharmacy services. Leave was granted by Weatherup J on 14 October 2003. On 15 October 2003 an amended Notice of Motion was filed adding a further relief sought namely -

- v. a declaration that the Statutory framework Under the Health and Personal Social Services (NI) Order 1972 and the Pharmaceutical Services Regulations (NI) 1997 were contrary to the provisions of the Humans Rights Act 1998 and Article 6 of the European Convention on Human Rights.

The amended Notice was accompanied by an affidavit from the applicant's solicitor. This dealt with the issue of delay in bringing the judicial review proceedings. Neither of these issues was raised before me.

[14] On 16 October 2003 a further amended Order 53 Statement was filed. At paragraph 4 this set out the grounds on which relief is sought. They are -

- (i) The NAP has failed to apply any or adequate criteria in fairly and properly defining the neighbourhood of the applicant's proposed premises;
- (ii) In having regard to the adequacy of services within the impugned vicinity (sic), the NAP has failed to take into account the significance of the word "desirable" as contained in the statutory test, which sets a lower standard than "necessary".
- (iii) The finding of the NAP at paragraph 14 of its decision is made wholly without evidence to support it.

- (iv) The NAP has defined a neighbourhood which is unfair, unreasonable and irrational.
- (v) Such other grounds as arising from the affidavits herein and documents exhibited thereto as to this Honourable Court seem meet

[15] On 11 November 2003 an affidavit by the Chairman of the NAP, Mr B Smyth, was filed . This dealt with the history of the appeal and the decision making process. I shall refer in detail to this affidavit later.

[16] On 20 November 2003 Mr Loughrey filed a further affidavit in which he disputes Mr Smyth's averment that there is little employment or shopping in the area of the proposed premises. In addition he exhibited Planning Policy Statement 5. This identifies a pharmacy as a typical element of a local centre in planning terms. On 2 December 2003 an affidavit sworn by Mr M White of Antrim Chemists Limited was filed. This seeks to refute Mr Loughrey's assertion in his affidavit dated 16 September 2003, that the closest pharmacy to the proposed site is 2 km.

[17] Two points arose for consideration at the outset. The first related to the admissibility of Mr Loughrey's two affidavits that were not before the Appeal Tribunal. Four affidavits were lodged by the parties. An affidavit by Mr Doyle in support of the application for judicial review was filed on 16 September 2003. An affidavit by Mr Loughrey was filed on the same date. This contained fresh information not before the appeal tribunal. The Chairman of the appeal tribunal Mr Smyth filed an affidavit on 11 November 2003 responding to the application for judicial review and the affidavits of Mr Doyle and Mr Loughrey. On 20 November Mr Loughrey filed a further affidavit in response to Mr Smyth's affidavit and in particular that part relating to shopping facilities in the proposed area. Finally Mr White filed an affidavit on 2 December 2003 responding to an assertion by Mr Loughrey.

[18] Mr Comerton QC on behalf of the respondent Boots and Mr O'Reilly on behalf of the appeal panel, objected to the admissibility of the new information contained in the two affidavits of Mr Loughrey, on the basis that judicial review involves a consideration of the material that lead to the impugned decision and was not an appeal from that decision or a rehearing at which fresh evidence could be considered. He referred to R (Lynch) v General Dental Council 2004 1 AER 1159 in which the principles relating to the admission of fresh evidence in judicial review proceedings were considered and submitted that none of the exceptions applied in this instance. Mr Deeny QC who appeared on behalf of the applicant submitted that the only fresh material in Mr Loughrey's affidavits related to various towns that

have not been considered as vicinities in themselves, in applications under the liquor licensing legislation.

[19] I do not think that the new material in Mr Loughrey's affidavit falls within the exceptions stipulated in Lynch, supra, and therefore have not taken that material into account in my deliberations. Equally the other affidavits referred to above where they contain fresh information not before the appeal tribunal, are also inadmissible. There was some dispute over the population figures for Antrim town and its wards. It did not seem to me that these relatively small differences were of any great significance in relation to the issues raised in the judicial review. A further point arose relating to the affidavit of Mr Smyth the appeal chairman. I will consider that issue later in this judgment.

