

NATIONAL APPEAL PANEL

constituted under

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)
(SCOTLAND) REGULATIONS 2009 as amended (“THE REGULATIONS”)**

DECISION

of the

CHAIR

of

THE NATIONAL APPEAL PANEL

in the application relating to

Unit 3, 19 Greenock Road, Bishopton, PA7 5JW

Applicant and Appellant:	Mr Andrew Mooney
Pharmacy Practices Committee:	Greater Glasgow & Clyde
PPC Decision Issued:	19th April 2016
Panel Case Number:	NAP54 (2016)

Decision of the Chairman of the National Appeal Panel

1. Background

- 1.1 This is an appeal against the decision of the Pharmacy Practices Committee of Greater Glasgow & Clyde (“the PPC”) and which decision was issued on 19th April 2016.
- 1.2 Andrew Mooney (“the Applicant or “Appellant”) made application for inclusion in the pharmaceutical list of NHS Greater Glasgow & Clyde (“the Board”) to provide pharmaceutical services in respect of the premises at Unit 3, 19 Greenock Road, Bishopton, PA7 5JW (“the Premises”), said application dated 21st January 2016.
- 1.3 The PPC, under delegated powers of the Board, held a hearing on 30th March 2016 in order to take evidence from the Applicant and interested parties and to consider supporting documentation, following upon which it determined that the provision of pharmaceutical services at the Premises were neither necessary nor desirable in order to secure adequate provision of pharmaceutical services in the **neighbourhood** in which the premises were located by persons whose names are included in the pharmaceutical list, and that it accordingly unanimously refused the application.

2. Grounds of Appeal

- 2.1 The **Appellant** submitted his grounds of appeal dated 1st and delivered to the Board on 3rd May 2016 and which may be summarised as follows:
 - 2.1.1 The Area Pharmaceutical Committee (APC) who were against the application were conflicted in that the pharmacy manager employee of Lloyds pharmacy was also a member of the board’s APC sub-committee and who was involved in a meeting of 16th February 2016 which agreed not to recommend approval of the application for inclusion. No declaration of interest was noted from any member. Lloyds pharmacy also objected to the application on the basis of “commercial interest” in relation to their pharmacy in Erskine. He states that he raised this conflict of interest with the Chair after conclusion of the evidence; the Chair agreed that it was a significant conflict of interest issue but that this had been omitted from the minutes. He states that Mrs Dalrymple of Bishopton Pharmacy made reference to the APC’s decision in her evidence at paragraph 5.7.25.
 - 2.1.2 The Appellant states that there was a lack of process of advice from the Board for submission of key evidence, including anticipated future population forecasts, scope and scale of a section 75 agreement, council residential phasing plans, safety and access issue risks etc.
 - 2.1.3 The PPC had allowed submission of new evidence from the Applicant (sic) on the day of the hearing which was misleading, misrepresentative and also speculative. In terms of paragraph 5.1.13, the Chair had reported that there had been 3 late submissions of additional supporting paperwork and that 2 documents were letters provided by Mrs Dalrymple, and one from Bishopton Medical Practice. The first was a letter of support from Dr Tiwari of Bishopton medical practice, the second a letter from the joint owners of the hairdressing

salon on Greenock Road adjacent to Bishopton Pharmacy, advising that they would allow Mrs Dalrymple a first option to purchase the premises upon their retiral. The third document (paragraph 5.1.14) was a communication from Bishopton community council addressed to the leader of Renfrewshire Council regarding a dispute between the two but this was not allowed by the Chair on the basis that it made no reference to the provision of pharmaceutical services and outwith the due date for submission. The Appellant states that he appears to have been advised that supporting evidence that he wished to submit was not possible as it was outwith the time and that the previous custom and practice of the board of allowing evidence up to 10 days before the hearing was no longer acceptable. He acknowledges that he was asked prior to the hearing whether he wished to submit other supporting evidence but had no time to gather together the documents that he would have liked to have submitted and had previously sought guidance on. He also states that the information contained in the communications between the community council and Renfrewshire Council would have been relevant. He was never asked by the Chair whether he had any objection to their submission. He considers in the circumstances that the interested party had been given preferential treatment and there was an element of bias to the proceedings.

- 2.1.4 He states that the Public Partnership Forum (PPF) established by community health partnerships had, in September 2015, expressed support and positive sentiment towards his application. Prior to the hearing, the Appellant states that he contacted the Board for advice on how to capture the PPF input as part of the Consultation Appraisal Report (CAR). The Board had stated that it would be consulted but in the end the Board had not consulted with the PPF and, whilst the Board stated that they were incorrect in not doing so, it was too late to include their view in the CAR. The minutes of this appeal and the covering letter indicated support for the application. He referred to appendix 3 of his appeal in this connection.
- 2.1.5 The Board failed to provide the PPC with enough local contextual documentation, eg detailed maps, population statistics, development progress details, forecast etc, to allow the PPC to make an informed decision. The Chair refused the **Appellant's** submission of population on demand forecasts based on ISD baseline during the course of his presentation. Population statistics were historic and inconsistent. He had introduced health centre lists indicating 7,083 patients in 2016, being 7% increase on the 2014 base of 6,692. This was challenged and not resolved during questions.
- 2.1.6 The Board failed to provide the PPC with a pharmaceutical care services plan (PCP). The most recently published plan was from 2013/14.
- 2.1.7 The Appellant narrated his proposals supporting his application.
- 2.1.8 The minutes for the meeting were inaccurate, eg stating that he was an independent prescriber when he was not nor at any time claimed to be. There were other inaccuracies contained in the minutes.
- 2.1.9 He states that one of the lay members of the PPC did not appear to be fully engaged in the process. Further, the Chair had indicated that he was unfamiliar with the Court of Session cases cited and called into question the expertise of

