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May 26, 2017

Via UPS Delivery

Ms. Courtney Avery
Administrator
Illinois Health Facilities and
Services Review Board
525 West Jefferson Street, 2nd Floor
Springfield, IL 62761

Re: ***Project 17-002,*** *Mercy Health Hospital and Medical Center, Crystal Lake*

Illinois Courts have Twice Rejected Mercy Crystal Lake Hospital Applications and the Current Application has More Legal Defects than the Prior Two

Dear Ms. Avery:

Our firm is legal counsel to Centegra Health System, and its affiliated McHenry County hospitals, and submits this letter on their behalf in opposition to Project 17-002.

Established judicial precedent shows that a denial of the Mercy Crystal Lake hospital application would likely be sustained in court and, conversely, approval of the application would likely be reversed:

a. The Circuit Court of McHenry County reversed a decision of the Health Facilities Planning Board to approve a Mercy Crystal Lake hospital application, holding that it was ***arbitrary and capricious, and against the manifest weight of the evidence*** where, among other things, the proposed 70-bed hospital did not meet the State regulation requiring a 100-bed minimum medical/surgical unit.

b. The Circuit Court of Will County ***dismissed with prejudice*** Mercy's complaint challenging the Review Board's denial of its Crystal Lake hospital application where, among other things, the proposed 70-bed hospital did not meet the State regulation requiring a 100-bed minimum medical/surgical unit.

c. The proposed project for a new Crystal Lake hospital with only 11 medical/surgical beds and two ICU beds does not meet the State regulations requiring a 100-bed minimum medical/surgical unit and four bed minimum ICU.

For the above reasons, and those additional reasons set forth below, the Health Facilities and Services Review Board should deny Project 17-002, Mercy Health Hospital and Medical Center, Crystal Lake.

A. The Legal Grounds for Reversal of the Permit on the First Mercy Crystal Lake Application

Project #17-002 is Mercy Health's third attempt to establish a non-compliant hospital in Crystal Lake. The first was Project #03-049 that was approved by the Health Facilities Planning Board in April 2004. Though that project was immersed in a well-publicized scandal that resulted in a moratorium on Board action, the removal of all sitting Board members, and a number of criminal convictions, the Circuit Court of McHenry County reversed the permit solely on the grounds that the project failed to meet certain key need-related criteria. Given the project's failure to meet these criteria, the Circuit Court found that the Board's decision to approve the application was both against the manifest weight of the evidence and was arbitrary and capricious. Project #17-002 fails to meet those same criteria, and more.

1. The Court Determined that Approval of the First Mercy Crystal Lake Application was Against the Manifest Weight of the Evidence

The Court first noted that the Board's review criteria, as duly adopted agency regulations, have "the force and effect of law." *Citing, Medcat Leasing Co. v. Whitley,* 253 Ill. App. 3d 801. (*See,* Memorandum Opinion and Order of Circuit Judge Maureen P. McIntyre ("Memorandum Opinion") attached hereto as Exhibit A at page 6.) The following Table identifies the need-related criteria that were not met in Project #03-049 and also indicates whether those criteria are met in the current Project #17-002:

TABLE 1: The Current Project Has the Same Legal Defects as Project #03-049

CRITERION	#03-049	#17-002
Med/Surg Bed Need	Not Met	Not Met
ICU Bed Need	Not Met	Not Met
100-Bed Med/Surg Minimum	Not Met	Not Met
Target Utilization of Proposed Services	Not Met	Not Met
Target Utilization of Existing Providers	Not Met	Not Met
Service Not Available in the Area	Not Met	Not Met
Access Limitations on Payor Status	Not Met	Not Met
Restrictive Admissions Policies	Not Met	Not Met
Indicators of Medical Problems in Area	Not Met	Not Met

As the above Table 1 demonstrates, the current Project #17-002 suffers from the same legal deficiencies as Project #03-049 in which the Circuit Court reversed the Planning Board's issuance of a permit. Moreover, Project #17-002 fails to meet an *additional* criterion that was satisfied in the earlier project. Project #03-049 satisfied the ICU minimum sized 4-bed unit, but the current project does not as it proposes only two ICU beds. Consequently, an even stronger case exists against approval of Project #17-002 than presented to the Circuit Court when it reversed the permit in Project #03-049.

2. The Court Determined that Approval of the First Mercy Crystal Lake Application was Arbitrary and Capricious

The Circuit Court also ruled that approval of Project #03-049 was arbitrary and capricious. The factors considered by the Court in making this determination were: "1. Did the Agency rely on factors the legislature did not intend the agency to consider; 2. Did the Agency fail to consider an important aspect of the problem, or 3. Did the Agency offer an explanation for its decision which runs counter to the evidence before the agency or which is so implausible that it could not be ascribed to a difference in view or the project of agency expertise." Memorandum Opinion at 15-16, *citing, Greer v. Illinois Housing Development Authority,* 122 Ill. 2d 462 (1988).

The Circuit Court found the approval of the Mercy permit to be arbitrary and capricious on the grounds that the Planning Board relied on factors not intended by the legislature, namely, Mercy's alleged physician shortage argument. The Court noted:

> "The Board hearing on April 21 focused in large part on the new physicians who would be employed by Mercy Hospital. **However, the rules governing the Board's decisions do not provide for criteria which address physician shortages."**

Emphasis added; Memorandum Opinion at 16.

Over ten years have passed since the Circuit Court's decision on Project #03-049 and neither the Planning Act nor the Review Board's rules have been amended to provide that physician shortages is a factor that will justify projects that violate the criteria on minimum unit size, bed need, unnecessary duplication and maldistribution. Nevertheless, Mercy makes the same physician shortage argument in the current application as it did on the first application. By doing so, Mercy seemingly invites a Review Board decision that is arbitrary and capricious.

The Circuit Court also determined that the Planning Board's decision was arbitrary and capricious for failing to consider an important aspect of the problem, including the impact of the proposed project on existing area hospitals. (Memorandum Opinion at 17.) Mercy claims that its current Project #17-002 will not adversely impact existing facilities because Mercy proposes to reduce beds at its Harvard hospital and it will not add capacity to the planning area. However, Mercy's own documentation shows that the project will reduce utilization rates at nearby hospitals.

Mercy's "anticipated patient origin table" on page 73 of its application for Project #17-002 shows that nearly all of its patient volumes will come from zip codes proximate to existing hospitals near Crystal Lake and *no patient volume is anticipated from the Mercy Harvard zip code.* Clearly, the move by Mercy from Harvard to Crystal Lake is dependent upon Mercy obtaining patient volume from existing facilities near Crystal Lake (and not Harvard) and thereby reducing the utilization of those nearby facilities. The impact of reduced utilization at

existing facilities was grounds for reversal of the Mercy Crystal Lake permit in Project #03-049, and would also be grounds for reversal of a permit in the current project.

3. The Court Sustained the Rule Requiring a Minimum 100-Bed Med/Surg Unit in MSAs, and Rejected Mercy's Argument Against It

Mercy argued that the criterion requiring 100-bed minimum med/surg units at new hospitals located within Metropolitan Statistical Areas was outdated because of decreasing average length of stays since the rule was adopted, which Mercy claimed was 1980. The Circuit Court rejected this argument noting, among other things, that the 100-bed rule was established in 1992. Significantly, the Court stated that even if average lengths of stay were declining, this would be a factor contributing to excess bed capacity at existing facilities which, the Court further noted, happened to be the case in the planning area for Crystal Lake which had an excess of 38 med/surg beds. Consequently, the Circuit Court viewed reduced lengths of stay *not* as an argument in support of building smaller hospitals in violation of the Board's rules on minimum unit sizes, but rather, as an argument to not allow small hospitals to be built at all, at least not within Metropolitan Statistical Areas.