[20] Article 63 (1) of the Health and Personal Social Services (NI) Order 1972 (the 1972 Order), as amended, imposes on every Health and Social Services Board a duty to make arrangements for the supply of proper and sufficient drugs, medicines and prescribed appliances in its area. Article 63 (2)(A) of the 1972 Order provides that regulations may make provision for securing that the arrangements will be such as to enable any person, receiving general medical services, to obtain proper and sufficient drugs, medicines and prescribed appliances. The regulations are to include provision for the preparation, publication and maintenance of a list of persons who undertake to provide pharmaceutical services (usually referred to as chemists or pharmacists).

[21] Article 63 (2)(A) also provides that an application shall only be granted if the Health and Social Services Board is satisfied, in accordance with the regulations, that it is necessary or desirable to grant the application in order to secure in the neighbourhood in which the premises are located, the adequate provision of pharmaceutical services or some of the pharmaceutical services, specified in the application. The current regulations made under Article 63 are the Pharmaceutical Services Regulations 1997 (the Regulations), Regulations 6 (1) of which makes provision for the preparation of a pharmaceutical list of persons providing pharmaceutical services within the Board's area. Paragraphs (2) provides that a person who wishes to be included in the pharmaceutical list shall apply to the Board. Paragraphs (3) to (8) refer to relocation applications. Paragraph (9) makes provision for applications in other cases and is the relevant provision in the present judicial review. It is in these terms -

- (9) An application made in any case other than one to which paragraph (3) or (4) applies shall be granted by the Board, after the procedures set out in Schedule 4 have been followed, only if it is satisfied that the provision of

pharmaceutical services at the premises named in the application is necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood in which the premises are located by persons whose names are included in the pharmaceutical list.

[22] Schedule 4 to the Regulations sets out the procedure to be followed in applications for inclusion in the pharmaceutical list. Paragraph 1 of Schedule provides for notification of any application to be given to the Local Pharmaceutical Committee and to any person whose name is included in the pharmaceutical list. Paragraph 2 makes provision for the determination of applications to be included in the pharmaceutical list. It is in these terms -

“2.-(1) In considering an application to which regulation 6(9) applies, the Board shall have regard to

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- (a) the pharmaceutical services already provided in the neighbourhood of the premises named in the application, by persons whose names are included in the pharmaceutical list;
- (b) any representations received by the Board under paragraph 1; and
- (c) any information available to the Board which, in its opinion, is relevant to the consideration of the application.

(2) The Board may determine an application in such manner as it thinks fit and may, if it considers that oral representations are unnecessary, determine the application without hearing any oral representations.

(3) In any case in which the Board decides to hear oral representations, it shall give the applicant and any person from whom it received representation under paragraph 1 reasonable notice of the meeting at which such representations are to be heard.

(4) The applicant and any person mentioned in sub-paragraph (3) shall be permitted to be assisted in making representations at any such meeting by some

other person, but a person shall not be entitled to be heard in the capacity of counsel or solicitor.

(5) The procedure by which representations are heard shall be such as the Board may determine.

(6) The functions of the Board under this paragraph shall be exercised by the Pharmacy Practices Committee on behalf of the Board.”

[23] Provision is made for appeals in paragraph 4 of Schedule 4. Appeals are referred to the National Appeal Panel established under Part IV of Schedule 4. If the Chairman of the National Appeal Panel is of the opinion that the notice of appeal discloses no reasonable grounds of appeal he may determine the appeal by dismissing it forthwith – Schedule 4 paragraph 4 (5). Paragraph 19 provides that every appeal shall be considered by all members present, but be determined by a majority of votes of those present and entitled to vote. The Chairman is not entitled to vote, except in the case of a tied vote of those present and entitled to vote, in which case he has a casting vote. Paragraph 20(1) provides that the NAP shall determine an appeal in such manner as it thinks fit and may do so without oral representations if it considers such unnecessary. Paragraph 20(2) provides that the NAP shall give written notice of its decision, together with reasons therefore, to the Board.

[24] In its consideration of any application, the Board or the NAP on appeal must consider the pharmaceutical services already provided in the neighbourhood in which the premises named in the application are located. Thus the Board or the NAP must define that neighbourhood.