the PPC in the application of the legal test. He acknowledges that there was a legal adviser present who had confirmed that the cases were relevant but she required time to source and review the cases and confirm and comment. Her advice was later not sought.

2.1.10 He alleges that the PPC failed to address the specific inadequacies identified in the CAR, particularly customer feedback on privacy and confidentiality, and access issues for young mothers. He states that the Chair blocked his comments on the CAR and, as a result, through distraction, failed to deliver a number of key weaknesses and supportive evidence. In addition, there was no plausible reason given for the 40% of prescription items leaving the neighbourhood and a number of other items of specific detail. Whilst the PPC did make reference to the CAR, it made no reference to the Derek McKay survey despite its inclusion in the CAR and that the CAR was not a true representation of local public opinion, representing 421 respondents whereas the Derek McKay survey received 1,081 responses. This was a procedural defect. It was minuted that the Derek McKay survey was available to the panel on the day but this was not the case. The Chair had stated that he would return to it but did not do so. This was unfair.

2.1.11 The Appellant states that the PPC had erred in considering the existence of 3 contractors outwith the neighbourhood in determining adequacy. As these contractors were not within the defined neighbourhood, they should only become a material consideration if they secured adequate provision in Erskine in totality is at risk. This is not the case. The Erskine pharmacies were 5/7 km distance outwith the neighbourhood. It makes reference to a letter from the Chair of Bishopton community council to the Board dated 20/9/12 that Erskine and Renfrew were not easily accessible from Bishopton as there was only an hourly bus service to Erskine with no direct trips to Renfrew.

2.1.12 The PPC erred in only addressing the adequacy of the existing provision although it considered whether the application was necessary and desirable to "secure" adequate provision in the probable future. In addition, there was a lack of provision in the north west of Bishopton which indicated inadequacy and not properly addressed.

2.1.13 The PPC did not properly address the legal precedents cited.

3. The Evidence of the Parties

3.1 The evidence of the Applicant at the hearing may be summarised as follows:

3.1.1 He was anxious to provide an objective view following on others' commercial interest, local scaremongering, lack of expert knowledge and personal agendas, and felt that the public voice was important and had thus taken steps, having had discussions with the local MSP in conducting a constituency wide survey of the Bishopton neighbourhood. He considered that there are inadequacies in the current provision of pharmaceutical services and that there was a weakness in the public consultation process. He highlighted his experience to date.

- 3.1.2 He considered the neighbourhood to be the PA7 postcode bounded on the north by the River Clyde, on the east by the M898 and A898, on the south by the B790 to Houston Road to the intersection at Turningshaw Road and to the west by Barochan Burn/Barochan Road. This neighbourhood was based on the council's decision for a one self-sustaining neighbourhood. Bishopton had one school and one post office. This neighbourhood was currently served by one small 1970's style pharmacy which he considered to be inadequate. It had been established that the local GP practice had 3 GP's but now has 6. Further, there had been growth and demand for pharmaceutical health services, community expansion in Bishopton, changes in pharmaceutical practice and policies, an ageing population and a requirement to address preventative care. Prescription growth increased by 35% over the past 10 years.
- 3.1.3 The demographic and demand in the area had changed and advised that Renfrewshire Council were planning a development which would be the largest brownfield site in Scotland with plans for 2,850 houses. In 20 years, the housebuilding phase will be complete and would move to phase 2. As part of the planning permission, a section 75 agreement had been entered into for the building of schools and other facilities. The healthcare lists had grown by 7% (443 patients) from April 2014 from 6,292 to currently 7,083. There was a transient population using the railway line, 2 large hotels and an equestrian centre and the Hewlett Packard factory in the neighbourhood. One pharmacy serving the GP practice was inadequate.
- 3.1.4 The Applicant made reference to the 2020 vision, the Prescription for Excellence and the Wilson & Barber review, which had identified a need for change, particularly in providing care and adequate services, managing long term conditions and improving access to minor ailments and emergency access to medicines. This service should become more personalised, concentrating on health protection, promotion and prevention.
- 3.1.5 If 50% of the houses had been built by 2020, this would result in 1,133 houses which at 3 persons per house would mean an additional 3,399 people in the area. He anticipated a range of additional prescription items per annum over the next 5 years to be in the region of 35,000 to 70,000.
- 3.1.6 The Applicant referred the PPC to the judgements of Lord Drummond Young in *Lloyds Pharmacy Limited v National Appeals Panel* (2004), Lord McPhail in *Rowlands v National Appeal Panel* (2006), Lord Malcolm in *Lloyds Pharmacy Limited v National Appeal Panel* (2010) and Lady Smith in *Lloyds Pharmacy Limited v National Appeal Panel* (2010), and argued that the cases contained key principles of support in his application. He specifically highlighted Lord Drummond Young's judgement in *Lloyds Pharmacy Limited v National Appeal Panel* (2004) wherein he stated the need to have regard to probable future developments; that the standard of adequacy would change over time and that pharmaceutical services must develop over time and that the word "secure" was meant to maintain adequacy for the future. The Applicant made reference to Lady Smith's analogy of the staircase in a multi storey building which may cease to be adequate were a lift installed and on Lord Malcolm's judgement regarding desirable features that if the existing provision was missing a desirable feature then it may not be regarded as adequate.