If Mercy wants to build a "micro-hospital" it must look to do so outside of a Metropolitan Statistical Area. As the Circuit Court of McHenry County noted, the 100-bed minimum standard "is applicable *only* to hospitals within a Metropolitan Statistical Area, such as the proposed location." (Emphasis added; Memorandum Opinion at 11.) But Mercy's current proposal would not be justified even outside of an MSA because the four bed ICU minimum standard has *statewide* application and is not limited to MSAs, yet Mercy is proposing only a two bed ICU. *See,* 77 Ill. Adm. Code 1110.530(g)(3).

The rationale for the 100-bed minimum standard is that new hospital projects within MSAs should not be proposed until there is an actual bed need for 100 medical/surgical beds within the area. This regulatory intent was articulated by the Board's ex-officio member from IDPH the last time Mercy tried to put an undersized hospital in Crystal Lake. At a Review Board meeting on June 28, 2011 on Mercy Crystal Lake Project #10-089, ex-officio Review Board member David Carvalho stated:

> "The issue of the 100 bed size was an issue four or five years ago, actually, for applications, I believe, in this region, and the point is you have adopted a rule that says you don't want to see a hospital built [within an MSA] until the unmet need is 100, and back then, you also got applicants saying, 'Well, we're almost at 100, so let us build.' The point of the rule was wait until the need is 100 and then do the application, not do the application before the need is 100 and then say, 'Well, please overlook the fact that we're not 100.'"

See, Excerpt of Transcript from Review Board meeting dated June 28, 2011 attached hereto as Exhibit B, Page 141, Line 16 *et seq.*

As noted in the above quote, the 100-bed minimum unit size criterion directly relates to the calculated bed need criterion and the intent of both is that new hospital projects in MSAs should not be presented until the bed need in the planning area meets or exceeds the minimum unit size criteria. Significantly, when the Review Board voted to approve a new hospital in McHenry County in September 2012, the med/surg bed need was 138, the OB bed need was 22, and the ICU bed need was 18. The approved project, Centegra Hospital-Huntley #10-090, satisfied the minimum med/surg unit size of 100 beds, the minimum OB unit size of 20 beds, and the minimum ICU size of four beds.

None of the three Mercy Crystal Lake applications satisfied both the bed need criteria and the minimum unit size criteria, as the Centegra project had.[1]

4. The Review Board Reaffirmed the 100-bed Minimum Standard Since Project #03-049 and the Circuit Court's Decision on that Project

Since the first Mercy Crystal Lake application and the Circuit Court's decision sustaining the 100-bed minimum rule, the Review Board evaluated and reaffirmed its minimum bed standards when it amended the review criteria in 2009.

In February 2008, the Review Board proposed incorporating minimum bed requirements into an amended section entitled "Medical/Surgical, Obstetric, Pediatric and Intensive Care—Review Criteria." (32 Ill. Reg. 1575, 1632 (Feb. 8, 2008).) In this regulation, the Board included a new "Performance Requirements" subsection that stated that the minimum bed capacity for a medical/surgical unit within an MSA was 100 beds. Significantly, the final regulation corrected a typographical error in the proposed regulation that indicated a minimum of only 75 medical/surgical beds instead of 100. *See* 33 Ill. Reg. at 3312, 3319. This correction demonstrates that the Review Board was keenly aware of the 100-bed minimum and intentionally maintained the requirement in its rules. The same amendment also specified that a minimum unit size for a new obstetric unit within an MSA was 20 beds and the minimum unit size for an intensive care unit, in any area, was four beds.

Mercy's current project does not meet the minimum standards for a medical/surgical unit or an ICU, and should therefore be denied.

5. The Court Recognized the Board's Discretion to Approve Projects that Do Not Satisfy All Criteria, But Nevertheless Held That a Project Must *Substantially* Comply

Mercy attempted to defend the issuance of a permit in Project #03-049 on the basis of the Review Board's rule that, "The failure of a project to meet one or more review criteria ... shall not prohibit the issuance of a permit." 77 Ill. Adm. Code 1130.660. The Circuit Court

[1] Mercy sued the Review Board seeking to overturn the permit issued for Centegra Hospital-Huntley. The Circuit Court of Will County and the Illinois Appellate Court both affirmed the Board's decision. *See, Mercy Crystal Lake Hospital and Medical Center v. Illinois Health Facilities and Services Review Board,* 2016 IL App (3d) 130947.

referenced a line of appellate court decisions where "the Courts have recognized that the State Board does have the authority to approve an application where one or more of the review criteria were not met." (Memoranda Opinion at 9.) The Circuit Court further noted, however, that "in each of the cases where the Courts upheld the Board's decision to exercise discretionary authority, the courts looked to the record to determine if there was adequate evidence to support the Board's decision." *Id.*

While the Review Board has discretionary authority to approve projects that do not *completely* comply with all the review criteria, the Board's statutory authority is limited to approval of only those projects for which the evidence shows *substantial* compliance with the criteria. The Review Board's discretionary authority is limited by its statutory authority. That issue was addressed by the Appellate Court in *Provena Health v. Illinois Health Facilities Planning Bd.*, 382 Ill. App. 3d 34 (1st Dist. 2008).

Section 6 of the Health Facilities Planning Act empowers the Review Board to approve applications for permit when it finds, among other things, that the proposed project is "is in accord with standards, criteria, or plans of need adopted and approved pursuant to the provisions of Section 12 of this Act." 20 ILCS 3960/6(d)(4). In *Provena Health,* the Appellate Court held that the statutory term "in accord with" was equivalent to a finding of the Review Board that a project "'substantially conformed' with the criteria." 382 Ill. App. 3d at 45.

In connection with the Review Board's discretionary authority under Section 1130.660 of the Board's rules, the Appellate Court concluded that the statutory requirement that a project be in accord with the criteria "does not suggest complete compliance" and that a Board finding of a project's "substantial conformance" with applicable criteria satisfies the Planning Act and the Board's rules. 382 Ill. App. 3d at 45. The court noted that the Illinois legislature had not amended the Planning Act to require complete conformance to all of the applicable criteria and that the "legislature is presumed to know how courts have interpreted a statute and may amend the statute if it intended a different construction." *Id.*

After the decision in *Provena Health,* the legislature did amend the Planning Act by adding language that the "Board must assure that the establishment, construction, or modification of a health care facility ... is in accord with the standards, criteria, or plans of need adopted and approved by the Board." 20 ILCS 3960/5. While the legislature still does not require complete conformance with the criteria, it did reinforce the notion that the Review Board "must assure" that a project substantially conforms to the criteria.

None of the Mercy Crystal Lake applications substantially conformed to the Review Board's criteria. On the first application, the Circuit Court held that the application did not substantially conform. On the second application, the Review Board determined on four separate occasions that the project did not substantially conform, and its decision was sustained in the Circuit Court. The current application conforms even less than the prior two, and should therefore be denied.

B. The Legal Grounds for Affirmance of the Review Board's Denial of the Second Mercy Crystal Lake Application

Mercy took its second bite at the apple in 2010 when it filed another application for a new hospital in Crystal Lake designated as Project #10-089. No project in the Review Board's history was considered and rejected more times than this project. The project was voted down by the Review Board on four separate occasions, as well as having received a negative determination by an Administrative Law Judge, as shown in Table 2, below.

