



STATE OF ILLINOIS
HEALTH FACILITIES AND SERVICES REVIEW BOARD

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DOCKET NO: H-01	BOARD MEETING: February 25, 2020	PROJECT NO: 19-022	PROJECT COST: Original: \$1,961,169
FACILITY NAME: Austin Dialysis at Loretto		CITY: Chicago	
TYPE OF PROJECT: Substantive			HSA: VI

PROJECT DESCRIPTION: The Applicants (Loretto Hospital and Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto) propose a 12-station ESRD facility in 2,750 GSF of modernized space on the campus of Loretto Hospital in Chicago, Illinois. The cost of the project is \$1,961,169 and the expected completion date is January 31, 2021.

EXECUTIVE SUMMARY

PROJECT DESCRIPTION:

- The Applicants (Loretto Hospital and Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto) propose to establish a 12-station ESRD facility in 2,750 GSF of leased space on the campus of Loretto Hospital, 645 South Central Avenue, Chicago, Illinois. The cost of the project is \$1,961,169 and the expected completion date is January 31, 2021. Although the facility will be housed in Loretto Hospital, it will function as an outpatient care facility, and will seek licensure, accreditation, and Medicare certification as a freestanding facility. Loretto Hospital is a Safety Net Hospital.
- Dr. Sameer Suhail, M.D. is the sole member of Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto. Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto will be responsible for operations of the ESRD facility, and Medicare certification. Loretto Hospital will acquire 49% ownership in the entity after issuance of the Certificate of Need permit, being actively involved in daily operations, provision of care, and be in control of capital assets such as fixed equipment, mobile equipment, and buildings. Loretto Hospital is a safety net hospital (see list at the end of this report).
- **Board Staff Notes:** The review for this project was extended¹ by State Board Staff from the October 22, 2019 meeting. At that time the Board Staff became aware that the patient referrals used to justify the demand for the facility (i.e. 12-stations) were acute care patients of Loretto Hospital. State Board rule requires that the patient referrals to justify the demand for a project are pre-ESRD patients that will receive dialysis on an outpatient basis not acute care patients of a hospital.

PURPOSE OF THE PROJECT

- The Applicants stated:
“The primary purpose of this project is to establish an ESRD facility to provide dialysis services and treatments to Loretto Hospital’s existing patients as well as the residents of the Austin community and surrounding neighborhoods. It is very important to have adequate dialysis care at Loretto Hospital because the community has a large percentage of residents who are African-American, a demographic group that is at increased risk of developing chronic kidney disease (CKD), which often leads to dialysis and may require a kidney transplant.”

WHY THE PROJECT IS BEFORE THE STATE BOARD:

- The Applicants propose to establish a health care facility as defined by the Illinois Health Facilities Planning Act (20 ILCS 3960/3).
- One of the objectives of the Health Facilities Planning Act is *“to assess the financial burden to patients caused by unnecessary health care construction and modification. Evidence-based assessments, projections and decisions will be applied regarding **capacity, quality, value and equity** in the delivery of health care services in Illinois. Cost containment and support for safety net services must continue to be central tenets of the Certificate of Need process.”* [20 ILCS 3960/2]

¹ Section 1130.640 - Extension of the Review Period

a) Extension by HFSRB of the Review of Information

As required to complete its review, HFSRB staff may extend the review period for up to 120 days to analyze additional information. HFSRB will consider the application at the next regularly scheduled meeting that is at least 10 days following the completion of HFSRB review of the additional information.

PUBLIC HEARING/COMMENT:

- A public hearing was offered regarding the proposed project, but none was requested. Five letters of support were received, and one letter of opposition was received:
 - Donald Dew, President/CEO Habilitative Systems, Inc. (support)
 - Melody Lewis, Executive Director, Austin Chamber of Commerce (support)
 - Camille Lilly, State Representative, 78th District (support)
 - LaShawn Ford, State Representative, 8th District (support)
 - Kimberly Lightford, State Senator, 4th District (support)
 - SIHF Healthcare (support)
 - Hamid Humayun M.D. CEO & Medical Director, Maple Avenue Kidney Center (opposition).
 - Support and Opposition Letters are included at the end of this report.

SUMMARY:

- There is a calculated need for 70 ESRD stations in the City of Chicago (HSA VI ESRD Planning Area) as of January 2020, and the Applicants are requesting 12-ESRD stations. The GSA for proposed facility is a 5-mile radius that has a population estimate of 1,353,395 residents. Currently, there are a total of 11 ESRD facilities with 254 stations in this 5-mile GSA. As of January 2020, there are a total of 1,120 patients receiving dialysis at these 11 facilities. Currently these 11 stations are underutilized as the 1,120 patients justifies 234 stations at 80% target occupancy. Should the historical growth of 3.1% in this planning area continue the additional 12 stations will not be needed until 2024 in this 5-mile GSA.
- On January 10, 2020 the State Board received additional information including a revised referral letter from Dr. Rajani Kosuri (Medical Director). In the Applicants submission the Applicants state *“The Applicants advise that the data provided therein is not in the format typically submitted to the State Board by in-center hemodialysis applicants. Typically, historical data is submitted by one or more private practice nephrologist(s) and is the same data reported to The Renal Network. However, in this case, the data submitted reflects historical patient data from a hospital (i.e., co-applicant Loretto Hospital) instead of an already practicing nephrologist.”* For the present certificate of need permit application, for the purpose of justifying need for the proposed ESRD Facility, the Applicant did not count patients who had already established a doctor-patient relationship with a nephrologist outside of the hospital. The Applicant wanted to ensure that this project would not adversely affect existing dialysis providers in the geographic service area. As a result, the data used to justify need for the proposed ESRD facility only relies upon historical patient numbers where the hospital determined that the patients had not already chosen a nephrologist. In regard to projected referrals, the Applicant reviewed the hospital's historic data, focusing solely on patients identified as pre-ESRD, and made a projection based on several factors, including: (1) the three-year trend of total patients receiving inpatient dialysis treatments; (2) the loss of patients due to a group of nephrologists ending its hospital affiliation in 2019; and (3) the ability to recapture patient referrals to outside providers upon the addition of one or more nephrologists following permit approval.”
- The Applicants have addressed a total of 22 criteria and have failed to meet the following:

Criteria	Reason for Non-Compliance
77 ILAC 1110.120 (b) - Projected Utilization	In the revised referral letter the Applicants provided data of patients that were provided dialysis at Loretto Hospital during their acute care stay at the hospital. No pre-ESRD patients were identified by zip code of residence currently under the care of Dr. Kosuri that the Board could use to determine if the proposed 12-stations would be at target occupancy within 24-months after project completion. (see pages 11-12 of this report)
77 ILAC 1110.230 (b) - Planning Area Need	While there is a need for 70 ESRD stations in the planning area the revised referral letter submitted by the Applicants did not identify the number of Pre-ESRD patients (Stage 4 and Stage 5) that would require dialysis within 24-months after project completion; and demand for the facility could not be determined. Additionally, it appears there is enough dialysis stations within the planning area to accommodate the workload of the proposed facility as 7 of the 11 ESRD facilities within 5-miles are not at target occupancy. (see pages 12-15 of this report)
77 ILAC 1110.230 (c) - Unnecessary Duplication of Service	The proposed 12-station facility will result in an unnecessary duplication of service in this 5-mile GSA. Based upon the Board Staff's review these 12-stations will not be needed in the 5-mile GSA until 2024. (see pages 15-16 of this report).
77 ILAC 1120.120 - Availability of Funds	The Bank Letter provided no assurance that the loan would be made should this project be approved. (see page 20 of this report)
77 ILAC 1120.130 -Financial Viability	Austin Dialysis Center, LLC is a new entity. No historical financial information is available. The Applicants did not meet all the State Board's ratio standards for the projected years. (see page 21 of this report)

STATE BOARD STAFF REPORT

Project 19-022

Austin Dialysis at Loretto

APPLICATION/CHRONOLOGY/SUMMARY	
Applicants	Loretto Hospital Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto
Facility Name	Austin Dialysis at Loretto
Location	645 South Central Avenue, Suite 100, Chicago, Illinois
Permit Holder	Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto
Operating Entity	Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto
Owner of Site	Loretto Hospital
Total GSF	2,750 GSF
Application Received	May 21, 2019
Application Deemed Complete	May 23, 2019
Review Period Ends	September 20, 2019
Financial Commitment Date	January 31, 2021
Project Completion Date	January 31, 2021
Review Period Extended by the State Board Staff?	Yes
Can the Applicants request a deferral?	No
Expedited Review?	No

I. Project Description

The Applicants (Loretto Hospital and Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto) propose to establish a 12-station ESRD facility in 2,750 GSF of leased space on the campus of Loretto Hospital in Chicago, Illinois. The cost of the project is \$1,961,169 and the expected completion date is January 31, 2021.

II. Summary of Findings

- A. State Board Staff finds the proposed project not in conformance with the provisions of 77 ILAC 1110 (Part 1110).
- B. State Board Staff finds the proposed project not in conformance with the provisions of 77 ILAC 1120 (Part 1120).

III. General Information

The Applicants are Loretto Hospital and Austin Dialysis Center, LLC d/b/a Austin Dialysis at Loretto. Dr. Sameer Suhail, M.D. is the sole owner of Austin Dialysis Center, LLC, and Austin Dialysis Center LLC will be responsible for operations of the ESRD facility, and Medicare certification. It is noted that Loretto Hospital will acquire 49% ownership in the entity after issuance of the Certificate of Need permit, being actively involved in daily operations, provision of care, and be in control of capital assets such as

fixed equipment, mobile equipment, and buildings. Loretto Hospital is an Illinois not-for profit hospital, incorporated under the laws of this state on September 7, 1939. This project is subject to a Part 1110 and Part 1120 review. Financial commitment will occur after permit approval.

IV. Health Planning Area

The proposed facility will be in the HSA VI Health Service Area. This planning area includes the City of Chicago. As of January 2020, the State Board is estimating a need for 70 ESRD stations by 2022. Growth in the number of ESRD patients in this Planning Area since 2008 has averaged 3.10%. The Illinois Department of Public Health is estimating very little to no growth in the population in this planning area by 2022.

Average Annual Growth HSA VI	
Number of Patients 2017	5,149 ⁽¹⁾
Number of Patients 2008	4,127
Difference	1,022
Average Annual Growth	3.10%
1. Patient numbers from 2008 and 2017 Inventory of Health Care Facilities and Services and Need Determination	

TABLE ONE	
Need Methodology HSA VI ESRD Planning Area	
Planning Area Population – 2017	2,716,500
In Station ESRD patients - 2017	5,149
Area Use Rate 2017 ⁽¹⁾	1895.454
Planning Area Population – 2022 (Est.)	2,721,500
Projected Patients – 2022 ⁽²⁾	5,185.5
Adjustment	1.33
Patients Adjusted	6,891
Projected Treatments – 2022 ⁽³⁾	1,070,281
Calculated Station Needed ⁽⁴⁾	1,429
Existing Stations	1,359
Stations Needed-2022	70
1. Usage rate determined by dividing the number of in-station ESRD patients in the planning area by the 2017 – planning area population per thousand. 2. Projected patients calculated by taking the 2022 projected population per thousand x the area use rate. Projected patients are increased by 1.33 for the total projected patients. 3. Projected treatments are the number of patients adjusted x 156 treatments per year per patient 4. $1,070,281 / 747 = 1,429$ 5. $936 \times 80\% = 749$ [Number of treatments per station operating at 80%]	

V. Project Uses and Sources of Funds

The Applicants are funding this project with cash in the amount of \$121,500, securities totaling \$167,750, fair market value (FMV) of leased space totaling \$264,419, equipment leases (FMV) totaling \$288,000, and loans totaling \$1,119,500. The estimated start-up costs and operating deficit is \$167,750.