- 3.1.7 The Applicant felt that that there was more than enough patient load now and in the future to support more than one pharmacy in the neighbourhood. In any event, there were inadequacies in the existing service provision in terms of quality and quantity to meet known and recognised future demands for the growth in the area or the needs of the community. The current prescribing figures were sufficient to support an additional pharmacy in Bishopton, even without expansion. He also indicated that the current pharmacy appeared to be losing 40% on GP practice output and that the existing pharmacy in his opinion was too small to meet demand, had not changed in 20 years and was not scaled to cope with meeting any increased demand. Further, there was no access for residents of north west Bishopton within walking distance when they required to go beyond the neighbourhood to a congested town centre. He considered that the current pharmacy's consultation room was not fit for purpose, it being small and providing no anonymity. Access to it was a difficulty in that mothers required to leave buggies outside the pharmacy while they went inside.
- 3.1.8 The Applicant made reference to the CAR in support of his application, eg a mother with two young children felt that two pharmacies was more comforting, that his proposed premises was better for a pram, the current pharmacy was too small to deal with the number of people waiting for prescriptions, requests for easier disabled access and others.
- 3.1.9 He questioned the current pharmacy's ability to hold sufficient stock in that patients required to collect their prescriptions the following day. He felt that even if the current owner of the pharmacy were to expand to adjacent premises, this would still be inadequate. The Applicant felt that economic viability was not a true test and referred to concerns regarding the closure of the current pharmacy. His proposal would be for 1,000 square feet and 2 consultation rooms with car parking and a location supported by the CAR. It would be a modern pharmacy. He would offer a Saturday afternoon opening service not currently available and handle minor ailments and with a wider range of stock.
- 3.1.10 The Applicant referred to the consultation process, in particular the new regulations for the 90 day public consultation, and questioned the value of the CAR to poor methodology and sampling. The Chair had interjected at this point as to whether it was proper for the Applicant who was a signatory to the CAR to question its validity. The legal adviser to the PPC stated that as long as the Applicant was making commentary rather than questioning its validity, the PPC could determine the value of that commentary, albeit that the planning of the CAR had been jointly agreed. The Applicant continued that there were no proper population controls and that there were other issues of concern including statistics being influenced by a selection basis and based on commercial interest and concerns. The responses were not random but from a select sample. The outcomes were different from the MSP survey from Derek McKay which had received responses from over 1,000 people, ie 2½ times that of the CAR sample which showed a 44% support for the addition of a new pharmacy and 40% not supportive.
- 3.1.11 The Chair had sought advice from the legal adviser present regarding the relevancy of the cases cited by the Applicant who said that she was aware of

the cases and agreed that they were relevant and would provide advice to the PPC following conclusion of the hearing. The Applicant stated that he was not seeking to maintain that the PPC was bound to grant the application on a proper interpretation of the legal precedents that he had cited, and on that basis there was no request made to the legal adviser to return to the PPC on the matter.

3.1.12 In responses to questions from members of the PPC, the Applicant stated that he was not an independent prescriber but currently a medical signatory and, on a query regarding the parking statistics, he had stated that he was unable to explain why he had speculated but that in his experience when he visited a health centre and the pharmacy was busy he would drive elsewhere. He had stated that he regarded the Prescription for Excellence as a potential solution and the key was to reduce harm, error and adverse drug reactions, and that there were more complex medicines. He had stated that he had been unable to source local information from ISD and that, as to healthcare needs in the neighbourhood, he was asked whether his information was based on local knowledge or national trends that he was seeking to fit into the neighbourhood. He felt that the neighbourhood was a microcosm of the national picture, not on health equality but on young people, health provisions being scaled back. He stated that 6% of the population of Bishopton had long term illnesses and that there were 394/7,000 patients suffering from asthma, thus providing an opportunity for additional services to be provided within Bishopton.

3.1.13 In response to a question suggesting that Bishopton was a fairly affluent, upwardly mobile area and that many people do not work in Bishopton itself, he was asked how many people work in Bishopton from a population of 5,239 and how many could obtain their prescriptions outwith Bishopton. The Applicant stated that, whilst the majority of people living in Bishopton worked outwith, he did not agree that the majority of people living in Bishopton could obtain their prescriptions outwith. He stated that there had been no Freedom of Information enquiry as to whether or not there had been any complaints regarding the current Bishopton Pharmacy.