TABLE 2: Project #10-089 was Considered and Rejected Multiple Times

Date	Adjudicating Entity	Action
06/28/11	Health Facilities & Services Review Board	Intent to Deny
12/07/11	Health Facilities & Services Review Board	Initial Denial
09/11/12	Health Facilities & Services Review Board (On Reconsideration)	Denied
04/14/14	Administrative Law Judge	Recommends Denial
07/14/14	Health Facilities & Services Review Board	Final Denial

Each of the four denials by the Review Board, as well as the recommendation to deny by the Administrative Law Judge, were based on the project's failure to substantially comply with the review criteria. The following Table 3 identifies the need-related criteria that were not met in Project #10-089 and also indicates whether those criteria are met in the current Project #17-002:

TABLE 3: The Current Project Has the Same Legal Defects as Project #10-089

CRITERION	#10-089	#17-002
Med/Surg Bed Need	Not Met	Not Met
100-Bed Med/Surg Minimum	Not Met	Not Met
Unnecessary Duplication	Not Met	Not Met
Maldistribution	Not Met	Not Met
Target Utilization of Proposed Services	Not Met	Not Met
Target Utilization of Existing Providers	Not Met	Not Met
Service Not Available within the Area	Not Met	Not Met
Access Limitations on Payor Status	Not Met	Not Met
Restrictive Admissions Policies in Area	Not Met	Not Met
Indicators of Medical Problems in Area	Not Met	Not Met

As the above Table 3 demonstrates, the current Project #17-002 suffers from the same deficiencies as Project #10-089 in which the Review Board voted on four separate occasions to deny the application based on its failure to substantially comply with the applicable criteria. Project #17-002 fails to meet additional criteria that were satisfied in the earlier project. Namely, the current project does not meet the four bed minimum ICU standard and does not meet the ICU bed need criteria whereas Project #10-089 did satisfy those criteria. Consequently, Project #17-

002 is more out of compliance with the Review Board's criteria than the prior project that was voted down four times by the Board for failing to substantially comply with the criteria.

Mercy sued the Review Board in the Circuit Court of Will County requesting the Court to not only reverse the Review Board's denial of Project #10-089, but also requesting the Court to order the Review Board to issue a permit. Mercy also claimed that both the Review Board and the Administrative Law Judge violated Mercy's constitutional right to due process and alleged that, "As a result of the Board's and ALJ Hart's conduct, Mercy was prejudiced because it had an unfair hearing and an inadequate opportunity to be heard before the Board." Complaint in *Mercy Crystal Lake Hospital and Medical Center v. Health Facilities and Services Review Board*, 14-CH-2017, ¶84.

After the Review Board and intervening hospitals filed briefs in support of the Review Board's denial of Mercy's permit application in Project #10-089, Mercy filed a motion to voluntarily dismiss its complaint. The Circuit Court of Will County then entered an order dismissing the complaint *with prejudice*. (A copy of the Circuit Court's Order, dated March 4, 2015, is attached hereto as Exhibit C.) The Appellate Court has held that, under the doctrine of *res judicata*, "the dismissal of an action with prejudice constitutes a final adjudication on the merits that bars any subsequent action on that issue." *Mercy Crystal Lake Hospital and Medical Center v. Illinois Health Facilities and Services Review Board*, 2016 IL App (3d) 130947.

Mercy's applications for a new hospital in Crystal Lake have now been twice litigated in court to final adjudications on the merits, and in both cases the courts have ruled against Mercy.

C. Additional Legal Grounds for Denying the Third Mercy Crystal Lake Application

The foregoing reasons compel denial of the current Mercy Crystal Lake application. There are also additional, forceful reasons supporting denial.

First, the Review Board approved a new 128-bed hospital in the McHenry County planning area in September 2012 with Centegra Hospital-Huntley, Project #10-089. The hospital opened in August 2016, and has only been in operation for less than a year. It is currently operating below target utilization in its medical/surgical unit. Crystal Lake is within the primary service area of Centegra Hospital-Huntley. It would create both a maldistribution of services and unnecessary duplication to have another hospital established within the primary service area of a newly opened hospital, especially when it is operating below target utilization.

Second, the proposed project will create a severe maldistribution of beds within the planning area. Mercy Harvard is the only acute care facility in northwest McHenry County. Mercy proposes to reduce that hospital's medical/surgical unit from 15 beds to only four beds, and reduce its ICU from three beds to only one bed. Those bed compliments are far below the facility's peak census in both services. During the last five years, Mercy Harvard's peak census in med/surg ranged from 11 beds to 13 beds, and its peak census for ICU ranged from two to three beds. The current bed compliment can handle that patient volume, but the proposed reduction will leave the hospital with less than half the beds needed to accommodate peak

census. The residents of Harvard and northwest McHenry County will have their access to acute care services dramatically and adversely impacted by the proposed project.

Third, as noted above, the Review Board's regulations do not recognize "micro-hospitals" within Metropolitan Statistical Areas, and Mercy's proposed project is even too small for an area outside an MSA because it does not meet the four bed minimum ICU standard. In addition, the Review Board should take no action on Mercy's application for a "micro hospital" because, by Mercy's own admission, this is a new model of health care delivery and, by statute, requires prior authorization of the legislature upon recommendation of the State Board of Health with prior input from the Governor and oversight by IDPH. The Mercy application seeks an end-run around this statutory and regulatory scheme by going directly to the CON Board for approval of what constitutes an alternative model of health care delivery.

The Illinois Alternative Health Care Delivery Act (210 ILCS 3/1 et seq.) ("AHCDA"), recognizes that there is "insufficient data and information on the efficacy of alternative models of health care delivery" and that "new and innovative solutions must be found to correct these problems." 210 ILCS 3/5. The AHCDA is "intended to foster those innovations through the development of demonstration projects to license and study alternative health care delivery systems." *Id.* Further, "these demonstration projects shall be developed in an orderly manner and regulated by the Department of Public Health." *Id.*

The AHCDA empowers the State Board of Health to "investigate new health care delivery models and recommend to the Governor and the General Assembly, through the Department [of Public Health], those models that should be authorized as alternative health care models for which demonstration programs should be initiated." 210 ILCS 3/20(a). IDPH "shall adopt rules for each alternative health care model authorized under this Act...." 210 ILCS 3/25. The AHCDA specifies that certain alternative health care models require Certificates of Need from the Health Facilities and Services Review Board. 210 ILCS 3/30(b).

Currently, the only alternative health care delivery models authorized by the AHCDA are (1) postsurgical recovery care centers, (2) children's community-based health care centers, (3) community-based residential rehabilitation centers, (4) Alzheimer's disease management centers, and (5) birth centers. The AHCDA has specific definitions of what constitutes each model and generally designates a maximum number and the approved geographic locations for a given model. The AHCDA does not recognize micro-hospitals as an authorized alternative health care delivery model.

The Mercy Crystal Lake application attempts to justify the project as a new and "innovative model" for the delivery of health care. This is the type of facility contemplated by the Alternative Health Care Delivery Act and, as such, the Review Board should not be issuing permits for such facilities unless and until they are investigated and authorized pursuant to that Act.

For the above reasons, Centegra Health System respectfully requests that the Review Board deny Project 17-002, Mercy Health Hospital and Medical Center, Crystal Lake.

Very truly yours,

BARNES & THORNBURG LLP

Daniel J. Lawler

DJL:dp
Enclosures

Exhibit A

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

NORTHERN ILLINOIS MEDICAL CENTER, MEMORIAL MEDICAL CENTER, AND CENTEGRA HEALTH SYSTEM,

Plaintiff

vs.

