

July 24, 2023

VIA E-MAIL (VIA JOHN.KNIERY@ILLINOIS.GOV)

Debra Savage
Board Chair
Health Facilities and Services Review Board
525 West Jefferson Street
2nd Floor
Springfield, Illinois 62761

**Re: Response to State Board Staff Report
Project #23-024, DeKalb County Rehab and Nursing Center**

Dear Chair Savage:

We are submitting this correspondence on behalf of our clients, DeKalb Healthcare Holdings, LLC and Dekalb SNF Land Holdings, LLC (collectively “Purchasers”) in response to the recently issued State Board Staff Report. The purpose is to document questions regarding the three instances with which the Board staff concluded this application failed to conform with the Board’s criteria, thus yielding a finding of non-compliance.

The three findings Board Staff identified related to 77 Ill. Admin. Code 1110.230(a), 1110.234(a), and 77 1110.234(b). Addressing them technically, first:

- 77 Ill. Admin. Code 1110.230(a) “applies to projects involving the In-Center Hemodialysis category of service” and since this project does not involve the provision of those services, it is not applicable.
- 77 Ill. Admin. Code 1110.234(a) and 77 Ill Admin. Code 1110.234(b) are not existing regulations.

Looking beyond the regulations cited by Board staff, we want to address what we believe to be the principles raised, related to: (1) Background of the Applicants; (2) Size of the Project, and Projected Utilization.

Size of Project and Projected Utilization raise issues related to the establishment of a new facility. This project proposes a change in the ownership of an existing facility and, as such, we considered those criteria inapplicable. Prior to filing, we discussed that issue with the Board administrator, who concurred, and we clearly demarked the criteria as “**NOT APPLICABLE**” within the body of the application. Upon a request for additional information, we addressed the letter and spirit of those criteria in response. We will endeavor to do so, herein, as well.

Project Size

The Project Size review criteria for Long-Term Care addresses the question of whether or not “the amount of physical space proposed for the project is necessary and not excessive.” 77 Ill.

Admin. Code §1125.620. The general Size of Project review criteria requires the applicant to document “that the physical space proposed for the project is necessary and appropriate.” 77 Ill. Admin. Code §1110.120(a)(1).

This facility was originally approved via Project # 97-124. The gross square footage of 82,597 square feet was evaluated at that time and approved by the Board. IDPH design and construction standards oversaw and surveyed the construction, and the facility was licensed by IDPH. It remains operational and the total gross square footage remains unchanged. As detailed in the application, the facility will continue to operate as it exists, unchanged by the proposed change of ownership. Thus, as this Board has previously opined on the physical space as both necessary and appropriate for the facility through its approval of Project # 97-124 and the physical size remains unchanged, there does not appear to be a basis for the negative finding regarding this criterion.

Projected Utilization

This criterion (which is not reflected in part 1125) asks an applicant to predict utilization in the first two years of operation to justify the creation of a facility. This facility has been operational for over 20 years and has an existing census. This facility is licensed for 190 beds. It will remain licensed for 190 beds. Every resident will have the option (and be encouraged to) remain within the facility after the change of ownership is approved. There does not appear to be any applicability of this regulations and would ask that the negative finding be set aside as inapplicable.

Background of the Applicants

As a threshold matter, failure to meet this criterion is highly irregular and particularly troublesome given the lack of additional rationale to justify the finding. In fact, there are several examples where applicants to this Board have had documented criminal charges levied and sustained against them who have been found to be in conformance with this criterion.

This finding cannot be allowed to stand as it is against the manifest weight of the evidence, including evidence available from the Illinois Department of Public Health and the Centers for Medicare and Medicaid Services, the government’s entities responsible for the oversight of skilled nursing facilities. Please consider the following, as none of this is reflected in the State Board Staff Report:

- None of the facilities in which Purchasers have an ownership interest have ever had their licenses suspended or revoked by IDPH. They have never been decertified from the Medicare or Medicaid programs.
- Every alleged deficiency was addressed, a plan of correction was developed, presented, accepted, and implemented to the satisfaction of IDPH and CMS.

- Every facility in which purchasers have an ownership interest maintains an active, valid, unencumbered license.

Without any other rationale to support this finding, we believe this finding to be driven by opponents' and staff's overreliance upon the CMS star-rating system.¹ Should this be the case, what is being vilified is Purchasers business model. Yes, Purchasers own several 1-star facilities, but their business model is to purchase underperforming facilities at risk for closure, oftentimes with challenging patient populations at risk of losing access to care. There is no evidence of their purchasing facilities and lowering the star-rating based upon operational issues.

Purchasers goal is to purchase and stabilize the facilities and then operate them with the goal of improvement. Moreover, Purchasers have demonstrated a significant commitment to the Medicaid program, best demonstrated by the 10 facilities in which they possess an ownership interest have an average percent of Medicaid days per facility at 81.66%. Yes, Purchasers facilities receive complaints and have deficiencies alleged, but every allegation has been addressed and resolved.

Purchasers have acquired special focus facilities ("SFF"). CMS established the SFF program to **improve care in the poorest performing nursing homes**. CMS and State survey agencies conduct increased oversight of nursing homes in the program by surveying these facilities twice per year-about twice as often as required for other nursing homes. This increased survey frequency increases the likelihood of deficiencies being identified, thereby presenting a further challenge in improving the star-rating. However, the SFF Purchasers acquired is now operating at a 2-Star level and approaching a 3-Star rating.

Board staff concluded Purchasers failed to meet a criteria that every other applicant to this Board has met – and did so without any rationale. This conclusion is inconsistent with the actions and findings of CMS and IDPH, the government's agencies responsible for oversight of these facilities. This negative finding cannot be allowed to remain.

Realize that if these three erroneous findings are corrected, the result is an application which ***meets all of the criteria against which it is evaluated*** – a far different prospect than having to address an unsupported and unprecedented conclusion that Purchasers who already own and operate 10 facilities in Illinois are insufficiently qualified to acquire this facility.

If you have any questions or need any additional information regarding the project, please do not hesitate to contact my colleague, Juan Morado, Jr. at JMorado@beneschlaw.com or me via email at MSilberman@beneschlaw.com or 312-212-4952.

¹ It must be noted that the CMS star-rating is ***not a criterion*** reflected anywhere in the Board's regulations.

Chairwoman Debra Savage
John Kniery, HFSRB Administrator
Rukhaya Alikhan, IDPH General Counsel
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Best regards,

BENESCH, FRIEDLANDER, COPLAN &
ARONOFF LLP



Mark J. Silberman

cc: John P. Kniery, Board Administrator
Rukhaya AliKhan, General Counsel IDPH