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MARYLAND HEALTH CARE COMMISSION

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MEMORANDUM

TO: Commissioners, Maryland Health Care Commission

St. Mary's Long Term Care, LLC d/b/a Blue Heron Nursing and Rehabilitation
LP Lexington Park, LLC d/b/a Chesapeake Shores
St. Mary's Nursing Center

FROM: Paul Fronstin, Ph.D. 
Commissioner/Reviewer

RE: Recommended Decision in the Matter of
St. Mary's Long Term Care, LLC d/b/a Blue Heron Nursing and Rehabilitation
Docket No. 13-18-2348

DATE: June 23, 2015

Enclosed is my Recommended Decision in my review of the application for Certificate of Need ("CON") filed by St. Mary's Long Term Care, LLC d/b/a Blue Heron Nursing and Rehabilitation Center ("Blue Heron") to establish a new 90-bed comprehensive care facility ("CCF" or "nursing home") in Callaway, St. Mary's County. Having considered the initial and modified applications, comments by the interested parties, the entire record in this review, and also having conducted site visits at the existing nursing homes in St. Mary's County and at the proposed site, I recommend that the application of **St. Mary's Long Term Care, LLC d/b/a Blue Heron Nursing and Rehabilitation Center** to establish a new nursing home in St. Mary's County be **DENIED**

The Proposed Project

Blue Heron seeks to establish a new 90-bed CCF on a site at 20877 Point Lookout Road in Callaway, St. Mary's County. The proposed 69,792 square foot facility would include 30 assisted living units in addition to the nursing home beds. The total estimated cost of the nursing home component is \$13,012,500. The total estimated cost of the combined CCF and the assisted living project is \$17.35 million.

The Applicant and Interested Parties

The applicant is St. Mary's Long Term Care, LLC d/b/a Blue Heron Nursing and Rehabilitation,¹ The facility would be built by St. Mary's Healthcare Realty, LLC, a related entity, and leased to St. Mary's Long Term Care, LLC, which would operate the facility.

The interested parties in this review are LP Lexington Park, LLC d/b/a Chesapeake Shores ("Chesapeake Shores") and St. Mary's Nursing Center, Inc. Chesapeake Shores is a 117-bed nursing home in Lexington Park and St. Mary's Nursing Center Inc. is a 160-bed nursing home in Leonardtown. They are the only nursing home in St. Mary's County that are available to the general public.²

Summary of Recommendation

I recommend that the Commission deny the application because there are a variety of reinforcing factors that indicate that the nursing home proposed by Blue Heron is not needed. It is not a cost-effective means to meet the small (14 bed)³ incremental addition to the jurisdiction's bed supply that is projected to be needed. The recent history of demand for nursing home beds in St. Mary's County raises concerns with respect to the viability of the project and the substantial negative impact that the project is likely to have on the existing nursing home in the jurisdiction, which have downsized in recent years in the face of declining demand for their services.

First, the proposed project is inconsistent with the projected need for CCF beds in the jurisdiction. MHCC's bed need projection forecasts that St. Mary's County needs only 14 additional beds.

Second, prior to a 3% increase in 2014, utilization of nursing home beds⁴ in St. Mary's County declined every single year since at least 2007. Despite that increase, utilization is still 8% lower than it was in 2007 (about 22 fewer patients, on an average day, in 2014 when compared to 2007). This reduction occurred despite a significant increase in the elderly population.

Third, since I find that there is not a need for 90 additional CCF beds in St. Mary's County, I also conclude that Blue Heron's project is not a cost-effective approach to meeting the need for additional nursing home beds in the jurisdiction, which the Nursing Home and Home Health Agency chapter ("Chapter") of the State Health Plan identifies as very modest. I note that the two publicly-available CCFs in St. Mary's County have responded to the declining demand

¹ For a more detailed description of the ownership of the application, see pages 1-2 of my Recommended Decision and Appendix B. See also the discussion regarding the Disclosure Standard, which begins at page 18.

² The State of Maryland operates a third nursing home in St. Mary's County, Charlotte Hall Veterans Home, which restricts admission to certain categories of Maryland veterans and spouses and widows of Maryland veterans.

³ In April of 2013, the Commission published an erroneous forecast projecting a need for 192 CCF beds in St. Mary's County. Unfortunately, this error was not discovered until 2014, after the docketing of Blue Heron's original application to build a 140-bed nursing home. After the Commission corrected the bed need projection in 2014, identifying a 14-bed deficit, Blue Heron filed a modified application, reducing the scope of the project to 90 nursing home beds and 30 assisted living beds. More detail is provided in Part II.E my Recommended Decision, pp.4-5.

⁴ The total combined patient days of service provided by the two publicly available nursing homes in the county in a given fiscal year.

for beds by downsizing their licensed capacity, even as they have made investments in physical plant improvements. Each of these facilities has the potential to flex upward if demand dictates, in one case, by reinstituting temporarily delicensed bed capacity and, in the other, by the addition of up to ten beds without CON authorization under existing procedural rules regarding “waiver” beds.

Finally, I also question the financial viability of the proposed facility because recent demand for beds does not indicate that there will be sufficient volume to support a third nursing home serving the general public. Diluting the likely levels of demand for nursing home beds across a larger bed supply will result in poorly occupied facilities with high unit costs, exceeding the level of revenue they can obtain, which is largely fixed by government payers, Medicaid and, to a lesser extent, Medicare.

Review Schedule And Further Proceedings

This matter will be placed on the agenda for a meeting of the Maryland Health Care Commission on July 16, 2015, beginning at 1:00 p.m. at 4160 Patterson Avenue. The Commission will issue a final decision based on the record of the proceeding.

As provided in COMAR 10.24.01.09B, the applicant and interested parties may submit written exceptions to the enclosed Recommended Decision. Exceptions must be filed no later than 4:30 p.m. on Thursday, July 2, 2015 (note that MHCC offices are closed on Friday, July 3). Written exceptions and argument must specifically identify those findings or conclusions to which exception is taken, citing the portions of the record on which each exception is based. The applicant and interested parties must submit 30 copies of their written exceptions and responses to exceptions. Responses to exceptions must be filed no later than 4:30 p.m. on Thursday, July 9, 2015. Copies of exceptions and responses should also be sent to parties and to the Commission by email.

Oral argument during the exceptions hearing before the Commission will be limited to 15 minutes for the applicant and 10 minutes per interested party, unless extended by the Chair or the Chair’s designated presiding officer. The schedule for the submission of exceptions and responses is as follows:

Submission of exceptions	July 2, 2015 No later than 4:30 p.m.
Submission of responses	July 9, 2015 No later than 4:30 p.m.
Exceptions hearing	July 16, 2015 1:00 p.m.

IN THE MATTER OF

**ST. MARY’S LONG TERM CARE, LLC
d/b/a BLUE HERON NURSING AND
REHABILITATION CENTER**

DOCKET NO. 13-18-2348

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BEFORE THE

**MARYLAND HEALTH
CARE COMMISSION**

Reviewer’s Recommended Decision

July 16, 2015

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	
A. The Project.....	1
B. The Applicant.....	1
C. Reviewer's Recommendation.....	2
II. PROCEDURAL HISTORY	3
A. Record of the Review.....	3
B. Interested Parties	3
C. Local Government Review and Comment.....	3
D. Community Support	4
E. Background Regarding CCF Bed Need Projections and the Review Process	4
III. BACKGROUND	5
A. St. Mary's County Population: Growth Patterns and Age Composition	6
B. St. Mary's County Nursing Home Bed Supply and Bed Occupancy	7
C. St. Mary's County Projected Nursing Home Bed Need.....	8
IV. REVIEW AND ANALYSIS.....	9
A. COMAR 10.24.01.08G(3)(a)-THE STATE HEALTH PLAN.....	9
COMAR 10.24.08.05A Nursing Home General Standards	9
-A(1) Bed Need.....	9
-A(2) Medical Assistance Participation	13
-A(3) Community Based Services	14
-A(4) Non-Elderly Residents.....	15
-A(5) Appropriate Living Environment	16
-A(6) Public Water.....	17
-A(7) Facility and Unit Design.....	17
-A(8) Disclosure	18
-A(9) Collaborative Relationships	22
COMAR 10.24.08.05B Nursing Home New Construction or Expansion of Beds or Services.....	22
-B(1) Bed Need.....	22
-B(2) Facility Occupancy	27
-B(3) Jurisdictional Occupancy.....	27
-B(4) Medical Assistance Program Participation.....	32
-B(5) Quality.....	33
-B(6) Location	33
B. COMAR 10.24.01.08G(3)(b) NEED.....	34

C. COMAR 10.24.01.08G(3)(c) AVAILABILITY OF MORE COST-EFFECTIVE ALTERNATIVES	35
D. COMAR 10.24.01.08G(3)(d)-VIABILITY OF THE PROPOSAL	38
E. COMAR 10.24.01.08G(3)(e)-COMPLIANCE WITH CONDITIONS OF PREVIOUS CERTIFICATES OF NEED.....	45
F. COMAR 10.24.01.08G(3)(f)-IMPACT ON EXISTING PROVIDERS	45
V. SUMMARY AND RECOMMENDATION.....	48

Appendix A – Record of the Review

Appendix B – Ownership Interest & Organizational Chart

I. INTRODUCTION

A. The Project

St. Mary's Long Term Care, LLC, doing business as Blue Heron Nursing and Rehabilitation ("Blue Heron" or "BHRNC") proposes to establish a new 90-bed comprehensive care facility ("CCF" or "nursing home") to be located at 20877 Point Lookout Road in Callaway, St. Mary's County. The facility would be built by St. Mary's Healthcare Realty, LLC, a related entity, and leased to Blue Heron. In addition to the 90 CCF beds, the facility would include 30 assisted living units that do not require Certificate of Need ("CON") approval.

The building design proposed is a single floor of 69,792 square feet ("SF") with 52,632 SF (75.4%) allocated to the nursing home facility and 17,160 SF allocated to the assisted living facility. The total estimated cost of the nursing home is \$13,012,500. The estimated cost of the assisted living component is \$4,337,500, for a total estimated cost of \$17.35 million.

B. The Applicant

St. Mary's Long Term Care, LLC is a wholly owned subsidiary of Maryland Long Term Care, LLC, a wholly owned subsidiary of THI of Baltimore, Inc., which is a wholly owned subsidiary of Hunt Valley Holdings LLC (formerly Fundamental Long Term Care Holdings, LLC). At the time of its initial application, Fundamental Long Term Care Holdings, LLC was owned by Murray Forman (50%) and Leonard Grunstein (50%). (Docket Item (DI) #11, Ex. 1). On January 1, 2014, Mr. Grunstein resigned his position as a Manager of Fundamental Long Term Care Holdings, LLC, due to regulatory and reputational issues raised by a misdemeanor plea, which will be detailed under the Disclosure standard, found at COMAR 10.24.08.05A(8), *infra*. At that time, Mr. Grunstein transferred a 1% interest to Mr. Forman, thus giving Mr. Forman controlling interest (51%) and was seeking estate planning advice. (DI #20) The applicant later stated that a transfer of Mr. Grunstein's remaining interests to three trusts occurred on May 21, 2014, and that, therefore, Leonard Grunstein no longer owned any interest in Fundamental Long Term Care Holdings. (DI #37, p.2) See Appendix B.

Fundamental Administrative Services, LLC, which will provide administrative support services including all financial services and back office functions at the proposed facility, is a wholly owned subsidiary of Fundamental Long Term Care Holdings, LLC. Fundamental Clinical and Operational Services, LLC, which will provide clinical support services including the development of clinical policies and procedures, clinical education, and health information management services, is a wholly owned subsidiary of THI of Baltimore, Inc. (DI #11, Ex. 1; DI #15, Ex. 1)

St. Mary's Healthcare Realty is owned by St. Mary's Healthcare Holdings, LLC, which is owned by Murray Forman (70%) and four limited liability companies, as presented in Appendix B. Three of the limited liability companies are owned by officers and relatives of officers of Fundamental-related entities, Fundamental Administrative Services, LLC and Fundamental Clinical and Operational Services, LLC. (DI #11, p. 3 & Ex. 1; DI #15, Ex. 1)

As of January 9, 2014, Mr. Forman and Mr. Grunstein had indirect ownership of 64 nursing homes under Fundamental LTC Holdings and 9 facilities under Palmetto Health Care, LLC. Between March 2006 and January 9, 2014 the two men had ownership interests in 164 health care facilities through their ownership of Long Term Care Holdings, LLC.¹ None of these health care facilities is in Maryland. From February 2005 through October 2013, Mr. Forman and Mr. Grunstein also had an interest in SVCare Holding, LLC, which owned 194 health care facilities during this period, including nine nursing homes in Maryland. (DI #15, Ex. 9, 20, & 22)

C. Reviewer's Recommendation

I have reviewed the application's compliance with the applicable standards found in COMAR 10.24.08.05A and B the Nursing Home and Home Health Agency chapter ("Chapter") of the State Health Plan for Facilities and Services ("State Health Plan") and with CON review criteria, COMAR 10.24.01.08G. I have also toured the existing nursing homes in St. Mary's County and have visited the site of the proposed Blue Heron facility.

