

October 1, 2019

VIA FEDEX OVERNIGHT

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

RECEIVED

OCT 02 2019

HEALTH FACILITIES &
SERVICES REVIEW BOARD

Re: MetroSouth Medical Center (E-024-19)

Dear Ms. Avery:

I write on behalf of People's Choice Hospital ("PCH") in regard to Quorum's application to discontinue MetroSouth Medical Center (E-024-19) ("Application"), to correct certain sworn statements that Quorum made to the Health Facilities and Services Review Board ("Board") during the September 17, 2019 hearing, and to request that the Board take action against Quorum pursuant to its powers under Section 15 of the Illinois Health Facilities Planning Act ("Planning Act").

The central tenet of PCH's opposition in these proceedings—as well as a lawsuit proceeding in the Circuit Court of Cook County, Chancery Division—is that Quorum is attempting to close MetroSouth under false pretenses and in breach of an agreement to sell the hospital to PCH. To that end, Quorum submitted knowingly false statements through its Application and during the review process in the hopes of convincing the Board that MetroSouth is financially insolvent and that there are no other companies willing to step in and continue running the hospital. In reality, PCH – a hospital turnaround company – is practically *begging* to buy MetroSouth from Quorum for \$20 million pursuant to an agreement that they began negotiating in May (i.e., *before* Quorum submitted its Application containing false information to the Board). What's more, PCH has pledged to convert MetroSouth into a nonprofit hospital and to maintain *all* services and departments that were previously offered at the facility. Quorum, on the other hand, seems intent on ensuring that MetroSouth closes down – with or without the Board's approval – and that PCH never has an opportunity to purchase, operate, or save the hospital.

A. Recent Developments That Are Relevant To These Proceedings.

There are numerous developments that the Board should be aware of before it meets again on October 22, 2019. First, three days after the Board voted to defer consideration of the Application, Quorum unilaterally – without approval and in violation of the Board's rules – shut down its emergency department and refused to admit any new patients into the hospital.¹ Then,

¹ "BLUE ISLAND'S METROSOUTH MEDICAL CENTER STOPS ADMITTING NEW PATIENTS, TEMPORARILY SUSPENDS EMERGENCY DEPARTMENTS," www.chicagotribune.com/suburbs/daily-southtown/ct-sta-metro-south-ceases-new-admissions-st-0922-20190921-2fez2627tngenk6ipe52tt3igy-story.html (last accessed Oct. 1, 2019).

on September 30, 2019, in defiance of state law and the Board's rules, Quorum unilaterally closed the remaining medical departments and shuttered the hospital indefinitely.²

On the same day, the Chicago Sun-Times published a bombshell report that exposed a secret deal between Quorum and the Mayor of Blue Island, under which Quorum would pay the City of Blue Island \$2 million in exchange for the Mayor supporting Quorum's Application to close MetroSouth at the September 17, 2019 Board hearing, which the Mayor did in fact do.³ As part of that secret agreement, Quorum promised to "not surrender, but suspend, the Hospital's state license for up to six months, if permitted under the state's current licensure guidelines" to supposedly give the City an opportunity to search for a new owner.⁴ But as Quorum well knows, the Board cannot issue a temporary suspension in this situation for two reasons. First, the Board limits temporary suspensions to "unanticipated and unforeseen circumstances," such as "the loss of appropriate staff or circumstances due to the result of a natural or unnatural disaster."⁵ Second, Quorum hasn't mentioned anything about seeking a temporary suspension of services in its Application and cannot unilaterally decide to relinquish an exemption (here, a discontinuance exemption), without express approval by the Board pursuant to 77 Ill. Admin. Code § 1130.580 (Relinquishment of an Exemption). Despite what Quorum wants the Mayor to believe, the fact is that if MetroSouth is allowed to close, it will lose its licensing and close permanently.

Given the gravity and importance of what's at stake (access to healthcare for 100,000 people annually, more than 800 jobs, and the fate of Blue Island's economic engine), the Board should take care to enforce its mandatory rules and take advantage of the powers provided by the Administrative Code to deal with situations like this, where applicants submit false information to the Board under penalty of perjury and unilaterally close hospital facilities in open defiance of the laws of the State of Illinois and the Board's rules.