[25] In Re Boots the Chemist’s Application 1994 NIJB 11 Carswell LJ (as he then was) considered whether the extensive judicial pronouncements on ‘vicinity’ in the liquor licensing laws, were applicable in determining the meaning and extent of a neighbourhood in applications under the Pharmaceutical Regulations. At page 14 h Carswell LJ stated –

“In my opinion the concept of a neighbourhood has the same limitation as that of a vicinity – its etymological parent – of which McGonigal J said in *Magill v Bell* [1972] NI 159, 164 that it is limited to premises in the neighbourhood in the sense in which one speaks of being a neighbour of another. In *Cormican’s case* (1975, unreported) Judge JP Higgins QC expressed the principles as follows:

‘I think it is impossible to lay down any general rule as to the extent of the area

indicated by the word "vicinity". In country districts people are said to be neighbours, that is to live in the same neighbourhood, who live many miles apart. The same cannot be said of dwellers in a city, where a single square may constitute a neighbourhood. Physical features may determine the boundary or boundaries of a neighbourhood as, for example, a river, a railway or a range of hills. In an urban area lacking such physical features the lay out of the streets and the nature, character and use of the buildings need to be looked at, as well as the size and distribution of the population, whether residing or working in the area.'

I would perhaps qualify that in the way in which I expressed it in *Donnelly v Regency Hotel Ltd* [1985] NI 144, 153:

'I think that it is of importance to look both at the physical features of an area and any natural boundaries, and also at the established dwelling patterns and any geographical allegiances of those who live, work, or shop there. A vicinity accordingly seems to me to connote more than the area plotted on a map; its determination has to take into account the habits and movements of people in the area, and the directions in which those habits take them in the course of their daily lives.'

In my view two important conclusions should be drawn: (1) There is no sensible distinction between a vicinity and a neighbourhood. The authorities in the field of licensing law in which the proper extent of a vicinity are discussed are therefore relevant in the present context. (2) A neighbourhood is an area defined by physical and social factors, and its extent remains the same whatever the context in which one comes to consider it.

[26] The present Regulations postdate that decision. In September 1997 the Department drew up a Guide to the Revised Arrangements for Considering Applications To provide Pharmaceutical Services. The Guide sets out the procedures Boards are required to follow when dealing with application to provide pharmaceutical services. The Guide is intended to reflect those requirements accurately, but it emphasizes that it should be read together with the Regulations, which are the only authoritative statement of the law (see Chapter 1.2).

[27] In Chapter 2 the Guide sets out what the Department considers to be the proper general approach to applications for inclusion in the pharmaceutical list -

“2. Applications for inclusion in the pharmaceutical list

2.1 In 1987, Regulations introduced a system of control to link the number of persons included in the pharmaceutical list as closely as possible to the need of the local population for reasonable access to the full range of health service pharmaceutical services. At the same time they were intended to take account of the cost to the taxpayer of providing pharmaceutical services. While there is a need to give existing pharmacies the opportunity to develop professional services and respond to changing needs, it is the effect on services to patients rather than the effect on other persons included in the pharmaceutical list which must be borne in mind.

2.2 Decisions as to whether additional services should be provided or additional premises opened should take account of changing circumstances and should be based on whether it is necessary or desirable to grant the application to secure an adequate provision of service in the neighbourhood. There are no hard and fast rules or formulae for determining the number and distribution of pharmacies or other premises supplying health service pharmaceutical services. Each application should be considered on its merits. Different considerations apply to applications for minor relocation or change of ownership and these are described in Sections 3 and 4 below.”

[28] At paragraph 2.8 the Guide states that if a Board is satisfied that an application satisfies the relevant criteria the application should be granted. At paragraph 3.5 in dealing with applications of relocation it states that it should be borne in mind that it is the “effect on HS pharmaceutical services which is at issue, not the effect on pharmacies as such “. At 3.6 it states that in determining a relocation application to new premises, physical barriers like a river, railway or motorway should be considered and in considering questions of access the Board is entitled to use its local knowledge of such things as the availability of public transport and whether most people are likely to be pedestrians or have the use of a private car.

[29] More extensive guidance is provided in Chapter 5. It is in these terms -

“Necessary or desirable

5.26 The PPC must first decide what area is to be taken as the neighbourhood of the premises named in the application it is considering. Until it has decided this it cannot decide whether the existing provision of pharmaceutical services is adequate for that neighbourhood. It is up to the PPC to decide, on the basis of the information available, what the relevant neighbourhood should be. The PPC is not bound to accept the neighbourhood as defined by the applicant (or by any objector) but may define its own neighbourhood using its own experience, expertise and local knowledge.

5.27 There are no hard and fast rules or formulae for determining the number and distribution of pharmacies. PPCs should not adopt norms or quotas, nor establish fixed rules for example for the distance from another pharmacy. Each application must be considered on its merits.