The detailed bases for my conclusions are explained in this Recommended Decision. In summary, I recommend that the Commission **DENY** the application because the nursing home that Blue Heron proposes is not needed in St. Mary's County. The proposed project is inconsistent with the projected need for CCF beds in the jurisdiction, which forecasts that St. Mary's County will only need an additional 14 beds as of 2016. Historical utilization of publicly available nursing home beds in St. Mary's County over the last decade is consistent with this conclusion, falling every year since at least 2007 before a 4% increase in 2014. Despite that increase, utilization is still 8% lower than it was in 2007.

Because I have concluded that 90 additional CCF beds in St. Mary's County are not needed, I must also conclude that Blue Heron's project is not a cost-effective approach to meeting the need for the 14 additional nursing home beds projected as needed in St. Mary's County. I found that the applicant has failed to demonstrate the financial viability of its proposed facility because, in the near term, there is not likely to be sufficient volume to support a third nursing home in this jurisdiction that is available to the general public and that will seek to draw patients primarily from St. Mary's County.

Finally, I have concluded that the opening of the proposed nursing home would be likely to have a significant adverse impact on the two existing St. Mary's County nursing homes that currently serve the general public and are interested parties in this review. The proposed project, if approved, would likely substantially reduce nursing home admissions and patient days and, thus, revenue at the two publicly available CCFs that have generally seen a long-term decline in patient census and that have downsized their CCF licensed bed capacity accordingly. It is important to note that each of the existing facilities has made significant recent investments in physical plant improvements in the face of this decline in demand. I note that by relicensing its temporarily delicensed nursing home beds, as provided in COMAR10.24.01.03C, one of the

¹ Includes nursing homes, hospices, specialty hospitals, rehabilitation centers, etc.

nursing homes in St. Mary's County can increase its bed capacity.² The other nursing home³ may be able to increase its bed capacity by up to ten beds through the use of the procedure in COMAR 10.24.01.02A(3), by which a non-hospital health care facility can change its bed capacity by up to ten beds, provided that the change is consistent with the applicable chapter of the State Health Plan.

II PROCEDURAL HISTORY

A. Record of the Review

Please see Appendix A for the Record of the Review.

B. Interested Parties

I have recognized two interested parties in this review that oppose the pending application: LP Lexington Park, LLC d/b/a Chesapeake Shores ("Chesapeake Shores"); and St. Mary's Nursing Center Inc. Chesapeake Shores and St. Mary's Nursing Center provide the same service as the applicant in the same planning region used for purposes of determining need under the State Health Plan, thus qualifying them as interested parties.

Chesapeake Shores is a 117-bed nursing home located at 21412 Great Mills Road in Lexington Park (St. Mary's County). At times during this review, it was licensed for as many as 125 CCF beds, but is currently licensed for 118 beds. It is a proprietary facility that is part of Louisville, Kentucky-based Signature HealthCARE, L.L.C., which has affiliates that operate and manage 126 nursing homes in ten states. Signature HealthCARE, L.L.C. operates two other nursing facilities in Maryland, Laurelwood Care Center at Elkton, in Cecil County, and Mallard Bay Care Center at Cambridge, in Dorchester County.

St. Mary's Nursing Center is a 160-bed nursing home located at 21585 Peabody Street, in Leonardtown (St. Mary's County) and is an independent, not-for-profit facility. It downsized from 180 beds effective July 1, 2013.

C. Local Government Review and Comment

No comments on this project were received from either the St. Mary's County Department of Health or other local government entities. State Senator Roy Dyson filed a letter in which he joined Chesapeake Shores and St. Mary's Nursing Center in opposition to the

² Chesapeake Shores delicensed eight CCF beds, effective January 1, 2015. It can relicense these beds by providing notice to the Commission on or before December 1, 2015, pursuant to COMAR 10.24.01.03C(5)(a).

³ Effective July 1, 2013, St. Mary's Nursing Center downsized from 180 CCF beds to 160 beds. Thus, if it has appropriate space for additional nursing home beds, it could obtain ten beds (commonly called "waiver" beds) under COMAR 10.24.01.02A(3) on or after July 1, 2015. To be consistent with the State Health Plan, the facility must have "licensable" space in which to operate the beds.

establishment of another nursing home in the County, stating that an additional facility should not be built until existing resources are fully utilized. (DI #52)

D. Community Support

The Maryland Health Care Commission received eleven comments from individuals and non-governmental entities. Nine letters expressed support for the application. Four were from individuals who live or worked in St. Mary's County. Four were from representatives of companies that had working relationships with Fundamental Administrative Services, LLC, and one was from Dr. Vinod Shah, a founder of MedStar Shah Medical Group, a multispecialty practice serving Southern Maryland including St. Mary's County. (DI #32)

The applicant also submitted a letter, characterized as a letter of support, from Christine Wray, who then was president of MedStar St. Mary's Hospital. However, Ms. Wray's letter actually stated that the hospital would welcome the opportunity to work with the proposed nursing home should it receive approval. The letter did not address the issue of whether a third general nursing home is needed in St. Mary's County. (DI #11, Ex 9)

The final letter was from Jeff Anderson, a self-described "concerned citizen." This letter raised questions about the care provided by companies related to the applicant and the ethics of the owners of those companies. (DI #36)

D. Background Regarding CCF Bed Need Projections and the Review Process

The Commission has previously issued a CON for a nursing home to be constructed on the same site in St. Mary's County as Blue Heron, but the nursing home was never built. On September 7, 2007, FutureCare Health and Management Corporation ("FutureCare") submitted a CON application (Docket No. 07-18-2201) for a 124-bed nursing home in response to the Commission's 2007 projection of the need for 124 additional nursing home beds in St. Mary's County through 2011. This earlier application was opposed by the same two existing nursing homes that oppose Blue Heron's application. These two interested parties had 337 licensed CCF beds at that time rather than the 277 that they operate today. The FutureCare application was approved by the Commission on September 18, 2008. The interested parties' appeal was unsuccessful. Despite this, FutureCare did not proceed with its project and relinquished its CON on September 5, 2012.⁴

On April 19, 2013, the Commission published an updated nursing home bed need projection through 2016 that projected a need for 192 nursing home beds for St. Mary's County. The current applicant, Blue Heron, submitted a letter of intent on August 2, 2013, followed by an application on October 4, 2013, to establish a 140-bed nursing home on the same site for which FutureCare had been granted a CON in 2008.

There seemed to be an intuitive contradiction between the relatively large projected bed need and the low occupancy rates being experienced by the two nursing homes in St. Mary's

⁴ The five years during which FutureCare held this CON approval exceeds the applicable performance requirements for a project of this type, but the performance requirements were stayed pending appeal.

County, the interested parties in this review. On average, bed occupancy was in the mid 80% range from 2007-2013, despite several rounds of bed delicensing by the two existing nursing homes. For this reason, in consultation with me, MHCC staff reexamined the bed need forecast. I concluded, in consultation with MHCC staff, that the calculation of the projected bed need for St. Mary's County contained calculation errors, which were identified and a corrected and updated bed need projection was published in 41:15 *Maryland Register* 928-29 on July 25, 2014. Specifically, the bed need projections published April 19, 2013 erred by not excluding patient days reported by Charlotte Hall Veterans Home, a third CCF facility that is not available to members of the general public that is located in St. Mary's County and that currently is licensed for 288 nursing home beds. The Chapter designates this State-operated facility, which admits only veterans and their spouses or widows, as a statewide resource. This is why the Chapter's bed need methodology does not include this facility's use and bed inventory in the methodology for the projection of bed need for the jurisdiction. This error artificially increased the gross bed need projected for St. Mary's County and also resulted in an incorrect calculation of the community-based services adjustment. This corrected and updated projection showed a need for an additional 39 beds instead of 192 beds.

In response to requests from Blue Heron, I instructed staff to provide details of the corrections and additional information concerning methodological assumptions and calculations, which are spelled out in detail in Section .07A of the Nursing Home and Home Health Agency Chapter of the State Health Plan, COMAR 10.24.08. In preparing this information, staff discovered additional computation errors and a typographical error in the methodology at .07I that is not particular to St. Mary's County but affects bed need projections throughout the State. These errors were detailed in my letter, attachment, and enclosures of September 9, 2014 to the applicant and interested parties. (DI #51) Correction of these errors resulted in a further revision to the bed need projections, which were then published in 41:20 *Maryland Register* 1180 on October 3, 2014. These projections indicated a need for only 14 nursing home beds in St. Mary's County through 2016.

In response to this final need projection, Blue Heron sought, and I granted, additional time in which to determine what action it wanted to take regarding its original application. On February 9, 2015, Blue Heron modified its application to its current proposal for 90 nursing home beds while maintaining that the incorrect need projection for 192 beds should apply in the Commission's review of its application.

III Background

A. St. Mary's County Population: Growth Patterns and Age Composition

St. Mary's County population grew at a much faster rate (22%) than the overall State population (9%) between 2000 and 2010. Narrowing the lens to consider the age groups that are most relevant to a nursing home application shows that, although the St. Mary's population aged 65 and older actually grew at a lower rate than that of Maryland over the first decade of this century, this lower growth rate is not anticipated to continue in the current decade, 2010 to 2020. Also of particular note is the County's 85+ cohort, which uses nursing home beds at a much

higher rate than others. This oldest population group in St. Mary's County grew at a much higher rate than the State overall (66% compared to 47%) between 2000 and 2010. However, that growth is projected to slow to approximately 39% from 2010 to 2020, which is still significantly higher than the statewide projected growth of 23%. These population details are shown in Table 1 below. Note that population projections are a component of the bed need calculations in the Chapter, and thus are already "baked into" the need projections

**Table 1: Trends in Population by Age Group:
St. Mary's County and Maryland, 2000 – 2020**

Age Group	St. Mary's County Population			Change 2000-2010	Projected Change 2010-2020
	2000 Census	2010 Census	Projected 2020		
0-64	78,386	94,570	108,610	20.7%	14.9%
65-74	4,336	6,302	9,735	45.3%	79.2%
75-84	2,714	3,194	5,012	17.7%	56.9%
85+	775	1,285	1,791	65.8%	39.4%
TOTAL	86,211	105,151	125,148	22.0%	19.0%
65+	7,825	10,781	16,538	37.8%	53.4%
Age Group	Maryland State Population			Change 2000-2010	Projected Change 2010-2020
	2000 Census	2010 Census	Projected 2020		
0-64	4,697,179	5,065,910	5,235,577	7.9%	3.3%
65-74	321,285	386,357	580,747	20.3%	50.3%
75-84	211,120	223,159	277,601	5.7%	24.4%
85+	66,902	98,126	120,581	46.7%	22.9%
TOTAL	5,296,486	5,773,552	6,214,506	9.0%	7.6%
65+	599,307	707,642	978,929	46.3%	38.3%

Source: 2000 US Census - Maryland Department of Planning, Population Projection Series (October 2007); 2010 US Census and 2020 Projections - Maryland Department of Planning, Total Population Projections by Age (January 2014).

B. St. Mary's County Nursing Home Bed Supply and Bed Occupancy

The interested parties in this review, Chesapeake Shores and St. Mary's Nursing Center, Inc., operate the two nursing homes in the County that are available to the general public and have a total current nursing home inventory of 285 beds. Chesapeake Shores has 125 beds, with 117 currently in operation and eight temporarily de-licensed. St. Mary's Nursing Center is licensed for 160 nursing home beds and the third nursing home in the county, Charlotte Hall Veterans Home, is a State-operated facility that, as previously noted, is not available to members of the general public but is a statewide resource for veterans and their spouses or widow/ers .

As shown in the following table, the utilization of the two non-State-owned nursing homes serving the general public, has not increased in line with the growing elderly population of St. Mary's County.

Historically, while the occupancy rate⁵ of St. Mary's Nursing Center was over 90% from 2000 through 2005, its occupancy rate did not exceed 86% between 2006 and 2013, despite reductions in its licensed bed capacity from 212 beds in 2007 to 160 beds effective July 1, 2013. That trend was broken in 2014, when occupancy rose to 90.5%.

At Chesapeake Shores, the occupancy rate was weak during most of the previous decade, ranging from 68% to 85% on an annual basis, until reaching 90% in 2010. From 2011 to 2014, Chesapeake Shores' average bed occupancy rate is just above 90%, as detailed in Table 2, below.

The average occupancy rate for the two facilities combined was below 90% from 2001 through 2013. Additionally, combined patient days for the two facilities declined each year from 2007 to 2013 and, according to preliminary 2014 data, increased approximately 4% in 2014.