TABLE TWO
Project Uses and Sources of Funds

Uses of Funds	Reviewable	Non-reviewable	Total	% of Total
Modernization Contracts	\$705,500	\$0	\$705,500	36%
Contingencies	\$70,500	\$0	\$70,500	3.5%
Architectural/Engineering Fees	\$71,500	\$0	\$71,500	3.6%
Consulting & Other Fees	\$0	\$50,000	\$50,000	2.5%
Movable or Other Equipment (not in construction contracts)	\$288,000	\$56,000	\$344,000	17.6%
Fair Market Value of Leased Space	\$432,169	\$0	\$432,169	22%
Fair Market Value Leased Equipment	\$288,000	\$0	\$288,000	14.8%
Total Uses of Funds	\$1,855,169	\$106,000	\$1,961,169	100.00%
Sources of Funds				
Cash	\$71,500	\$50,000	\$121,500	6.2%
Securities	\$167,750	\$0	\$167,750	8.5%
Leases Space (fair market value)	\$264,419	\$0	\$264,419	13.5%
Leases Equipment (fair market value)	\$288,000	\$0	\$288,000	14.8%
Other Funds & Sources (Loans)	\$1,063,500	\$56,000	\$1,119,500	57%
Total Sources of Funds	\$1,855,169	\$106,000	\$1,961,169	100.00%

VI. Background of the Applicants, Purpose of the Project, Safety Net Impact, Alternatives

A) Criterion 1110.110(a) - Background of the Applicant

To address this criterion the applicants must provide a list of all facilities currently owned in the State of Illinois and an attestation documenting that no adverse actions² have been taken against any applicant's facility by either Medicare or Medicaid, or any State or Federal regulatory authority during the 3 years prior to the filing of the Application with the Illinois Health Facilities and Services Review Board or a certified listing of adverse action taken against any applicant's facility; and authorization to the State Board and Agency access to information in order to verify any documentation or information submitted in response to the requirements of the application for permit.

1. The applicant, Austin Dialysis at Loretto, is a newly formed entity and is not currently operating any other facilities in Illinois. The co-applicant, Loretto Hospital, owns and operates the following:
 - a. The Immediate Care Center of Oak Park, Oak Park
 - b. Loretto Hospital outpatient Mental Health Program at Symphony West, Chicago
 - c. Loretto Primary/Intermediate Care, Berwyn
2. The Applicants provided the necessary attestation that no adverse action has been taken against any facility owned or operated by the Applicants and authorization allowing the State Board and IDPH access to all information to verify information in the Application for Permit. [Application for Permit pages 111-116]
3. Evidence of ownership (Copy of the Letter of Intent to Lease the Property) of the site has been provided as required at pages 38-43 of the Application for Permit. Organizational relationships can be found at pages 47 of the Application for Permit.
4. Certificates of Good Standing has been provided as required for Loretto Hospital and Austin Dialysis Center, as entities with permission to transact business in the State of Illinois. An Illinois Certificate of Good Standing is evidence that an Illinois business franchise (i.e. Illinois Corporation, LLC or LP) is in existence, is authorized to transact business in the state of Illinois and complies with all state of Illinois business requirements and therefore is in "Good Standing" in the State of Illinois. [Application for Permit page 45-46]
5. The Applicants provided evidence that they were in compliance with Executive Order #2006-05 that requires *all State Agencies responsible for regulating or permitting development within Special Flood Hazard Areas shall take all steps within their authority to ensure that such development meets the requirements of this Order. State Agencies engaged in planning programs or programs for the promotion of development shall inform participants in their programs of the existence and location of Special Flood Hazard Areas and of any State or local floodplain requirements in effect in such areas. Such State Agencies shall ensure that proposed development within Special*

² "Adverse action is defined as a disciplinary action taken by IDPH, CMMS, or any other State or federal agency against a person or entity that owns or operates or owns and operates a licensed or Medicare or Medicaid certified healthcare facility in the State of Illinois. These actions include, but are not limited to, all Type "A" and Type "AA" violations." (77 IAC 1130.140)

Flood Hazard Areas would meet the requirements of this Order. [Application for Permit page 48-55]

6. The proposed location of the facility is in compliance with the Illinois State Agency Historic Resources Preservation Act which requires *all State Agencies in consultation with the Director of Historic Preservation, institute procedures to ensure that State projects consider the preservation and enhancement of both State owned and non-State owned historic resources* (20 ILCS 3420/1). [Application for Permit pages 57-93]

B) Criterion 1110.110(b) - Purpose of the Project

To demonstrate compliance with this criterion the Applicants must document

1. That the project will provide health services that improve the health care or well-being of the market area population to be served.
2. Define the planning area or market area, or other relevant area, per the applicant's definition.
3. Identify the existing problems or issues that need to be addressed as applicable and appropriate for the project.
4. Detail how the project will address or improve the previously referenced issues, as well as the population's health status and well-being.
5. Provide goals with quantified and measurable objectives, with specific timeframes that relate to achieving the stated goals as appropriate.

The Applicants stated the following in part:

“The primary purpose of this project is to establish an ESRD facility to provide dialysis services and treatments to Loretto Hospital’s existing patients as well as the residents of the Austin community and surrounding neighborhoods. It is very important to have adequate dialysis care at Loretto Hospital because the community has a large percentage of residents who are African American, a demographic group that is at increased risk of developing chronic kidney disease (CKD), which often leads to dialysis and may require a kidney transplant. The applicants decided to seek a Certificate of Need (CON) permit from the State Board is to enhance access to care for Loretto’s patients who need dialysis care. The most recent inventory of health care services published by the State Board shows that the health service area has a need for additional dialysis stations. The applicant will close the need gap by establishing the ESRD facility, which will serve a community that is largely African-American, a population group disproportionately affected by kidney disease”

C) Criterion 1110.110(c) – Safety Net Impact Statement

To demonstrate compliance with this criterion the Applicants must document

- The project's material impact, if any, on essential safety net services in the community, to the extent that it is feasible for an applicant to have such knowledge.
- The project's impact on the ability of another provider or health care system to cross-subsidize safety net services, if reasonably known to the applicant.
- How the discontinuation of a facility or service might impact the remaining safety net providers in each community, if reasonably known by the applicant.

The Applicants provided a safety net impact statement as required at pages 318-321.

TABLE THREE Loretto Hospital Net Revenue, Charity and Medicaid Information for the State of Illinois Facilities			
	2017	2016	2015
Amt. of Charity Care (charges)	\$2,147,639	\$1,287,335	\$1,061,311
Cost of Charity Care	\$2,573,063	\$2,147,643	\$1,053,200
% of Charity Care/Net Patient Revenue	3.4%	3.3%	3.1%
Number of Charity Care Patients (self-pay)	1,337	130	111
Number of Medicaid Patients	2,906	2,039	1,383
Medicaid Revenue	\$29,287,135	\$18,064,174	\$13,598,752
% of Medicaid to Net Patient Revenue	46.1%	46.9%	40%

D) Criterion 1110.110(d) – Alternatives to the Proposed Project

To demonstrate compliance with this criterion the Applicants must identify all the alternatives considered to the proposed project.

The Applicants considered three alternatives to the proposed project;

1) Do Nothing/Maintain Status Quo

The applicants rejected this alternative because it fails to address the growing need for dialysis services in HSA-06. The applicants note that Loretto hospital has served approximately 100 dialysis patients in the last two years, which presents a valid need for these services. The applicants identified no costs with this alternative

2) Propose a Project of Lesser Scope

The applicants note, per the MSA requirement, that the smallest facility that can be established in an MSA is 8 stations. The applicants cite a need for 70 additional stations in the service area, and a projected referral population that will support 12 stations. The applicants rejected this alternative and feel that a project of lesser scope would not meet the needs of its existing and future patient populations. The applicants identified no project costs with this alternative.

3) Utilize Other Health Care Resources in the GSA

The applicants rejected this alternative, citing a heightened need for ESRD services in the zip code (60644) in which the hospital is located. It is noted that 70% of Loretto Hospital patients were required to seek ESRD services further away, increasing travel time, the potential for missed appointments, and a lessened continuity of care. The applicants agree with their patient base in that it is best to receive patient care within their own community. The applicants identified no project costs with this alternative.

VII. Size of the Project, Projected Utilization and Assurances

A) Criterion 1110.120(a) - Size of the Project

To demonstrate compliance with this criterion the Applicants must document the size of the proposed facility is in compliance with the State Board Standards published in Part 77 ILAC 1110 Appendix B.

The Applicants are proposing 2,750 GSF for 12-stations, amounting to 229 GSF per station. The State Board Standard is 650 GSF per station or 7,800 GSF. $[7,800 \text{ GSF (State Standard)} - 7,067 \text{ GSF (Proposed GSF)} = (733 \text{ GSF})$. The Applicants have successfully addressed this criterion.

STATE BOARD STAFF FINDS THE PROPOSED PROJECT TO BE IN CONFORMANCE WITH SIZE OF THE PROJECT CRITERION (77 ILAC 1110.120(a))

B) Criterion 1110.120(b) – Projected Utilization

To demonstrate compliance with this criterion the Applicants must document that the proposed facility will be in compliance with the State Board Standards published in Part 77 ILAC 1110 Appendix B two (2) years after project completion.

In supplemental material, the Applicants submitted a revised referral letter from Dr. Kosuri to estimate demand for the 12-stations. This is a proposed new facility therefore the Applicants had to provide projected referrals. The projected referrals needed to include the following:

1. The total number of patients that have received care at existing facilities in the area, name of the facility, zip code of residence for the most recent 3 years and at the end the most recent quarter.
 2. Number of new patients (by facility and zip code of residence) located in the area, that the physician referred for in-center hemodialysis for the most recent year;
 3. An estimated number of patients (transfers from existing facilities and pre-ESRD, as well as respective zip codes of residence) that the physician will refer annually to the applicant's facility within a 24-month period after project completion, based upon the physician's practice experience. The anticipated number of referrals cannot exceed the physician's documented historical caseload;
 4. An estimated number of existing patients who are not expected to continue requiring in-center hemodialysis services due to a change in health status (e.g., the patients received kidney transplants or expired);
-
1. The revised referral letter that was submitted does not identify the number of patients under Dr. Kosuri's care that received care at existing in-center hemodialysis facilities in the area, by zip code of residence as required.
 2. The revised referral letter that was submitted does not identify the number of new patients by facility and zip code of residents under Dr. Kosuri's care that were referred to in-center hemodialysis for the most recent year are required.