5.28 While there is a need to give existing contractors the opportunity to develop a fully professional service and to respond to changing needs, it is the effect on services to patients and not the effect on other contractors as such which must be borne in mind. Decisions as to whether additional services should be provided or additional premises opened should take account of changing circumstances and should be based on whether it is necessary or desirable to grant the application to

secure an adequate level of service in the neighbourhood.

5.29 There is no target for the number of contracts, either overall or for individual Boards. In some areas there may be a clear need to award an additional contract, and where PPCs are satisfied that such need exists, a further contract should be granted. In other areas, there may already be an apparent superfluity of contractors. Above all PPCs should adopt a flexible approach. Local needs and circumstances will change over time and the pattern of pharmacy provision must adapt accordingly. These provisions must not be allowed to fix rigidly the pattern of service which already exists nor should they be allowed to create a closed shop for existing pharmacy contractors.

5.30 The reference, in the test of 'necessary or desirable', to persons on the pharmaceutical list is important. The Regulations allow for dispensing by general medical practitioners (GMPs) in some circumstances. However, these applications are for dispensing or the supply of appliances by involved or consulted in the process. GMPs who dispense are not included in the pharmaceutical list so, for example, in an area where there were no pharmacies, an applicant could establish a need for one by referring to the absence of provision of pharmaceutical services by persons included in the pharmaceutical list. The applicant would not have to show that his services were to be preferred to those currently being provided by GMPs but would still have the burden of proving that a pharmacy is necessary or desirable.

5.31 Information on the following matters is likely to be helpful to the PPC in making a decision:

Primary care services should be provided as part of the normal fabric of people lives. Where, how often and how easily people travel about the locality in order to go to work, shop, school, visit other health care facilities or pursue leisure activities are all important. Reasonable provision has no absolute measure and will depend on what is reasonable in the circumstances. For example, a distance which might

be regarded as excessive in some environment would be quite acceptable in others.

(2) Existing patterns

(a) The number and location of existing pharmacies and relevant GMP practices, the possible effects on the HS pharmaceutical services and the range of services provided by existing pharmacies, their hours of availability and the scope for amendment of those hours.

(b) The number of prescriptions dispensed and, as far as this can be ascertained, their usual sources. To a very considerable extent this will be dependent on the number and location of GMP practices and the size of their lists. It should be borne in mind that it is common for prescriptions to be dispensed at a pharmacy convenient to the patient's home, place of work, shops etc. Possible seasonal trends.

(c) Local demography, especially the presence of any groups who make above average demands on primary care services or who may have special needs.

(d) Ease of access. Distances between home, pharmacy and surgery are highly relevant but should not be taken alone whether most people are likely to be pedestrians or to have the use of a car (bearing in mind that the elderly are one of the main categories of pharmacy user) and the features of local geography including natural or man made barriers.

(e) Evidence of local deficiencies in the current service, for example, complaints known to have been upheld or the perceived unwillingness of existing contractors to fulfil a stated need.

(3) Anticipation of future developments

(a) Known firm plans for the development/expansion of new centres of population, eg housing estates, or for changes in the pattern of population. eg redevelopment.

(b) Known firm plans for changes in the number and/or source of prescriptions eg changes in GMPs' surgeries, or the appointment of additional GMPs in the area.

(c) Known firm plans for developments which would change the patter of local social traffic and therefore access to services eg shopping centres or significant shopping developments whether these are in town, on the edge of town or out of town.

(d) Plans for the development of services, eg. community care.

(e) Local population projections.

This list is not necessarily comprehensive nor are all the items listed necessarily relevant to every application."

[30] The first task of a PPC or the NAP on appeal is to determine the neighbourhood in which the premises are located and then to consider, whether the provision of pharmaceutical services at those premises is necessary or desirable.

[31] The PPC defined the boundary as the Dublin Road/Ballymena Road to the West, the Ballycraigy Road/Stiles Way to the North-East and the Belmont Road/Belfast Road to the South. The Applicant's case before the NAP was that Antrim town was too large an area to be considered as a single neighbourhood and that the town was bisected naturally by the railway line, thus creating a neighbourhood between the railway line and the Town Limit of Development. The NAP decided that the neighbourhood should be the Dublin Road/ Ballymena Road to the West, including Inishmoyn Green, Innishgarry Park, Masserene Gardens and Castle Park, the M2 boundary to the North and East and the Antrim Road/ Belfast Road to the South. The NAP stated that they scrutinised all the maps provided. They concluded that the railway line was not a major obstacle for people visiting the town centre and that it should not be the only factor when determining the neighbourhood. The NAP also concluded that most people living in the outskirts of Antrim travel to the town centre in the normal course of their daily lives.