ILLINOIS HEALTH FACILITIES PLANNING BOARD, ILLINOIS DEPARTMENT OF PUBLIC HEALTH, MERCY CRYSTAL LAKE HOSPITAL AND MEDICAL CENTER, INC. MERCY HEALTH SYSTEM CORPORATION, ELI L. BEEDING JR. AND THE BEEDING GROUP,

Defendants

CASE NO: 04 MR 106

MEMORANDUM OPINION AND ORDER

This cause came before the Court on Count I of the Complaint filed by the Plaintiffs' Northern Illinois Medical Center, Memorial Medical Center and Centegra Health System for Administrative Review of the Decision of Illinois Health Facilities Planning Board ("State Board") pursuant to 735 ILCS 5/3-110, 5/3-111 20 ILCS 3960/11. Plaintiffs seek reversal of the Administrative Decision of the State Board which granted a permit to the Mercy Crystal Lake Hospital and Medical Center, Inc. ("Mercy Hospital") to construct a new hospital in Crystal Lake. Plaintiffs contend that the State Board's actions in approving the issuance of the permit were against the manifest weight of the evidence and arbitrary and capricious, particularly in light of the negative reports of the Illinois Department of Public Health ("State Agency").

The Court has reviewed all the relevant pleadings, including Count I of the Complaint for Administrative Review, Plaintiffs' Motion to Reverse Administrative Decision, the Memorandum in support of said Motion, the Response of Mercy Hospital and Mercy Health System Corporation and Reply of Plaintiffs thereto. The Court has further reviewed the entire certified record of administrative proceedings which includes the Application for Permit, documents in support of the application, the State Agency reports, the Record of Public Hearing on September 29, 2003 and the transcripts of hearings before the State Board on December 17, 2003 and April 21, 2004, with corrections made at the June 15, 2004 State Board meeting. The Court has reviewed the case law cited by the parties in their written submissions and has had the benefit of the oral arguments of the attorneys for the Plaintiffs and Defendants.

BACKGROUND

The Illinois Health Facilities Planning Act was instituted "to establish a procedure designed to reverse the trends of increasing in costs of health care resulting from unnecessary construction or modification of health care facilities ... and to improve the financial ability of the public to obtain necessary health services and to establish an orderly and comprehensive health care delivery system which will guarantee the availability of quality health care to the general public". 20 ILCS 3960/2 To that end, the Planning Act provided for the creation of a Board and defined its duties and functions. The powers and duties of the State Board include the prescribing of rules, regulations, standards, criteria and procedures to carry out the provisions of the Act. 20 ILCS 3960/12 The regulations and criteria are contained in Sections 1110 through 1260 of Title 77 of the Illinois Administrative Code. A health care facility cannot be modified or constructed unless the Board issues a permit. 20 ILCS 3060/5.1 In evaluating an application for

permit or Certificate of Need, the Board is assisted by Illinois Department of Public Health which serves as administrative and staff support for the Board. 20 ILCS 3960/4

On July 11, 2003, Mercy Hospital filed an Application for Certificate of Need (CON) with the Illinois Health Facilities Planning Board. The application requests a permit for establishment and construction of a new 70 bed hospital with adjacent office facilities for 45 physicians in Crystal Lake, Illinois. The proposed hospital would have 56 medical/surgical beds; 10 obstetrics beds and 4 intensive care beds. The hospital site is located within a MSA, known as area A-10. The initial application was deemed incomplete on July 24, 2003 and by letter of that date, additional information was requested. That information was provided on July 30, 2003, which included a listing of all hospitals within 45 minutes of the proposed facility.

A public hearing was conducted on September 29, 2003 in Crystal Lake, Illinois. In addition to persons associated with Mercy Hospital and its parent corporation, Mercy Health System, hundreds of interested persons testified or offered written submissions both in favor of and in opposition of the proposed project.

The Illinois Department of Public Health issued its initial report evaluating Mercy Hospital's application. The report found that overall, Mercy Hospital did not meet the review criteria of Illinois Administrative Code, Sections 1110 and 1120. The State Agency submitted its report to the Board on December 17, 2003 and the Board conducted a hearing on that same date. At the meeting the Board denied the application.

Thereafter, Mercy Hospital submitted additional information for the project to the State Agency and requested another hearing date before the State Board. A Supplemental Agency Report was prepared based on the new materials and submitted to the State Board at its April 21, 2004 meeting. The report did change some of its findings in the supplemental report dealing

with financial and economic considerations under Section 1120 of the Illinois Administrative Code. The evaluations pertaining to Section 1110 remained unchanged. At the Board meeting on April 21, 2004, the Board approved Mercy Hospital's application. The State Agency issued a letter on May 15, 2004 informing the applicant of the State Board's approval of the project.

On May 26, 2004, the Plaintiffs filed its Complaint for Administrative Review of the State Board's decision to grant the CON to Mercy Hospital. The Plaintiffs assert that the decision of the State Board should be reversed because (a) it is against the manifest weight of the evidence; (b) the issuance of the permit was arbitrary and capricious; (c) the vote of the Board on April 21st did not specify the action proposed and the Board did not make any findings; and, (d) the voting process was improper and evidence of arbitrary conduct.

REVIEW OF THE BOARD'S DECISION

A. MANIFEST WEIGHT OF THE EVIDENCE:

The Plaintiffs contend that the Decision of the Board to issue the permit to Mercy Hospital for the establishment and construction of a new hospital in Crystal Lake, Illinois was against the manifest weight of the evidence.

If factual findings are made by an administrative agency, they are viewed as prima facie correct and a reviewing court will not disturb those findings, unless they are contrary to the manifest weight of the evidence. BRIDGESTONE/FIRESTONE, INC. vs. DOHERTY, 305 Ill. App. 3d 141 (1999).

At the administrative hearing on April 21, 2004, no factual findings were made by the State Board. On May 14, 2004, the executive secretary of the Board issued a letter notifying Mercy Hospital that the State Board had approved the Application for Permit. That letter

indicated that Board based its approval upon the project's substantial conformance with the applicable standards and criteria of Part 1110 and 1120. It further stated that, "In arriving at a decision, the State Board considered the findings contained in the State Agency Report, the application material, the State Agency's Report of Public Hearing held on September 29, 2003 and any testimony made before the State Board".

The aforesaid letter does not set forth specific findings of fact. It does state the Board's conclusions and the basis therefore. Section 10 of the Planning Act does not require the Board to specify its findings of facts and conclusions unless negative action on an Application is taken. 20 ILCS 3960/10 In addition, Section 1130.680 of the Administrative Code requires the Board to specify its "finding of fact and conclusions of law" only when the Board denies an application. ACCESS CENTER FOR HEALTH, LTD. Vs. HEALTH FACILITIES PLANNING BOARD, 283 Ill App 3d 227 (1996).

In the case at bar, the State Board did not deny Mercy Hospital's Application for Permit or CON. Even if findings were necessary, that may not be enough for the trial court to reverse the Board's decision. If the record contains competent and sufficient evidence that supports the agency's decision, the decision should be affirmed. CATHEDRAL ROCK OF GRANITE CITY, INC. vs. ILLINOIS HEALTH FACILITIES PLANNING BOARD. 308 Ill App 3d 529 (1999).