3. The revised referral letter that was submitted does not identify the number of pre-ESRD patients under Dr. Kosuri's care that will be referred to the proposed facility.
4. The revised referral letter that was submitted did not identify the number of existing patients that were not expected to continue in-center hemodialysis due to a change in health status.

The revised referral letter did identify 144 patients by zip code of residence who received dialysis in the last 3 years (2017, 2018, 2019) at Loretto Hospital that were acute care patients of the hospital that needed dialysis during their stay at the hospital. These patients were not under the care of Dr. Kosuri as required by rule, nor has any documentation been provided of the number of patients Dr. Kosuri is currently caring for.

From the data provided Board Staff could not make a determination

STATE BOARD STAFF FINDS THE PROPOSED PROJECT NOT IN CONFORMANCE WITH PROJECTED UTILIZATION CRITERION (77 ILAC 1110.120(b))

C) Criterion 1110.120(e) – Assurance

To demonstrate compliance with this criterion the Applicants must document that the proposed facility will be in compliance with the State Board Standards published in Part 77 ILAC 1110 Appendix B two (2) years after project completion.

The Applicants have provided the necessary attestation as required at page 258 of the Application for Permit.

STATE BOARD STAFF FINDS THE PROPOSED PROJECT TO BE IN CONFORMANCE WITH ASSURANCE CRITERION (77 ILAC 1110.120(e))

VIII. In-Center Hemodialysis

A) Criterion 1110.230(b)(1)(A) & (B) - Planning Area Need

The applicant shall document that the number of stations to be established or added is necessary to serve the planning area's population, based on the following:

1) 77 Ill. Adm. Code 1100

A) The number of stations to be established for in-center hemodialysis is in conformance with the projected station deficit specified in 77 Ill. Adm. Code 1100, as reflected in the latest updates to the Inventory.

B) The number of stations proposed shall not exceed the number of the projected deficit, to meet the health care needs of the population served, in compliance with the utilization standard specified in 77 Ill. Adm. Code 1100.

The Applicants are proposing a 12-station facility. There is a calculated need in this ESRD Planning Area for 70 stations per the January 2020 Inventory update. The Applicants have met this sub-criterion.

B) Criterion 1110.230 (b) (2) - Service to Planning Area Residents

A) Applicants proposing to establish or add stations shall document that the primary purpose of the project will be to provide necessary health care to the residents of the area in which the proposed

project will be physically located (i.e., the planning or geographical service area, as applicable), for each category of service included in the project.

The proposed 12-station facility will be located at 645 South Central Avenue, Suite 100, Chicago, IL. Dr. Rajani Kosuri (proposed medical director and Nephrologist with Loretto Hospital) has identified 144 patients (of which 112/78% live in the same zip code as the applicant facility) with chronic kidney disease who received dialysis services from Loretto Hospital. Of the 144 patients, the Applicants identified 26 patients that were not affiliated with a practicing Nephrologist or were referred by a practicing Nephrologist to Loretto Hospital. [Supplemental Information submitted January 10, 2020]. Of the total number of patients served by Loretto Hospital, it appears that 26 of these patients are considered suitable referral patients for the purpose of State Board review, which does not meet the requirement for enough patient referrals.

TABLE FOUR Number of Patients served by Loretto Hospital in the 5-mile GSA by zip code			
Zip Code	Population	Pre-ESRD patients begin dialysis in 12 months	Pre-ESRD patients begin dialysis in 12-24 months
60153	24,029	1	1
60608	78,072	1	1
60612	35,559	1	1
60622	54,467	1	1
60623	88,137	6	8
60624	38,134	6	3
60632	91,668	1	1
60644*	49,645	23	23
60651	61,759	3	1
60804	83,972	1	1
Total	1,353,395	48	83

*Zip code for proposed facility

C) Criterion 1110.230 (b) (3) - Service Demand – Establishment of In-Center Hemodialysis Service

The number of stations proposed to establish a new in-center hemodialysis service is necessary to accommodate the service demand experienced annually by the existing applicant facility over the latest 2-year period, as evidenced by historical and projected referrals, or, if the applicant proposes to establish a new facility, the applicant shall submit projected referrals. The applicant shall document subsection (b) (3) (A) and either subsection (b) (3) (B) or (C).

As documented at 77 ILAC 1110.120 (b) above at pages 11-12 the referral letter did not meet the requirements of the State Board.

D) Criterion 1110.230 (b) (5) - Service Accessibility

The number of stations being established or added for the subject category of service is necessary to improve access for planning area residents. The applicant shall document the following:

A) Service Restrictions

The applicant shall document that at least one of the following factors exists in the planning area:

- i) The absence of the proposed service within the planning area;
- ii) Access limitations due to payor status of patients, including, but not limited to, individuals with health care coverage through Medicare, Medicaid, managed care or charity care;
- iii) Restrictive admission policies of existing providers;
- iv) The area population and existing care system exhibit indicators of medical care problems, such as an average family income level below the State average poverty level, high infant mortality, or designation by the Secretary of Health and Human Services as a Health Professional Shortage Area, a Medically Underserved Area, or a Medically Underserved Population;
- v) For purposes of this subsection (b)(5) only, all services within the established radii outlined in subsection (b)(5)(C) meet or exceed the utilization standard specified in 77 Ill. Adm. Code 1100.
 - i) There is no absence of ESRD services in the HSA VI ESRD Planning Area-Chicago. There are 68-ESRD facilities within this planning area with 1,349 stations.
 - ii) No Access limitations have been identified.
 - iii) No restrictive admission policies of existing providers have been identified.
 - iv) The proposed facility will be in an area that has been Federally designated as a Medically Underserved Area and Medically Underserved Population.³

³ Medically Underserved Areas (MUAs) and Medically Underserved Populations (MUPs) identify geographic areas and populations with a lack of access to primary care services. MUAs have a shortage of primary care health services for residents within a geographic area such as:

- a whole county;
- a group of neighboring counties;
- a group of urban census tracts; or
- a group of county or civil divisions.

MUPs are specific sub-groups of people living in a defined geographic area with a shortage of primary care health services. These groups may face economic, cultural, or linguistic barriers to health care. Examples include, but are not limited to, those who are:

- homeless;
- low-income;
- Medicaid-eligible;
- Native American; or
- migrant farmworkers.

MUA/P designations are based on the Index of Medical Underservice (IMU). IMU is calculated based on four criteria:

- the population to provider ratio;
- the percent of the population below the federal poverty level;
- the percent of the population over age 65; and
- the infant mortality rates.

IMU can range from 0 to 100, where zero represents the completely underserved. Areas or populations with IMUs of 62.0 or less qualify for designation as an MUA/P. Source: Health Resources and Services Administration.

TABLE FIVE
ESRD Facilities within 5-miles of the Proposed Project

Facilities	City	Ownership	Stations ⁽¹⁾	Patients ⁽²⁾	Utilization	Star Rating ⁽³⁾	Met Target Utilization?
Fresenius Kidney Care Oak Park	Oak Park	Fresenius	12	72	100.00%	5	Yes
Maple Avenue Kidney Center	Oak Park	Independent	18	70	64.81%	2	No
Fresenius Kidney Care Austin	Chicago	Fresenius	16	65	67.71%	4	No
Fresenius Kidney Care Congress	Chicago	Fresenius	30	100	55.56%	4	No
Fresenius Kidney Care Cicero	Cicero	Fresenius	20	103	85.83%	5	Yes
Fresenius Kidney Care River Forest	River Forest	Fresenius	24	108	75.00%	4	No
DaVita Lawndale Dialysis	Chicago	DaVita	16	95	98.96%	4	Yes
DaVita Garfield Kidney Center	Chicago	DaVita	24	86	59.72%	5	No
Fresenius Kidney Care Berwyn	Berwyn	Fresenius	30	131	72.78%	4	No
Loyola Center for Dialysis	Maywood	Independent	30	148	82.22%	4	Yes
Fresenius Medical Care Humboldt	Chicago	Fresenius	34	142	69.61%	N/A	No
Total/Average Utilization (all 11 facilities)			254	1,120	73.49%		

1. Stations as of January 2020
2. Patients as of December 31, 2019.
3. Star Rating from Medicare ESRD Compare Website.

SUMMARY:

There is a calculated need for 70-stations by 2022. However, the referral provided by the Applicants did not meet the requirements of the State Board and the State Board Staff was unable to determine the demand for these 12-stations.

STATE BOARD STAFF FINDS THE PROPOSED PROJECT IS NOT IN CONFORMANCE WITH CRITERION PLANNING AREA NEED (77 ILAC 1110.230 (b) (1) (2) (3) (5))

C) Criterion 1110.230(c) - Unnecessary Duplication of Service/Maldistribution

1) The applicant shall document that the project will not result in an unnecessary duplication. The applicant shall provide the following information:

A) A list of all zip code areas that are located, in total or in part, within the established radii outlined in subsection (c)(4) of the project's site;

B) The total population of the identified zip code areas (based upon the most recent population numbers available for the State of Illinois population); and

C) The names and locations of all existing or approved health care facilities located within the established radii outlined in subsection (c)(4) of the project site that provides the categories of station service that are proposed by the project.

- A. A list of zip codes was provided at page 224 of the Application for Permit. According to the Applicant there are approximately 1,353,395 residents within this 5-mile radius. There are 11 ESRD facilities within this 5-mile radius with 254 stations. There is one station per every 5,328 residents in the identified 5-mile GSA.
- B. In the State of Illinois there is one station per every 2,589 residents. There is not a surplus of stations in this 5-mile GSA when compared to the State of Illinois ratio. To have a surplus of stations in this 5-mile GSA there would have to be one station per every 1,726 residents or 1.5 times the State of Illinois ratio.
- C. The Board Staffs' determination of the number of residents in this 5-mile GSA is 847,460 residents. The ratio of stations to population is one station per 3,337 residents that denotes no surplus of stations in this 5-mile GSA.

TABLE SIX
Station to Population Analysis

	5-mile GSA	5-mile GSA ⁽¹⁾	State of Illinois
Stations	254	254	4,946 (Jan. 2020)
Population	1,353,395	847,460	12,802,100 (2017 Est.) ⁽²⁾
Ratio	1 station per 5,328 residents	1 station per 3,337 residents	1 station per 2,589 residents

1. Staff estimate of population within the 5-mile GSA
2. IDPH population estimate

Based upon the State Board's methodology should the State Board approve this project the number of stations within the 5-mile GSA is not 1.5 times the State Board ratio.

As demonstrated by Table Seven below if the historical growth of 3.1% continues in the HSA VI ESRD Planning Area there will be a need for the 12-stations by 2024 (254 stations + 12 stations = 266 stations).