**Table 2: St. Mary's County Nursing Home
Occupancy – FY 2006 – FY 2014**

Year	Chesapeake Shores			St. Mary's Nursing Center			St. Mary's County Total		
	Beds FYE	Patient Days	Percent Occ.*	Beds FYE	Patient Days	Percent Occ.*	Beds FYE	Patient Days	Percent Occ.*
2006	125	30,887	67.70%	212	69,239	89.48%	337	100,126	81.40%
2007	125	35,676	78.19%	212	66,489	85.93%	337	102,165	83.06%
2008	125	37,579	82.14%	200	61,253	82.84%	325	98,832	82.57%
2009	125	38,940	85.35%	180	56,279	80.79%	305	95,219	82.59%
2010	120	39,635	90.49%	180	54,415	82.82%	300	94,050	85.89%
2011	123	40,004	89.29%	180	53,916	82.06%	303	93,920	84.99%
2012	117	38,248	87.10%	180	52,393	79.53%	297	90,641	82.56%
2013	117	38,700	90.62%	180	51,634	78.59%	297	90,334	83.33%
2014**	125	41,130	94.68%	160	52,867	90.52%	285	93,997	92.30%

* Occupancy rate is based on a ratio of total patient days to total available licensed nursing home days accounting for changes in licensure during each facility's fiscal year including temporarily delicensed beds.

Source: Maryland Health Care Commission, Occupancy Reports 2006-2013 ;

** Preliminary, unaudited data.

Comparing nursing home utilization data for St. Mary's County to that for the State as a whole and for the Southern Maryland Region (which includes Calvert, Charles, and Prince George's Counties, as well as St. Mary's County) for 2008-2013, the years for which data for both the region and the State is available, reveals a general downward trend for each geographic area during that period, as demonstrated in Table 3, which follows.

⁵ A facility's occupancy rate is calculated dividing the actual number of patient days by the possible patient days for the facility (i.e., number of licensed beds x 365 days). For instance, if a 100-bed nursing home had 30,000 patient days in a year, it would have had 36,500 possible patient days. Thus, under this example, the nursing home had an occupancy of 82.19% (30,000 actual patient days divided by 36,500 possible patient days).

Table 3: Comparison of the Occupancy of St. Mary's County Nursing Homes to that of the State of Maryland and the Southern Maryland Region – FY 2006 – 2013

State of Maryland and the Southern Maryland Region – FY 2006 – 2013 Year	St. Mary's County			Southern Maryland Region**			State Total		
	Beds FYE	Patient Days	Percent Occ.*	Beds FYE	Patient Days	Percent Occ.*	Beds FYE	Patient Days	Percent Occ.*
2006	337	100,126	81.40%	3,909	1,274,905	89.88%	28,416	9,307,407	89.92%
2007	337	102,165	83.06%	4,061	1,293,223	88.94%	28,508	9,257,817	89.33%
2008	325	98,832	82.57%	4,061	1,284,878	88.99%	28,442	9,178,426	88.83%
2009	305	95,219	82.59%	3,884	1,264,598	89.33%	28,030	9,122,861	89.10%
2010	300	94,050	85.89%	3,857	1,275,708	89.41%	27,919	9,144,087	89.16%
2011	303	93,920	84.99%	3,812	1,276,312	90.08%	27,627	8,966,725	88.88%
2012	297	90,641	83.56%	3,784	1,258,896	90.75%	27,753	8,944,415	88.45%
2013	297	90,334	83.33%	3,796	1,251,260	90.69%	27,593	8,846,934	87.81%

* Occupancy rate is based on a ratio of total patient days to total available licensed nursing home days accounting for changes in licensure during each facility's fiscal year including temporarily delicensed beds. The results for Charlotte Hall are excluded from this table.

**Includes Prince George's, Calvert, Charles, and St. Mary's Counties.

Source: Maryland Health Care Commission Occupancy Reports, 2006-2013.

C. St. Mary's County Projected Nursing Home Bed Need

The nursing home bed need projection applicable⁶ to this project review is summarized in the following table.

Table 4: 2016 CCF Bed Need Projection for St. Mary's County

Licensed Beds	277
Temporarily Delicensed Beds	8
CON Approved Beds	0
Waiver Beds ⁷	0
Total Bed Inventory	285
Gross Bed Need Projection	317
Unadjusted Bed Need	32
Community-Based Services Adjustment	18
2016 Net Bed Need	14

Source: 41:20 *Maryland Register* 1180 (October 3, 2014)

⁶ See discussion in Part IV.A-A(1) of this Recommended Decision regarding COMAR 10.24.08.05A(1): Bed Need, beginning at p. 9, *infra*.

⁷ Note that, while there were no existing unimplemented "waiver" beds authorized under COMAR 10.24.01.02A(3) as of the date of the publication of the revised projection in the October 3, 2014 *Maryland Register*, St. Mary's Nursing Center is eligible to obtain ten CCF waiver beds effective July 1, 2015, provided that it meets applicable requirements, including having space that can be licensed for this additional capacity.

IV. Review and Analysis

A. The State Health Plan

COMAR 10.24.01.08G(3)(a) State Health Plan. An application for a Certificate of Need shall be evaluated according to all relevant State Health Plan standards, policies, and criteria.

The applicable section of the State Health Plan for this review is COMAR 10.24.08, the State Health Plan for Facilities and Services: Nursing Home and Home Health Agency Services (the “Chapter”). The specific standards to be addressed include the General Standards for review of all nursing home projects and the Nursing Home Standards for New Construction or Expansion of Beds or Services, found at COMAR 10.24.08.05A and .05B.

COMAR 10.24.08

.05 Nursing Home Standards.

A. General Standards. The Commission will use the following standards for review of all nursing home projects.

(1) Bed Need. The bed need in effect when the Commission receives a letter of intent for the application will be the need projection applicable to the review.

This standard is relevant because the applicant, in its modified application, seeks to add 90 comprehensive care facility beds to the overall bed inventory through the development of a new nursing home in St. Mary’s County.

As I explained in Part II.E of this Recommended Decision, *Background Regarding CCF Bed Need Projections and the Review Process*, when Blue Heron submitted its letter of intent, the published *Gross and Net Bed Need Projection for Nursing Home Beds in Maryland*, 40:8 *Maryland Register* 767 (April 19, 2013) was erroneous. The 2013 erroneous projection showed a net need for 192 additional CCF beds in St. Mary’s County. The bulk of this error was caused by the mistaken inclusion in the calculation of gross bed need of patient days at Charlotte Hall, a State nursing home for veterans, spouses, and surviving spouses of deceased veterans that is not available to general residents of St. Mary’s County or the State. The 2013 erroneous calculation correctly excluded the Charlotte Hall beds in the calculation of net bed need (but incorrectly included Charlotte Hall patient days), resulting in an overstated CCF bed need projection.

After MHCC staff and I realized the calculation errors in the 2013 projection, the Commission ultimately submitted a CCF bed need projection that corrected calculation errors (and showed an updated bed inventory of 285 beds) that was published in the *Maryland Register* on October 3, 2014.⁸ The corrected projection lowered the gross bed need to 317 beds, reduced

⁸ 41:20 *Maryland Register* 1180 (October 3, 2014). As noted in Part II.E, *Background re CCF Bed Need Projections and the Review Process*, *supra*, an initial updated CCF bed need projection that corrected some, but not all, calculation errors was published in 41:15 *Maryland Register* 928-29 (July 25, 2014).

the community based service adjustment to 18 beds, and reduced the net bed need to 14 beds. The 2013 erroneous projection and the October 2014 corrected and updated projection are shown in the following table.

Table 5: Comparison of the 2016 CCF Bed Need Projections for St. Mary's County as Published April 19, 2013 and October 3, 2014

	Erroneous April 19, 2013	Corrected and Updated October 3, 2014
Licensed Beds	297	277
Temporarily Delicensed Beds	8	8
CON Approved Beds	0	0
Waiver Beds	0	0
Total Bed Inventory	305	285
Gross Bed Need Projection	528	317
Unadjusted Bed Need	223	32
Community-Based Services Adjustment	31	18
2016 Net Bed Need	192	14

Applicant's Response

Blue Heron states that the bed need projection in effect when the Commission received the letter of intent for this application is the bed need that should be considered in evaluating compliance with this standard.

Interested Party Comments

Comments by Chesapeake Shores

Chesapeake Shores notes that Blue Heron continues to assert that COMAR 10.24.08.05A(1) prohibits the application of the corrected need projection to this review in spite of the fact that I have twice rejected the applicant's argument. Chesapeake Shores specifically pointed to my letter of September 9, 2014 and its reference to COMAR 10.24.08.07K(3) in stating that the wording of the standard .05A(1) in the Chapter does not mean that the Commission is without power to correct computational errors. Pointing to the case of *Farmers & Merchants Bank v. Schlossberg*, 306 Md. 48, 61 (1986), Chesapeake Shores stated that "it is well settled that regulations (like statutes) must be harmonized if possible and an interpretation of one provision that nullifies another provision should be avoided." Chesapeake Shores noted that the only way to harmonize .05A(1) and .07K(3) is to conclude that the published need projection at the time an application is filed will govern the review except when a need projection is corrected for data or computational errors, or to update the inventory. (DI #60, pp. 3-4)

Chesapeake Shores also pointed to the principle of statutory interpretation that, when a general provision appears to conflict with a specific provision the specific will be regarded as an exception to the general one – i.e., the specific provision will prevail. *Id.* at 63. For this reason, Chesapeake Shores stated that, because COMAR 10.24.08.07K(3) is more specific than .05A(1), the bed need corrected pursuant to .07K(3) is the exception to the general rule and must govern.

Furthermore, Chesapeake Shores contends that it is unreasonable to conclude that the Commission intended .05A(1) to require it to apply an erroneous need projection in a pending review and states that the regulations must be interpreted to avoid an unreasonable result. (DI #60, p. 4)

Comments by St. Mary's Nursing Center

St. Mary's Nursing Center stated that the Commission must take steps to correct computational errors in the need calculation, which it has done. St. Mary's also stated that the Commission should consider existing realities. The interested party noted that the corrected bed need projection for the County is 14. It states that the applicant is asking the Commission to ignore this fact and approve an application for 90 CCF beds. St. Mary's Nursing Center believes that "greater harm would be done to existing facilities and the health care system in the county, if the corrected need projection is ignored." (DI #59)

Applicant's Response to Comments

In responding to the interested party comments, Blue Heron points to two places in the applicable Chapter that it believes assure an applicant that the nursing home bed need projection in effect at the time of the filing of a letter of intent will govern that review. In addition to the general bed need standard addressed in COMAR 10.24.08.05A(1), Blue Heron points to COMAR 10.24.08.07K(4) regarding update, correction, and notification of the nursing home bed need projections, which provides that the "[p]ublished projections and Commission inventories in effect at the time of submission of a letter of intent will control projections of need used for that Certificate of Need review." Blue Heron believes that the fact that this assurance is stated twice makes it clear that it governs all reviews. (DI #63, pp. 2-3)

Blue Heron states its view that the only logical way to harmonize the provisions stating that the Commission must apply the bed need projections in effect at the time of the submission of the letter of intent, .05A(1) and .07K(4), and the provision allowing for the revision of bed need projections for changes in inventory or to correct for errors in the data or computations, at .07K(3), is to recognize the latter as a separate part of the application of the methodology. Blue Heron believes that the meaning of the phrase "during the interim" in .07K(3) refers to the period between CON reviews, not in the midst of CON reviews. Thus, Blue Heron maintains that the meaning of K(4) is that even if there are updates to published bed need projections during the course of a review, those changes do not apply to a pending CON review where an application was filed in reliance on the projections in effect on the date of the letter of intent. (DI #63, pp. 3-4)

Reviewer's Analysis and Findings

I have again considered the arguments made by the applicant and the interested parties regarding the applicable bed need projection. The conclusion and reasoning set forth in my letter of September 9, 2014 still applies.

Blue Heron continues to insist that the 2013 erroneous need for 192 additional CCF beds in effect at the time of the filing of the letter of intent is still applicable in this review. However,

as I pointed out in my letters of June 27, 2014 and September 9, 2014, there were errors in the computation of the projected need. While Blue Heron relies on the language of Subsection .05A(1) of the Chapter regarding the use of the bed need in effect as of the date of the filing of a letter of intent, I continue to conclude that the more relevant provision is Subsection .07K(3), which provides that the “[p]ublished projections remain in effect until the Commission publishes updated nursing home bed need projections, and *will not be revised during the interim other than to incorporate inventory changes or to correct errors in the data or computation.*” (emphasis added). While Blue Heron contends that the meaning of “during the interim” in .07K(3) refers to the period between CON reviews, this wording refers to the period between updated bed need projections set forth in .07K(1). Accordingly, I must reject Blue Heron’s argument.