3.1.14 Regarding the Derek McKay MSP survey, he stated that he had no influence on the questions posed. The survey question was *“NHS Greater Glasgow & Clyde is in joint consultation with Mr Andrew Mooney who is proposing to submit an application to open a pharmacy from vacant premises at 19 Greenock Road, Bishopton. This is in view of the growing population of Bishopton. My opinion as the constituency MSP has been sought. I would therefore ask:*

Would you be supportive of such a proposal?

and

Would you be opposed to such a proposal?”

3.1.15 The Applicant in referring to the 40% leakage of prescriptions from the medical practice said he did not know where they were going but that he was basing his information on the ISD figures with which he had been provided.

3.2 The evidence of **Mrs Dalrymple** of Bishopton Pharmacy may be summarised as follows:

- 3.2.1 She disagreed with the Applicant's definition of neighbourhood and she had proposed for the purposes of the legal test the outer boundaries of the village in Bishopton rather than the PA7 postcode. Bishopton, old and new, was, in her opinion, a single **neighbourhood**. She stated that her pharmacy provides the majority of services in the **neighbourhood** but that residents may also access pharmaceutical services in neighbouring Erskine or further afield if convenient for work, shopping etc. Her pharmacy provides the full range of NHS pharmaceutical services, both core and locally negotiated services.
- 3.2.2 She felt that the key question was that of adequacy, not only now but in the future, and that if services were regarded as adequate to meet the needs of the neighbourhood both now and in the foreseeable future then the application should fail this point. She disagreed that services provided by her pharmacy were "not of satisfactory quality or quantity to meet current ... and future demands" and considered the claims about her supposed "antiquated ... 70's style pharmacy" to be insulting.
- 3.2.3 The population of Bishopton on the 2011 census was 4,708, a decrease from 2001 when it was 5,157. With the commencement of the Dargavel Village development, there had been a modest increase in the population to approximately 6,000, this figure being based on a number of patients registered within the GP practice. This also included residents in nursing homes who received prescriptions elsewhere. Bishopton is a healthy, wealthy and mobile population. The pharmacy serving an affluent population of 5,500/6,000 is far from unusual and the workload unremarkable. She cited Houston as an example which had a population of over 6,000 and which had a single pharmacy. Erskine, with a less affluent population of 15,300 has 3 pharmacies, ie one for every 5,100 patients.
- 3.2.4 The service offered to patients and to an exceptionally high standard included CMS (96% of patients had a completed CMS assessment and care plan), eMAS (1,519 patients were registered for eMAS which suggested that almost everyone in the village who is eligible is registered, and that followed on a significant effort to publicise the service). The pharmacy provided supervised methadone and suboxone. She was approaching the end to her independent prescribing course and would soon hope to offer independent prescribing clinics. Further, the pharmacy was on the palliative pharmacy list and she worked closely with the district nurses based at Bishopton and often helped them out last minute with prescriptions and deliveries.
- 3.2.5 She disputed the Application's allegations that the size of her pharmacy militated against patient care, that the consultation area worked perfectly for one to one private consultations and wheelchair users could get adequate access, and quoted a favourable comment from the CAR from a wheelchair user patient. There were no problems accommodating prams. Whilst the dispensary is compact, it is efficient with twice daily deliveries from four different wholesalers, that there was no need to hold large quantities to stock, and she had received no complaints regarding balances or items not being available. Parking was not a problem. The opening hours were appropriate for the needs of the local population and were indeed in excess of the health board's model hours scheme.

- 3.2.6 Mrs Dalrymple acknowledged that if the PPC were satisfied that existing services were adequate, it may consider that the pharmacy was unable to cope with increasing demand in the foreseeable future and accordingly may consider granting the current application in order to secure an adequate pharmaceutical service. However, such a decision would require very good evidence and she did not consider that the evidence provided by the Applicant was such that the existing pharmacy would be unable to cope with any increase in demand. She was in any event able and willing to expand the pharmacy to meet the needs of any future population. She stated that there were 150 houses proposed to be built every year, with a completion date in 2033, ie in 17 years. This meant a gradual increase in population of about 400 each year. The population was mainly made up of young, relatively affluent families and this put a relatively smaller burden on pharmacy services than an average population. No evidence has been produced that her pharmacy would be unable to cope with these changes in the foreseeable future.
- 3.2.7 In the event of any future expansion there were 2 options available to the pharmacy:
- (i) Reference was made to the letter from the owners of the hairdressing salon next door agreeing that they would give the pharmacy first option when they retired in the near future, which would enable the pharmacy to double in size.
- or
- (ii) That growth in the local population was already creating a strain on the GP practice which would eventually require new purpose built premises and an expansion of the GP team. It may be more cost efficient for the pharmacy to be part of any future purpose built health centre. She stated that either way there will be no problems in the future concerning expansion but that, in any event, the pharmaceutical services provided by the existing pharmacy can reasonably be foreseen to be adequate far into the future.
- 3.2.8 She cited in her favour the detailed joint survey, 79% of the respondents to which believe that there was currently adequate pharmaceutical services within the neighbourhood, the GP's letter stating that the pharmacy provided a more than adequate service to the community, that the PPC did not support a new application, the community council did not believe that there was a need for an additional pharmacy and the positive comments contained within the CAR.
- 3.2.9 She referred to one important part of the legal test in that "securing" an additional pharmacy may affect viability, either of the new pharmacy or of the existing one. In any event, she had purchased the pharmacy 3½ years previously with a significant loan repayable over 10 years and the pharmacy required to make modest increases in turnover and profitability. If the new pharmacy were to open, the likely effect of the existing pharmacy would be to render it unviable. If there were such a risk then the application should be refused.