[32] The neighbourhood determined by the NAP comprises the entire town of Antrim with the exception of two small areas to the West and South of the Dublin Road, that includes the residential areas of Firfields, Greenmount Avenue and Cedarmount. A short distance to the West of these areas lies the

natural boundary of Lough Neagh. There is no provision for pharmaceutical services in the area that lies to the West of the Dublin Road. The existing pharmacies are located within the area bounded by the Dublin Road and the railway line. The neighbourhood determined by the NAP extends far beyond the residential town of Antrim. It includes large swathes of rural townland to the North and in particular to the East of the town stretching beyond the hamlet of Dunadry. In effect this neighbourhood comprises the town of Antrim and a much larger area of rural Co Antrim. No explanation is given for the exclusion of the residential areas to the West of the Dublin road nor for the inclusion of the very large rural areas to the North and West. Nor is any reason given why the NAP determined upon a different neighbourhood than that decided upon by the PPC.

[33] In his affidavit in response to the application for judicial review and the affidavit in support thereof, the Chairman of the NAP averred -

“7. I have read the Notice of Motion herein and the Affidavits filed in support of the Applicant’s application and wish to respond to the grounds of challenge as follows:-

- (i) The neighbourhood as defined by the NAP resulted from a careful consideration of all relevant issues by the Panel. The Panel took into account all of the papers before it and every Member of the Panel had visited the site of the application and the general area of the town of Antrim and its surrounding area before the meeting on 16th June 2003. The Panel also took account of maps and aerial photographs which were available. In addition the Panel had before it a copy of the decision of Carswell LJ (as he then was) in the Boots’ case. In approaching the definition of neighbourhood the NAP was conscious that there was no hard and fast rule or pre-determined formula for determining the extent of a neighbourhood but did take account of the factors referred to in the Boots’ decision such as the size and distribution of the population, the area’s physical features, natural boundaries, established dwelling patterns and so far as known geographical allegiances and habits and movements. The Panel did not consider that the railway line was a factor which ought to inform the

delineation of neighbourhood in the present appeal as it did not appear to it that it was a major obstacle to movement within the Antrim Area. The Panel's view was that Antrim town was easily accessible from all outlying areas of Antrim and that the proposed site was not in the nature of a focal point and, and on the contrary, was somewhat isolated, deserted and quiet. There was little in the way of employment or shopping in the area of the subject site. There appeared to be no good reason for splitting Antrim into more than one neighbourhood given the accessibility of the town centre from outlying housing areas and the availability of public transport. It was the Panel's view that in their daily lives those who lived in the area of the site would regularly visit Antrim town centre.

- (ii) The criteria upon which the Panel's decision on neighbourhood were based were as set out at (i) above.
- (iii) In the light of the neighbourhood defined by the NAP the Panel considered both the issue of whether the provision of pharmaceutical services at the site was necessary in order to secure adequate provision of pharmaceutical services in the neighbourhood or was desirable for this purpose. As can be seen from paragraph 19 of the NAP's decision the Panel did not view the existing provision of pharmacies in the neighbourhood as defined to be inadequate and an express finding of adequacy was made. This finding was based on the absence of strong evidence of complaint about access to or the range of facilities already available. In the light of this conclusion the Panel adverted to whether the provision of pharmaceutical services as submitted in the application was necessary in order to secure adequate provision. The Panel concluded that this was not the case. The Panel then considered whether the provision of pharmaceutical services was desirable in order to secure adequate provision overall. On this

issue the Panel reviewed the advantages and disadvantages which might arise from the locating of a new pharmacy at this site but considered that, against the backcloth of its view on the existing adequacy of provision, it was not satisfied that any real advantage would accrue which would warrant the conclusion that the new provision was desirable.

- (iv) The finding of the Panel at paragraph 14 of its decision was made as a result of the consideration of all the evidence, in particular it was based on the knowledge of the area gleaned by Panel Members in the course of their site inspections and from the aerial photographs of the site which were available at the hearing of the maps. I refer to copies of the aerial photographs (Exhibit "BS1") which were available and from these it can be seen that the outlying areas of Antrim to the East of the town have few service and shopping facilities."

