

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

77 Main Road, Fenwick, KA3 6DU

Applicant and First Named Appellant:	Afshaq Ahmed
Second Named Appellants:	Fenwick and Moscow & Waterside Community Councils
Health Board:	NHS Ayrshire & Arran
PPC Decision Issued:	15 December 2017
Panel Case Number:	NAP75 (2017)

Decision - National Appeal Panel: 77 Main Road, Fenwick, KA3 6DU (NAP75(2017))

Decision of the Chair of the National Appeal Panel

1. BACKGROUND

- 1.1. This is an appeal against the decision of the Pharmacy Practices Committee (“PPC”) of NHS Ayrshire & Arran (“the Board”), the hearing in connection with which was held on 15 December 2017.
- 1.2. Mr Ashfaq Ahmed (“the Applicant” or “the First Named Appellant”) made an application for inclusion in the Pharmaceutical List of NHS Ayrshire & Arran to provide pharmaceutical services in respect of the premises at 77 Main Road, Fenwick, KA3 6DU (“the Premises”), said application dated 3 November 2017.
- 1.3. The PPC, under delegated powers of the Board, held a hearing on 15 December 2017 taking evidence from the Applicant and Interested Parties and considered supporting documentation and, following upon which, determined that the provision of pharmaceutical services at the Premises was neither necessary nor desirable in order to secure adequate provision of pharmaceutical services within the neighbourhood within which the premises were located by persons whose names were included in the pharmaceutical list, and accordingly refused the application.
- 1.4. Both the First Named Appellant and Fenwick and Moscow & Waterside Community Councils (“the Second Named Appellants”) submitted letters of appeal against the PPC’s decision, both received 16 January 2018. The First Named Appellants and Second Named Appellants will collectively hereinafter be referred to as “the Appellants”.

2. SUMMARY ON GROUNDS OF APPEAL

- 2.1. The Appellants assert generally that the PPC has failed to correctly narrate the facts, had made inaccurate assumptions and procedural defects and were guilty of personal bias. Specifically, the First Named Appellant stated that the APPC agreed with the Applicant’s defined neighbourhood but had stated incorrectly that the closest pharmacy was 2.8 miles away, and that there were good transport and road links to other pharmacies. He stated further that confusion resulted at the hearing in relation to the recent withdrawal of the dispensing activities of the former GP surgery situated in Fenwick. He considered that the PPC rejected the Application based on unemployment levels alone, when other factors were equally important. A panel member raised a point incorrectly assuming that the qualifying criteria for the Minor Ailments Service (MAS) was for those over 65 when in fact it is available to those over 60 years of age. The PPC wrongly assumed that being in employment disqualified any person from entitlement to MAS .
- 2.2. One of the members of the PPC had suggested that the premises were located at the top of a hill, which was incorrect, and that residents had no difficulty in accessing the surgery in a similar location when it was operational. The PPC referred to a projection of 1175 as being the average number of items dispensed per month and questioned the viability of the pharmacy as a result. The First Named Appellant asserted that it was never suggested that, at present or in the future, the forecast would be around 1175. The PPC had stated that as there was no medical facility within the village, patients would have to travel outwith the neighbourhood and could therefore complete pharmacy trips on such occasions, thus failing to recognise the value of a pharmacy in the event of emergencies

and other general medical situations. In addition, the PPC made no proper reference to the high level of backing from community councils and the letters of support from other elected officials including MSPs and Councillors.