An administrative agency's decision is against the weight of the evidence only if the opposite conclusion is clearly evident. The mere fact that the opposite conclusion is reasonable or that the reviewing court may have ruled differently does not justify reversal of an administrative decision. A trial court may not reweigh the evidence or make an independent

determination of the facts. ABRAHAMSON vs. ILLINOIS DEPARTMENT OF PROFESSIONAL REGULATION, 153 Ill. App 2d 76 (1992)

In order to approve and authorize the issuance of a permit if it finds the State Board must find that the proposed project is consistent with the orderly and economic development of such facilities and is in accord with standards, criteria or plans of need adopted and approved pursuant to provisions of Section 12 of 20 ILCS 3960.

Section 12 of the Illinois Health Facilities Planning Act authorizes the State Board to prescribe rules, regulations, criteria and procedures to carry out the purposes of the Act. That section further enumerates certain factors the Board shall consider in developing health care facility plans. Those factors include the number of existing and planned facilities offering similar programs, the extent of utilization of existing facilities, the availability of facilities which may serve as alternatives or substitutes and the availability of personnel necessary to operate the facility. 20 ILCS 3960/12(1) and (4).

Acting as an administrative and support arm of the State Board, the State Agency prepared two reports for the Board's review and consideration. Those reports consider the application and supporting documentation submitted. The State Agency evaluated Mercy Hospital's application with respect to financial and economic criteria set forth in Section 1120 of Title 77 of the Illinois Administrative Code and the general review criteria and needed related criteria set forth in Section 1110 of the Illinois Administrative Code 77 Illinois Adm. Code. The Administrative Code has the force and effect of law. MEDCAT LEASING CO. vs. WHITLEY, 253 Ill App 3rd 801 (1993).

The Agency report completed for submission to the State Board Hearing on December 17, 2003 found that the Mercy Hospital Application, was in conformity with three of the four

applicable economic feasibility criteria and that the financial feasibility criteria were not applicable. The Agency report found that aside from meeting the background of applicant criterion (1110.230), that Mercy Hospital met none of the other criteria under Section 1110, the general or need related criteria, including the criteria for a variance to bed need.

At the December 17, 2003 State Board Hearing, Mercy Hospital had various representatives present who presented testimony regarding the application and in response to questioning by Board members. Those present for Mercy were Javon Bea, President of Mercy Hospital; Richard Gruber, Vice President of Mercy Hospital; Dan Colby, President of mercy Harvard Hospital and three attorneys representing Mercy. The Board addressed concerns regarding the bed variance, the shortage of obstetrical beds in the M.S.A., the additional physicians that Mercy would bring to staff its proposed hospital and the impact of the hospital on staffing in other area hospitals. At the conclusion of the hearing, the State Board denied Mercy Hospital's application. No findings were made. However, before the Notice of Intent to Deny was sent on January 27, 2004, Mercy Hospital on January 15, 2004 sent a letter with supplemental information requesting leave to reappear before the Board at the February meeting.

After receipt of the supplemental information from Mercy Hospital, the State Agency issued another report for submission to the Board at its April 21, 2004 meeting. No hearing was held regarding Mercy's application between December 17 and the April 21st meeting. The report of the State Agency for the April hearing contained the same findings regarding the general criteria and needed related criteria; that being that except for applicant meeting the background criteria, Mercy Hospital did not meet the other 1110 criteria. The State Agency found that with the change in cost submitted by Mercy in the supplemental materials, Mercy now met all of the economic feasibility factors.

At the hearing on April 21, 2004 before the Board representatives of Mercy appeared as well as its legal counsel. With respect to bed need, Mercy Hospital had submitted data from the Center for Disease Control which indicated that 76% of the hospitals in the United States have less than 100 beds. Upon questioning, hospital personnel acknowledged that this study was not Illinois or McHenry County based but rather reflected nationwide statistics. Documentation regarding the decrease in average patient stays was discussed using 980 figures versus today. Testimony was received regarding the 45 new physicians Mercy would bring to the proposed hospital, which physicians would be in their employ. Mercy representatives opined that with these new doctors in place, patients who resided in the M.S.A. who sought treatment outside of the M.S.A. would return for care. There was discussion concerning the findings by the State Agency on the general criteria and need criteria not being met. Board member Levine believed that the rules were outdated and needed to be revised to reflect current data. He was particularly impressed with the 45 physicians who would be moving to McHenry County to staff the proposed hospital. At the conclusion of the hearing, the Board voted to approve the application and the motion passed. On May 14, 2003, a letter advising of the approval of the application for permit was sent to Mercy Hospital.

Plaintiffs assert that the decision of the State Board is against the manifest weight of the evidence because the proposed project was not in accordance with the standards, criteria or plans of need adopted and approved pursuant to the provisions of the Illinois Health Facilities Planning Act. In particular, the Plaintiffs direct the Court to the State Agency reports wherein it was noted that Mercy Hospital's proposed project was not in conformity with the general review criteria and need related criteria under Sections 1110 of the Illinois Administrative Code.

The Defendants counter Plaintiffs assertions by directing the Court to the standard of review and the discretionary authority the State Board has under 1130.660 of the Illinois Administrative Code. That provision states in pertinent part the follows:

> "The State Board shall consider the application and any supplemental information or modification submitted by the applicant, IDPH report(s), the public hearing testimony, if any and other information coming before it in making its determination whether to approve the project. The applications are reviewed to determine compliance with review criteria enumerated in 77 Ill. Adm. Code 1110 and 1120. The failure of a project to meet one or more review criteria, as set forth in 77 Ill. Adm. Code 1110 and 1120 shall not prohibit the issuance of a permit."

The applicability of Section 1130.660 has been addressed in a number of cases, which cases have been cited by the parties herein. With the exception of the Court in SPRINGBOARD, the Courts have recognized that the State Board does have the authority to approve an application where one or more of the review criteria were not met. DIMENSIONS MEDICAL CENTER, LTD. Vs. SUBURBAN ENDOSCOPY CENTER, 298 Ill App 3d 93 (1998). ACCESS CENTER/FOR HEALTH LTD. vs. HEALTH FACILITIES PLANNING BOARD, 283 Ill App 3d 227 (1996), CATHEDERAL ROCK OF GRANITE CITY vs. ILLINOIS HEALTH FACILITIES PLANNING BOARD, 308 Ill. App 3d 529 (1999) and MARION HOSPITAL CORPORATION vs. ILLINOIS HEALTH PLANNING BOARD, FACILITIES SPRINGWOOD is distinguishable from the aforementioned cases because the Court did not consider the applicability of 1130.660 in that case. SPRINGWOOD ASSOCIATES vs. HEALTH FACILITIES PLANNING BOARD, 269 Ill App 3d 944 (1995).

However, in each of the cases where the Courts upheld the Board's decision to exercise its discretionary authority, the courts looked to the record to determine if there was adequate evidence to support the Board's decision. None of the cases cited by the Defendants have State

Agency Reports that found lack of conformity with essentially all of the need related and general criteria as in the case at bar.

The letter of May 14, 2004, issued on behalf of the State Board found substantial conformance with the applicable standards and criteria of part 1110 and 1120 based on its consideration of the findings contained in the State Agency reports, the application material, the report of public hearing on September 29, 2003 and any testimony made before the State Board.

At the public hearing the majority of those who testified were in opposition to the proposed project. Almost 2000 letters were submitted both in support of and in opposition to Mercy Hospital. More letters were in opposition. Many of the letters submitted were form letters used by supporters of Plaintiffs' and Defendants' respective positions. Some of the letters were from Mercy's website, which did not allow negative input.