Blue Heron also points to Subsection .07K(4) as reiterating the language at Subsection .05A(1), which it views as assuring applicants that they may rely on the bed need projection in effect at the time of the filing of a letter of intent. Blue Heron argues that the only logical way to harmonize the provision that recognizes the bed need projections in effect at the time of the submission of the letter of intent as governing and the provision allowing for the revision of bed need projections to reflect changes in inventory or to correct for errors in the data or computations is to recognize the latter as a separate part of the bed need methodology. I disagree. The language at Subsection .07K(1) requires the Commission to update the bed need projections at least every three years using the latest utilization data as well as the most recent bed inventory. Such updates also use the most recent population projections and a new projection period set seven years beyond the base year population and utilization data (see .07B). Subsection .07K(3) limits revisions to the projections between updates to changes in the inventory and corrections for errors. In addition, while .07K(4) addresses inventories, it does not mention corrections of errors in data or computation. It is reasonable to conclude that the possibility of such errors was contemplated and the need to correct them and apply the corrected bed need methodology to ongoing reviews, as was done in this case, was anticipated. In this situation, the corrected and updated projections reflected changes in the inventory as well as corrections in the calculations. As a result, the change in inventory from 305 licensed beds to 285 licensed beds increased the net bed need that would have resulted if only the computational errors had been corrected. Had the correction been limited to correcting the calculation errors, there would have been a projected bed surplus (-6 beds), not a net bed need of 14.

Blue Heron continues to insist that the Commission should use the 2013 erroneous projection. I believe that the Commission could not have intended, when adopting the Chapter, that it be bound by an erroneous bed need projection that contains calculation errors and does not reflect the reality of the jurisdiction’s actual nursing home usage, resources, and need. As I noted in my September 2014 letter, this position is supported by the 1985 decision of the Maryland Court of Special Appeals in *Perini Services v. Maryland Health Resources Planning Comm’n*, 67 Md. App. 189, *cert. den.*, 307 Md. 261 (1986). Although that case dealt with earlier regulations and is almost 30 years old, I continue to find the following language to be instructive:

If the SHP bed availability methodology projects a need for additional resources, but other factors substantially indicate no such need under COMAR, we hold the Commission must not ignore that information. [The appellant’s] argument eliminates the Commission’s discretion, judgment and expertise, and instead

advocates a mechanical approach to allocating critical health care services. This pure mathematical formula produces a sterile bed projection without regard to changing events in health care delivery.

Id. at 208. As I noted, Subsection .07K(3) permits the Commission to correct errors in computation of its need methodology. *Perini* indicates that the Commission has the duty to correct such errors so as to avoid “a mechanical approach to allocating critical health services.”

Therefore, I find that the corrected and updated need projection published on October 3, 2014 applies. Thus, the projected need for additional CCF beds in St. Mary’s County that applies in this review is 14.

(2) Medical Assistance Participation.

- (a) Except for short-stay hospital-based skilled nursing facilities required to meet .06B of this Chapter, the Commission may approve a Certificate of Need for a nursing home only for an applicant that participates, or proposes to participate, in the Medical Assistance Program, and only if the applicant documents a written Memorandum of Understanding with Medicaid to maintain the proportion of Medicaid patient days required by .05A 2(b) of this Chapter.**
- (b) Each applicant shall agree to serve a proportion of Medicaid patient days that is at least equal to the proportion of Medicaid patient days in all other nursing homes in the jurisdiction or region, whichever is lower, calculated as the weighted mean minus 15.5%, based on the most recent Maryland Long Term Care survey data and Medicaid Cost Reports available to the Commission, as shown in the *Supplement to COMAR 10.24.08: Statistical Data Tables*, or in subsequent updates published in the *Maryland Register*.**
- (c) An applicant shall agree to continue to admit Medicaid residents to maintain its required level of participation when attained, and have a written policy to this effect.**
- (d) Prior to licensure, an applicant shall execute a written Memorandum of Understanding with the Medicaid Assistance Program of the Department of Health and Mental Hygiene to:**
 - (i) Achieve or maintain the level of participation required by .05A2(b) of this Chapter; and**
 - (ii) Admit residents whose primary source of payment on admission is Medicaid.**
 - (iii) An applicant may show evidence why this rule should not apply.**

Applicant's Response

Blue Heron stated that it will execute a written Memorandum of Understanding prior to licensure, and participate in the Medical Assistance Program. The applicant also stated that it will: (i) achieve or maintain the level of participation required by .05A 2(b) of the Chapter; and (ii) admit residents whose primary source of payment on admission is Medicaid.

Interested Party Comments

Neither Chesapeake Shore nor St. Mary's Nursing Center submitted comments regarding the applicant's response to the Medical Assistance Participation standard.

Reviewer's Analysis and Findings

Based on Blue Heron's response, I find that it complies with this standard.⁹

- (3) Community-Based Services. An applicant shall demonstrate commitment to providing community-based services and to minimizing the length of stay as appropriate for each resident by:**
 - (a) Providing information to every prospective resident about the existence of alternative community-based services, including, but not limited to, Medicaid home and community-based waiver programs and other initiatives to promote care in the most appropriate settings.**
 - (b) Initiating discharge planning on admission; and**
 - (c) Permitting access to the facility for all "Olmstead" efforts approved by the Department of Health and Mental Hygiene and the Department of Disabilities to provide education and outreach for residents and their families regarding home and community-based alternatives.**

Applicant's Response

Blue Heron stated that all prospective residents will receive information about the existence of alternative community-based services, including but not limited to, Medicare home and community-based waiver programs, home care, medical day care, assisted living, and other initiatives to promote care in the most appropriate settings. (DI # 11, Exhibit 7) It noted that it will initiate discharge planning on admission as part of the development of the Patient Care Plan

⁹ If I were recommending approval of this application, I would also be recommending that the applicant provide the Commission with a completed Memorandum of Understanding with the Maryland Medical Assistance Program, in which Blue Heron agrees to maintain the minimum proportion of Medicaid patient days required by Nursing Home Standard as a condition of first use approval. However, I am not recommending approval of this project.

and provided examples of discharge planning upon admission in the facility's Discharge Planning and Notification Policy. (DI #4, Exhibit 3) The applicant also stated that it will permit access to the facility for all Olmstead efforts approved by the Maryland Department of Health and Mental Hygiene to provide education and outreach for residents and their families.

Interested Party Comments

Neither Chesapeake Shore nor St. Mary's Nursing Center commented on Blue Heron's response to the standard regarding Community-Based Services.

Reviewer's Analysis and Findings

I find that the applicant complies with this standard.

- (4) Nonelderly Residents. An applicant shall address the needs of its nonelderly (<65 year old) residents by:**
 - (a) Training in the psychosocial problems facing nonelderly disabled residents; and**
 - (b) Initiating discharge planning immediately following admission with the goal of limiting each nonelderly resident's stay to 90 days or less, whenever feasible, and voluntary transfer to a more appropriate setting.**

Applicant's Response

The applicant stated that its Department of Physical Medicine utilizes "a full and comprehensive age appropriate, person centered evaluation process to precisely identify all areas of resident needs to include various aspects of the physical, spiritual, cognitive, functional and psychosocial domains." (DI #4, p. 27) The applicant states that Fundamental Clinical and Operational Services, LLC, its related entity that will provide clinical support services, will deploy a variety of internal facility and external community resources to assess, upon admission, the areas of resident care priorities and need that will allow the patient to achieve full recovery while maintaining autonomy through self-expression and choice.

Blue Heron states that it will "carefully plan all aspects of care for each individual resident, mapping the care and treatment from admission through discharge." The applicant stated that "the objective is to optimize the patient's recovery and expedite transition to the next most appropriate stage of recovery and setting." (DI #4, p. 28)

Interested Party Comments

Neither Chesapeake Shores nor St. Mary's Nursing Center submitted a comment on the applicant's response to the standard regarding Nonelderly Residents.

Reviewer's Analysis and Findings

I find that the applicant complies with this standard.

- (5) Appropriate Living Environment. An applicant shall provide to each resident an appropriate living environment, including, but not limited to:**
- (a) In a new construction project:**
 - (i) Develop rooms with no more than two beds for each patient room;**
 - (ii) Provide individual temperature controls for each patient room; and**
 - (iii) Assure that no more than two residents share a toilet.**
 - (b) In a renovation project:**
 - (i) Reduce the number of patient rooms with more than two residents per room;**
 - (ii) Provide individual temperature controls in renovated rooms; and**
 - (iii) Reduce the number of patient rooms where more than two residents share a toilet.**
 - (c) An applicant may show evidence as to why this standard should not be applied to the applicant.**

Applicant's Response

In response to the standards contained in Paragraph .05A(5)(a), the applicant stated that it will not have more than two beds for each patient room, that each patient room will have individual temperature controls, and that no more than two residents will share a toilet.

Interested Party Comments

Neither Chesapeake Shores nor St. Mary's Nursing Center submitted comments on the applicant's response to the Appropriate Living Environment standard.

Reviewer's Analysis and Findings

Based on the representations made by the applicant I find BHRNC complies with this criterion.

(6) Public Water. Unless otherwise approved by the Commission and the Office of Health Care Quality in accordance with COMAR 10.07.02.26, an applicant for a nursing home shall demonstrate that its facility is, or will be, served by a public water system.

Applicant's Response

The applicant stated that the Metropolitan Commission of St. Mary's County is the water and sewer agency that will serve the facility.

Interested Party Comments

Neither interested party commented on Blue Heron's response to the Public Water standard.

Reviewer's Analysis and Findings

Based on the representation by the applicant above, I find that Blue Heron complies with this criterion.

- (7) Facility and Unit Design.** An applicant must identify the special care needs of the resident population it serves or intends to serve and demonstrate that its proposed facility and unit design features will best meet the needs of that population. This includes, but is not limited to:
- (a) Identification of the types of residents it proposes to serve and their diagnostic groups;**
 - (b) Citation from the long term care literature, if available, on what types of design features have been shown to best serve those types of residents;**
 - (c) An applicant may show evidence as to how its proposed model, which is not otherwise documented in the literature, will best serve the needs of the proposed resident population.**

Applicant's Response

The applicant stated that the design of its facility will provide a motivating, inspiring, and comforting environment that facilitates healing. The proposed facility is expected to provide post-acute inpatient care to patients with the following conditions: musculoskeletal (traumatic/non-traumatic/post-surgical/chronic); cardiopulmonary (acute/surgical/chronic); neurological (traumatic/non-traumatic/degenerative/behavioral); genitourinary (acute/chronic); and other general medical conditions including liver disease, post-surgical/general gastrointestinal, infectious disease, endocrine disorders, and chronic wounds. (DI #11, p. 15)

The proposed facility will use natural light, open air spaces, and incorporate materials, fabrics, textures and designs to stimulate the patient's senses. The applicant stated that it will construct the nursing home to allow for the maximum number of windows, with each patient room having a large exterior window. Multiple windows are planned for the dining, living, and common areas, as well as the therapy gym. Interior courtyards, gardens, and walking trails will be incorporated into the facility's design. The facility will include a variety of materials, fabrics, and textures to help stimulate the senses and provide the resident with a home-like experience. The hallways will have offsets, recesses, and undulations to eliminate the long institutional hallway feel. (DI #11, p. 16)

Blue Heron states that the facility has been designed to meet the individual needs of the residents while providing spaces conducive to improved clinical efficiencies. (DI #11, p. 18) The applicant notes that: nursing stations will be designed with maximum viewing of resident corridors; it is considering the use of a full electronic medical record; many patient rooms will have in-wall piped-in oxygen and medical vacuum; all passage doors will meet or exceed the Americans with Disabilities Act requirements; and each resident room will have its own bathroom with a full shower. The proposed facility will include a Wellness Center, Internet Cafe, and kitchenettes.

Interested Party Comments

Neither interested party submitted comments on Blue Heron's response to the Facility and Unit Design standard.

Reviewer's Analysis and Findings

I find that Blue Heron has demonstrated consistency with this standard.