- 2.3. The Second Named Appellants took issue with the failure of the PPC to give any explanation as to how the Consultation Analysis Report (“CAR”) had been considered in arriving at the decision to refuse the application. They also took issue with one of the members of the PPC who, they state, had indicated bias at a point of the hearing where further representation and summaries remained to be heard, and indicated her reasons as to why the application could be refused. They claim that during the course of the evidence, another member of the PPC had misunderstood the effect of the Glencairn Medical Practice closing and referred to the pharmaceutical care plan published in Spring 2017 whereby GP practices may dispense medicines for some or all of their patients where a Board is satisfied that a “person by reason of distance or inadequacy or means of communication or other exceptional circumstances, will have serious difficulty in obtaining from a pharmacist any drugs...” They state that the Practice in Fenwick continued dispensing until its closure in late 2017 and had thereby created an inadequacy for the residents of Fenwick. They assert that the closure resulted in a significant gap in pharmaceutical provision and it was such gap that was not fully understood, identified or addressed by the PPC. It had failed to understand that for many residents, pharmaceutical provision was accordingly inadequate for the very reason that the Fenwick surgery was required to dispense in the first place.
- 2.4. They state that the PPC had taken the view that 70% males and 54% females were in employment and as such, the majority of these residents would not be resident in the neighbourhood during normal working hours. They argue that the PPC’s assertion was incorrect and that the census of 2011 indicated that of the then population of 1038, only 36% left the village to work, on the assumption of a full time 9-5 working pattern, and with 29% of the working population working part time, it would be reasonable to assume that they would have access to the proposed pharmacy during opening hours. The figures used by the PPC, accordingly, distorted their view and accordingly the decision.
- 2.5. During the course of questioning, one member of the PPC asserted that Fenwick had a lower unemployment rate as a whole and that most people in the neighbourhood would therefore not be able to access the MAS as the criteria were children, those on benefits and over 65s. This statement was incorrect. 60 is the entitled age and the statistical data recorded 46.8% of the population in Fenwick was under 16 and over 60, whilst 19% were unemployed and 17% of households had one or more carers resident, and 29.4% of people had one or more long term health condition. Accordingly, the Second Named Appellants argued that demand for the service was significantly higher and likely to be in the order of 50% of the population.
- 2.6. They assert that the PPC had erred in that, as the GP practice in Fenwick was now closed, prescriptions were not being generated in Fenwick itself, and that in any event, the number of prescriptions dispensed to the resident population was expected to be lower than that from a GP surgery and just under half that as estimated by the Applicant and which questioned the likely long term sustainability of the pharmaceutical services to be provided from the premises. The Appellants argued that whilst it was self evident that the closure of the surgery resulted in the population seeking pharmaceutical services elsewhere, in order to assess viability of the proposed pharmacy, the PPC would require to have taken into account the uptake of all pharmaceutical services from all pharmacy contractors by all residents in the neighbourhood and there was no evidence that they

did so, relying on historical information from a dispensing doctor's surgery. They stated the applicant had quoted a top figure of 2350 items dispensed per month and based his business plan on a conservative 1300 prescription items which was based only for those patients registered at the Glencairn surgery and did not include those registered elsewhere. They PPC ought to have addressed that issue.

- 2.7. The Second Named Appellants assert that the PPC showed little regard for local opinion, did not recognise that the closure of the dispensing doctors had created a gap in pharmaceutical provision, and instead focussed on whether existing pharmacies, all of which were remote from the locality, had capacity. Further, the length and time and cost of accessing a pharmacy for those relying on public transport, was given little consideration, particularly when a return journey was required to collect the balance of a prescription. This applied equally to those driving a car. Face-to-face contact with a pharmacist was given little regard to and reference was made to adequacy of pharmaceutical services based on whether prescriptions could be delivered and which is not a core activity. They state that the PPC ignored the almost universal positive comments contained in the CAR. The PPC had ignored the Scottish Government's desire to see pharmacies at the heart of the community, wishing to improve access and increase capacity. Further, the PPC had not in any way demonstrated that they had considered future requirements in securing adequate provision of pharmaceutical services in the neighbourhood.