TABLE SEVEN
Number of Stations Warranted at 80% Utilization
Based upon a growth rate of 3.1%

Year	01/2020	01/2021	01/2022	01/2023	01/2024	01/2025	01/2026	01/2027
# of Patients	1,120	1,155	1,191	1,227	1,265	1,305	1,345	1,387
# of Stations Warranted at 80% Target Occupancy	234	241	249	256	264	272	281	289

The Applicants stated the following regarding the underutilized facilities in the 5-mile GSA: *“Of the six facilities that are not at capacity, five are owned by Fresenius. When Fresenius comes before the State Board, they always claim that their centers will achieve capacity. Perhaps Fresenius' inability to achieve the 80% utilization rate is the result to overly aggressive expansion when the State Board's need data showed over a 70 station need in 2017 or maybe Fresenius simply built centers too large for the community (e.g., Fresenius Kidney Care Congress has 30 stations, presently utilized at 56%). The Applicant asks the State Board to hold this against Fresenius and not the Applicant when considering utilization of existing ESRD facilities in the GSA.”*

STATE BOARD STAFF FINDS THE PROPOSED PROJECT NOT IN CONFORMANCE WITH CRITERION UNNECESSARY DUPLICATION/MALDISTRIBUTION (77 ILAC 1110.230(c)(1)-(3))

D) Criterion 1110.230(e) - Staffing

The applicant shall document that relevant clinical and professional staffing needs for the proposed project were considered and that licensure and The Joint Commission staffing requirements can be met. In addition, the applicant shall document that necessary staffing is available by providing letters of interest from prospective staff members, completed applications for employment, or a narrative explanation of how the proposed staffing will be achieved.

The proposed clinic will be staffed in accordance with all State and Medicare staffing requirements. The Medical Director is Rajani Kosuri, M.D. A copy of Dr. Kosuri's curriculum has been provided as required. As patient volume increases, the applicant will ensure that the ESRD facility will be staffed in accordance with federal conditions for coverage. All staff will be training under the direction of the proposed clinic's Governing Body, to ensure competency and compliance with today's health care standards. A summary of the training program has been provided. Austin Dialysis at Loretto will be utilize a closed medical staff. [Application for Permit pages 237-248]

STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION STAFFING (77 ILAC 1110.230(e))

E) Criterion 1110.230 (f) - Support Services

An applicant proposing to establish an in-center hemodialysis category of service must submit a certification from an authorized representative that attests to each of the following:

- 1) Participation in a dialysis data system;
- 2) Availability of support services consisting of clinical laboratory service, blood bank, nutrition, rehabilitation, psychiatric and social services; and
- 3) Provision of training for self-care dialysis, self-care instruction, home and home-assisted dialysis, and home training provided at the proposed facility, or the existence of a signed, written agreement for provision of these services with another facility.

The Applicants have attested to the following:

- A patient tracking system will be utilized to record the provision of dialysis care to its patients;
- Austin Dialysis at Loretto will have available all needed support services required by CMS which may consist of clinical laboratory services, blood bank, nutrition, rehabilitation, psychiatric services, and social services. [Application for Permit page 250]

STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION SUPPORT SERVICES (77 ILAC 1110.230(f))

F) Criterion 1110.230(g) - Minimum Number of Stations

The minimum number of in-center hemodialysis stations for an End Stage Renal Disease (ESRD) facility is:

- 1) Four dialysis stations for facilities outside an MSA;
- 2) Eight dialysis stations for a facility within an MSA.

The proposed 12-station ESRD facility will be in the Chicago-Naperville-Elgin, IL-IN-WI MSA. The Applicants have successfully addressed this criterion.

STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION MINIMUM NUMBER OF STATIONS (77 ILAC 1110.230(g))

G) Criterion 1110.230(h) - Continuity of Care

An applicant proposing to establish an in-center hemodialysis category of service shall document that a signed, written affiliation agreement or arrangement is in effect for the provision of inpatient care and other hospital services. Documentation shall consist of copies of all such agreements.

A signed transfer agreement with Loretto Hospital has been provided as required. Loretto Hospital has agreed to provide Emergency, In-Patient and Backup Support Services to the dialysis patients. The proposed ESRD facility will be located on the Loretto Hospital campus.

STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION CONTINUITY OF CARE (77 ILAC 1110.230(h))

H) Criterion 1110.230(i) - Relocation of Facilities

This criterion may only be used to justify the relocation of a facility from one location in the planning area to another in the same planning area and may not be used to justify any additional stations. A request for relocation of a facility requires the discontinuation of the current category of service at the existing site and the establishment of a new category of service at the proposed location. The applicant shall document the following:

- 1) That the existing facility has met the utilization targets detailed in 77 Ill. Adm. Code 1100.630 for the latest 12-month period for which data is available; and
- 2) That the proposed facility will improve access for care to the existing patient population.

The Applicants are proposing the establishment of a new facility and not relocating an existing facility. This criterion is not applicable to this project.

STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION RELOCATION OF FACILITIES (77 ILAC 1110.230(i))

I) Criterion 1110.230 (j) - Assurances

The applicant representative who signs the CON application shall submit a signed and dated statement attesting to the applicant's understanding that:

- 1) By the second year of operation after the project completion, the applicant will achieve and maintain the utilization standards specified in 77 Ill. Adm. Code 1100 for each category of service involved in the proposal; and

- 2) **An applicant proposing to expand or relocate in-center hemodialysis stations will achieve and maintain compliance with the following adequacy of hemodialysis outcome measures for the latest 12-month period for which data are available:
≥ 85% of hemodialysis patient population achieves urea reduction ratio (URR) ≥ 65%
and ≥ 85% of hemodialysis patient population achieves Kt/V Daugirdas II 1.2.**

The Applicants have provided the necessary attestation at page 258 of the Application for Permit.

STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION ASSURANCES (77 ILAC 1110.230(j))

IX. Financial Viability

A) **Criterion 1120.120 – Availability of Funds**

To demonstrate compliance with this criterion the Applicants must document that the resources are available to fund the project.

The Project's total cost is \$1,961,169. Of that amount, \$720,169 represents the fair market value of two leases over a five (5) year term-----the first, a real property lease valued at \$432,169 over the term, and the second, an equipment lease with a 5-year value of \$288,000. The first two years of the property lease rent will be waived by Loretto Hospital in exchange for the purchase of securities (i.e., membership units) in the Applicant's limited liability company. Loretto Hospital will acquire up to 49% of the membership units in the LLC. The value of the securities totals \$167,750, which is the equivalent of the first two years of waived rent. The Applicants will take on a loan of \$1,119,500 to fund the balance of the Project's costs.

A summary of the consolidated financial statements of Loretto Hospital is provided below. No historical financial ratio information was provided for Loretto Hospital. Austin Dialysis Center, LLC is a new entity and no historical financial information is available. A letter from STC Capital Bank for a loan of \$700,000 was provided. However, the letter stated *the bank will consider issuing a loan* for the \$700,000. There was no firm commitment that the loan will be made should the project be approved by the Board.

TABLE EIGHT
Loretto Hospital Consolidated Financial Statements
Ending June 30th 2016-2017
(in thousands (000))

	2018 ⁽¹⁾	2017	2016
Cash	\$2,483,786	\$10,650,931	\$15,476,868
Current Assets	\$9,400,496	\$10,650,931	\$15,476,868
Total Assets	\$53,296,322	\$55,570,675	\$56,6787,645
Current Liabilities	\$12,074,703	\$13,184,074	\$9,398,593
Total Liabilities	\$25,190,246	\$22,058,234	\$18,116,018
Patient Service Revenue	\$63,710,976	\$63,067,790	\$60,462,021
Total Net Revenues	\$60,230,846	\$59,030,650	\$58,710,595
Total Operating Expenses	\$65,954,746	\$64,564,785	\$60,002,012
Operating Income (Loss)	(\$5,723,900)	(\$5,534,135)	(\$1,289,417)
Net Income	(\$5,411,745)	(\$4,800,186)	\$2,191,907

1. 2018 financial statements were provided as a Draft.

STATE BOARD STAFF FINDS THE PROPOSED PROJECT IS NOT IN CONFORMANCE WITH CRITERION AVAILABILITY OF FUNDS (77 ILAC 1120.120)

B) Criterion 1120.130 - Financial Viability

To demonstrate compliance with this criterion the Applicants must document that they have a Bond Rating of “A” or better, they meet the State Board’s financial ratio standards for the past three (3) fiscal years or the project will be funded from internal resources.

The Applicants are funding this project with cash in the amount of \$289,250 an equipment lease with an FMV of \$288,000, a lease for the space totaling \$264,419, and a loan totaling \$1,119,500. As a new business entity, the Applicant has provided projected financial viability ratios in Table Eight below. As seen in the table below the financial ratio information is not in compliance with State standards.

TABLE NINE Financial Viability Ratios Austin Dialysis Center					
	State Standard	Year 1	Year 2	Year 3	Met Standard?
Current Ratio	≥1.5	1.71	0.93	0.72	No
Net Margin Percentage	≥3.5	-4%	-10%	-10%	No
Long-Term Debt to Capitalization	≤80%	10%	10%	11%	Yes
Project Debt Service Coverage	≥1.75	2.28	-24.75	-21.11	No
Days Cash on Hand	≥45 days	-459.11	-176.48	-102.23	No
Cushion Ratio	≥3.0	41.01	3.64	1.12	No

STATE BOARD STAFF FINDS THE PROPOSED PROJECT NOT IN CONFORMANCE WITH CRITERION FINANCIAL VIABILITY (77 ILAC 1120.130)

X. Economic Feasibility

A) Criterion 1120.140(a) – Reasonableness of Financing Arrangements

B) Criterion 1120.140(b) – Terms of Debt Financing

To demonstrate compliance with these criteria the Applicants must document that leasing of the space is reasonable. The State Board considers the leasing of space as debt financing.

The Applicants are funding this project with cash in the amount of \$289,250 an equipment lease with an FMV of \$288,000, a lease for the space totaling \$264,419, and a loan totaling \$1,119,500. The lease for space is for 5 years at \$30.50/GSF per year for the first 5 years with a 2.4% increase annually. [Application for Permit pages 268-273]. The equipment lease is located on pages 274-279 of the application. The applicant also supplied a letter of interest to lend from STC Capital Bank (application p. 262). The supplied letter does not confirm a promise on the lenders part to finance the mortgage portion of the project.

TABLE TEN Terms of Lease Space	
Premises	Approximately 2,750 GSF, 645 South Central Ave. Ste 100, Chicago, Illinois 60644
Landlord:	Loretto Hospital
Tenant:	Austin Dialysis Center, LLC
Term:	Initial 5 Year term with two five-year options
Base Rent:	\$30.50/per gsf with 2.5% increases after the second year of lease. The rent for the first two years is being waived by Loretto Hospital.