- 3.2.10 In response to questions from the Applicant, Mrs Dalrymple stated that she agreed with the community council that one pharmacy could service 15,000 patients and that her pharmacy could cope. She also made reference to the letter from Dr Tiwari which was supportive although she understood that GP's require to remain neutral and that it had been Dr Tiwari's personal decision whether to write that letter. She confirmed that she had managed her stock well and it was not often that patients required to return and that between her pharmacy and one in Erskine they had a good relationship. She explained her view on the 40% "leakage" of prescriptions and considered that it was from the population working outwith Bishopton and also related to 2 nursing homes and the large Erskine Hospital population, and that within the GP practice there were around 900 patients who did not have a PA7 postcode. She confirmed that she was one of 10 local pharmacies who participated in the locally enhanced services for asthma and had in fact been only one of 2 pharmacies doing well at it.
- 3.2.11 In response to questions from members of the PPC she stated that there are many chronic conditions in the area but not at the level where she required to increase workloads. She stated that the local GP's had indicated that they could provide a room for her clinics in order to access patient details when she completed her independent prescriber course. She stated that she had a long term commitment to the community – building trust and relationships – and the provision of services from her pharmacy was adequate because it did provide a good service and looked after the community, that patients felt happy, had no complaints.
- 3.3 The evidence of **Mr Woodrow** of Bishopton Community Council may be summarised as follows:
- 3.3.1 Mr Woodrow stated that communication had broken down between building developers and the Community Council and that there had been an original proposal for 2,500 houses, recently increased to 2,900, and that over the next couple of months there was an anticipation of there being a new link road between the North and South Bishopton. He had noted the survey from Mr Derek McKay MSP which had received more responses for the current application. That said, the community council was happy with the current pharmaceutical provision and it would be happy for this to be expanded sooner rather than later.
- 3.3.2 In response to the question by the Applicant, Mr Woodrow stated that there had been no access issues at the current pharmacy but there were at the health centre. He could not answer the question as to whether or not one pharmacy could serve the community but did state that in an ideal world the community council would like the health centre to move with the pharmacy by being closer to the rail station with good parking and an alternative village centre.
- 3.3.3 In response to the question from the PPC, Mr Woodrow stated that he was not aware of any complaints regarding the current provision and that in fact he had only received positive comments.
- 3.4 The evidence of **Mrs Claudia Henry** representing Andrew Hughes Chemist may be summarised as follows:

- 3.4.1 She agreed with the defined neighbourhood [*it is not clear whether this was as defined by the Applicant or Mrs Dalrymple*]. She stated that the current service was adequate, not just by Bishopton Pharmacy but also by their own and that of Lloyds in Erskine. She felt that the area to the north was more covered by them than by the Bishopton Pharmacy. Their pharmacy had 2 pharmacists who did not require to work full time and that there was scope for them to work 5 days a week if patient numbers increased. She had one staff member who was in the process of training to be an independent prescriber. She was of the view that Bishopton had excellent pharmaceutical services and that there was a good relationship between her pharmacy and Bishopton Pharmacy in that if there were any difficulty in securing items, one or other pharmacy would be able to assist. There were no inadequacies in Bishopton, a view that was supported by 79% of the respondents to the CAR.
- 3.4.2 In response to questions by the Applicant, Mrs Henry stated that the population of Erskine was around 15,000 with 3 pharmacies. She was of the view that the 40% "leakage" was not due to inadequacy but due to other reasons such as commuting from Bishopton to Erskine, the main reason being the large supermarket because Bishopton did not have anything similar.

4. The PPC's Decision

- 4.1 The PPC had considered the submissions and supporting documents received from the Applicant and interested parties, as well as the responses from the joint consultation process undertaken by the Board and the Applicant . It had conducted a group site visit.
- 4.2 In determining **neighbourhood**, whilst the PPC accepted that there were stretches of unoccupied land within the Applicant's defined neighbourhood, it considered that the postal district PA7 was a sensible way to define the neighbourhood of the village of Bishopton including Dargavel Village and the immediate hinterland. The PPC considered it premature to regard Dargavel as a separate neighbourhood as its future development was at this stage considered to be speculative. In the circumstances, the neighbourhood was defined as lying on the north by the River Clyde, on the east by the M8/M898/A898, to the south by the B790/Houston Road and on the west by Barochan Burn/Barochan Road, B789.
- 4.3 As to **adequacy** of the existing provision of pharmaceutical services within the neighbourhood and whether the granting of the application was necessary or desirable to secure adequate provision of pharmaceutical services in that neighbourhood as so defined , the PPC acknowledged that there was one pharmacy within the neighbourhood, ie Bishopton Pharmacy. The PPC was satisfied from the evidence presented that the pharmacy provided a comprehensive range of pharmaceutical services, including NHS core services and supplementary services. It was also satisfied from the evidence that claims regarding stock shortages, general poor levels of service provision were neither supported by the evidence nor by the expressions of satisfaction with the existing services within the CAR.