3. EVIDENCE OF THE PARTIES

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

- 3.1.1. The Applicant indicated that his defined neighbourhood lay to the north by the M77; to the East by M77/A719 intersection following the road to Moscow; to the South from Moscow travelling north on the A719, turning left and taking an unnamed road towards Sunnyside Cottages, thereafter travelling west and taking a series of roads until the B7038/Main Road roundabout was reached; and to the West by the M77. The proposed pharmacy would be located at the heart of the village allowing for very easy local access. The neighbourhood comprised a primary school, nursery, church, and other amenities and services. He stated that the nearest pharmacy was located on Glasgow Road and over 3.2 miles away. There was a bus service every 30 minutes and the total time for a patient using public transport to travel to the nearest pharmacy and back was over 1.5 hours. The pharmacy at Kilmaurs is close to 4.5 miles from the premises, with no direct bus service, and a total of four buses would be required for a return journey. He indicated an adult return journey to Lloyds Pharmacy would be £4.60, and an adult travelling with a child under 16 would pay £6.90. These costs, he asserted, would act as a deterrent for those seeking medical advice on a regular basis. Car owners would require to travel a round trip in excess of 6 miles to access the nearest pharmacy. The distance to the nearest pharmacy from Waterside was 4.3 miles and those travelling with personal transport would require to travel a minimum distance of 9 miles. The resulting difficulty in access was a reason why a delivery service from pharmacies close to 6 miles away could not be expected to replace a full pharmaceutical service.
- 3.1.2. Fenwick Surgery had dispensed prescriptions for four decades from its premises which confirmed that the Board was aware of the difficulties with access to a pharmacy able to dispense prescriptions within the neighbourhood. He argued that it was imperative that difficulties in access to healthcare did not force people to delay treatment or ignore their health, which was emphasised by the Scottish Government which wished pharmacies to

be placed at the heart of the community. He made reference to the Scottish Government's strategy "Achieving Excellence in Pharmaceutical Care: A Strategy for Scotland", in which there was a commitment to "increasing access to a community pharmacy as the first port of call for managing self limiting illnesses and supporting self-management of stable long term conditions, in-hours and out-of-hours". He advised that the population of Fenwick in 2013 was 1038, Waterside 82, and Moscow 141, ie a total of approximately 1300. 100 3-5 bedroom houses had been built and occupied in Fenwick, raising the number of residents by around 300. There were plans for further development in Fenwick and Waterside, increasing the resident levels by approximately 200, and that accordingly, the anticipated population would be around 1800 excluding significant populations living in nearby farms who were dependent on the surgery and would look to be served by a community pharmacy. The population including such communities could be as much as over 2000. There were, in addition, businesses in Fenwick and surrounding areas which would utilise the pharmacy. He asserted that Fenwick was placed in the top 25%, and Waterside and Moscow within the top 4% with regard to the most deprived areas for access to services. There was a significantly higher percentage of over 60 year olds than in East Ayrshire and Scotland.

- 3.1.3. As to viability, he stated that pharmacy contracts had been granted in Logan and Ochiltree with smaller populations and years later both were still operating. Having examined the NHS payments to the former Fenwick surgery, he was satisfied that viability would not be an issue. 7052 items were dispensed from the surgery from July to September 2016, giving an average of 2350 per month and that during the quieter summer period when schools were off and people were away. He indicated that his provisional business plan was loosely based on an average less than half that number. He was confident that demand had increased considerably since the surgery's figures were published. Having stated that, he accepted that not all residents in the neighbourhood would have their prescriptions filled by his proposed pharmacy, but with 90% support in the CAR and a significant increase in the population, he was confident that the pharmacy would secure a healthy proportion of the former surgery's average.
- 3.1.4. Members of the PPC addressed questions to the Applicant. One indicated that the condition of the road between Moscow, Waterside and Fenwick was poor and asked why people would negotiate these bad roads to access the proposed pharmacy rather than visit an existing pharmacy. The Applicant stated that although the road conditions might be better, the existing pharmacies were further away. In response to a further question, the Applicant confirmed that a delivery service would be available, not just for housebound residents, and as the geography was not vast, he anticipated that it could be easily covered by one delivery driver. The member made reference to the closed surgery in response to which the Applicant explained that most GP practices did not dispense prescription medication, but that the Fenwick surgery took on a dispensing contract, having been asked originally to do so by the Board. The member concerned stated that the Fenwick surgery had closed because of administration difficulties, not because the Board had asked it to stop dispensing, and the member understood that it continued to dispense as it had carried a large amount of stock. In response to further questions, the Applicant stated he would pick up prescriptions from surgeries once or twice a day and have them filled in the pharmacy, and that the population estimates quoted by him had been taken from Government websites. Another member had asked a question regarding the number of those in the neighbourhood who were elderly, and thereafter offered the evidence that the majority of people in the 18-50 age group were working and had access to a car, and accordingly driving elsewhere. The applicant stated that there was evidence in the Community Action Plan indicating that there was a

higher percentage of people of retirement age in Fenwick than the rest of East Ayrshire and Scotland and advised that the proposed pharmacy would offer a delivery service .