TABLE ELEVEN Loan Terms ⁽¹⁾	
Amount	\$700,000
Borrowers	Austin Dialysis Center, LLC, Dr. Sameer Suhail Dr. Dena Suhail and AICG
Term	72-month
Repayment	12 months interest only, 60 months principal and interest
Purpose	Purchase contract for Kidney Machines, tenant improvements and miscellaneous FF&E.
1. See page 266 of the Application of Permit	

The applicant supplied notarized attestations pertaining to the reasonableness of financing arrangements, saying that a portion of the project will be funded through financing, which is less costly than liquidation of existing investments (application, p. 310), and a Conditions of debt financing statement, saying that the debt financing will be at the lowest net cost available and in part involves leasing of space and equipment (application, p. 311).

STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERIA REASONABLENESS OF FINANCING ARRANGEMENTS AND TERMS OF DEBT FINANCING (77 ILAC 1120.140(a) & (b))

C) Criterion 1120.140(c) – Reasonableness of Project Costs

To demonstrate compliance with this criterion the Applicants must document that the project costs are reasonable by the meeting the State Board Standards in Part 1120 Appendix A.

Table below details the ESRD cost per GSF for new construction based upon 2015 historical information and inflated by 3% to the midpoint of the construction. Additionally, Table Ten details the cost per station based upon 2008 historical information and inflated by 3% to the midpoint of construction.

TABLE TWELVE Calculation of ESRD Cost per GSF						
Year	2015	2016	2017	2018	2019	2020

ESRD Cost Per GSF	\$254.58	\$262.22	\$270.08	\$278.19	\$286.53	\$295.13
Calculation of Moveable Equipment Cost per ESRD Station						
Year	2015	2016	2017	2018	2019	2020
Cost per Station	\$49,127	\$50,601	\$52,119	\$53,683	\$55,293	\$56,952

Modernization and contingency costs total \$776,000 or \$282.18 per GSF ($\$705,500 \div 2,750$ per GSF = \$282.18]. This appears reasonable when compared to the State Standard of \$295.13 per GSF or \$811,607.

Contingencies total \$70,500 and are 9.9% of modernization costs of \$705,500. This appears reasonable when compared to the State Board Standard of 10%-15%.

Architectural and Engineering Fees total \$71,500 or 9.2% of modernization and contingencies [$\$71,500 \div \$776,000 = 9.2\%$]. This appears reasonable when compared to the State Board standard of 7.18% -10.78%.

Movable or Other Equipment totals \$288,000 or \$24,000 per station [$\$288,000 \div 12$ stations = \$24,000 per station]. This appears reasonable when compared to the State Board Standard of \$56,952 per station or \$683,424.

Fair Market Value of Leased Space/Equipment totals \$720,169. There is no State Board standard for this criterion.

STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION REASONABLENESS OF PROJECT COSTS (77 ILAC 1120.140(c))

D) Criterion 1120.140(d) – Projected Operating Costs

To demonstrate compliance with this criterion the Applicants must document that the projected direct annual operating costs for the first full fiscal year at target utilization but no more than two years following project completion. Direct costs mean the fully allocated costs of salaries, benefits and supplies for the service.

The Applicants are projecting \$128.21 operating expense per treatment. The Board does not have a standard for this criterion.

THE STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION PROJECTED OPERATING COSTS (77 ILAC 1120.140(d))

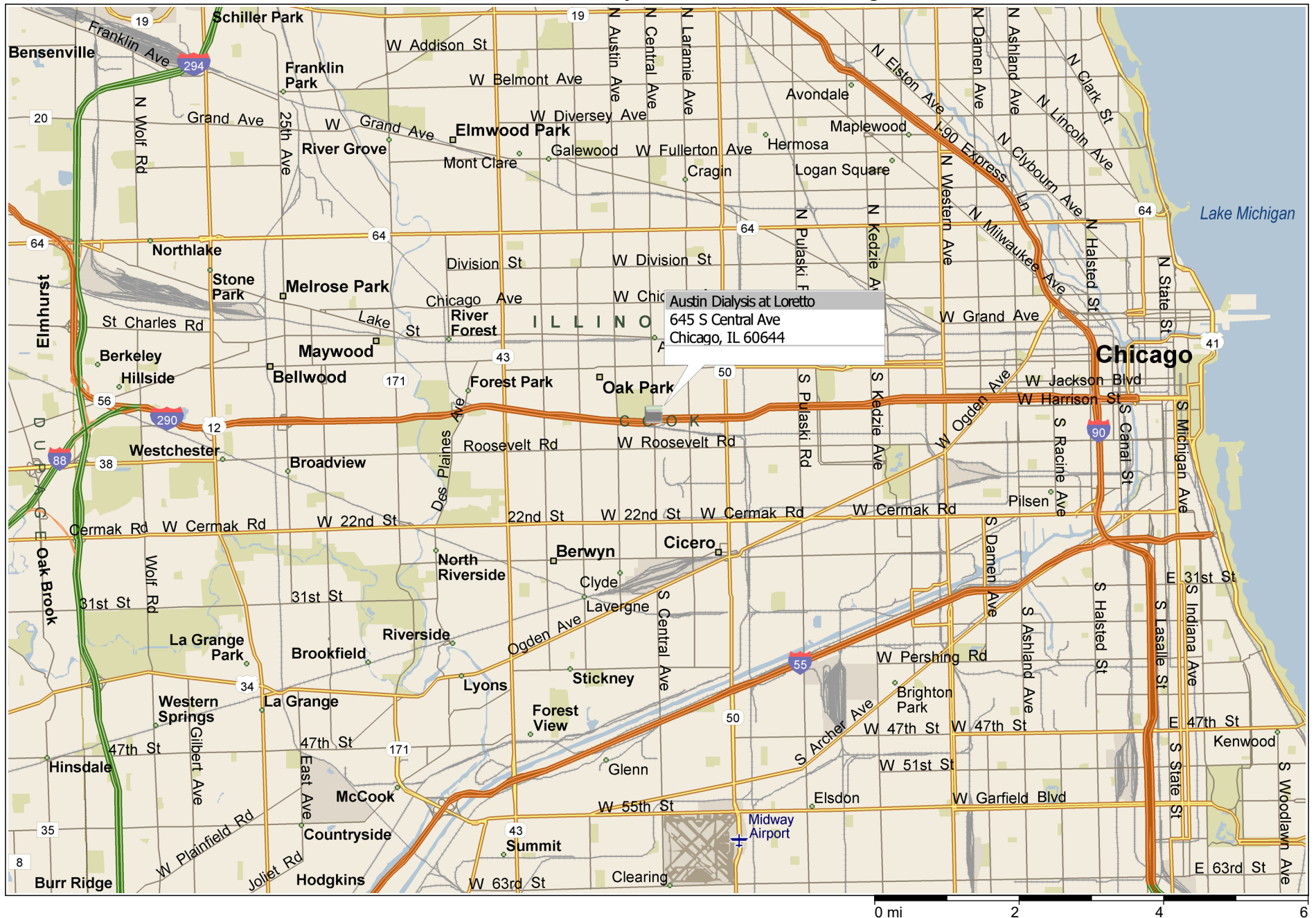
E) Criterion 1120.140(e) – Total Effect of the Project on Capital Costs

To demonstrate compliance with this criterion the Applicants must provide the total projected annual capital costs for the first full fiscal year at target utilization but no more than two years following project completion. Capital costs are defined as depreciation, amortization and interest expense.

The Applicants are projecting capital costs of \$30.98 per treatment. The Board does not have a standard for this criterion.

THE STATE BOARD STAFF FINDS THE PROPOSED PROJECT IN CONFORMANCE WITH CRITERION TOTAL EFFECT OF THE PROJECT ON CAPITAL COSTS (77 ILAC 1120.140 (e))

19-022 Austin Dialysis at Loretto - Chicago



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Visionary Founder

Honorable Camille Y. Lilly
Loretto Hospital

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OCT 2 2019

**HEALTH FACILITIES &
SERVICES REVIEW BOARD**

October 2, 2019

Illinois Health Facilities and Services Review Board
525 West Jefferson Street, Second Floor
Springfield, Illinois 62761
Attention: Courtney Avery, Administrator

**Re: Letter of Support for Austin Dialysis at Loretto
CON Project 19-022**

Dear Board Members:

I am currently serving as the Executive Director of Austin Chamber of Commerce. Our organization serves as a resource and liaison for businesses in the Austin Neighborhood.

I am writing to express our support for the certificate of need (CON) permit application submitted by Austin Dialysis at Loretto, a joint venture with Loretto Hospital to establish a 12-station in-center hemodialysis center. We ask the members of the State Board to approve this project and grant a CON permit because this project will enhance access to important healthcare services in a traditionally underserved and impoverished community. There are no other infusion centers in the Austin area, therefore it is very much needed. We kindly request that you approve this application. We believe the project is both necessary and in the best interest of our community. Thank you for your consideration.

Sincerely,

Melody Lewis
Executive Director

Visionaries

Congressman Danny K. Davis • State Senator Kimberly Lightford • State Senator Don Harmon • State Representative Camille Y. Lilly
• State Representative LaShawn Ford • Alderman Emma Mitts • Alderman Chris Talifero • Alderman Jason Ervin
• Commissioner Barbara McGowan • Commissioner Richard R. Boykin •



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An affiliate of the American Hospital Association

Tiffany White
Healing Touch Home Health

PRESIDENT/CEO
Donald J. Dew

October 2, 2019

Illinois Health Facilities and Services Review Board
Attn: Courtney Avery, Administrator
525 West Jefferson Street, Second Floor
Springfield, Illinois 62761

Re: Letter of Support for Austin Dialysis at Loretto
CON Project 19-022

Dear Board Members:

I am currently serving as the President/CEO of Habilitative Systems, Inc. Our organization serves vulnerable, low-income people who face a wide variety of adverse health and social outcomes which include, but are not limited to: homelessness, substance abuse, mental illness, and developmental disabilities. Our core services are segmented into four categories: *Residential Services*, *Disabilities Management*, *Children and Family Services*, and *Behavioral Health*. We provide community housing, outpatient therapy and counseling, psychoeducational groups, medication management, case management, crisis intervention, prevention and wellness services and employment and training.

I am writing to express our support for the certificate of need (CON) permit application submitted by Austin Dialysis at Loretto, a joint venture with Loretto Hospital to establish a 12-station in-center hemodialysis center. We ask the members of the State Board to approve this project and grant a CON permit because this project will enhance access to important healthcare services in a traditionally underserved and impoverished community. It will provide an additional and accessible resource for our clients who frequently have co-occurring medical conditions, including kidney disease.

We kindly request that you approve this application. We believe the project is both necessary and in the best interest of our community. Thank you for your consideration.