The State Agency Reports submitted to the State Board for hearings on December 17, 2003 and April 21, 2004 found that the proposed project was not in conformity with the following general review and need related criteria: 110.320(a): Establishment of Additional Hospitals, 110.320(b); Allocation of Additional Beds, 1110.520(a); Unit Size; 1110.520(b); Variances to Bed Needs, 110.520(b)(2); Medically Underserved Variance, 1110.230(a); Location, 1110.230(c); Alternatives, 1110.230(d); Need for the Project, 1110.230(e); and Size of the Project. The project was in conformity with 1110.230(b), Background of Applicant, which provided that the applicants complied with the necessary licensure and certification information required and are fit, willing, able and have the necessary background to provide a proper standard of healthcare service for the community.

In response to the adverse reports of the State Agency, Mercy Hospital addressed the growing population trends in McHenry County, the shortage of physicians in McHenry County

and the changes in the practice of medicine that have reduced the average length of patient stays in hospitals. Mercy Hospital asserts that as a result of the decline in the patient length of stays, there is no longer a need for the requirement of 100 medical/surgical beds as established in 1980 and that only 67 beds are needed to serve the same number of patients.

Section 1110.320(2) of the Illinois Administrative Code requires that hospitals within a M.S.A. must have a minimum of 100 medical/surgical beds. Hospitals situated outside a M.S.A. do not have such a limitation. Mercy Hospital proposes 56 med/surg. beds with initially 32 of the entire 70 beds being built out and the remaining 38 being shells for later construction. The Defendant hospital did not identify how the 32 beds would be allocated. At the Board hearing of April 21, 2004, Mr. Glaser, on behalf of Mercy Hospital stated that all 70 beds would immediately be built out, contrary to the data in the application and earlier testimony. (R3541) (R.14) Section 1110.230.530(a)(1)(A) provides that a new obstetric unit with a M.S.A. must have 20 beds. Mercy proposal is for 10 obstetric beds.

Mercy Hospital submitted material based on average length of patient stays in 1980 to the present, claiming that 67 beds would now provide care for the same number of patients in a 100 bed facility in 1980. The documentation presented gives nationwide figures with no specific data for Illinois.

The 100 bed standard was established in 1992 and not 1980 and is applicable only to hospitals within a Metropolitan Statistical Area, such as the proposed location. Furthermore, according to the bed inventory data, the A-10 planning area (M.S.A.), where the proposed facility would be located, has 35 excess medical surgical beds and 7 excess ICU beds. Assuming that the present average length of patient stays reduces the need for beds, then the proposed additional beds at Mercy Hospital would only increase the surplus but also affect the target

utilization rates at neighboring hospitals, which is also taken into account under the need related criteria. Presently the hospitals in proximity to the proposed project are generally not operating at the State's target utilization rates.

The only shortage of beds in the M.S.A. is obstetrical beds, which shortage is 20 beds. Mercy's application proposes 10 obstetrical beds. Mercy Health System Corporation operates Mercy Harvard Hospital, which is within M.S.A. 10. Mercy Harvard Hospital closed its obstetrical unit approximately three years ago and has not reopened since Mercy acquired the hospital approximately two years ago.

There are located within planning Area 10 three hospitals which offer the same services as the proposed project. Two of these three hospitals are within 30 minutes of the proposed facility. These are Northern Illinois Medical Center in McHenry and Memorial Medical Center in Woodstock. The third hospital, Mercy Harvard is within 45 minutes of the proposed facility. Additionally, there are four other hospitals not within the planning area, but within 30 minutes of the site of Mercy Hospital. They are Advocate Good Shepherd, Barrington, St. Alexius Medical Center, Hoffman Estates, Sherman Hospital, Elgin and Provena St. Joseph Hospital in Elgin. Each of these health facilities offer the same services as the proposed hospital.

Defendant acknowledges the presence of these other hospitals and that Mercy will offer no services not already provided by these facilities. However, Mercy contends that with the growth of population within the county, the travel times will increase in the future and thereby increasing the travel times in excess of 30 minutes to those hospitals. The estimates of future travel times do not take in account road expansion projects which might be undertaken. The evidence on the travel times and future projections offered by the Defendant are in some instances inaccurate and other instances speculative.

Mercy opines that a significant percentage of patients are leaving the planning area for health care and that with the establishment of a new hospital, a good percentage of those patients will return to the area for treatment. Competent evidence is lacking to support this opinion. Evidence at the public hearing and elsewhere in the record shows that approximately 75% of the residents within zip code targeted area received care at existing hospitals and that other patients leaving the target area are doing so for specialized or tertiary care. It is also unclear if Mercy's opinion takes into account the services received at the hospitals located within 30 minutes but outside of area A-10.

The review criteria does provide for variance for bed need. 77 Ill. Adm. Code 1110.530(b)(2). In order to satisfy the variance to bed need requirements, Mercy Hospital had to document that access to the proposed service is restricted in the planning area by documenting at least one of the following: (i) the absence of service within the planning area; (ii) limitations on government funded or charity patients; (iii) restrictive admissions policies of existing providers; (iv) the area population and existing care system exhibits indicators of median care problems such as an average family income level below the state poverty level, high infant morality or designation as a "Health Manpower Shortage Area:, or (v) the project will provide for a portion of the population who must currently travel over 45 minutes to receive service. Mercy Hospital was found to have documented none of the aforesaid criteria in order to receive a variance. Evidence presented showed that seven hospitals are within 45 minutes and all offer the same services Mercy will offer, if not more. Travel studies submitted by mercy were in some ways misleading as they included round trip travel times which is not the standard for review or were based on future projections. No evidence whatsoever was submitted to document items (i) through (iv).

Much was made by the Board at the April 21, 2003 hearing about the 45 physicians Mercy Hospital would bring to staff its hospital and adjacent offices. It is unclear from the evidence where these physicians will come from. However, Mercy did indicate that with the opening a new hospital, it would close three of its physician staffed facilities now located in and Cary and Crystal Lake. Board member, Mr. Levine, commented at the April 21st meeting how impressed he was that these new physicians would help make a dent in the shortage of physicians in the area. There was a chart provided showing a physician shortage in McHenry County. The underlying data for the information in the chart is unknown. While the Board addressed the shortage of physicians in the area, it appears not to have adequately considered the shortage of healthcare support staff. The evidence in the record reflects that there is a shortage of health care personnel needed to staff hospitals. There are not enough nurses, medical technicians and laboratory technicians to staff hospitals nationwide and in McHenry County. Testimony at the public hearing expressed a concern that the new hospital would not be able to adequately staff its facility and would have to recruit medical personnel from other area hospitals, thereby causing shortages of necessary and required staff in those facilities. Area hospitals have experienced staffing problems which have resulted in their not being able to maximize the use of their facilities.

The record further documents that the proposed hospital would adversely impact the utilization rates at hospitals within the M.S.A. and nearby. Mr. Ryder, of Advocate Health Care in Barrington testified at the public hearing that more than 25% of its patients are from the towns targeted by Mercy Hospital. A study submitted at the public hearing by Plaintiffs and prepared by Deloitte and Touche, at Plaintiff's instance concluded that Northern Illinois Medical Center and Memorial Medical Center, both in A-10 would lose approximately 9,500 cases annually.

Upon a review of the record, there is not sufficient and competent evidence supporting the State Board's decision to grant the issuance of the permit to Mercy Hospital. While the Board has the authority to issue a permit when all of the criteria under 1110 are not met, there needs to be some rationale basis to excuse compliance with the criteria. The record does not reflect that Mercy Hospital presented sufficient evidence showing that the proposed hospital facility was needed, was the most effective or least costly alternative and was in a medically underserved planning area. Sufficient evidence did not establish that the project warranted a variance to bed need.