3.2. Evidence of Mrs Jean Brown of Fenwick and Moscow & Waterside Community Councils may be briefly summarised as follows:

3.2.1 She indicated that the CAR clearly showed that the current provision of pharmaceutical services in the defined neighbourhood was inadequate and that a pharmacy as proposed in the application was both necessary and desirable. The response was high with 205 responses, and 88% of those responding supported the opening of a pharmacy at the premises. The responses suggested that the pharmacy would serve a wider area than the defined neighbourhood. Fenwick was a hub of the joint rural communities which had numerous facilities. The loss of the dispensing doctor's surgery in November 2016 had been a major blow to the community. Over 1000 patients were registered with Fenwick Surgery and the doctors at the Glencairn Medical Practice were supportive of a pharmacy opening in Fenwick. That the doctors' surgery had been established for over 50 years, alone demonstrated the inadequacy of the provision of pharmaceutical services in the neighbourhood. Of necessity, those who were served by the former dispensing doctors had made alternative arrangements to access their prescriptions, resulting in lengthy and costly journeys to collect prescriptions and often facing return journeys to collect the balance.

3.2.2 In quoting the National Records for Scotland projections, she indicated that the population over 75 years in East Ayrshire is projected to rise by 36% from 2015-2025. There is already a higher than average retired population living in the local communities. With an aging population, age related illnesses follow, which are likely to impede the ability of people to drive. With increasing strain on GPs, people would wish access to a first point of primary care within the community. She advised that a journey by car to Kilmaurs was a round trip of 9 miles from Fenwick and 14 miles from Waterside. Parking near the pharmacy in Kilmaurs was congested. There was no direct public access from Fenwick to Kilmaurs by public transport. Two buses at a cost of £10.20 return per adult and £5.20 per child with a journey time of at least 45 minutes each way would be required. It would neither be safe nor reasonable to access Kilmaurs pharmacy on foot. For the other nearest pharmacy, Lloyds, a journey by car would be a round trip of 7 miles from Fenwick and 12 miles from Waterside. There is a bus service available at intervals of 30 minutes and at a cost of £4.60 return per adult and £2.30 per child. There was no safe crossing place when arriving by bus at the increasingly busy Glasgow Road. A 30 minute waiting time was not unusual at Lloyds. A round trip could result in a time of 1 hour 30 minutes. A round trip of 7 miles on foot was unreasonable. Lloyds Pharmacy does not offer a delivery service to Fenwick.

3.2.3 She stated as Community Councillors living in the heart of their communities, they were well placed to understand the fears and concerns of local residents in terms of their ability to access pharmaceutical services and primary care. That the GP surgery has now closed, a pharmacy at the heart of the community in a central and accessible location supports Pharmacy First and the Government's vision for the future of pharmacy provision. It was desirable and achievable. Numerous letters of support were received from local elected MSPs and Councillors.

3.2.4 In response to questions from members of the PPC, Mrs Brown stated that whilst the community did not want more housing development in the area, its views were not altogether shared by the people within the community and she fully expected the

population to grow in the future. On being asked her views on why the Community Action Plan Survey received 450 responses whereas the CAR received 205 responses, she was of the opinion that 205 was a good response rate and that all those interested had responded and expected them to be loyal to a local pharmacy and prescriptions to be brought back to Fenwick to be dispensed. Another PPC member asked no questions but gave the opinion that the most recent figures indicated that Fenwick had a lower unemployment rate than Scotland as a whole and most people in the neighbourhood would not be able to access the Minor Ailment Service as the eligibility criteria were children, those on benefits, and the over 65s. Further, that Member stated that the PPC needed to secure adequate provision of pharmaceutical services for the neighbourhood and that if an Applicant's business was not likely to be viable, then adequate provision would not be secured, and this was why there had been much discussion about prescription figures. The Member stated that the GP practice in Fenwick was now closed so prescriptions were not being generated in Fenwick itself, and that a dispensing practice had a different prescribing pattern from a non-dispensing GP practice.