- (8) Disclosure. An applicant shall disclose whether any of its principals have ever pled guilty to, or been convicted of, a criminal offense in any way connected with the ownership, development, or management of a health care facility.**

Applicant's Response

In its initial application, Blue Heron stated that none of its principals had ever pled guilty to, or been convicted of a criminal offense in any way connected with the ownership, development, or management of a health care facility. (DI #4, p. 30) In its response to staff's first set of completeness questions, the applicant stated that none of the principals of related entities St. Mary's Healthcare Realty, Fundamental Administrative Services, and Fundamental Clinical and Operational Services had ever pled guilty to, or been convicted of a criminal offense in any way connected to the ownership, development, or management of a health care facility. (DI #11, pp. 20-21) Also in response to staff's first completeness questions, Blue Heron identified Mr. Forman and Mr. Grunstein as co-owners of Fundamental Long Term Care Holdings, LLC, the upstream owner of Blue Heron. (DI # 11, att. 1)

In its January 2014 response to additional staff completeness questions, the applicant stated that neither Mr. Forman nor Mr. Grunstein had pled guilty or been convicted of a criminal offense relating to the ownership, development, or management of a health care facility. The applicant further stated that “in December 2013, Mr. Grunstein pled guilty in New York State court to perjury in the third degree, a misdemeanor, based on statements made in a civil deposition related to the funding of certain loans.”¹⁰ (DI #15, p. 13)

In response to additional information questions from staff, the applicant reported that, on January 1, 2014, Mr. Grunstein resigned his position as a Manager of Fundamental Long Term Care Holdings, LLC due to regulatory and reputational issues raised by his guilty plea. At the time of his resignation, Mr. Grunstein transferred a 1% interest to Mr. Forman, thus giving Mr. Forman controlling interest in Fundamental Long Term Care Holdings. As previously noted in Part I.B of this Recommended Decision (*supra*, p. 1), Mr. Grunstein later transferred his remaining 49% interest in Fundamental Long Term Care Holdings to three companies, each of which has a trust as its sole member. (DI #20 and #37, p. 2)

Interested Party Comments

Comments by Chesapeake Shores

Chesapeake Shores noted that the applicant suggested that Mr. Grunstein’s guilty plea was unrelated to his ownership, development, or management of a health care facility when the applicant characterized that plea as relating to the funding of certain loans. Chesapeake Shores maintained that this guilty plea was given in a legal battle for control of a portfolio of 170 nursing homes, which is clearly relevant to this standard. The interested party states that Blue Heron’s denial that this information is relevant to this standard means that it has failed to satisfy the standard. (DI #23, p. 15)

Regarding the transfer of Mr. Grunstein’s ownership shares, Chesapeake Shores stated that the organization chart raises a question as to whether family members of Leonard Grunstein acquired ownership interests in St. Mary’s Long Term Care, LLC (DI #23, pp.15-16)

In a letter dated May 9, 2014, both interested parties jointly directed attention to another proceeding pending in federal bankruptcy court against certain defendants including: Mr. Foreman; Mr. Grunstein; Fundamental Long Term Care Holdings, LLC; Fundamental Administrative Services, LLC; and THI of Baltimore, Inc. The interested parties pointed to a March 14, 2014 ruling against motions to dismiss the case for claims of relief against the parties named above as well as others. (DI #33)

In its comments on the modified application, Chesapeake Shores characterized the bankruptcy proceeding as involving a claim by the plaintiffs (six probate estates) that the

¹⁰ Mr. Grunstein’s guilty plea, in which he admitted to making false statements under oath, stemmed from a lawsuit over the financing of the 2004 purchase of Mariner Health Services, another operator of nursing homes. (<http://observer.com/2013/12/prominent-real-estate-lawyer-leonard-grunstein-pleads-guilty-to-perjury-in-sv-care-holdings-case/>)

transaction in which Fundamental Long Term Care Holdings (“FLTCH”) acquired the ownership of Trans-Health, Inc.-Baltimore (“THIB”) and its nursing home operations was fraudulent by transferring liabilities of another previously affiliated company (Trans-Health Management, Inc. (“THMI”) to a shell company that later lost \$2 billion in jury verdicts to families who claim relatives died of neglect in the chain’s nursing homes. Chesapeake Shores pointed to a subsequent tentative December 16, 2014 court ruling that informed the parties how the U.S. Bankruptcy Court would likely rule if he were entering a definitive ruling on that date instead of directing the parties to mediation and possible settlement. Chesapeake Shores cited the statement on page 62 of the transcript of the judge’s “tentative” ruling which states:

Accordingly under the facts of this case the Court would find that FAS and possibly THIB and FLTCH are the mere continuation of THMI and that the 2006 transaction was a fraudulent effort to avoid the liability of a predecessor corporation. As a result, FAS and possibly THIB and FLTCH would be liable for claims against THMI and the Debtor under the theory of successor liability.

(DI #60, Ex. 1, p. 62)

While Chesapeake Shores acknowledged that the Court’s findings and conclusions were not final, it believes that the court’s tentative ruling raises substantial and serious concerns regarding the suitability of Blue Heron’s principals and that the modified application should be denied on this basis. (DI #60, p. 9)

St. Mary’s Nursing Center also raised this concern, stating that it does “not believe that the Commission should consider granting a CON to parties related to the defendants in that suit given the serious nature of the allegations, until such time as that matter is resolved.” (DI #59)

Applicant’s Response to Comments

In response to Chesapeake Shores’ comments on Blue Heron’s answer to Commission staff’s question regarding whether Mr. Forman or Mr. Grunstein had ever pled guilty to or been convicted of a criminal offense related to the ownership, development, or management of a health care facility, the applicant stated that, if it had taken the position that the guilty plea were unrelated to the ownership, development, or management of a health care facility, it would not have mentioned the guilty plea at all. (DI #28, p. 20)

Regarding Chesapeake Shores’ comment that the organizational chart raises question as to whether family members of Leonard Grunstein acquired ownership interests in St. Mary’s Long Term Care, LLC, the applicant responded that Mr. Grunstein’s children are not involved in the dispute and Mr. Grunstein is not a beneficiary of the trusts. (DI #28, p. 21)

In response to comments by Chesapeake Shores and St Mary’s Nursing Center on the bankruptcy case currently before the United States Bankruptcy Court for the Middle District of Florida, the applicant noted that the former cited COMAR 10.24.08.05A(8) and that the latter did not cite a standard, as required by the regulations. Blue Heron states that that it has fully complied with this standard that requires that an applicant disclose whether any of its principals

have ever pled guilty to, or been convicted of a criminal offense in any way connected with the ownership, development, or management of a health care facility. It also states its belief that consideration of the allegations in the bankruptcy proceeding would be unfair and inappropriate because the dispute is in process of being settled on mutually agreed terms and there is no final determination of any misconduct on the part of any of Blue Heron's owners and principals. (DI #63, pp. 7-8 & att.)

Reviewer's Analysis and Findings

At this time, the only result of a legal proceeding that is relevant to this standard as currently written is the fact the Lenard Grunstein, then a co-owner of Fundamental Long Term Care Holdings, LLC, the upstream owner of the Blue Heron, pled guilty to perjury in December 2013 in a case that the applicant characterizes as being related to the funding of certain loans in the applicant's January 2014 response to staff questions. In fact, these loans related to the ownership and of control of a portfolio of 170 nursing homes.

While it is true that the applicant's response to the questions gave the appearance that the guilty plea was not in connection with the ownership, development, or management of a health care facility, the applicant did disclose the plea. In addition, Mr. Grunstein no longer has ownership interests in Fundamental Long Term Care Holdings. On January 1, 2014 he resigned his position as a Manager of Fundamental Long Term Care Holdings and transferred 1% of his shares to Mr. Forman. On May 21, 2014 he transferred his remaining 49% interest to three companies each of which has a trust as its sole member with one of his children as one of the trustees. The applicant did not indicate whether or not Mr. Grunstein controls any of the trusts.

My concern about the history of this applicant's principals is not limited to the perjury plea. As the result of an internet search, I have learned that, in February of 2010, Mariner Health Care, SavaSeniorCare Administrative Services and their principals, Grunstein, Forman, and Schron agreed to pay the United States and several states \$14 million to settle an alleged kickback scheme with Omnicare, the largest pharmacy company specializing in dispensing drugs to nursing homes. See February 26, 2010 release from the Department of Justice, www.justice.gov/opa/pr/2010/February/10-civ-204. Again this was not a conviction or a guilty plea so that failure to disclose does not invoke the specific language of the standard.

In addition to the previously mentioned settlement in the alleged kickback scheme, there is the case in federal bankruptcy court that was noted by the interested parties. The bankruptcy case, at its core, relates to jury verdicts in negligence cases and what appears to be an attempt to escape liability involving Mr. Forman, Mr. Grunstein, and Fundamental Administrative Services, and the company that would provide administrative support to the proposed facility, as well as related entity Fundamental Long Term Care Holdings, LLC (which was the previous name of Hunt Valley Holdings, LLC, the parent of THI of Baltimore, and the great grandparent of Blue Heron). The bankruptcy case does not involve a conviction or a guilty plea at this time and in fact may never involve such an outcome. The judge in the case directed the parties to mediation and possible settlement and the letter from counsel of Fundamental Administrative Services indicates that the parties have reached a settlement, which was stated on the record at a hearing on March 5, 2015. (DI #63, attachment)

I have noted my concerns about the history of the applicant's principals; however, given my recommendation that the application should be denied for failure to meet certain other standards and criteria, I will not make a specific finding regarding the disclosure standard.

- (9) Collaborative Relationships. An applicant shall demonstrate that it has established collaborative relationships with other types of long term care providers to assure that each resident has access to the entire long term care continuum.**

Applicant's Response

Blue Heron stated that its related entity, Fundamental Administrative Services, LLC, which will provide administrative support services, "will work on establishing collaborative relationships with local providers and physicians" in St. Mary's County. Examples of organizations with which the applicant will make an effort to develop relationships include the St. Mary's Office on Aging, assisted living agencies, home health agencies, adult medical day care facilities, and the Hospice of St. Mary's at St. Mary's Hospital.

Interested Party Comments

No comments were submitted regarding this standard.

Reviewer's Analysis and Findings

Based on this response, I find that the applicant complies with this standard. However, if I were recommending approval of this application I would have recommended that, as a condition of first use approval, Blue Heron provide the Commission with information demonstrating that it has established collaborative relationships with other types of long term care providers in St. Mary's County to assure that each resident has access to the entire long term care continuum, including, as appropriate, formal transfer and referral agreements. However, as previously noted, I am not recommending approval of this project.

B. New Construction or Expansion of Beds or Services. The Commission will review proposals involving new construction or expansion of comprehensive care facility beds, including replacement of an existing facility or existing beds, if new outside walls are proposed, using the following standards in addition to .05A(1)-(9):

(1) Bed Need.

- (a) An applicant for a facility involving new construction or expansion of beds or services, using beds currently in the Commission's inventory, must address in detail the need for the beds to be developed in the proposed project by submitting data including, but not limited to: demographic changes in the target population; utilization trends for**

the past five years; and demonstrated unmet needs of the target population.

- (b) For a relocation of existing comprehensive care facility beds, an applicant must demonstrate need for the beds at the new site, including, but not limited to: demonstrated unmet needs; utilization trends for the past five years; and how access to, and/or quality of, needed services will be improved.**

Applicant's Response

In addressing subpart (a) of this standard, Blue Heron pointed to a November 2012 update¹¹ of MHCC's projections for comprehensive care facility bed need that indicated a need for 192 CCF beds in St. Mary's County by 2016. Initially, Blue Heron filed an application for a new 140-bed facility in response to this projected need. (DI #57, Replacement p. 32)

Blue Heron noted the corrected and updated need projections for 39 beds published on July 25, 2014 and for 14 beds published on October 3, 2014, but insisted that there was still an error in the calculations because the revised and updated projections did not correctly account for migration from adjacent states. Specifically, it stated that the calculations only counted the change in patient days, not the net result of that change. The applicant calculated the actual need as 23, not 14. (DI #57, replacement p. 33)

While acknowledging the Commission's published corrections to projected bed need, in support of its continued belief that the projected need applicable to this review is the 192 beds, Blue Heron cited language in standard .05A(1) that the bed need in effect when the Commission receives a letter of intent for the application will be the need projection applicable to the review. However, Blue Heron states that it modified its application to request 90 CCF beds in an effort to compromise. (DI #57, replacement p. 33a)

Blue Heron noted that strong population growth is still projected for the county and cited the projected growth in the population 65 and over by the Maryland Department of Planning of 23.5% between the years 2010 and 2015 and by 23.7% between 2015 and 2020.¹² (DI #57, Table 1, replacement p. 33a) To further support the need for the 90 CCF beds in St. Mary's County, Blue Heron developed use rates for comprehensive care beds based on 2011 patient days at the two St. Mary's County nursing homes and estimated and projected population reported by the Maryland Department of Planning for the population age 65 years and over. The result was a use rate of 8.3 days per person and a projected need for 418 beds in 2020 for the county's projected population 65 and over of 16,460 at an average occupancy of 90%. Blue Heron reported that Chesapeake Shores and St. Mary's Nursing Center operated with 303 CCF beds in 2011, and, thus, the applicant's methodology supports a need for 115 additional CCF beds in St. Mary's County. (DI #4, p. 34 and DI #57, replacement p. 34)

¹¹ This updated projection was actually published in the *Maryland Register* on April 19, 2013.

¹² Blue Heron only provides the total projected population for the age group 65 years and over; the applicant does not break these age groups into smaller age cohorts.

Blue Heron also projected bed need based on a 2011 use rate for the State of Maryland, which was higher than for the jurisdiction. Using the same methodology to calculate the use rates for the state, BHNRC calculated the 2011 use rate for the state at 12.4 days per person. At this use rate, Blue Heron projected the bed need to be 622 at an occupancy rate of 90%. Taking into account the 303 CCF beds in use in St. Mary's County in 2011, the applicant states that an additional 319 CCF beds would be needed. (DI #4, p. 35 and DI #57, replacement p. 35)

Blue Heron suggested that the difference in the use rates between the 8.3 days per person for St. Mary's County and the 12.4 days per person for Maryland is due to residents in this jurisdiction who have to travel outside the county for comprehensive care. When MHCC staff asked the applicant to provide evidence to support this statement during completeness, Blue Heron stated that this was a reasonable assumption based on the low use rate in St. Mary's County and the difference in use rates between this jurisdiction and the State. (DI #11, Question #13)

Interested Party Comments

Comments by Chesapeake Shores

With respect to Blue Heron's modified application for 90 beds instead of the original 140, Chesapeake Shores stated that the modified application is inconsistent with the applicable need projection because it is more than six times the projected need of 14 beds. (DI #60, p. 3) Chesapeake Shores' other comments on the need for a new nursing home in St. Mary's County as currently proposed by Blue Heron, have been addressed in Part IV.A-A(1) regarding general standard .05A(1), *supra*. However, a number of Chesapeake Shores' comments on Blue Heron's original application are applicable to this modification.