[34] It was submitted by Mr Comerton QC that the Chairman should be entitled to correct any deficiencies in the reasoning or lack of reasoning in the decision of the NAP in relation to the determination of the neighbourhood (or any other issue). He relied on the case of Re Anglin (reported decision Kerr J, as he then was). This was a challenge to another decision of the NAP given in 1995 in which, inter alia, it was held that the NAP had failed to comply with its duty to give reasons. The Chairman in that case was Mr B M Smyth. An affidavit by Mr Smyth setting out in detail the reasons for the NAP's conclusions was submitted. The applicant for judicial review objected to this affidavit on the ground that this was an ex post facto justification of the NAP decision. The learned judge found that the reasons for the NAP's decision were adequately expressed in the affidavit of Mr Smyth. He said he was not prepared to hold that Mr Smyth's exposition of his reasons was an ex post facto rationalisation of the NAP's decision. He found the advice at page 470 of De Smith & Wolff & Jowell on Judicial Review of Administrative Action (5th Edition) to be pertinent. The authors state -

"... it is suggested that the court is unlikely to quash the decision or make any order unless the reasons so disclosed are inadequate or unlawful ... such breach may be remedied in affidavit evidence and the court ought in its discretion to refuse to grant relief unless it

suspects that the reasons provided by way of affidavit are merely an ex post facto rationalisation of the decision.'

[35] The following year the Pharmaceutical Services Regulations 1997 came into effect. Paragraph 20(2) of Schedule 4 to these Regulations requires the NAP to give written notification of its decision "together with reasons therefore". The purpose of this requirement is to allow the parties to be informed of the reasoning that lay behind the NAP's decision. The written decision of the NAP in this case is a mere statement of the NAP's conclusion, not its reasons for arriving at that conclusion. The affidavit of Mr Smyth states that the NAP had the decision of Carswell LJ in Re Boots' Application before them. In that case Carswell LJ said that the NAP should determine the ambit of the neighbourhood "by reference to defensible criteria" and went on to say that, in that case the NAP had not given "any logically defensive reason".

[36] It could not be clearer that giving reasons is essential. Indeed the Guide to which I have already referred states at 6.17 that the NAP must notify the Board of its decision "and the reasons for it". Paragraph 6.18 states that it is essential that the notification of the reasons for the decision should show how it evaluated the evidence and the route by which it reached its conclusion. One of the most critical decisions in such an application is the determination of the neighbourhood, as all other decisions depend upon it. It was therefore essential that the NAP demonstrate why they decided upon a particular neighbourhood. In this appeal it was all the more critical as the NAP had differed in their view as to the appropriate neighbourhood, from the neighbourhood expressed by the applicant, but more particularly from that determined by the PPC. It is six years from the decision in Re Anglin. Mr Smyth sits regularly in these appeals. He knows from the Regulations, the Guide, the decision in Re Boots' Application and from his experience in Re Anglin, that reasons (and defensible reasons at that) are required. No explanation has been advanced as to why the NAP failed to include reasons in their decision. In all these circumstances this court should not receive reasons now by way of an ex post facto affidavit. Therefore I decline to admit Mr Smyth's affidavit for the purpose of providing reasons for the decision. The absence of reasons for the decision given is sufficient ground to allow this application for judicial review and quash the decision of the NAP.

[37] In his affidavit Mr Smyth states that the "the NAP was conscious that there was no hard and fast rule or predetermined formula of determining the extent of a neighbourhood". This appears to be a reference to paragraph 5.27 of the Guide – see above. He then goes on to say "but they did take account of the factors referred to in the Boots' decision such as the size and distribution of the population, the area's physical features, natural boundaries, established dwelling patterns and so far as known geographical allegiances and habits and

movements “. These are all factors referred to in the judgment of Carswell LJ and appear to be a mere repetition of them.

[38] What is a neighbourhood is primarily a matter of geography, but other factors are relevant – whether it is urban or rural, the physical features of the area, the road or housing lay-out, the character of the area and the lifestyle of its inhabitants. There may be other factors. The affidavit does not say what physical features, boundaries etc in this particular case, led the NAP to determine the neighbourhood. A glance at the map delineating the neighbourhood determined by the NAP provides ample grounds for saying that the neighbourhood determined by the NAP cries out for explanation or reasons. Three matters are evident – the inclusion of the large swathe of rural area to the North and East of the town; the exclusion of the area to the West of the Dublin Road and the inclusion of the entire town of Antrim. The latter is all the more evident as the issue in *Re Boot’s Application* (which Mr Smyth averred the NAP had before them) was whether or not the town of Bangor could be a neighbourhood.