3.3. The evidence of Ms Yousaf of Central Pharmacies UK Ltd (Village Pharmacy) may be summarised as follows :

3.3.1. Ms Yousaf stated that the pharmacy in Kilmaurs initially struggled as the dispensing doctor in Kilmaurs continued to dispense prescriptions for a year after Village Pharmacy had opened, although she accepted that the situation in Fenwick differed, in that there was no longer a GP practice issuing prescriptions and 99% of pharmacy income came from prescriptions. She was of the view that if the proposed pharmacy were unsustainable then this would be a blow to residents who had already faced disruption to pharmacy services. In addition to the affect on patients if the pharmacy was unsustainable, her employer also had concerns about the size of the premise as well as the experience and expertise of the Applicant in running the pharmacy.

3.3.2. In response to questions from the Applicant, Ms Yousaf agreed there was a shift to payment for services rather than prescriptions, but that the bulk of pharmacy income still came from prescriptions. In response to questions from members of the PPC, she stated that there would be no major impact on her pharmacy if a successful pharmacy were to open in Fenwick. She was of the view that it was not a requirement for a GP practice in the area to have a successful pharmacy and considered that another primary care practitioner would be an asset in the absence of a GP practice in the community. She stated that the 1300 items per month mentioned during the course of her evidence was an estimate derived from her employer's own calculations and that, after initial difficulties, her own pharmacy at Kilmaurs was sustainable after the Kilmaurs doctors' practice closed, and she was of the view that were a pharmacy to open at Fenwick, it would not have a prejudicial impact on the business of Kilmaurs pharmacy.

4. THE PPC DECISION

4.1. The PPC had indicated that they had taken into account not only the oral evidence, but also the various items of supplementary information referred to including the CAR, maps, Community Action Plan, Pharmaceutical Care Services Plan and others. It provided a summary of the CAR including the questions and analysis of responses, indicating that 205 responses had been received, and noted a high level of local support for the new pharmacy at 88%.

4.2. The PPC had noted the **neighbourhood** as defined by the Applicant which had been agreed by the Interested Parties, in connection with which a number of factors had been taken into account, including those resident in it, natural and physical boundaries, general amenities such as schools/shopping areas, the mixture of public and private housing, the provision of parks and other recreational facilities, the distances residents required to travel to obtain pharmaceutical and other services and also the availability of public transport. The PPC accordingly agreed with the Applicant that the neighbourhood should be defined by the following boundaries and included the villages of Waterside and Moscow –

- Northern boundary – M77
- Eastern boundary – M77/A719 intersection following the road south to Moscow
- Southern boundary – From Moscow travelling North on A719 turning left and taking the unnamed road towards Sunny Side Cottage Gardens then travelling West and taking a series of unnamed roads until B7038/Main Road Roundabout is reached
- Western boundary – M77

Major roads provided physical boundaries. As it was a rural area the villages of Waterside and Moscow were included in the neighbourhood because the Community Councils worked closely together. The definition was also consistent with the areas defined for primary school catchment and the electoral register.