- 4.4 The PPC addressed the overall services provided by the existing contractors within the vicinity of the proposed pharmacy, namely Bishopton Pharmacy as aforesaid and the three contractors in Erskine, the number of prescriptions dispensed by those contractors in the preceding 12 months and the level of service provided by those contractors to the neighbourhood and, in the circumstances, the PPC considered that the neighbourhood was currently adequately served.
- 4.5 The proposed residential housing development at Dargavel Village was taken account of and the PPC addressed the legal precedents cited by the Applicant. Whilst the PPC considered it reasonable to take account of probable developments over the next 2 to 3 years, it felt that to go beyond that time period became speculative in terms of the potential impact on the **neighbourhood** as a whole. The PPC had noted the reductions in the level of population prior to the most recent development and accordingly the current evidence from the residential housing development did not provide sufficient grounds to support the need for additional pharmaceutical services in the foreseeable future.
- 4.6 There was sufficient evidence that the area was quite affluent, with many car owners and no social housing which had the effect of reducing demand for pharmaceutical services compared with the national average. The CAR had evidenced 79% responses expressing satisfaction with the existing pharmaceutical provisions. They considered that the thrust of the Applicant's argument was to the effect that there were a range of pharmaceutical services not being provided by the Bishopton Pharmacy, yet such evidence had not been considered sufficient.
- 4.7 In the circumstances, the PPC felt that the level of service provided by current contractors both within and outwith the neighbourhood suggested that the current level of service was adequate and, in the circumstances, decided that the provision of pharmaceutical services at the premises was not necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood in which the premises were located by persons whose names are included in the pharmaceutical list and, as such, the PPC unanimously decided that the application be refused.

5. Discussion and Reasons for Decision

- 5.1 The Regulations require to be considered in light of the objects of the scheme set out under the National Health Service (Scotland) Act 1978 and, in particular, Section 27, in that it shall be the duty of every Health Board to make arrangements as to its area for the supply to persons in that area of proper and sufficient drugs and medicines which are ordered for those persons by a medical practitioner in pursuance of his functions in the Health Service. An Application made in any case should be granted by the Board after procedures set out in Schedule 3 of the Regulations are followed, if the Board is satisfied that it is necessary or desirable to grant an Application in order to secure in the neighbourhood in which the premises are located the adequate provision by persons included on the list of the services specified in the Application. This is further extended by Regulation 5 (10) of the Regulations in that an Application shall be granted by the Board: (1) 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 and (2) if the boundaries of the neighbourhood within which the Applicants intend to provide pharmaceutical services falls within any part of a controlled locality, only if it is satisfied that the granting of such an application, in its opinion, would not prejudice the provision of NHS funded services in the controlled locality. For the purposes of clarification in terms of paragraph 1A of Schedule 3 of the Regulations, a controlled locality is an area within a Health Board which is remote or rural in character and which is served by a dispensing doctor. This latter provision does not apply in the current circumstances.
- 5.2 In terms of paragraph 3 (i) of Schedule 3, the PPC shall have regard to the pharmaceutical services already provided in the neighbourhood of the premises, the pharmaceutical services to be provided in the neighbourhood at those premises, any information available to the PPC which, in its opinion, is relevant to the consideration of the Application, the CAR, the Pharmaceutical Care Services Plan and the likely long-term sustainability of the pharmaceutical services to be provided by the applicants.
- 5.3 The grounds of appeal are limited to areas where the PPC has erred in law in its application of the provisions of the Regulations, that there has been a procedural defect in the way the Application has been considered, that there has been a failure by the PPC to properly narrate the facts or reasons upon which their determination of the Application is based, or there has been a failure to explain the application by the PPC of the provisions of the Regulations to those facts.
- 5.4 The principal point of the PPC's decision is whether or not it has exercised its judgement fairly and given adequate reasons for it and that it does not otherwise offend against the grounds of appeal set out in Schedule 3, paragraph 5 (2A) and (2B). It is relevant to note that the PPC comprises pharmacists and lay members who may be expected to understand the issues involved on the evidence before it. It is an expert tribunal. Equally, it must be understood that the PPC's decision must be intelligible and it must be adequate. It must enable the reader to understand why the matter was

decided as it was and what conclusions were reached on the principal issues and its reasoning does not give rise to any substantial doubt that it had erred in law. Such adverse inference will not readily be drawn.