Chesapeake Shores stated that the decision by FutureCare not to proceed with the project after prevailing on appeal undercuts the existence of need. It stated that the inference by the applicant that FutureCare, a large and sophisticated nursing home operator, was somehow worn down by a "lengthy judicial appeal" is unfounded because the appeal was no more lengthy or onerous than any other appeal of Commission decisions, after which projects routinely proceed if they continue to be justified. (DI #23, pp. 8-9)

Chesapeake Shores also commented on Blue Heron's statements regarding the projected population growth stating that these population growth projections do not alone demonstrate need, especially when occupancy rates for the two existing providers in St. Mary's County have been below 90%. The interested party did not believe that Blue Heron has reconciled the growth in population with the low occupancy experienced at both Chesapeake Shores and St. Mary's Nursing Center.

Chesapeake Shores next addressed Blue Heron's calculations for a need of 115 beds based on a "use rate" of 8.3 for St. Mary's County (which it states that the applicant admits in its CON application is not a true use rate). The interested party also questioned the applicant's statement that the St. Mary's use rate is "suppressed for some reason" because it is lower than the statewide use rate. Chesapeake Shores pointed out a lack of evidence that the St. Mary's use

rate is inappropriately suppressed. It suggested that one reason why the use rate for the county may appear lower than the statewide use rate is that, although Charlotte Hall serves St. Mary's County residents as well as veterans from other parts of the state, this utilization is not counted. (DI #23, p. 10)

Comments by St. Mary's Nursing Center

While St. Mary's Nursing Center commented on Blue Heron's response to this standard in its original application, it did not comment on Blue Heron's modification except to reiterate that the Commission has corrected the projected bed need for the county and it is now 14. (DI #59) St. Mary's Nursing Center's comments on Blue Heron's original application included an analysis of the bed need for a sub-market of St. Mary's County that accounted for nearly 60% of the interested party's admissions from July 2011 to January 2014. This analysis concluded that there is and will continue to be an oversupply of nursing home beds in the county. (DI #22, pp. 8-11) All other comments made by the interested party regarding bed need have been addressed in Part IV.A-A(1) of my Recommended Decision, *supra*, where general standard .05A(1) is discussed.

Applicant's Response to Comments

Blue Heron did not specifically respond to the interested parties' comments on the modified application with respect to this standard. In responding on earlier comments, the applicant disagreed with Chesapeake Shores' comments on the reasons and meaning of FutureCare's relinquishment of its CON to construct a new nursing home in St. Mary's County. Blue Heron pointed out that FutureCare did not cite lack of need as a reason. (DI #28, pp. 12-14)

Regarding St. Mary's Nursing Center's sub-market area analysis of bed need, Blue Heron stated that there are substantial flaws in that analysis of need in its defined sub-market area of the county and noted that the incidence rates are actually patient day use rates and the analysis lacked definition of the year and the geographic area (national or sub-region of the county) upon which the incidence rates were based. (DI #28, pp. 14-15)

Reviewer's Analysis and Findings

This standard requires the applicant for a facility involving new construction to address in detail the need for beds to be developed in the proposed project by submitting data including but not limited to: demographic changes in the target population; utilization trends for the past five years; and demonstrating unmet needs of the target population. Subpart (b) of this standard does not apply because Blue Heron is not proposing the relocation of existing comprehensive care facility beds.

Again, Blue Heron refers to the April 19, 2013 erroneous projection of the need for 192 nursing home beds as evidence of unmet need. As previously explained, I cannot rely on the erroneous 2013 projection in assessing the need for this project and must rely instead on the corrected and updated October 3, 2014 projection of the need for 14 beds. I note that the current 14-bed projection aligns much more closely with the observed trends in demand for nursing

home beds in the jurisdiction in recent years. It would be wrong for me to rely on the erroneous 2013 projection and ignore reality. In my December 2, 2014 letter (DI #56), I addressed Blue Heron's contention that there are errors in the October 2014 projected bed need and that the need is actually 23 CCF beds, not 14 beds. The changes that would be needed to arrive at a projection of 23 CCF beds sought by Blue Heron would require the Commission to adopt amendments both to the description of the methodology and to the methodology itself. Moreover, in my view, the change Blue Heron desires that would result in a projected 2016 need for 23 CCF beds in St. Mary's County is immaterial in the context of my consideration of its proposal for a new 90-bed nursing home.

Regarding Blue Heron's reference to the projected growth in the county's elderly population that it uses in its attempt to show need for its project, the Chapter's bed need projection methodology already takes population growth into account. Furthermore, while Blue Heron considered projected changes in population, the focus was on the 65 and over population as one group instead of the smaller groups (65-74, 75-84, and 85+) that are used in the Commission's methodology for projecting nursing home bed need. By lumping all the population 65 and over into one group, the applicant obscures the differences in projected demand among these elderly age bands, which are substantial. For example, the St. Mary's County population 85 and older uses nursing home beds at a rate of 33,588 days per thousand population, compared to a use rate of 10,823 days per thousand population for the 75 to 84 age group and 3,159 days per thousand for the 65 to 74 age group. The county's population aged 85 and older is projected to grow at a slower rate from 2010 to 2020 (39%) than it did from 2000 to 2010 (66%). While .05B(1)(a) permits an applicant to submit data showing "demographic changes in the target population" to show need for a proposed project, Blue Heron has not shown any demographic changes that are not already accounted for in the Chapter's need methodology and the data that it submitted is not as specific or as targeted to a nursing home target population as the data used in the Chapter.

More importantly, because Blue Heron did not submit data on utilization trends, as permitted by .05B(1)(a), it did not use utilization trends to demonstrate unmet need as required by the standard. Instead Blue Heron attempted to demonstrate need by calculating a county and State use rate for the population 65 and over based on one year of data (2011) and multiplying those use rates by the projected population for 2020. When I consider the evidence of a downward trend in nursing home use at the State, regional, and jurisdictional levels, I cannot accept Blue Heron's approach as a valid representation of the likely demand for beds in St. Mary's County, as is permitted in the Chapter. Blue Heron failed to meet its burden of showing need in the face of a realistic 2016 CCF bed need projection of 14 beds that results from a corrected calculation of the Chapter's methodology.

In its response to this standard and others, the applicant appears to have taken great comfort from the Commission's 2008 approval of the Point Lookout application. While I agree that the reasons given by FutureCare for relinquishing the CON for that facility did not explicitly cite need as a basis, this does not mean that need and the state of the market were not contributing factors in its decision. The census of nursing home patients continued to decline steadily during the time in which FutureCare held a valid CON and existing facilities continued to delicense bed capacity. I note that the relinquishment letter cited the cost of fill up and

operation as contributing factors in FutureCare's decision, costs that would be exacerbated by the softening market conditions.

Blue Heron stated that it was reasonable to assume that the use rate of nursing homes per person for St. Mary's County is lower than the State per-person use rate because St. Mary's County residents travel outside the jurisdiction for nursing home care. Blue Heron (DI #11, Question #13) Blue Heron's assumption regarding outmigration is incorrect. St. Mary's County's rate of retention of county residents is 74%, slightly above the State median retention rate of 73%. Thus, the outmigration rate for St. Mary's County residents seeking nursing home care is, at 26%, slightly below the State average outmigration rate of 27%. This information can be derived from information regarding retention that was provided in excel format on a disc that accompanied my September 9, 2014 letter to the parties.

It is important to a discussion of need to note that, from 2008 through 2013, historical trends in St. Mary's County showed a steady, uninterrupted decline in nursing home patient days. This decline ended in 2014 when there was a 4% increase in patient days over 2013. Despite this recent increase, however, the facilities' 2014 patient days were still 8% lower than in 2007.

For these reasons, I find that Blue Heron has failed to demonstrate that its proposed facility is needed. It has not shown that its proposed nursing home will address unmet needs of the target population or presented demographic or utilization trends showing that additional CCF beds are needed in St. Mary's County.

(2) Facility Occupancy.

- (a) The Commission may approve a nursing home for expansion only if all of its beds are licensed and available for use, and it has been operating at 90 percent or higher, average occupancy for the most recent consecutive 24 months.**
- (b) An applicant may show evidence why this rule should not apply.**

Because Blue Heron seeks to establish a new facility, and not an expansion, this standard is not applicable.

(3) Jurisdictional Occupancy.

- (a) The Commission may approve a CON application for a new nursing home only if the average jurisdictional occupancy for all nursing homes in that jurisdiction equals or exceeds a 90 percent occupancy level for at least the most recent 12 month period, as shown in the Medicaid Cost Reports for the latest fiscal year, or the latest Maryland Long Term Care Survey, if no Medicaid Cost Report is filed. Each December, the Commission will issue a report on nursing home occupancy.**

(b) An applicant may show evidence why this rule should not apply.

Because Blue Heron is proposing a new nursing home, this standard applies. This standard limits the Commission's approval of new nursing homes to jurisdictions where the average occupancy of the nursing homes in that jurisdiction equaled or exceeded 90 percent for at least the most recent 12-month period for which data is available. This standard permits an applicant to show evidence why this rule should not apply.

Applicant's Response

In its original application, Blue Heron stated that the average occupancy for the two nursing homes in St. Mary's County that are available to the general public (interested parties Chesapeake Shores and St. Mary's Nursing Center) was 84.8%. However, Blue Heron gave the following reasons why it believes that this standard should not apply: (1) the Commission's 2013 bed need projections for nursing home beds showed a net bed need for 192¹³ additional nursing home beds in 2016; (2) the difference between the St. Mary's County occupancy rate of 84.8% and the 90% threshold of the standard was 5,747 patient days, which is approximately 16 beds; (3) the fact that 16 beds should not deprive the residents of St. Mary's County of a "state of the art" new nursing home that will meet the Commission's¹⁴ projected need for 192 beds; (4) both existing nursing homes are older facilities and the relatively small difference between the actual occupancy rate and 90% should not deprive the residents of St. Mary's County of a new "state of the art" nursing home that meets need projected by the Commission; and (5) approval of this CON application would enhance the availability of choice for St. Mary's residents, and in particular, the population age 65 and over. (DI #4, pp. 36-37) Blue Heron did not change its response to this standard in its February 9, 2015 modified application.

In supporting the need for a new 90-bed CCF in St. Mary's County, Blue Heron also cited the Recommended Decision made by former Commissioner Darren W. Petty, who was the Reviewer in the 2007-08 review of a CON application submitted by FutureCare Health and Management Corporation proposing establishment of a 124-bed CCF in St. Mary's County (Docket No. 07-18-2201). The Commissioner's Recommended Decision in that review addressed the issue of low bed occupancy and projected bed need. In arriving at his recommendation to approve the CON request by FutureCare, Commissioner Petty stated "the SHP's case for more nursing home beds in St. Mary's County can be called into question by the average number of unoccupied beds in the jurisdiction at the two facilities (i.e., Bayside Care Center [now Chesapeake Shores] and St. Mary's Nursing Center) that serve the general public. However, I believe that the long term pattern of population growth in St. Mary's County warrants favorable consideration of this project...."¹⁵ On September 18, 2008, the Commission adopted the Commissioner/Reviewer's recommendation to approve FutureCare's application for a CON to construct a 124-bed CCF in St. Mary's County. Blue Heron points out that, after an

¹³ Note that I concluded that the 2013 projections to be erroneous and have found that the Corrected and Updated Bed Need Projection, published in 41:20 *Maryland Register* 1180 (October 3, 2014) (showing 14 CCF beds as needed in St. Mary's County in 2016) is correct.

¹⁴ See footnote 11, *supra*.

¹⁵ Point Lookout Nursing Center Decision, Docket No. 07-18-2201 (Sept. 18, 2008), at. p. 27.

appeal and a protracted review by the court, the MHCC's decision granting FutureCare's CON was upheld.¹⁶ (DI #4, p. 32)

Interested Party Comments

Comments by Chesapeake Shores

Chesapeake Shores stated that the reasons given by Blue Heron's for not applying the jurisdictional occupancy standard were unpersuasive as originally presented and that those reasons were further undercut by the correction of the 2016 CCF bed need projection. Chesapeake Shores pointed out that Blue Heron continues to repeat its position that

the jurisdictional standard should not apply because the Commission had projected a need for an additional 192 beds in St. Mary's County in 2016 and applying the occupancy threshold would 'deprive' St. Mary's County residents of a new nursing home to meet this significant level of need.