4.3. The PPC required to consider the **adequacy** of pharmaceutical services in the neighbourhood and if the PPC deemed them inadequate, whether the granting of the application was necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood. The PPC had noted that there were no pharmacies within the neighbourhood and that the location of two existing pharmacies serving the neighbourhood to be in Kilmaurs and Kilmarnock. It reported that it was the professional opinion of the pharmacists advising the PPC that the majority of acute prescriptions would be dispensed in the locality where the prescription was issued i.e. Crosshouse, Kilmaurs and Kilmarnock. Notwithstanding that the Community Council had assured loyalty of the residents to the proposed pharmacy and that there was a high level of local support for the new pharmacy in the CAR, the PPC stated that it had been demonstrated that the majority of residents of 70% males and 54% females were in employment and, as such the majority of these residents would not be in the neighbourhood during normal working hours and that it was unlikely acute prescriptions would be kept until the Saturday morning to be dispensed at the proposed pharmacy. The PPC reported that the Applicant had estimated the number of items dispensed from the proposed pharmacy at less than 1175 per month and it was again the professional opinion of the pharmacy members that this volume could be adequately dispensed by the existing pharmacies.

4.4. That Fenwick Surgery had dispensed prescription items for over 40 years did not, in the view of the PPC, demonstrate that current pharmacy services were inadequate. Circumstances had changed because the GP surgery had closed and prescriptions were no longer being generated in Fenwick. In any event, the GP practice had provided a dispensing service not a pharmacy service. Had residents required a pharmacy service during the 40 years when the Medical Practice was open, then this would still require to have been accessed out-with the neighbourhood. Further, following the closure of Glencairn Surgery, residents required to make alternative arrangements for accessing pharmaceutical services. The PPC considered the situation of accessing pharmacy services by public transport. They noted that the bus service was infrequent with 3 services per day in each direction for the residents of Moscow and Waterside, but the PPC thought it more likely that these residents would visit their GP surgery where

receipt of the appropriate assistance was more certain and, in any event, for those with travel difficulties there was a delivery service for repeat prescriptions from a number of pharmacies in nearby towns including Kilmaurs, and concluded that there was no difficulty for people living in Fenwick, Waterside and Moscow in obtaining prescription items.

- 4.5. The impact of recent and future developments on adequacy of existing pharmacy services was assessed; 100 new homes had been built and occupied in the neighbourhood in the last five years, all of which were 3-5 bedroom family homes. It was unlikely that these residents would choose to move into this neighbourhood without access to a car and, as such had an open choice on where to access pharmacy services. The road network in the area was excellent with the M77 close by. As there were no medical services, banking services or a convenience store within the neighbourhood, residents required to travel out-with Fenwick, Waterside and Moscow to visit primary care services and obtain day to day provisions, and accordingly, pharmacy services could be accessed during these trips.
- 4.6. As to viability of the proposed pharmacy, professional advice was given that the majority of pharmacy business was still derived from the dispensing of prescriptions rather than the provision of pharmaceutical services. The PPC was of the view that the number of prescriptions dispensed to the resident population was expected to be much lower than that from Glencairn Surgery and could be significantly lower than just under the half estimated by the Applicant, making the likely long term sustainability of the pharmaceutical services to be provided by the Applicant questionable.
- 4.7. Accordingly, it was the decision of the PPC was that the provision of pharmaceutical services at the premises was neither necessary nor desirable in order to secure adequate provision of pharmaceutical services within the neighbourhood in which the premises were located by persons whose names were included in the pharmaceutical list, and that, as such, the application was rejected.

5. DISCUSSION AND REASONS FOR DECISION

- 5.1. Under the Regulations, the available grounds for appeal against a decision of the Board are limited to circumstances where there has been an error in law by the Board in its application of the Regulations, that there has been a procedural defect in the way the application has been considered by the Board, a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based, or a failure to explain the application by the Board of the provisions of these Regulations to those facts.
- 5.2. I am required to consider the Notices of Appeal and to dismiss the Appeals if I consider that they disclose no reasonable grounds or are otherwise frivolous or vexatious, remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out above have occurred or in any other case convene the National Appeal Panel to determine the Appeal.
- 5.3. The PPC had “demonstrated” that the majority of residents of 70% males and 54% females were in employment and that the majority of those residents were unlikely to be in the neighbourhood during the day. It is not clear how the PPC came by these figures but assuming, as the Second Named Appellants have suggested, that these were drawn

from the Community Action Plan, it does not (according to these figures), paint the whole picture, in that in terms of the statistics, only 36% leave the village to work. Those and others may work part-time and therefore be able to access the pharmacy in normal working hours. In the circumstances, the bald statement of 70% males and 54% females is misleading on its own without a more detailed examination of them as highlighted by the Appellants.