[39] The affidavit then states that “the Panel did not consider that the railway line was a factor which ought to inform the delineation of the neighbourhood in the present appeal as it did not appear to it that it was a major obstacle to movement within the Antrim Area”. By contrast the NAP decision states that the “Panel concluded that the railway line is not a major obstacle for people visiting the town centre and shouldn’t be the only factor when determining the neighbourhood”. The former suggests it was not a factor and the latter that it was but should not be the only one. These two statements are illogical and inconsistent and merely highlight the deficiencies in the reasoning process. Is the railway line an obstacle at all and if so in what manner and to what extent. If it was a factor to what manner and to what extent was it so.

[40] The NAP also concluded that most people living in the outskirts of Antrim travel to the town centre in the normal course of their daily lives. There is nothing to indicate the basis upon which the panel came to this conclusion. In his affidavit Mr Smyth averred that this was based on knowledge of the area gleaned by the panel members from their site inspections and from the aerial photographs. Again the facts upon which the knowledge was based are absent. What was the nature and extent of the local knowledge that led to this conclusion.

[41] Finally the NAP considered the adequacy of existing pharmaceutical services and whether the provision of further services is necessary or desirable. In paragraph 16 the NAP set out the applicant’s case and in paragraph 17 the evidence produced by the applicant in support of his case. In paragraph 18 the NAP stated that the appeal was allowed and in paragraph 19 stated their purported reasons. These are in effect conclusions – that the existing pharmacies provide an adequate service and an additional pharmacy was neither necessary nor desirable; there was no strong evidence to suggest an

inadequacy of services and Antrim is a compact town where most of the population travel to require their daily needs and other services. Paragraph 7 (iii) of Mr Smyth's affidavit is intended to provide the reasons for this decision. Analysis of it shows that it is merely a repetition of the original decision in different language and sequence, without stating the reasons why the NAP concluded that an additional pharmacy was neither necessary nor desirable. My conclusion was that this was no better than the attempt to rationalise the decision as to the neighbourhood. Applying the test approved in Re Anglin and quoted in De Smith & Wolff & Jowell, there are ample grounds to suspect (if not more) that the reasons provided by way of Mr Smyth's affidavit are merely ex post facto rationalisation of the NAP decision. I am not prepared to hold that the reasons set out in the affidavit are not ex post facto rationalisation. Indeed they appear to be just that.

[42] It is not to be expected that administrative panels such as the PPC and the NAP should write decisions with the same reasoning and definitiveness of a judicial decision. Nonetheless they are, in this instance, required to give logically defensible reasons why they arrived at a particular decision in the light of the evidence presented to them, particularly in a case where the decision of the PPC has been reversed.

[43] It was submitted by Mr Deeny QC that, following the decision in Re Boot's Application, the NAP, in determining the neighbourhood in this case, were obliged to take account of the principles and rulings on the question of "vicinity" in the major decisions under the liquor licensing laws. The sense of neighbourhood as defined in this large body of judicial pronouncement was inconsistent with a determination that the neighbourhood in this case was the entire town of Antrim together with a large swathe of the countryside to the North and East of the town itself. I was referred to a number of authorities illustrative of both the principles involved in ascertaining a 'vicinity' as well as the different types of vicinities found, whether large parts of a town or city or relatively small areas with a distinct sense of neighbourhood. Reliance was placed on Barr v Delargy, (unreported decision of Carswell J, as he then was), an application in respect of licensed premises in the centre of Antrim. The vicinity was agreed between experienced senior counsel and accepted by the judge. This was that the Park Hall estate and the eastern part of the town of Antrim were not in the vicinity of licensed premises in the town centre. Mr Deeny QC accepted that this decision was not binding on the NAP, but was illustrative of his point that Antrim town was not a neighbourhood in itself. In addition he submitted that the notices of objection, supra, which referred to the other chemists in the "adjoining neighbourhood" providing adequate pharmaceutical services, further illustrated his point.