Mercy Hospital's application did not meet the necessary general review and need related criteria and the factors set forth in 20 ILCS 3960/12. The written submissions and oral testimony did not rebut the Agency's findings that Mercy Hospital's application was not in conformity with the criteria set forth in 77 Ill. Adm. Code 1110. This Court finds that the State Board's decision is against the manifest weight of the evidence.

B. ARBITRARY AND CAPRICIOUS

The Plaintiffs also contend that the Board's decision was arbitrary and capricious. The Illinois Supreme Court in GREER vs. ILLINOIS HOUSING DEVELOPMENT AUTHORITY, 122 Ill 2d 462 (1988) set forth guidelines to be applied by the Court in determining whether the decision of an Agency is arbitrary and capricious. Those guidelines direct the Court to consider: 1. Did the Agency rely on factors the legislature did not intend the agency to consider; 2. Did the Agency fail to consider an important aspect of the problem, or 3. Did the Agency offer an explanation for its decision which runs counter to the evidence before the agency or which is so

implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The State Board in the case at bar excused the mercy Hospital's failure to comply with essentially all of the general and need related criteria. The only rationale for the Board's actions capable of being gleaned from the hearing on April 21st was that the rules and review criteria are outdated and that this new facility will help fill the shortage of physicians in the service area.

At that April Board meeting, Board members expressed concern about the Board's decision being termed "arbitrary and capricious" if it approved the Mercy Hospital Application for Permit in light of the State Agency's two reports showing non conformity with the 1110 criteria. In response thereto, Board member Stuart Levine stated that the rules and criteria are "woefully out of date". He further stated that he has participated in "a lot of applications that were granted that had complete negative findings. And those occurred in instances where there were valid reasons and justifications given in each of the areas that, of course, are in the Board's discretion to do". R 3264. Yet, Mr. Levine did not offer any explanation or justification for the Board's approval in the instant case, other than he was impressed with the 45 new physicians who would be coming to McHenry County and who would make a dent in the physician shortage.

The Board hearing on April 21 focused in large part on the new physicians who would be employed by Mercy Hospital. However, the rules governing the Board's decisions do not provide for criteria which address physician shortages. The documentation provided by Mercy regarding physician shortages was done by Solucient and is in the record at page 2913. The chart shows that Crystal Lake, the location of the proposed hospital, has no physician shortage. Lake in the Hills, Cary and Algonquin are the other target service areas. No data is provided for

physicians in Lake in the Hills. On Solucient's documentation, Cary and Algonquin do show physician shortages. The source for the data is not disclosed. Even with these claimed shortages, Mercy System Corporation is going to close its two physician offices in Crystal Lake and one in Cary.

Furthermore, while there may be a shortage of physicians in the area, the Board did not discuss and apparently did not consider the evidence in the record of the shortages of registered nurses, laboratory technicians and medical technologists in the area. The public hearing record is replete with testimony of medical personal on the shortage of such personnel. These personnel are needed to staff a hospital. Mercy Hospital offered no evidence where this staff would come from other than stating they would recruit medical personnel who worked outside of the area. Northing in the record indicates a surplus of such personnel in other areas of the state. No evidence was presented on the number of resident medical personnel who worked outside of the M.S.A. or beyond the 30 minute travel time. Testimony at the public hearing showed a concem among McHenry County health care workers that Mercy would recruit staff from area facilities thereby affecting the viability of those hospitals.

Upon a review of the record, the Court finds that State Board relied on factors not intended by the legislature and that they failed to consider important aspects of the problem concerning the shortage of medical support staff and the impact the proposed hospital would have on the hospitals within the M.S.A. and within 30 minutes travel time. When the Board first denied the Mercy Hospital's application, it had information on the 45 new employee-physicians who would be at the physician offices adjacent to the hospital. Yet, at the April 21st meeting, the new physicians appeared to be the primary basis for the affirmative vote.

The Court finds that the actions of the State Board, in approving the application for permit for the Mercy Hospital project, was arbitrary and capricious.

C. NECESSARY PARTIES

Plaintiffs contend that the decision should be reversed because the proper party was not joined as a party to the application. Particularly, Plaintiffs claim that Section 1130.220(b) of the Illinois Administrative Code requires that Mercy Health Systems Corporation be a co-applicant.

Section 1130.220 provides in pertinent part as follows:

"The following person(s) must be the applicant(s) for permit or exemption, as applicable:

(b)(3) any related person who is or will be financially responsible for guaranteeing or making payments on any debt related to the project."

It is undisputed that Mercy Health System falls within that classification and that they were not parties to the application. The State Agency Report, however, reflects that is considered that entity to be a co-applicant even though it wasn't. Documentation was submitted verifying the bond rating of Mercy Health System Corporation and other data was provided regarding its corporate structure and related entities.

The non inclusion of Mercy Health System as an applicant may have affected the economic review criteria under 1120.310(a). The State Agency found that Criterion 1120.310(a) was "not applicable as the applicant's document proof of an "A "bond rating". Mercy Health System should have been a party to the application for permit. However, the failure to include Mercy Health System Corporation as a co-applicant, standing alone, would not be a basis for a finding of the State Board's decision being against the manifest weight of the evidence.

D. THE VOTING PROCESS

The Plaintiffs claim that the voting process was improper by the Board not specifying the nature of the motion voted on and Board members engaging in off the record discussions. It is apparent from the record that the Board on motion knew that it was voting to approve the permit. While formality is lacking, the record reflects that in the other proceedings that day, which are part of the record the Board used the same methodology in voting.

While the off record comments by Board members may be irregular, they do not constitute ex parte communications. The Court can not attribute any significance to the off record comments in this review.

Based on a review of the record and for the foregoing reasons, the Court hereby finds that the Decision of the Illinois Health Planning Board to grant the issuance of the permit to Mercy Hospital and Mercy Health Systems was against the manifest weight of the evidence and arbitrary and capricious.

IT IS HEREBY ORDERED that the Decision of the Illinois Health Planning Board to issue a permit in Project No. 03-049 is reversed.

DATED: May 6, 2005 ENTERED Maureen P. McIntyre

MAUREEN P. McINTYRE
CIRCUIT JUDGE

Exhibit B

RECEIVED

JUL 12 2011

HEALTH FACILITIES &
SERVICES REVIEW BOARD

STATE OF ILLINOIS
HEALTH FACILITIES AND SERVICES REVIEW BOARD

OPEN SESSION

JUNE 28, 2011

DAY 1

ORIGINAL

Exhibit B

STATE OF ILLINOIS

HEALTH FACILITIES AND SERVICES REVIEW BOARD

525 West Jefferson Street, 2nd Floor

Springfield, Illinois 62761

217-782-3516

OPEN SESSION

DAY 1

The regular session of the meeting of the State of Illinois Health Facilities and Services Review Board was held on June 28, 2011, at Holiday Inn Joliet Conference Center, 411 South Larkin, Joliet, Illinois.

PRESENT:

Dale Galassie - Chairman
Ronald Eaker
John Hayes
John Burden
Alan Greiman
Kathy Olson
Richard Sewell
Rob Hilgenbrink
David Penn

ALSO PRESENT:

Courtney Avery - Administrator
Cathy Clarke - Assistant
Frank Urso - Legal Counsel
Juan Morado
Michael Constantino - IDPH Staff
George Roate - IDPH Staff
Bill Dart - IDPH Staff
David Carvalho - Deputy Director, IDPH
Michael C. Jones - IDFS
Mike Pelletier - IDHS

Reported by:
Karen K. Keim
CRR, RPR, CSR-IL, CRR-MO
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County created by Mercy's proposed project, if approved, would result in price declines of up to 9 percent, thus improving the financial ability of the residents of McHenry County to obtain necessary healthcare services.