B. The Board Should Act To Restrain Quorum From Unilaterally Closing MetroSouth Outside Of The Defined Regulatory Process.

It is undisputed that Quorum has violated the Planning Act by unilaterally closing down the hospital without prior Board approval. Under Section 14.1 of the Planning Act, the Board may deny an application and take any other action it deems appropriate, including the imposition of fines, when an applicant modifies (i.e., discontinues) a health care facility "without a permit or exemption or in violation of the terms of a permit." 20 ILCS 3960/14.1(a)(2). Further, Section 15 of the Planning Act, expressly states that the Board may "maintain an action in the name of

² "METROSOUTH MEDICAL CENTER CLOSES ITS DOORS," abc7chicago.com/health/metrosouth-medical-center-closes/5579735 (last accessed Oct. 1, 2019).

³ "BLUE ISLAND MAYOR CRITICIZED FOR 'BACKROOM DEAL' IN FAVOR OF CLOSING METROSOUTH HOSPITAL," <https://chicago.suntimes.com/2019/9/29/20883771/metrosouth-hospital-blue-island-mayor-domingo-vargas-quorum-health> (last accessed Oct. 1, 2019).

⁴ https://cdn.vox-cdn.com/uploads/chorus_asset/file/19238858/MetroSouthVargasAgreement.0.pdf (last accessed Oct. 1, 2019).

⁵ "ANNOUNCEMENT REGARDING TEMPORARY SUSPENSIONS OF SERVICES," <https://www2.illinois.gov/sites/hfsrb/Announcements/Pages/Temporary-Suspension-of-Services--4-17-2019.aspx> (last accessed Oct. 1, 2019).

the State for injunction or other process against any person” to “restrain or prevent” the discontinuation of a health care facility without prior Board approval, and that the “Attorney General shall represent the Board in [such] proceedings.” 20 ILCS 3960/15.

Accordingly, we strongly encourage the Board to direct the Attorney General to bring a limited action against Quorum to prevent it from closing MetroSouth without Board approval. The action would not seek to force Quorum to keep the hospital open indefinitely, but rather, would only seek to prevent Quorum from closing it outside of the regulatory process established by the State of Illinois and mandated by the Board’s rules.

C. The Administrative Code Requires The Board To Defer Consideration Of The Application Until After The Underlying Litigation Is Completed.

The Board correctly voted to defer consideration of the Application in light of the lawsuit that PCH filed against Quorum on September 16, 2019. It is undisputed that the Board’s rules mandate deferral of exemption applications that are the subject of litigation: “HFSRB *will* defer consideration of an application for *exemption* when the application is the subject of litigation, until all litigation related to the application has been completed.” 77 Ill. Admin. Code § 1130.560(b)(2) (emphasis added). This mandatory language stands in notable contrast to the Board’s deferral rules that apply in the *permit* context, which are discretionary. *See* 77 Ill. Admin. Code § 1130.655(b)(5) (“HFSRB *may* defer consideration of an application for *permit* when the application is the subject of litigation”) (emphasis added). “A board’s actions will be deemed to be arbitrary and capricious where it fails to follow its own regulations.” *Marion Hosp. Corp. v. Illinois Health Facilities Planning Bd.*, 324 Ill. App. 3d 451, 455 (1st Dist. 2001).

The mandatory deferral rule exists for good reason. First, the exemption process is a much more “hands off” regulatory process than the permit process. But when an application is subject to pending litigation, it suggests that there are serious issues that require the more fulsome investigative process that in-court adjudication will provide. Second, when the Board proceeds to decide an application regardless of pending litigation, it makes that decision without the benefit of facts that could invalidate the application or trigger a mandatory revocation, such as, for example, the submission of false information. 77 Ill. Admin. Code § 1130.590 (“HFSRB shall revoke an exemption upon a determination that an exemption holder has failed to comply with the requirements of the Act and this Part.”). Third, proceeding in the face of pending litigation risks inconsistent adjudications between the Board and the court overseeing the litigation. Here, for example, one of the remedies sought by the lawsuit – an injunction forcing Quorum to sell MetroSouth to PCH pursuant to their agreement – would be negated entirely if the Board were to permit Quorum to close the hospital before the lawsuit is resolved on the merits. As such, the Board’s decision to defer consideration of the Application was correct and practically necessary.