Sincerely,

Donald J. Dew, MSW, ACSW
President/CEO

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OCT 2 2019

HEALTH FACILITIES &
SERVICES REVIEW BOARD

Web Site www.habilitative.org

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repford@lashawnford.com



La Shawn K. Ford
State Representative
8th District

CAPITOL OFFICE
239-E STRATTON BUILDING
SPRINGFIELD, IL 62706
217.782.5962 OFFICE
217.557.4502 FAX

October 2, 2019

Illinois Health Facilities and Services Review Board
Attention: Courtney Avery, Administrator
Illinois Department of Public Health
525 West Jefferson St., 2nd Floor
Springfield IL 62761

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OCT 2 2019

**HEALTH FACILITIES &
SERVICES REVIEW BOARD**

Re: Project 19-022 – Austin Dialysis at Loretto Hospital

Dear Ms. Avery:

I write this letter in support of Austin's Dialysis Certificate of Need (C.O.N) Project at Loretto Hospital. Please inform the members of the Illinois Health Facilities and Services State Review Board that I fully support C.O.N Project 19-022. The C.O.N Project is proposing the establishment of a 12-station dialysis facility in the City of Chicago. Currently, the State Board's inventory data shows that Health Service Area 6 (Chicago) has a need for 80 additional dialysis stations. The C.O.N Project is prepared to help meet those needs of the State Board.

The federal Health Resources and Services Administration lists Austin and the surrounding communities as medically underserved. Austin is an area with a large African American population, and a group that suffers disproportionately from kidney disease. Loretto Hospital's C.O.N Project will help to enhance access to dialysis care for people in our area.

In conclusion, I support Loretto Hospital's C.O.N Project. The C.O.N Project will not only provide the much-needed resources but will also provide new economic development and job creation in our community. I humbly ask the State Board to approve the C.O.N Project's permit application to further help serve the many constituents in need of this service.

For any further questions about this letter of support, please contact me at Repford@lashawnford.com. I thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to be "LSK".

La Shawn K. Ford
State Representative-Eighth District

October 2, 2019

Illinois Health Facilities and Services Review Board
Illinois Department of Public Health
525 West Jefferson St., 2nd Floor
Springfield IL 62761

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OCT 2 2019

HEALTH FACILITIES &
SERVICES REVIEW BOARD

Attention: Ms. Courtney Avery, Administrator

Re: Project 19-022 – Austin Dialysis at Loretto

Dear Ms. Avery:

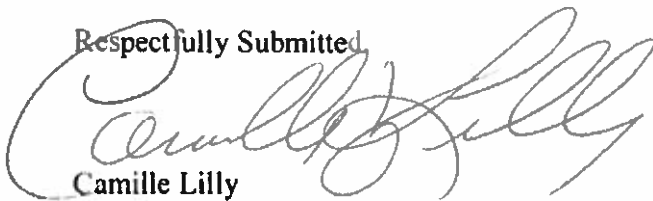
Please let the members of the Illinois Health Facilities and Services Review Board (State Board) know that I fully support CON project 19-022, which is proposing the establishment of a 12-station dialysis facility in the City of Chicago. The State Board's inventory data shows that Health Service Area 6 (i.e., Chicago) has a need for 80 additional dialysis stations. This project will meet that stated need.

Furthermore, I support this project because:

- it will enhance access to dialysis care in the Austin neighborhood, an area with a large African American population, a group that suffers disproportionately from kidney disease;
- it will enhance access to dialysis care services in an area that is underserved, with the federal Health Resources and Services Administration listing Austin and surrounding communities as medically underserved; and
- it will provide economic development and create more jobs in this community.

For the reasons noted above, I ask the State Board to approve this CON permit application. Thank you for your consideration.

Respectfully Submitted,



Camille Lilly
State Representative
Illinois 78th District
6937 W. North Avenue
Oak Park, IL 60302
773.854.5011
Camille.lilly@lorettohospital.org

SPRINGFIELD OFFICE:
ROOM 329A CAPITOL BUILDING
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10330 WEST ROOSEVELT ROAD
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KIMBERLY A. LIGHTFORD
MAJORITY LEADER
STATE SENATOR • 4TH DISTRICT

COMMITTEES:

ASSIGNMENTS
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EDUCATION
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EXECUTIVE
EXECUTIVE APPOINTMENTS
HIGHER EDUCATION
LABOR

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OCT 2 2019

**HEALTH FACILITIES &
SERVICES REVIEW BOARD**

October 2, 2019

Illinois Health Facilities and Services Review Board
Illinois Department of Public Health
525 West Jefferson St., 2nd Floor
Springfield IL 62761

Attention: Ms. Courtney Avery, Administrator

Re: Project 19-022 – Austin Dialysis at Loretto

Dear Ms. Avery:

Please let the members of the Illinois Health Facilities and Services Review Board (State Board) know that I fully support CON project 19-022, which is proposing the establishment of a 12-station dialysis facility in the City of Chicago. The State Board's inventory data shows that Health Service Area 6 (i.e., Chicago) has a need for 80 additional dialysis stations. This project will meet that stated need.

Furthermore, I support this project because:

- it will enhance access to dialysis care in the Austin neighborhood, an area with a large African American population, a group that suffers disproportionately from kidney disease;
- it will enhance access to dialysis care services in an area that is underserved, with the federal Health Resources and Services Administration listing Austin and surrounding communities as medically underserved; and
- it will provide economic development and create more jobs in this community.

For the reasons noted above, I ask the State Board to approve this CON permit application. Thank you for your consideration.

Respectfully Submitted,

Kimberly A. Lightford

Kimberly Lightford
State Senator
Illinois 4th District
10330 West Roosevelt Road
Westchester, IL 60154
708.343.7444
statesenatorkimberlylightford@comcast.net

RECEIVED

DEC 06 2019

HEALTH FACILITIES &
SERVICES REVIEW BOARD

November 25, 2019

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

Re: Letter of Support for Austin Dialysis at Loretto
CON Project 19-022

Dear Ms. Avery:

I am pleased to write a letter in support of Austin Dialysis at Loretto. This joint venture with Loretto Hospital to establish a 12-station in-center hemodialysis center will enhance access to important healthcare services in a traditionally underserved and impoverished community.

Please contact me if you have any questions.

Sincerely,



Larry McCulley
President and CEO



MAPLE AVENUE KIDNEY CENTER
DIVISION OF NEPHROLOGY

September 4, 2019

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

RECEIVED

SEP 10 2019

**HEALTH FACILITIES &
SERVICES REVIEW BOARD**

Re: Opposition to #19-022, Austin Dialysis at Loretto, Chicago
Applicants: **Austin Dialysis Center, LLC**

I am writing on behalf of Maple Avenue Kidney Center in Oak Park, Illinois in opposition to project **#19-022 Austin Dialysis at Loretto**, Chicago, (a proposed Joint Venture between Austin Dialysis Center LLC and Loretto Hospital) based on lack of Need, Unnecessary Duplication/Maldistribution of Services and impact on other Providers.

There is currently a need of **only 5 stations in HSA 6**. The applicants have submitted application for a 12 station ESRD facilities in HSA 6 to be heard at the October 22, 2019 Board meeting (#19-02, #19-025 and #19-027). Even if there will be a need for stations in HSA 6 after the next need determination, approving 12 stations to come on line at the same time in one HSA, within 30-minutes travel time, will flood the market rather than incrementally adding clinics to adjust to evidenced and projected growth of ESRD.

It also seems that the applicant is using the CKD base to justify number of CKD patients based on the **hospital admissions** of CKD and ESRD patients, the fact remains that these patients have established nephrology support outside the hospital with other nephrologist **and in case of ESRD patients they have already established schedule for their dialysis treatments with existing facilities**. Having **97 ESRD** patients' getting acute dialysis in the hospital does not guarantee that these patients did not have continuity of care and were actively looking for a dialysis unit placement. This merely means that they were hospitalized for any number of other health complications, received acute dialysis treatment at the hospital and upon discharge will prefer to return to their respective dialysis facilities. Almost every hospital provides acute dialysis treatment to the patients that are admitted to their facilities seeking care.

Applicants also attached a letter from their proposed medical director, Dr. Rajani Kosuri, who states in her letter that she **reviewed the records of the ESRD patients belonging to other Nephrologists** and agrees that they need dialysis. She was not the nephrology service provider for these patients either at the hospital or in her private practice and by reviewing these records she is possibly **violating the HIPPA rights** of these patient as well as their providers. These patients were followed by their respective providers at the hospital and continued their care at their outpatient practices after the patients got discharged from the hospital.



MAPLE AVENUE KIDNEY CENTER

DIVISION OF NEPHROLOGY

Further, Loretto hospital is non-profit organization with tax exempt status with IRS, they are going in partnership with Austin Dialysis Center, LLC, A for-profit organization with zero percent control of this joint venture. According to IRS Revenue Ruling 98-15, the summarized guidelines for joint venter partnership between a non-pro and for-profit organizations are as follows:

1. The **non-profit organization must have control** (in substance as well as a form) of the partnership or joint venture. (Loretto Hospital has **0 control** on this Dialysis JV)
2. The **benefit to the community** (or the non-profit's charitable purpose) must explicitly be put ahead of the partnership's profitability. (With **0 control, Loretto will have 0 benefits** to the community)
3. Although the ruling specifically deals with hospital joint ventures, it is not limited to the hospital sector and is presumably **applicable to any joint venture involving a non-profit entity as a general partner.**
4. Revenue Ruling 98-15 does not apply when an exempt entity is a limited partner rather than a general partner because the organization is merely a passive investor at that point. (Loretto Hospital is not a passive investor in this project)
5. Since a joint venture can also be a partnership, an entity's exempt status may be jeopardized by the activities of the partnership since the activities of a partnership are attributed to its partners.
6. The facts and circumstances of each joint venture or partnership arrangement will be analyzed to determine whether the preceding guidelines are satisfied.

Lastly, the applicant failed to inform our facility that they were applying for the certificate of need application for a new dialysis facility that will be located less than 3 miles from our unit. Our current utilization is 56.48%, we will gladly care for new patients requiring care, and do so willingly and well, and ask that you give us the opportunity to continue to provide this care by making our facility sustainable. Other facilities close by are struggling to keep their stations occupied, notable facilities current quarterly census is attached with this letter for your reference. Approving this project will put strain on the health care delivery system.

The approval of the Austin Dialysis at Loretto will create unnecessary duplication & maldistribution of services across HSA 6 & 7. There are under-utilized facilities of various providers in close proximity to the proposed project that would be negatively impacted.



MAPLE AVENUE KIDNEY CENTER
DIVISION OF NEPHROLOGY

We respectfully ask the Board to take our comments/concerns into consideration when reviewing the proposed project, as well as the negative findings which will most certainly be noted in the State Board Report.