- 5.5 It may be useful at this point to address the cases cited by the Appellant, in particular the decision in *Lloyds Pharmacy v National Appeal Panel* [2004] SC in which Lord Drummond Young set out the legal test and which involved a two stage approach. He states: “the decision-maker, [be it or the PPC or the National Appeal Panel] must consider whether the existing provision of pharmaceutical services in the relevant neighbourhood is adequate. If it decides that such provision is adequate, that is the end of the matter and the application must fail. If it decides that such provision is not adequate, it must go on to consider the second question: whether the provision of pharmaceutical services at the premises named in the application is “necessary or desirable” in order to secure adequate provision ... A deficiency in services must exist before an application can be granted. Consequently, the existence of such a deficiency must be identified before it is necessary to consider what may be done to provide a remedy ... adequacy is a simple concept in the sense that there is no room for different degrees of adequacy or spectrum of adequacy. Either the pharmaceutical services available in a neighbourhood are adequate or they are not ... The standard of adequacy is a matter for the decision-maker ... the decision-maker is a specialist tribunal and can be expected to apply its knowledge of the pharmaceutical business to the task of determining the appropriate standard. In addressing that question, however, it is in our opinion proper to have regard to probable future developments for two reasons. First, the standard of adequacy in a particular neighbourhood will obviously change with time. The relevant neighbourhood may change, for example, through the construction of new housing developments or the movement of population out of inner city areas. Likewise, changes inevitably occur in pharmaceutical practice and the standard of “adequate” pharmaceutical provision must accordingly develop over time. Regulation 5(10) uses the word “secure” in relation to the adequate provision of pharmaceutical services. That word seems to us to indicate that the decision-maker can look to more than the area achieving a fair present adequacy of pharmaceutical provision. “Secure” suggests that it should be possible to maintain a state of adequacy of provision into the future ... the decision-maker must have some regard to future developments in order to ensure that an adequate provision can be maintained. The decision maker must, however, determine the adequacy of the existing provision of pharmaceutical services at a specific time, the time of its decision. It must accordingly reach its conclusion on the adequacy of the existing provision on the basis of what is known at that time, together with future developments that can be considered probable rather than speculative. The decision-maker must also bear in mind that the critical question at this stage with reasoning is the adequacy of the existing provision, not the adequacy or desirability of some other possible configuration of pharmaceutical services in the neighbourhood ...”.
- 5.6 The case referred to by the Appellant in which he quotes Lord Malcolm’s opinion on *Lloyds Pharmacy Limited v National Appeal Panel* (2010) CS OH 22 related to an application for a pharmacy licence at the Fort William Health Centre. Lloyds were included in a pharmaceutical list in respect of premises in

Caol and High Street, Fort William. Boots also operated a pharmacy at High Street. All three of the medical practices in the area were located some 2½ miles from Fort William town centre. The Board through its PPC intimated its refusal of the application, and which refusal subsequently appealed to the National Appeal Panel which upheld the refusal. Lord Malcolm considered that the National Appeal Panel had not addressed whether there was any provision of pharmaceutical services in the neighbourhood when all the GP practices were located in a relatively remote health centre which offered more or less all possible health and related services other than a pharmacy. He accordingly quashed the panel's decision, ordering that a new panel should be constituted for the purpose of determining the appeal again. His decision was appealed to the Inner House of the Court of Session where Lady Smith delivered the Opinion of the Court under reference [2010] CSIH55. The Inner House agreed with Lord Malcolm's decision and the matter was referred back to a freshly constituted panel which, in the event, found against Lloyds Pharmacy having addressed the question posed by Lord Malcolm. The quotes referred to by the Appellant in each of the Opinions of Lord Malcolm and Lady Smith were merely observations and nothing more and, in the circumstances of the present case, are of no avail to the Appellant.

- 5.7 The Appellant takes issue with the decision of the APC who were against his application in that the pharmacy manager employee of Lloyds Pharmacy (based in Erskine) was also a member of the Board's APC sub-committee which had agreed not to recommend approval of the application. It is almost axiomatic that a local pharmacy member of the APC would be against a new application. In any event, Lloyds Pharmacy had already lodged an objection to the application and, further, in objecting to the reference to the Erskine pharmacies he had stated that they were some 5-7 km distance and outwith the neighbourhood and that there was a difference between Erskine and Bishopton residents. Accordingly, it is not considered that the APC's decision will have had much impact on the PPC notwithstanding their awareness of all the factors involved in reaching its decision. In passing it is noted that Lloyds objection was not based on 'commercial interests' as suggested by the Appellant.
- 5.8 The Appellant refers on numerous occasions to the fact that many points made by him and others were omitted from the minutes. Once the minutes had been signed off by the Chair of the meeting that is an end of the matter. The Appellant cannot at this stage endeavour to reintroduce either evidence which he states he did or endeavoured to introduce at the meeting or as part of his appeal. In addition, it is not a matter for the Board to produce key evidence documents for a hearing. It is for the Applicant to produce such evidence as he considers appropriate and relevant as he is able to do, whether by enquiry of the Board, as a result of freedom of information requests, SIMD figures and other publicly available data.
- 5.9 In regard to the grant of appeal referred to in 2.1.3 above, Mrs Dalrymple of Bishopton Pharmacy was allowed to introduce as a late submission two letters of support: one from Dr Tiwari of Bishopton Medical Practice, and the other from joint owners of the salon at 109 Greenock Road, stating that they would provide Mrs Dalrymple with the first opportunity to purchase the premises when they retire. Their submission was allowed by the PPC. A further