- 5.4. The PPC reports that the Appellants had estimated that the Applicant had considered the number of items to be dispensed from the pharmacy to be 1175. This mis-states the Applicant's evidence where he indicated that the former GP dispensary issued approximately 2350 items per month during the summer months of 2016 and that the proposed pharmacy, with 90% support, should secure a healthy proportion of that figure, albeit his business plan provided for a figure of less than half that number. These figures were taken on the basis of the dispensing GP practice alone and not, and as suggested by the Appellants, registered elsewhere. This was an important point not addressed by the PPC.
- 5.5. The size of a population of a neighbourhood is a critical issue and, again, not addressed by the PPC. The Applicant had stated that, whilst the current population of the neighbourhood was 1600 (including the recent building of 3/5 bedroom houses), there were further plans which would increase the population to 1800 but excluding significant populations in nearby farmlands which suggested an increase to 2000. None of these figures was considered by the PPC, nor were they rejected or otherwise; equally, the proportion of the population which would be expected to utilise the pharmacy service was not commented upon.
- 5.6. Access to the nearest pharmacies was a major issue and the Appellants made significant points during the course of their evidence of the difficulties in accessing nearby pharmacies by public transport, including distance, time and costs. The PPC, whilst noting that the bus service was infrequent, took the view that it was more likely that those visiting their GP surgery would access pharmaceutical services there and that, in any event there was a delivery service for prescriptions. The PPC has ignored the fact that a delivery service, which may be withdrawn at any time, is not a core service and have, in addition, misunderstood the meaning of a pharmaceutical service. To have rejected the access issue without reasoned discussion was a signal error.
- 5.7. The Chair on the one hand refused both the Applicant and one of the Interested Parties to ask questions out of turn, yet allowed Members of the PPC to make statements of "fact" without hindrance. In particular, a pharmacy Member had no questions to ask but was permitted to make a statement that Fenwick had a lower unemployment rate in Scotland as a whole (unvouched and disputed) and that therefore most people would not be able to access MAS as the qualifying criteria were children, those on benefits and those over 65. This is a surprising misstatement by a pharmacy Member. Quite apart from the fact that the qualifying age is 60, there are numerous exceptions to these criteria – eg those suffering from diabetes, thyroid problems, pregnancy (including one year after birth), unscheduled care and other medical exceptions. The PPC are reported to have relied on the advice of the pharmacy Members. One would have expected them to have been more accurate in the circumstances.
- 5.8. The Second Named Appellants made reference to the CAR and what consideration the PPC had given to it at arriving at its decision. It is unarguable that the PPC had noted the analysis of the CAR. However, in terms of Schedule 3, paragraph 3(6)(b), the PPC is

required to give an explanation as to how the CAR was taken into account when arriving at its decision. Other than the brief terms of paragraph 19.9 of the PPC's decision, which are insufficient for the purposes of the Regulations, they have failed to do so.

6. DECISION

- 6.1. For the reasons set out above, I consider that Schedule 3, paragraphs 5(2A) and (2B) are engaged. In particular it was procedurally inept for two members of the PPC to offer 'evidence' during the course of the hearing without challenge by the Chair, the applicant and interested parties. The PPC has, in view of the evidence of the parties, failed to properly narrate the facts and reasons sufficiently upon which their determination of the application was based and, further, failed to explain clearly and with reasons the application of the Regulations to those facts.
- 6.2. It is indeed unfortunate that this is the second occasion upon which I now advise the Board to empanel a new PPC as soon as possible absent any of the Members who participated at both the hearing held on 15 December 2017 and the previous hearing held on 25 January 2015 in order to consider the application afresh. There will be no requirement to enter into a consultation process and that the existing CAR will suffice.
- 6.3. I fully appreciate that this will place an extra burden on the Board and very much regret that it has been necessary to decide as I have.

(sgd) J Michael D Graham

Interim Chair

5th April 2018