Sincerely,

Hamid Humayun M.D., F.A.C.P., F.A.S.N.
CEO & Medical Director

Attachment with this Letter:

- I. Utilization data of 16 facilities within 5/6 miles radius of the proposed project. 12 of the 16 facilities are under 80% of the capacity utilization. .
- II. The IRS Revenue Ruling 98-15 document, retrieved from <https://www.irs.gov/pub/irs-drop/rr-98-15.pdf>

Facility & Address	Ownership	HSA	Miles From Proposed Unit	March 2019 Stations	March 2019 Census	March 2019 Utilization	June 2019 Census	June 2019 Utilization
West Metro Dialysis Center 1044 West Mozart, Chicago Center	Fresenius	6	5.5	12	9	12.50%	10	13.89%
1806 West Hubbard Street, Chicago	Fresenius	6	6	21	59	46.83%	59	46.83%
Davita West Side 1600 West 13th Street, Chicago Parkway	Davita	6	6	12	39	54.17%	38	52.78%
3410 West Van Buren Street. Chicago	Fresenius	6	3.1	30	101	56.11%	97	53.89%
Maple Avenue Kidney Center 610 South Maple Avenue. Oak Park	Independent	7	2.5	18	-	-	61	56.48%
Garfield Kidney Center 408 North Homan Avenue. Chicago	Davita	6	4	24	88	61.11%	87	60.42%
Austin Community Kidney Center 4800 W Chicago Ave Ste 2A. Chicago	Fresenius	6	2.8	16	65	67.71%	65	67.71%
FMC Humboldt Park 3500 West Grand Avenue. Chicago	Fresenius	6	5	34	144	70.59%	141	69.12%
Fresenius Medical Care River Forest 103 Forest Avenue. River Forest	Fresenius	7	3.6	24	100	69.44%	107	74.31%
FMC Berwyn 2601 South Harlem Avenue. Berwyn	Fresenius	7	4.7	30	138	76.67%	135	75.00%
West Suburban Hosp. Dialysis Unit 518 N Austin Blvd 5th Fl, Oak Park	Fresenius	7	1.9	46	237	85.87%	220	79.71%
Fresenius Medical Care Cicero 3000 South Cicero Avenue. Cicero	Fresenius	7	3.4	20	97	80.83%	99	82.50%
Oak Park Dialysis Center 733 West Madison Street. Oak Park	Fresenius	7	6.5	12	67	93.06%	67	93.06%
Little Village Dialysis 2335 W. Cermack Road. Chicago	Davita	6	6.2	16	89	92.71%	90	93.75%
Davita Lawndale 3934 West 24th Street. Chicago	Davita	6	3.9	16	101	105.21%	99	103.13%

Part I

Section 501.--Exemption From Tax on Corporations, Certain Trusts, Etc.

26 CFR 1.501(c)(3)-1: Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.
(Also §§ 170 and 509.)

Rev. Rul. 98-15, 1998-12 I.R.B.

ISSUE

Whether, under the facts described below, an organization that operates an acute care hospital continues to qualify for exemption from federal income tax as an organization described in § 501(c)(3) of the Internal Revenue Code when it forms a limited liability company (LLC) with a for-profit corporation and then contributes its hospital and all of its other operating assets to the LLC, which then operates the hospital.

FACTS

Situation 1

A is a nonprofit corporation that owns and operates an acute care hospital. A has been recognized as exempt from federal

income tax under § 501(a) as an organization described in § 501(c)(3) and as other than a private foundation as defined in § 509(a) because it is described in § 170(b)(1)(A)(iii). B is a for-profit corporation that owns and operates a number of hospitals.

A concludes that it could better serve its community if it obtained additional funding. B is interested in providing financing for A's hospital, provided it earns a reasonable rate of return. A and B form a limited liability company, C. A contributes all of its operating assets, including its hospital to C. B also contributes assets to C. In return, A and B receive ownership interests in C proportional and equal in value to their respective contributions.

C's Articles of Organization and Operating Agreement ("governing documents") provide that C is to be managed by a governing board consisting of three individuals chosen by A and two individuals chosen by B. A intends to appoint community leaders who have experience with hospital matters, but who are not on the hospital staff and do not otherwise engage in business transactions with the hospital.

The governing documents further provide that they may only be amended with the approval of both owners and that a majority of three board members must approve certain major decisions relating to C's operation, including decisions relating to any of the following topics:

A. C's annual capital and operating budgets;

- B. Distributions of C's earnings;
- C. Selection of key executives;
- D. Acquisition or disposition of health care facilities;
- E. Contracts in excess of \$x per year;
- F. Changes to the types of services offered by
the hospital; and
- G. Renewal or termination of management agreements.

The governing documents require that C operate any hospital it owns in a manner that furthers charitable purposes by promoting health for a broad cross section of its community. The governing documents explicitly provide that the duty of the members of the governing board to operate C in a manner that furthers charitable purposes by promoting health for a broad cross section of the community overrides any duty they may have to operate C for the financial benefit of its owners.

Accordingly, in the event of a conflict between operation in accordance with the community benefit standard and any duty to maximize profits, the members of the governing board are to satisfy the community benefit standard without regard to the consequences for maximizing profitability.

The governing documents further provide that all returns of capital and distributions of earnings made to owners of C shall be proportional to their ownership interests in C. The terms of the governing documents are legal, binding, and enforceable under applicable state law.

C enters into a management agreement with a management company that is unrelated to A or B to provide day-to-day management services to C. The management agreement is for a five-year period, and the agreement is renewable for additional five-year periods by mutual consent. The management company will be paid a management fee for its services based on C's gross revenues. The terms and conditions of the management agreement, including the fee structure and the contract term, are reasonable and comparable to what other management firms receive for similar services at similarly situated hospitals. C may terminate the agreement for cause.

None of the officers, directors, or key employees of A who were involved in making the decision to form C were promised employment or any other inducement by C or B and their related entities if the transaction were approved. None of A's officers, directors, or key employees have any interest, including any interest through attribution determined in accordance with the principles of § 318, in B or any of its related entities.

Pursuant to § 301.7701-3(b) of the Procedure and Administrative Regulations, C will be treated as a partnership for federal income tax purposes.

A intends to use any distributions it receives from C to fund grants to support activities that promote the health of A's community and to help the indigent obtain health care. Substantially all of A's grantmaking will be funded by distributions from C. A's projected grantmaking program and its

participation as an owner of C will constitute A's only activities.

Situation 2

D is a nonprofit corporation that owns and operates an acute care hospital. D has been recognized as exempt from federal income tax under § 501(a) as an organization described in § 501(c)(3) and as other than a private foundation as defined in § 509(a) because it is described in § 170(b)(1)(A)(iii). E is a for-profit hospital corporation that owns and operates a number of hospitals and provides management services to several hospitals that it does not own.

D concludes that it could better serve its community if it obtained additional funding. E is interested in providing financing for D's hospital, provided it earns a reasonable rate of return. D and E form a limited liability company, F. D contributes all of its operating assets, including its hospital to F. E also contributes assets to F. In return, D and E receive ownership interests proportional and equal in value to their respective contributions.

F's Articles of Organization and Operating Agreement ("governing documents") provide that F is to be managed by a governing board consisting of three individuals chosen by D and three individuals chosen by E. D intends to appoint community leaders who have experience with hospital matters, but who are not on the hospital staff and do not otherwise engage in business transactions with the hospital.

The governing documents further provide that they may only be amended with the approval of both owners and that a majority of board members must approve certain major decisions relating to E's operation, including decisions relating to any of the following topics:

- A. E's annual capital and operating budgets;
- B. Distributions of E's earnings over a required minimum level of distributions set forth in the Operating Agreement;
- C. Unusually large contracts; and
- D. Selection of key executives.

E's governing documents provide that E's purpose is to construct, develop, own, manage, operate, and take other action in connection with operating the health care facilities it owns and engage in other health care-related activities. The governing documents further provide that all returns of capital and distributions of earnings made to owners of E shall be proportional to their ownership interests in E.

E enters into a management agreement with a wholly-owned subsidiary of E to provide day-to-day management services to E. The management agreement is for a five-year period, and the agreement is renewable for additional five-year periods at the discretion of E's subsidiary. E may terminate the agreement only for cause. E's subsidiary will be paid a management fee for its services based on gross revenues. The terms and conditions of the management agreement, including the fee structure and the

contract term other than the renewal terms, are reasonable and comparable to what other management firms receive for similar services at similarly situated hospitals.

As part of the agreement to form E, D agrees to approve the selection of two individuals to serve as E's chief executive officer and chief financial officer. These individuals have previously worked for E in hospital management and have business expertise. They will work with the management company to oversee E's day-to-day management. Their compensation is comparable to what comparable executives are paid at similarly situated hospitals.

Pursuant to § 301.7701-3(b), E will be treated as a partnership for federal tax income purposes.

D intends to use any distributions it receives from E to fund grants to support activities that promote the health of D's community and to help the indigent obtain health care. Substantially all of D's grantmaking will be funded by distributions from E. D's projected grantmaking program and its participation as an owner of E will constitute D's only activities.

LAW

Section 501(c)(3) provides, in part, for the exemption from federal income tax of corporations organized and operated exclusively for charitable, scientific, or educational purposes,

provided no part of the organization's net earnings inures to the benefit of any private shareholder or individual.

Section 1.501(c)(3)-1(c)(1) of the Income Tax Regulations provides that an organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in § 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose. In Better Business Bureau of Washington, D.C. v. United States, 326 U.S. 279, 283 (1945), the Court stated that "the presence of a single . . . [non-exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly . . . [exempt] purposes."

Section 1.501(c)(3)-1(d)(1)(ii) provides that an organization is not organized or operated exclusively for exempt purposes unless it serves a public rather than a private interest. It further states that "to meet the requirement of this subdivision, it is necessary for an organization to establish that it is not organized and operated for the benefit of private interests"

Section 1.501(c)(3)-1(d)(2) provides that the term "charitable" is used in § 501(c)(3) in its generally accepted legal sense. The promotion of health has long been recognized as a charitable purpose. See Restatement (Second) of Trusts, §§ 368, 372 (1959); 4A Austin W. Scott and William F. Fratcher,

The Law of Trusts §§ 368, 372 (4th ed. 1989). However, not every activity that promotes health supports tax exemption under § 501(c)(3). For example, selling prescription pharmaceuticals certainly promotes health, but pharmacies cannot qualify for recognition of exemption under § 501(c)(3) on that basis alone. Federation Pharmacy Services, Inc. v. Commissioner, 72 T.C. 687 (1979), aff'd, 625 F.2d 804 (8th Cir. 1980) ("Federation Pharmacy"). Furthermore, "an institution for the promotion of health is not a charitable institution if it is privately owned and is run for the profit of the owners." 4A Austin W. Scott and William F. Fratcher, The Law of Trusts § 372.1 (4th ed. 1989). See also Restatement (Second) of Trusts, § 376 (1959). This principle applies to hospitals and other health care organizations. As the Tax Court stated, "[w]hile the diagnosis and cure of disease are indeed purposes that may furnish the foundation for characterizing the activity as 'charitable,' something more is required." Sonora Community Hospital v. Commissioner, 46 T.C. 519, 525-526 (1966), aff'd 397 F.2d 814 (9th Cir. 1968) ("Sonora"). See also Sound Health Association v. Commissioner, 71 T.C. 158 (1978), acq. 1981-2 C.B. 2 ("Sound Health"); Geisinger Health Plan v. Commissioner, 985 F.2d 1210 (3rd Cir., 1993), rev'g 62 T.C.M. 1656 (1991) ("Geisinger").