Conversely, he also concluded that the Centegra project, if approved, would result in a virtual monopoly for Centegra Health System, giving them for 436 out of 461 total beds in McHenry County or 94.6 percent, which, in turn, will lead to increased healthcare costs for the residents of McHenry County. So the choice is really kind of simple. Competition tends to breed expanded consumer choices, the provision of higher quality goods and services being provided, and lower cost in prices, and that, I believe, is part of the whole tenets of the Health Planning Act in the state of Illinois. Those are goals set forth in the very statutes within which you operate.

CHAIRMAN GALASSIE: Thank you.

Any questions by Board.

If not, Mr. Carvalho?

MR. CARVALHO: Thank you, Mr. Chair.

I'm trying to recall if Courtney and I were the only ones here the last time we had a bunch of new hospital applications.

MS. AVERY: Yes.

MR. CARVALHO: We were. With all of your applications, obviously it's important to hear all different perspectives on the information that is presented, but in the case of the new hospitals, which are such large investments of capital, for better or for worse the prior Board appreciated me asking questions that were skeptical, in order to get that information out. I'll see how that goes. So, let me ask some questions that are skeptical but for the purposes of illuminating the information, not indicating a Department preference one way or the other on the application.

Part of the reason why we wanted to make sure the inventory information was out there was because we wanted you to have an understanding of the strengths and weaknesses of the inventory. With respect to this particular application, let me recap the impact. The overstatement of population by 10 percent from what was really -- what is really there versus what was projected to be there has an impact, we estimate, of reducing the overall need from about the 289 beds down to 260, which would reduce the unmet need from 83 down to 54, roughly. You also should know that the -- as has been alluded, that 289 number is generated by looking at the service that people receive outside of the service area and taking that

into account, and the contribution to the total bed need for this region, due to that migration factor, as they call it, is about 64 beds. So, again, of the total 289 bed need in this planning area by our inventory, 64 beds of that need is attributable to persons receiving care outside of the planning area.

And the -- you know, the flip side, of course, is to the extent that you build in the planning area to address that need, tautologically those folks are getting their care outside of the planning area, so there's a flip side impact on the hospitals outside the planning area.

The issue of the impact of competition and the CON process is the inherent conflict of the CON process. Clearly, unlimited competition would involve most CON process. The Legislature has made a determination that there be a CON process. One of the impacts of that is that if you only allow construction where there's need, you do have an impact on the amount of competition. It has never been part of the process that you allow construction that doesn't meet your need criteria to foster competition. The whole point of the CON is to cap construction at need. So -- I mean, the Legislature has made that determination that the CON process -- that we're a CON state.

In the past in these types of applications,

we've also heard the utilization factor is calculated based on licensed beds versus staffed beds and, therefore, tends to overstate the lack of utilization, because if you're dividing by a larger number, you're making a smaller result, and so if it's something that looks like it's 50 percent utilized but many of the beds aren't staffed, then the beds that are staffed are being utilized at 60 percent or 70 percent. But that argument overlooks the fact that the unstaffed beds are, nonetheless, allowable beds and you have authorized them to be staffed. At such time as the demand is sufficient to staff them, they would be staffed. So, in the absence of taking away those unstaffed beds, allowing additional beds to be filled because there are unstaffed beds elsewhere actually contributes to the over supply. It doesn't work the other direction.

The issue of the 100 bed size was an issue four or five years ago, actually, for applications, I believe, in this region, and the point is you have adopted a rule that says you don't want to see a hospital built until the unmet need is 100, and back then, you also got applicants saying, "Well, we're almost at 100, so let us build." The point of the rule was wait until the need is 100 and then do the application, not do the application before the need is 100 and then say, "Well, please overlook

the fact that we're not 100."

The safety net -- I apologize for not speaking earlier when Mr. Penn had made the motion on the safety net response. I had been under the impression that our Staff had reviewed the materials that were supplied as part of the safety net response but it simply neglected to include their description in the State Agency Report. In fact, we have not reviewed it, and so I do need you to know that we have not reviewed that. So, the information that has been alluded to in the safety net response, which presents another perspective on whether there is an impact on the safety net -- namely the perspective of other providers and the entity that did the study -- has not been reviewed by us, and so we can't make any statement to you as to whether it's accurate or not.

In the past, there has also been the issue about access and access to ER's and access to services and, again, it's a balance view to draw, because the logical conclusion, you'd have a hospital on every block if everybody is expected to walk to their hospital and have access. So, clearly, somewhere in between the access that exists and the access that you would like to see is the reasonable position.

And, finally, on the issue of charity care,

one of the things that you should focus on is, unlike the situation that came earlier with respect to a surgical center, a surgical center has no -- first off, it's not a non-profit. It has no obligation to provide charity care or any community benefit simply because of its non-profit, charitable status, because most surgical centers do not have that status. Hospitals do. But the mechanism by which hospitals provide their charity care is typically persons who are seen in the emergency room who do not have a source of payment, and there's a Federal law that requires that care be provided under those circumstances. Since a surgical center has no emergency room, there is not that back door entry. So when you seek a commitment with respect to charity care or questions about charity care, you may wish to seek the difference between affirmative charity care and passive charity care. In other words, if I open a hospital and I have an emergency room, I will de facto be providing charity care, because some people come to my emergency room who can't pay and I will be writing off their bills. Affirmative charity care would be I actually view a charity care as something I don't simply budget for, as what is going to happen to me, but something I affirmatively choose to do. How much do I set aside to affirmatively reach out and provide charity care for

persons who may need specialty referral or other kind of care that isn't typically provided in an emergency room because of EMTALA obligations. So, in fact, sometimes I started referring to it as uncompensated indigent care as opposed to charity care, because there is really no charitable impulse. It's just uncompensated, unsponsored care provided as a cost of doing business.

So, that goes through a list of observations and benefit of the history of this. Just so you know, the Board has considered perhaps 8, 10 applications for new hospitals over the last 8 years and approved one in Bolingbrook and denied the others. But many of these issues I raise today were part of the dialogue back then, so I wanted to raise them today to inform you of those issues. I'll stop there.

CHAIRMAN GALASSIE: Thank you, David.

Any other questions on the part of Board members? I have attempted to be very gracious of the time committed to this item because of the significance involved in it. Does the Board --

MR. HILGENBRINK: Mr. Chairman, I'd like to ask a question on the cost, construction cost. Has anything been built into the cost of construction to address ongoing operational cost? Is it a -- in terms of,

Exhibit C

#10

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

MERCY CRYSTAL LAKE HOSPITAL AND MEDICAL CENTER, INC. and MERCY ALLIANCE, INC.,	)
Plaintiffs,	)
v.	) Case No. 14 MR 2017
ILLINOIS HEALTH FACILITIES AND SERVICES REVIEW BOARD, et al.,	)
Defendants.	)

FILED
2015 MAR -4 AM 9:51

ORDER

This cause coming to be heard on Plaintiffs' Unopposed Motion to Voluntarily Dismiss, the Court having read the Motion, and the Parties being duly advised:

IT IS HEREBY ORDERED that this action is dismissed with prejudice, with each party to pay its own costs and fees, and the March 25, 2015 status date is stricken.

DATED: March 4, 2015

ENTERED: _____
Judge John Anderson

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