(DI #60, p. 5) Chesapeake Shores also pointed out that the applicant has maintained its belief that the existing nursing homes have been close enough to the 90% occupancy threshold to justify not applying the occupancy standard and approving a new nursing home. In conclusion, Chesapeake Shores notes that it is well within the capacity of the two existing nursing homes in St. Mary's County to accommodate the 14 additional beds projected as needed, if such need actually materializes. (DI #60, pp.5-6)

When commenting on the modified application, Chesapeake Shores did not repeat all of the comments it made on the original application. Its original comments are still relevant, however, particularly because the applicant did not modify its response to this standard. In its comments regarding the applicant's position that the jurisdictional occupancy standard should not apply because the Commission had¹⁷ [in 2013] projected the need for 192 beds, Chesapeake Shores stated that this occupancy standard comes into play when there is a need projection for additional beds in the jurisdiction. The interested party pointed out that, if the existence of a need projection was sufficient to overcome this standard, the jurisdictional occupancy standard would never apply and would be deprived of all meaning. Chesapeake Shores stated its belief that this standard operates independently of the Commission's need projection as a "reality check" when the Commission projects a nursing home bed need. (DI #23, pp. 6-7)

In response to Blue Heron's contention that the standard should not apply because the two existing facilities are "older facilities," Chesapeake Shores noted that the applicant's reasoning would also render the jurisdictional occupancy standard meaningless because existing facilities would always be older than proposed new facilities. The interested party also pointed out that the applicant failed to account for recent renovations undertaken at both Chesapeake Shores and St. Mary's Nursing Center. (DI #23, p. 7) Chesapeake Shores noted the improvements that it made between 2007 and 2012, including redecoration throughout the

¹⁶ FutureCare did not proceed with this project and relinquished its CON on September 5, 2012.

¹⁷ Erroneously, as it turned out. As previously noted, the updated and corrected bed need forecast project 14 CCF beds as needed in the County in 2016.

building, replacement of floors throughout the facility including resident rooms, purchase of new furnishings for patient rooms and the dining room, renovation of resident bathrooms, and the relocation of the therapy room and replacement of the therapy equipment. (DI #23, Ex. 2)

Finally, Chesapeake Shores commented on Blue Heron's belief that the jurisdictional occupancy standard should not apply in order to increase the choice of nursing home providers in St. Mary's County. It stated that the addition of another provider in a jurisdiction would always increase choice, but "the purpose of this standard is to prevent additional capacity when existing facilities are operating well below capacity." (DI #23, p. 7)

Comments by St. Mary's Nursing Center

In commenting on the modified application, St. Mary's Nursing Center stated that the modification does not address the points it made in commenting on the original application with respect to this standard and that subpart (a) still was not met and that Blue Heron has not given reasons, under subpart (b), why this standard should not apply. (DI #59)

In commenting on the original application, St. Mary's Nursing Center stated that evidence submitted by Blue Heron as to why the jurisdictional occupancy standard should not apply is without merit. First, the interested party responded to the applicant's calculation that the difference between actual utilization and the 90 percent occupancy threshold is less than 16 beds by noting that its historically low census has prompted St. Mary's Nursing Center to delicense 32 CCF beds since September 2007 and temporarily delicense another 20 beds as of July 1, 2013.¹⁸ It believes that any calculation of occupancy should take these bed reductions into account. (DI #22, pp. 3-4)

St. Mary's Nursing Center also addressed Blue Heron's statements that the existing nursing homes are old and that the Commission should not deprive the residents of St. Mary's County of a new "state of the art" nursing home. The interested party noted a number of its recent and planned renovation projects, including: (1) \$86,000 for interior and exterior lighting and new gazebos in 2011; (2) \$2,124,000 for a new heating, ventilation, and air conditioning system, a new roof, kitchen improvements, a new nurse call system, a new resident quiet room, and resident dining room renovations in 2012; and (3) \$80,000 for renovations to second floor resident rooms in 2013. Its comments on Blue Heron's original application also noted the St. Mary's Nursing Center plan in 2014, to add a second rehabilitation therapy gym, renovate the first floor resident rooms, add a dental/vision suite, and renovate the lobby. After the 2014 renovations, the facility would have 57 double- and 46 single-occupancy rooms. The completion of these renovations would make St. Mary's Nursing Center similar in room accommodations to the 51 double- and 38 single-occupancy rooms originally proposed by Blue Heron in its original application for 140 beds. Regarding the statement that the proposed facility will be "state of the art," the interested party pointed out that Blue Heron's construction documents indicate lower-cost construction using wood framing and heating/cooling units in the resident rooms. (DI #22, pp. 4-5)

¹⁸ These 20 beds were permanently relinquished on May 5, 2014.

Applicant's Response to Comments

In responding to the interested parties' comments, Blue Heron revised its calculation of the difference between the actual occupancy and 90% occupancy. Using information provided by Chesapeake Shores in its comments and licensed bed information from the Office of Health Care Quality's website, Blue Heron calculated that the difference between 90% occupancy and actual occupancy was now 9 beds. Blue Heron stated that this small difference does not demonstrate any general occupancy problem or provide a basis to deprive St. Mary's County of a third nursing home, but simply reflects the age, services, and characteristics of the two facilities. (DI #63, pp. 4-5)

Blue Heron pointed out that the Commission, in the Point Lookout CON review (Docket No. 07-18-2201) had previously determined that the occupancy standard is not a barrier to approval of a new CCF in St. Mary's County. Blue Heron also noted that the elderly population in St. Mary's County continues to grow. It stated that with "only two nursing homes in the county, small changes in occupancy can have a material and disproportionate percentage impact under this 90% standard." (DI #63, p. 5)

Blue Heron also stated that it will offer special programs and services that will benefit the community, including a Diabetes Specialty program and a Medical Specialty program for clinically complex patients. The applicant also pointed to its capability to offer programs in cardiac and pulmonary rehabilitation, chronic wound care, chronic disease management and orthopedic rehabilitation, and stated that the residents should not be deprived of such programs because two existing facilities have not filled nine beds between them. (DI #63, pp. 5-6)

In responding to the interested party comments on the original application concerning the importance of choice, Blue Heron stated that the fact that neither St. Mary's Nursing Center nor Chesapeake Shores has been able to convince residents in this jurisdiction to utilize these facilities at levels that will meet the jurisdictional occupancy standard is evidence that the people of St. Mary's County need another choice of long term care facilities. Blue Heron then pointed to page six of the Chapter, which it quoted as stating:

Another component of consumer choice is access to care. Although each jurisdiction in Maryland has at least one nursing home, there are a small number of jurisdictions that have only one or two facilities. The Commission should encourage the development of services¹⁹ to serve the residents of these jurisdictions.

While acknowledging that this statement applies to community-based services, Blue Heron states its belief that the importance of "choice," as represented by this statement, supports waiving the jurisdictional occupancy standard where there is a large bed need. (DI #28, pp. 7-8)

¹⁹ Note that the quotation deletes the words "and programs" after "services." The complete sentence from the Chapter is as follows: "The Commission should encourage the development of services *and programs* to serve residents of these jurisdictions." (emphasis added)

Reviewer's Analysis and Findings

This standard limits the Commission's approval of new nursing homes to jurisdictions where the average occupancy of the nursing homes within that jurisdiction equaled or exceeded 90 percent for at least the most recent 12-month period for which data is available. When the application was filed and during the comment and response periods, FY2013 was the latest data. In FY2013, the average occupancy rate for the two existing publically available nursing homes in St. Mary's County was 83.3%.

I note that, from 2006 through 2013,²⁰ jurisdictional occupancy percentages²¹ in St. Mary's County were below 90%, even though the number of licensed nursing home beds had decreased through the delicensure of CCF beds in the county. The delicensure of beds continued in 2014.²² Quite recently, data from the MHCC Long Term Care Survey and Medicaid Cost Reports for 2014 became available. While the 2014 occupancy data is preliminary and unaudited, it shows that, the jurisdictional occupancy of publicly available nursing homes in St. Mary's County exceeded 90% during this most recent period for which data is available.

Thus, I find that the application is consistent with this standard.

(4) Medical Assistance Program Participation.

- (a) An applicant for a new nursing home must agree in writing to serve a proportion of Medicaid residents consistent with .05A 2(b) of this Chapter.**
- (b) An applicant for new comprehensive care facility beds has three years during which to achieve the applicable proportions of Medicaid participation from the time the facility is licensed, and must show a good faith effort and reasonable progress toward achieving this goal in years one and two of its operation.**
- (c) An application for nursing home expansion must demonstrate either that it has a current Memorandum of Understanding (MOU) with the Medical Assistance Program or that it will sign an MOU as a condition of its Certificate of Need.**
- (d) An applicant for nursing home expansion or replacement of an existing facility must modify its MOU upon expansion or replacement of its facility to encompass all of the nursing home beds in the**

²⁰ See Table 2, *supra*, p. 7.

²¹ From 2006 through 2013, there also was a steady, uninterrupted decline in patient days in the county. Although patient days at Chesapeake Shores and St. Mary's Nursing Center increased by 4% in 2014, the facilities' 2014 patient days were still 8% lower than in 2007. See Table 2, *supra*, p. 7.

²² St. Mary's Nursing Center delicensed 20 beds for the entirety of FY2014. Chesapeake Shores' temporarily delicensed bed capacity fluctuated in FY2014.

expanded facility, and to include a Medicaid percentage that reflects the most recent Medicaid participation rate.

- (e) **An applicant may show evidence as to why this standard should not be applied to the applicant.**

Applicant's Response

Please see Blue Heron's response to the Chapter's general standard regarding participation in the Medical Assistance Program, at the discussion regarding COMAR 10.24.08.05A(2), *supra*.

Reviewer's Analysis and Findings

Paragraphs (4)(c) and (d) do not apply as this project does not propose to expand or replace an existing nursing home. As discussed under COMAR 10.24.08.05A(2), Blue Heron has provided the Commission with its assurances that it is committed to meeting the requirements of this standard. Further, the applicant stated that it will participate in the Medicaid Program, will execute the required Memorandum of Understanding, and will implement the required written policies set forth in this standard. Based on these assurances, the proposed project is consistent with this standard. As previously noted, were I recommending approval of this application, I would recommend that the Commission condition its approval on the applicant's entering an MOU committing to the required levels of Medicaid participation with the Medicaid program before putting the facility into operation. However, I am not recommending approval of this project.

- (5) **Quality. An applicant for expansion of an existing facility must demonstrate that it has no outstanding Level G or higher deficiencies, and that it maintains a demonstrated program of quality assurance.**

This standard concerns expansion of an existing facility, and therefore, is not applicable in this review.

- (6) **Location. An applicant for the relocation of a facility shall quantitatively demonstrate how the new site will allow the applicant to better serve residents than its present location.**

Because the applicant does not seek to relocate an existing facility to a new location, this standard is not applicable.

OTHER CERTIFICATE OF NEED REVIEW CRITERIA

The project's compliance with the five remaining general review criteria in COMAR 10.24.01.08G(3) is discussed below:

B. NEED

COMAR 10.24.01.08G(3)(b) Need. The Commission shall consider the applicable need analysis in the State Health Plan. If no State Health Plan need analysis is applicable, the Commission shall consider whether the applicant has demonstrated unmet needs of the population to be served, and established that the proposed project meets those needs.

Applicant's Response

In its modified application, Blue Heron responded to this criterion by reference to its response to the Chapter's bed need standard for new construction or expansion of beds or services, found at COMAR 10.24.08.05B(1). (DI #57, replacement pp. 40-43) In responding to that standard, as previously discussed, *supra*, Blue Heron pointed to a November 2012 update of MHCC's projections for comprehensive care facility bed need that indicated a need for 192 CCF beds in St. Mary's County by 2016 and stated that it filed an application for a new 140-bed facility in response to this projected need.

Blue Heron also noted the corrected and updated need projections published July 25, 2014 (showing a need for 39 beds in St. Mary's County) and October 3, 2014 (showing a need for 14 beds). Blue Heron believes that there is still an error in the calculations because the revised and updated projections did not correctly account for migration from adjacent states. Blue Heron calculated the actual need as 23, not 14.

Blue Heron cited the language in standard .05A(1) that "the bed need in effect when the Commission receives a letter of intent for the application will be the need projection applicable to the review" in support of its continued belief that the projected need applicable to this review is the 192 beds, not the subsequent corrected projection published by MHCC. However, Blue Heron stated that it modified its application to request 90 CCF beds in an effort to compromise. (DI #57, replacement pp. 32-33a)

Interested Party Comments

Comments by Chesapeake Shores

Chesapeake Shores stated that the applicable bed need projection is 14 beds. With respect to the modified application for 90 beds instead of the original 140, Chesapeake Shores stated that the modified application is inconsistent with the applicable bed need projection because the number of beds proposed is more than six times the projected need. (DI #60, p. 3)

Comments by St. Mary's Nursing Center

St. Mary's Nursing Center stated that the Commission must take steps to correct computational errors in the need calculation, which it has done, and that it must take into consideration existing realities. The interested party noted that the corrected CCF bed need projection for the county now stands at 14, and that the applicant is asking the Commission to ignore this fact and approve an application for 90 CCF beds. St. Mary's Nursing Center stated its belief that there is no basis for ignoring the Commission's current bed need analysis. (DI #59)

Applicant's Response to Comments

Blue Heron responded to the interested party comments on the bed need criterion in conjunction with its response to interested party comments on State Health Plan standards. Essentially, as detailed in the discussion under standard .05A(1) Bed Need, Blue Heron stated that the bed need projection in place at the time it submitted its letter of intent (192 beds) should apply to this review. It pointed to the wording of that standard, at COMAR 10.24.08.05A(1), and to the wording at COMAR 10.24.08.07K(4) in support of its position that the Commission cannot apply a bed need projection that is updated during a CON review to correct errors in the computation of that projection.