Nonetheless, during the September 17, 2019 hearing, Quorum’s attorney argued that the mandatory deferral rule doesn’t apply to the Application because (1) PCH’s lawsuit doesn’t involve the Board or name the Board as a defendant, (2) the Planning Act requires the Board to approve applications for discontinuance exemptions, regardless of what the Board’s rules say, and (3) the fact that the Legislature recently amended the Planning Act to require mandatory

deferrals means that the Board didn't previously possess that power. None of these arguments can withstand scrutiny.

First, Quorum's attempt to cabin the mandatory deferral rule to instances where the lawsuit at issue names or "involves" the Board is self-serving and violates the express language of the Administrative Code. *See* September 17, 2019 Hearing Transcript, 46:1-9 ("the lawsuit here does not involve the Board, does not ask any relief against the Board, does not ask that the vote today be stopped by the Courts or anyone else"). But these supposed requirements do not exist. To the contrary, the mandatory deferral rule applies to *any* application for exemption when the application is the "subject of litigation." 77 Ill. Admin. Code § 1130.560(b)(2). Quorum's attempt to mislead the Board in this manner is reckless and must be rejected.

Second, the Planning Act does not trump the Board's mandatory deferral rule. In fact, this issue was specifically reviewed by the Circuit Court during a recent administrative review action concerning the approved closure of Westlake Hospital. In that case, Judge Loftus found that "there does not appear to be conflict" between the language of the Planning Act and the Board's mandatory deferral rule:

Both can coexist: Whether the Board was obligated to grant the Discontinuance Application or not, Section 3960/8.5(a-5) does not address the deferment provision, and does not explicitly overrule it. The Planning Act is silent as to how these provisions overlap, if at all. It is possible to read them consistently: to the extent that the Board may be obligated to grant the application at some point, there is no reason why that decision could not be deferred, if appropriate, until a future date, after the litigation has resolved, at which the Board would have no discretion to deny it.

Village of Melrose Park, et al. v. Illinois Health Facilities and Services Review Board, et al., Case No. 19 CH 05553 at 17-18 (Cook Cty., Ill. May 7, 2019). As such, this argument also fails.

Next, the Legislature's recent amendments to the Planning Act do not mean that the Board didn't previously have the power to defer consideration of an application that was the subject of litigation. Quorum's argument here is based on a fundamental misunderstanding of what the recent amendment actually says. Rather than providing the Board with a *new* power, the amendment modifies the mandatory deferral rule in two very important ways. First, it requires applicants to obtain a permit – rather than a mere exemption – from the Board in order to discontinue a hospital, which means that the Board will have a far greater ability to investigate allegations of wrongdoing on its own and will not necessarily benefit from the more fulsome discovery process provided by in-court adjudication. Second, and even in light of the new permit requirement, the amendment still nonetheless provides the Board with the option to defer consideration of an application for up to 6 months. 20 ILCS 3960/8.7(c). Importantly, the amendment does not roll back or limit the mandatory deferral rule insofar as applications for *exemptions* are concerned, including the discontinuance exemption sought by Quorum, which, if anything, shows that the Legislature approves of the mandatory deferral rule and the Board's power to enforce it.

* * *

For these reasons, it is essential that the Board not reverse its decision to defer consideration of Quorum's discontinuance application during the October 22, 2019 hearing, to continue to defer until the underlying litigation is resolved, and to direct the Attorney General to initiate an action to restrain Quorum for closing the hospital without Board approval (*i.e.*, outside of the regulatory process mandated by the Planning Act).

Respectfully,

A handwritten signature in black ink, appearing to read 'A. Scharg', with a long horizontal flourish extending to the right.

Ari J. Scharg