document submitted was disallowed. There is nothing in the minutes to suggest that the then Applicant was asked for his approval or objection, nor does any objection appear to be noted. Then at 5.23 of the minutes, it is noted that all parties confirm that they had received a full and fair hearing. The Appellant states that he wished to have submitted further evidence but it was not possible as he was outwith the time of 10 days as being 'the previous custom and practice'. He acknowledges that he was asked prior to the hearing whether he wished to submit other supporting evidence but stated he had no time to gather the documents that he would have liked to have submitted. He does not articulate what these documents were in his letter of appeal. The two documents provided seem, to me, to be unremarkable. The letter from Dr Tiwari was, in Mrs Dalrymple's evidence, merely his personal opinion and explained that GPs require to remain neutral. It was considered that this letter and that from the hairdressing salon would have little bearing on the PPC's decision as to adequacy.

- 5.10 It was a matter for the Appellant to provide such evidence he had for the PPF and insofar as the PPC was concerned, albeit that the most recently published panel was from 2013/14, it is a public document and to which the PPC would have had access.
- 5.11 The PPC is entitled to consider existing services within the neighbourhood. The "services" is the subject matter and is not to be strictly interpreted as being the pharmaceutical services properly located within the neighbourhood. Services issued from outwith the neighbourhood may be enjoyed within it. The PPC are noted to have had a group visit of the vicinity surrounding the proposed premises, the existing pharmacies, GP surgeries and facilities, and the immediate area and surrounding areas of Bishopton, including Dargavel and Erskine.
- 5.12 The Appellant takes issue with the lack of reference to the MSP survey and stated that the joint CAR was not a true representation of local public opinion representing 421 respondents, whereas the MSP survey received 1,081 responses. There is little detail as to the methodology of the latter survey which appears to be somewhat limited in its scope from the papers submitted. In any event, the CAR was a joint undertaking between the then Applicant and the Board, and which the PPC have a legal obligation to consider. The other points of appeal raised by the Appellant are considered to be either irrelevant or repetitive, some are an attempt to introduce new evidence which cannot be addressed by this forum. The remaining points of appeal are considered, in the circumstances, of regulation 5(10) to be *de minimis*.
- 5.13 It is considered that the decision of the PPC is in accordance with regulation 5(10). Upon considering the definition of the relevant neighbourhood, the panel addressed to the two questions which are referred to above: the adequacy of the existing pharmaceutical services in the neighbourhood, and whether the granting of the application was necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood. The second question is only relevant if an inadequacy of existing services is identified. The PPC have noted that the application had made several claims as to the inadequacy of the current provision of pharmaceutical services. The PPC addressed that evidence as well as the evidence of the other parties and

considered itself to be satisfied, from that evidence, that the Bishopton pharmacy provided a comprehensive range of pharmaceutical services including NHS core services and supplementary services. The Applicant had made claims about stock shortages in the existing pharmacy and general poor levels of service provision, but the PPC were of the view that these were not supported by the evidence nor by the expressions of satisfaction with the existing services which were set out within the CAR. The PPC considered that the level of existing services to/and within the neighbourhood provided satisfactory access for those resident in the neighbourhood to pharmaceutical services. In considering the proposed residential housing development at Dargavel Village, the PPC took account of the fact it was of the legal precedents referred to by the Applicant and did consider it reasonable to take account of probable developments over the next 2-3 years, but felt that to go beyond that time period it became speculative in terms of the potential impact on the neighbourhood as a whole. The current evidence from the residential housing development did not provide sufficient grounds to support the need for an additional pharmaceutical service in the foreseeable future. In any event, the area was quite affluent with many car owners, no social housing, and which had the effect of reducing the demand for pharmaceutical services compared with the national average. The PPC also noted the evidence of the CAR that 79% of the responses expressed satisfaction with the existing pharmaceutical provision.

- 5.14 The evidence before the PPC was considerable. The PPC is a specialist decision-maker and it has come to its decision on the evidence of submissions produced by the parties on the question of adequacy and its own inspection. This evidence incorporated not only by the parties' oral submissions but accompanying documents
- 5.15 It is clear that the panel did address the question of the adequacy of existing pharmaceutical services and in doing so gave consideration to the adequacy of those services for the future, and that the PPC gave full consideration to the critical condition that the existing pharmacy in Bishopton secured adequate provision of pharmaceutical services in the neighbourhood in the sense that an adequate provision could be maintained into the future.

6. Conclusion

For the reasons set out above, I conclude that the grounds of appeal set out by the Appellant disclose no reasonable grounds for appeal and accordingly dismiss the appeal in terms of paragraph 5(5)(a)(i) of Schedule 3 of the Regulations. In doing so, I am cognisant that the test set out in said paragraph is not a high bar for the Appellant to cross. In the circumstances, paragraphs 5(2)(A) and (2)(B) are not engaged.

(sgd) JMD Graham

J. Michael D. Graham
Interim Chairman
National Appeal Panel
20 July 2016