[44] While the various judicial pronouncements on vicinity and neighbourhood are relevant to the process of defining a neighbourhood for the purposes of the pharmaceutical list, there is a distinction in the applicable

legislation. In the liquor licensing cases the court has to be satisfied that the number of licensed premises in the vicinity of the subject premises is inadequate – see Article 7(4)(e)(i) of the Licensing (NI) Order 1996. In applications for inclusion in the pharmaceutical list, the application shall be granted only if the Board is satisfied that the provision of pharmaceutical services is necessary or desirable to secure adequate provision of pharmaceutical services in the neighbourhood in which the subject premises are located. In the latter case it is essential for the Board (or Panel) to define the neighbourhood in order to determine whether the pharmaceutical services within it are adequate. In the former the court has to determine whether the number of licensed premises in the vicinity of the proposed premises is inadequate. It is not necessary to define a vicinity or neighbourhood for that purpose. In cases involving the pharmaceutical list it is obligatory.

[45] Both Mr Comerton QC and Mr O'Reilly submitted that this court should be slow to find that the neighbourhood determined by the NAP was irrational, that is that no reasonable tribunal properly directing itself to the issues and the relevant judicial authorities, could have determined the neighbourhood as this Panel did. Both submitted that the threshold test for irrationality was a high one. However there is much merit in Mr Deeny's pithy observation – would a resident of Dunadry village consider himself a neighbour of a resident of Stiles Way. The irrationality of that idea, looking only at the map, is self-evident. I therefore hold that in defining the neighbourhood that they did, the NAP acted irrationally and unreasonably, in the sense in which those words are understood in judicial review proceedings. In addition they failed to apply the correct criteria in determining that neighbourhood. If they had done they would not have concluded that the entire town of Antrim constituted a neighbourhood for the purposes of the pharmaceutical regulations nor would they have concluded that the neighbourhood included large swathes of rural Co Antrim. In light of the judicial pronouncements on 'vicinity' in liquor licensing cases, as well as the decision in Re Boots' Application, supra, the argument for at least two neighbourhoods in Antrim town, with or without part or parts of its hinterland, must be strong. However I refrain from deciding what amounts to a neighbourhood. This is not an appeal from the decision of the NAP, but a judicial review of their decision.

[46] Mr Deeny QC questioned the evidential basis for the conclusion that most of the residents of Antrim travel to the town centre for their pharmaceutical needs. Furthermore he highlighted the failure of the NAP to deal separately with the issue of the desirability of pharmaceutical services being provided at the subject site. In Re Boots' Application, without expressing any concluded view on the approach to the issue whether the provision of pharmaceutical services at the subject premises was desirable, as opposed to necessary, Carswell J found that these concepts were separate and distinct. Mr Comerton QC submitted that the approach in the case R v Yorkshire

Regional Health Authority, ex parte Baker 35 BMLR 118 (a decision of Sir Louis Blom-Cooper QC sitting as a Deputy High Court Judge) was to be preferred. In that case it was held that the words necessary or desirable are not to be construed disjunctively. Mr Comerton QC described the reasoning in that case as more subtle. I was referred to the opinion of Lady Smith in the Scottish case Lloyds Pharmacy Limited v The National Panel for Entry To the Pharmaceutical Lists (unreported) in which at paragraph 38 she quoted the opinion of the Lord Justice Clerk in Safeway Stores PLC v National Appeal Panel 1997 SC 189 in which he appeared to consider the words should be applied disjunctively. In this jurisdiction Murray LJ expressed some concerns about the approach to these words in Re Cooper's Application 1991 10 NIJB 1.

[47] I do not need to express a concluded opinion on this issue. However I incline to the view that the words should be construed disjunctively. It may be difficult to understand that something that was necessary was not also desirable, however it is easier to comprehend that something which is desirable may not be necessary. Therefore both adjectives should probably be considered separately in the context of adequacy of provision. It is evident that the NAP did not state any conclusion on the desirability of the provision of pharmaceutical services at the proposed services in their decision. Mr O'Reilly relied on the affidavit of Mr Smyth in which he mentioned that the Panel concluded that it was not desirable. However for the reasons I have given I do not consider this affidavit should be admitted.

[48] Mr Comerton QC submitted that in dealing with the adequacy of existing pharmaceutical services, the NAP were entitled to consider only those pharmaceutical services existing within the defined neighbourhood. Mr Deeny QC took the opposite view and observed that in this case the NAP did not take pharmaceutical premises outside the neighbourhood into account. It is not necessary that I should express any concluded view on this issue, as it is not germane to the decision that this court has to make.

[49] The decision of the NAP cannot stand for the reasons I have given and will be quashed. The appeal will be remitted to the Board for determination before a differently constituted panel.