In evaluating whether a nonprofit hospital qualifies as an organization described in § 501(c)(3), Rev. Rul. 69-545, 1969-2 C.B. 117, compares two hospitals. The first hospital discussed is controlled by a board of trustees composed of independent

civic leaders. In addition, the hospital maintains an open medical staff, with privileges available to all qualified physicians; it operates a full-time emergency room open to all regardless of ability to pay; and it otherwise admits all patients able to pay (either themselves, or through third party payers such as private health insurance or government programs such as Medicare). In contrast, the second hospital is controlled by physicians who have a substantial economic interest in the hospital. This hospital restricts the number of physicians admitted to the medical staff, enters into favorable rental agreements with the individuals who control the hospital, and limits emergency room and hospital admission substantially to the patients of the physicians who control the hospital. Rev. Rul. 69-545 notes that in considering whether a nonprofit hospital is operated to serve a private benefit, the Service will weigh all the relevant facts and circumstances in each case, including the use and control of the hospital. The revenue ruling concludes that the first hospital continues to qualify as an organization described in § 501(c)(3) and the second hospital does not because it is operated for the private benefit of the physicians who control the hospital.

Section 509(a) provides that the term "private foundation" means a domestic or foreign organization described in § 501(c)(3) other than an organization described in § 509(a)(1), (2), (3), or (4). The organizations described in § 509(a)(1) include those described in § 170(b)(1)(A)(iii). An organization is described

in § 170(b)(1)(A)(iii) if its principal purpose is to provide medical or hospital care.

Section 512(c) provides that an exempt organization that is a member of a partnership conducting an unrelated trade or business with respect to the exempt organization must include its share of the partnership income and deductions attributable to that business (subject to the exceptions, additions, and limitations in § 512(b)) in computing its unrelated business income. See also H.R. No. 2319, 81st Cong., 2d Sess. 36, 111-112 (1950); S. Rep. No. 2375, 81st Cong., 2d Sess. 26, 109-110 (1950); § 1.512(c)-1.

In Butler v. Commissioner, 36 T.C. 1097 (1961), acq. 1962-2 C.B. 4 ("Butler"), the court examined the relationship between a partner and a partnership for purposes of determining whether the partner was entitled to a business bad debt deduction for a loan he had made to the partnership that it could not repay. In holding that the partner was entitled to the bad debt deduction, the court noted that "[b]y reason of being a partner in a business, petitioner was individually engaged in business." Butler, 36 T.C. at 1106 citing Dwight A. Ward v. Commissioner, 20 T.C. 332 (1953), aff'd 224 F.2d 547 (9th Cir. 1955).

In Plumstead Theatre Society, Inc. v. Commissioner, 74 T.C. 1324 (1980), aff'd, 675 F.2d 244 (9th Cir. 1982) ("Plumstead"), the Tax Court held that a charitable organization's participation as a general partner in a limited partnership did not jeopardize its exempt status. The organization co-produced a play as one of

its charitable activities. Prior to the opening of the play, the organization encountered financial difficulties in raising its share of costs. In order to meet its funding obligations, the organization formed a limited partnership in which it served as general partner, and two individuals and a for-profit corporation were the limited partners. One of the significant factors supporting the Tax Court's holding was its finding that the limited partners had no control over the organization's operations.

In Broadway Theatre League of Lynchburg, Virginia, Inc. v. U.S., 293 F.Supp. 346 (W.D.Va. 1968) ("Broadway Theatre League"), the court held that an organization that promoted an interest in theatrical arts did not jeopardize its exempt status when it hired a booking organization to arrange for a series of theatrical performances, promote the series and sell season tickets to the series because the contract was for a reasonable term and provided for reasonable compensation and the organization retained ultimate authority over the activities being managed.

In Housing Pioneers v. Commissioner, 65 T.C.M. (CCH) 2191 (1993), aff'd, 49 F.3d 1395 (9th Cir. 1995), amended 58 F.3d 401 (9th Cir. 1995) ("Housing Pioneers"), the Tax Court concluded that an organization did not qualify as a § 501(c)(3) organization because its activities performed as co-general partner in for-profit limited partnerships substantially furthered a non-exempt purpose, and serving that purpose caused

the organization to serve private interests. The organization entered into partnerships as a one percent co-general partner of existing limited partnerships for the purpose of splitting the tax benefits with the for-profit partners. Under the management agreement, the organization's authority as co-general partner was narrowly circumscribed. It had no management responsibilities and could describe only a vague charitable function of surveying tenant needs.

In est of Hawaii v. Commissioner, 71 T.C. 1067 (1979), aff'd in unpublished opinion 647 F.2d 170 (9th Cir. 1981) ("est of Hawaii"), several for-profit est organizations exerted significant indirect control over est of Hawaii, a non-profit entity, through contractual arrangements. The Tax Court concluded that the for-profits were able to use the non-profit as an "instrument" to further their for-profit purposes. Neither the fact that the for-profits lacked structural control over the organization nor the fact that amounts paid to the for-profit organizations under the contracts were reasonable affected the court's conclusion. Consequently, est of Hawaii did not qualify as an organization described in § 501(c)(3).

In Harding Hospital, Inc. v. United States, 505 F.2d 1068 (6th Cir. 1974) ("Harding"), a non-profit hospital with an independent board of directors executed a contract with a medical partnership composed of seven physicians. The contract gave the physicians control over care of the hospital's patients and the stream of income generated by the patients while also

guaranteeing the physicians thousands of dollars in payment for various supervisory activities. The court held that the benefits derived from the contract constituted sufficient private benefit to preclude exemption.

ANALYSIS

For federal income tax purposes, the activities of a partnership are often considered to be the activities of the partners. See, e.g., Butler. Aggregate treatment is also consistent with the treatment of partnerships for purpose of the unrelated business income tax under § 512(c). See H.R. No. 2319, 81st Cong., 2d Sess. 36, 110-112 (1950); S. Rep. No. 2375, 81st Cong., 2d Sess. 26, 109-110 (1950); § 1.512(c)-1. In light of the aggregate principle discussed in Butler and reflected in § 512(c), the aggregate approach also applies for purposes of the operational test set forth in § 1.501(c)(3)-1(c). Thus, the activities of an LLC treated as a partnership for federal income tax purposes are considered to be the activities of a nonprofit organization that is an owner of the LLC when evaluating whether the nonprofit organization is operated exclusively for exempt purposes within the meaning of § 501(c)(3).

A § 501(c)(3) organization may form and participate in a partnership, including an LLC treated as a partnership for federal income tax purposes, and meet the operational test if participation in the partnership furthers a charitable purpose, and the partnership arrangement permits the exempt organization

to act exclusively in furtherance of its exempt purpose and only incidentally for the benefit of the for-profit partners. See Plumstead and Housing Pioneers. Similarly, a § 501(c)(3) organization may enter into a management contract with a private party giving that party authority to conduct activities on behalf of the organization and direct the use of the organization's assets provided that the organization retains ultimate authority over the assets and activities being managed and the terms and conditions of the contract are reasonable, including reasonable compensation and a reasonable term. See Broadway Theatre League. However, if a private party is allowed to control or use the non-profit organization's activities or assets for the benefit of the private party, and the benefit is not incidental to the accomplishment of exempt purposes, the organization will fail to be organized and operated exclusively for exempt purposes. See est of Hawaii; Harding; § 1.501(c)(3)-1(c)(1); and § 1.501(c)(3)-1(d)(1)(ii).

Situation 1

After A and B form C, and A contributes all of its operating assets to C, A's activities will consist of the health care services it provides through C and any grantmaking activities it can conduct using income distributed by C. A will receive an interest in C equal in value to the assets it contributes to C, and A's and B's returns from C will be proportional to their respective investments in C. The governing documents of C commit C to providing health care services for the benefit of the

community as a whole and to give charitable purposes priority over maximizing profits for C's owners. Furthermore, through A's appointment of members of the community familiar with the hospital to C's board, the board's structure, which gives A's appointees voting control, and the specifically enumerated powers of the board over changes in activities, disposition of assets, and renewal of the management agreement, A can ensure that the assets it owns through C and the activities it conducts through C are used primarily to further exempt purposes. Thus, A can ensure that the benefit to B and other private parties, like the management company, will be incidental to the accomplishment of charitable purposes. Additionally, the terms and conditions of the management contract, including the terms for renewal and termination, are reasonable. Finally, A's grants are intended to support education and research and give resources to help provide health care to the indigent. All of these facts and circumstances establish that, when A participates in forming C and contributes all of its operating assets to C, and C operates in accordance with its governing documents, A will be furthering charitable purposes and continue to be operated exclusively for exempt purposes.

Because A's grantmaking activity will be contingent upon receiving distributions from C, A's principal activity will continue to be the provision of hospital care. As long as A's principal activity remains the provision of hospital care, A will

not be classified as a private foundation in accordance with § 509(a)(1) as an organization described in § 170(b)(1)(A)(iii).

Situation 2

When D and E form F, and D contributes its assets to F, D will be engaged in activities that consist of the health care services it provides through F and any grantmaking activities it can conduct using income distributed by F. However, unlike A, D will not be engaging primarily in activities that further an exempt purpose. "While the diagnosis and cure of disease are indeed purposes that may furnish the foundation for characterizing the activity as 'charitable,' something more is required." Sonora, 46 T.C. at 525-526. See also Federation Pharmacy; Sound Health; and Geisinger. In the absence of a binding obligation in F's governing documents for F to serve charitable purposes or otherwise provide its services to the community as a whole, F will be able to deny care to segments of the community, such as the indigent. Because D will share control of F with E, D will not be able to initiate programs within F to serve new health needs within the community without the agreement of at least one governing board member appointed by E. As a business enterprise, E will not necessarily give priority to the health needs of the community over the consequences for F's profits. The primary source of information for board members appointed by D will be the chief executives, who have a prior relationship with E and the management company, which is a subsidiary of E. The management company itself will

have broad discretion over E's activities and assets that may not always be under the board's supervision. For example, the management company is permitted to enter into all but "unusually large" contracts without board approval. The management company may also unilaterally renew the management agreement. Based on all these facts and circumstances, D cannot establish that the activities it conducts through E further exempt purposes. "[I]n order for an organization to qualify for exemption under § 501(c)(3) the organization must 'establish' that it is neither organized nor operated for the 'benefit of private interests.'" Federation Pharmacy, 625 F.2d at 809. Consequently, the benefit to E resulting from the activities D conducts through E will not be incidental to the furtherance of an exempt purpose. Thus, D will fail the operational test when it forms E, contributes its operating assets to E, and then serves as an owner of E.

HOLDING

A will continue to qualify as an organization described in § 501(c)(3) when it forms C and contributes all of its operating assets to C because A has established that A will be operating exclusively for a charitable purpose and only incidentally for the purpose of benefiting the private interests of B. Furthermore, A's principal activity will continue to be the provision of hospital care when C begins operations. Thus, A will be an organization described in § 170(b)(1)(A)(iii) and thus, will not be classified as a private foundation in

accordance with § 509(a)(1), as long as hospital care remains its principal activity.

D will violate the requirements to be an organization described in § 501(c)(3) when it forms E and contributes all of its operating assets to E because D has failed to establish that it will be operated exclusively for exempt purposes.

DRAFTING INFORMATION

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