Reviewer's Analysis and Findings

This criterion requires the Commission to consider the applicable need analysis in the State Health Plan. I have found that 2013 erroneous projection upon which the applicant relies included computation errors that required corrections. As previously discussed in Part IV.A-A(1) of this Recommended Decision, *supra*, I cannot ignore the reality on the ground in making a decision on this application. The 2014 corrected bed need projection indicates a need for only an additional 14 beds in St. Mary's County.

I find that Blue Heron's modified application to construct a new 90-bed nursing home is not consistent with the need criterion.

C. AVAILABILITY OF MORE COST-EFFECTIVE ALTERNATIVES

COMAR 10.24.01.08G(3)(c) Availability of More Cost-Effective Alternatives. The Commission shall compare the cost effectiveness of the proposed project with the cost effectiveness of providing the service through alternative existing facilities, or through an alternative facility that has submitted a competitive application as part of a comparative review.

Applicant's Response

The applicant did not change its response to this criterion in its modified application except to make changes to its analysis of the cost of construction compared to the Marshall Valuation Service cost guide. In responding to this criterion in the original application, Blue Heron addressed the alternative of adding the beds to one of the existing facilities. Blue Heron

noted that neither of the two existing nursing homes submitted a CON application to meet the projected need. Blue Heron stated that adding beds to the existing facilities would require major construction projects that would require expansion of kitchens and other support areas, and that the cost per square foot would be comparable to the proposed project. (DI #4, p. 48) The applicant believes that if one of the existing facilities proposed to add beds and replace existing structures, the project would be larger than that proposed by the applicant and the costs would be higher, but there is no way to know the mix of patient rooms and common spaces that would be included in such plans. (DI #4, pp. 48-49 and DI #11, pp. 24-25)

Interested Party Comments

In their comments on the original application, both interested parties stated that they did not submit applications for additional beds because neither thinks there is a need for such beds given their recent occupancy rate experiences, and, furthermore, it is not cost effective to add beds that are not needed.

Comments by Chesapeake Shores

Chesapeake Shores stated that the applicant's attempt to satisfy this standard was not altered by the modification of the application. It noted that the applicant asserted in the original application that its proposal to construct a 140-bed facility ("presumably now 90 beds") represents the most cost effective alternative because there is no cost effective way to add the beds to the existing facilities. Chesapeake Shores believes that the applicant's response misses the mark because, under the corrected need projection, only 14 additional beds are needed, not 90. The interested party maintains that it is well within the capabilities of the two existing nursing homes to meet this need without major capital projects, and, therefore, the Blue Heron has not met this criterion.

Comments by St. Mary's Nursing Center

St. Mary's Nursing Center pointed out that, in addition to decertifying beds, its board and management are considering the impact of the Affordable Care Act ("ACA") and how long-term post-acute care services will be provided and paid for. St. Mary's Nursing Center believes that the ACA's emphasis on providing services in the lowest cost and most cost efficient setting will not require additional nursing home beds in St. Mary's County. (DI #22, p. 14)

Applicant's Response to Comments

Referring to Chesapeake Shores' assertion that the existing nursing homes could easily add fourteen beds if the demand for them were present, Blue Heron responded that "Chesapeake Shores' comment is wholly derivative of its comment on bed need," and stated that it is not cost effective to deprive St. Mary's County residents of the right to choose to receive the additional, specialized services Blue Heron will offer in a state of the art, newly constructed long term care facility with a continuum of nursing home and assisted living care. The applicant also stated that the 2008 Point Lookout decision confirms that when there is a need for an additional facility, it is not more cost effective to deny a CON for an additional facility. (DI #63, p. 6)

Reviewer's Analysis and Findings

The applicant dismissed Chesapeake Shores' comments connecting the bed need to cost effectiveness. However, I believe a major question concerning the cost effectiveness of a proposed project is whether it is needed. If there is not a demonstration of the need for a project, it cannot be cost effective. The question of need revolves around the nursing home bed need as projected by the methodology, which, when correctly applied, shows a relative modest need for additional beds. I conclude that the construction of a 90-bed nursing home is not a cost effective means to meet the need for 14 beds. I believe that it will be more cost effective to wait until there is a clearer indication of need as measured by the occupancy of the existing facilities, which could seek to meet the minimal projected need when justified by the facilities' actual occupancy.

When considering cost effectiveness, I also looked at the quality of the existing publicly available nursing homes in St. Mary's County. In late May, I conducted site visits of Chesapeake Shores, St. Mary's Nursing Center, and Blue Heron's proposed location. While each of the existing nursing home shows its age, as one would expect of older facilities, it was apparent that each facility has made renovations and upgrades in common areas as well as in individual patient rooms. Additional renovations are ongoing. The staffs at Chesapeake Shores and St. Mary's Nursing Center appeared to have a good rapport with their residents.

I also reviewed publicly available information about quality of the existing nursing homes in St. Mary's County, and considered the Nursing Home Family Satisfaction Survey conducted by Commission staff and reported on the MHCC website. In reviewing information regarding the family satisfaction survey, I was particularly interested in the percentage of those who said that they would recommend the nursing home to others. For Chesapeake Shores, 92% of those responded stated that they would recommend the nursing home.²³ For St. Mary's Nursing Center,²⁴ 100% of responders would recommend the facility. Each nursing home exceeds the Maryland average of 89%.

As detailed below, each compared favorably to other nursing homes on quality standards. The federal Center for Medicare and Medicaid Services ("CMS") has a website, called Nursing Home Compare, that provides information on all Medicare- and Medicaid-certified nursing homes operating in the country. Rating elements that are shown in Table 6 below resulted in CMS's conclusion that Chesapeake Shores and St. Mary's Nursing Center each had an "Above Average" overall rating s of 4-stars on its 5-star scale.

²³ For survey results regarding Chesapeake Shores, click on "Health and Fire Safety Results" at the following link: http://mhcc.maryland.gov/consumerinfo/longtermcare/Nursing_Home/Users/FacilityProfile.aspx?FacId=18003&CountiesList=SM&nhList=&services=&NHService=Y

²⁴ For results regarding St. Mary's Nursing Center, click on "Health and Fire Safety Results" at the following link: http://mhcc.maryland.gov/consumerinfo/longtermcare/Nursing_Home/Users/FacilityProfile.aspx?FacId=18002&CountiesList=SM&nhList=&services=&NHService=Y

**Table 6: CMS Nursing Home Compare Findings²⁵
Chesapeake Shores and St. Mary's Nursing Center**

CMS Star Rating Elements	Chesapeake Shores	St. Mary's Nursing Center
Overall Rating	Above Average	Above Average
Health Inspection	Above Average ²⁶	Above Average ²⁷
Staffing	Average	Average
Quality Measures	Above Average	Below Average
Total No. of Health Deficiencies	6	7
Average No. Health Deficiencies in Maryland Facilities	11.2	11.2

Source: <https://www.medicare.gov/nursinghomecompare> (accessed June 2015)

The Maryland Department of Health and Mental Hygiene's Office of Health Care Quality ("OHCQ"), the State agency that licenses nursing homes, conducts inspections (referred to as "surveys") of Maryland nursing homes. In its most recent surveys conducted at Chesapeake Shores and St. Mary's County Nursing Center, OHCQ's survey team reported that each nursing home had a total number of deficiencies²⁸ that is lower than the average number of deficiencies reported for all Maryland nursing homes.

For reasons noted above, I find that Blue Heron's application for 90 beds is not the most cost effective alternative to meet the projected need for 14 additional nursing home beds in St. Mary's County.

D. VIABILITY OF THE PROPOSAL

COMAR 10.24.01.08G(3)(d) Viability of the Proposal. The Commission shall consider the availability of financial and nonfinancial resources, including community support, necessary

²⁵ Nursing Home Compare 'provides information on all Medicare- and Medicaid-certified nursing homes operating in the country. The five- star rating system consists of three elements which provide evaluations based on (1) health inspections, (2) staffing, and (3) quality measures. These three elements are then combined by CMS to calculate the overall 5-star rating for each nursing home. The rating system uses the following scale for each element: 1-star – Much Below Average; 2-star – Below Average; 3-star – Average; 4-star – Above Average; and 5-star – Much Above Average. Further information on the calculation of how the overall ratings are calculated is available at:

<http://www.medicare.gov/NursingHomeCompare/About/HowWeCalculate.html>.

²⁶

<https://www.medicare.gov/nursinghomecompare/profile.html#profTab=1&ID=215142&Distn=0.0&cmprTab=0&cmprID=215142%2C215013&cmprDist=0.0%2C0.0&stsltd=MD&state=MD&county=SAINT%20MARYS&lat=0&lng=0&AspxAutoDetectCookieSupport=1>

²⁷

<https://www.medicare.gov/nursinghomecompare/profile.html#profTab=1&ID=215013&Distn=0.0&cmprTab=0&cmprID=215142%2C215013&cmprDist=0.0%2C0.0&stsltd=MD&state=MD&county=SAINT%20MARYS&lat=0&lng=0&AspxAutoDetectCookieSupport=1>

²⁸ The survey team identified six health deficiencies at Chesapeake Shores and seven at St. Mary's Nursing Center.

to implement the project within the time frames set forth in the Commission's performance requirements, as well as the availability of resources necessary to sustain the project.

Applicant's Response

Availability of Resources Necessary to Implement the Project

The total estimated cost of Blue Heron's proposed nursing home is \$13,012,500. The \$13,012,500 includes \$9,776,250 for construction (land, building, site work, architect and engineering fees and permits), \$1,106,250 for equipment, \$300,000 in capitalized construction interest, \$300,000 for estimated future inflation, \$210,000 in financing and other cash requirements, and \$750,000 in working capital for start-up costs. The estimated cost of the assisted living units is an additional \$4,337,500.

Blue Heron proposes to fund the \$17,350,000 total cost of the project with a cash contribution of \$2,110,000, a mortgage of \$14,240,000, and working capital loans totaling \$1,000,000. The following table details the estimated project costs and the proposed sources of funds.

**Table 7: Project Budget Estimate –
Uses and Sources of Funds**

A. Uses of Funds	Nursing Home Beds	Assisted Living	
<i>New Construction</i>			
Building	\$ 7,125,000	\$ 2,375,000	\$ 9,500,000
Land Purchase	1,256,250	418,750	1,675,000
Site Preparation	1,087,500	362,500	1,450,000
Architect/Engineering Fees	285,000	95,000	380,000
Permits	22,500	7,500	30,000
Subtotal	9,776,250	3,258,750	13,035,000
<i>Other Capital Costs</i>			
Movable Equipment	1,106,250	368,750	1,475,000
Contingencies	562,500	187,500	750,000
Other	7,500	2,500	10,000
Subtotal	1,676,250	558,750	2,235,000
Capitalized Construction Interest	300,000	100,000	400,000
Total Current Capital Costs	11,752,500	3,917,500	15,670,000
Inflation	300,000	100,000	400,000
Total-Proposed Capital Costs	12,052,500	4,017,500	16,070,000
<i>Financial and Other Cash Requirements</i>			
Loan Placement Fee	112,500	37,500	150,000
Legal Fees and CON Assistance	97,500	32,500	130,000
Subtotal	210,000	70,000	280,000
Working Capital Start Up Costs	750,000	250,000	1,000,000
Total Uses of Funds	\$13,012,500	\$4,337,500	\$17,350,000

B Sources of Funds			
Cash	1,582,500	527,500	2,110,000
Mortgage	10,680,000	3,560,000	14,240,000
Working Capital Loans	750,000	250,000	1,000,000
Total Sources of Funds	\$13,012,000	\$4,337,500	\$17,350,000

Source: Modification to CON application. (DI #57, replacement pp. 21-22)

Regarding the availability of the resources to implement the project, Blue Heron stated that no audited financial statements are available because it was proposing a new facility. (DI #4, p. 52; DI #57, replacement p. 52) As part of the original application and in response to completeness questions, the applicant submitted letters of interest from F&M Bank to St. Mary's Healthcare Realty, LLC (the related entity that will build the facility and lease it to Blue Heron) expressing an interest in financing the proposed facility based on experience providing financing to indirect affiliates of the real estate entity. The applicant also provided letters from Stephanie Lubitz, Director, Greenspring Consulting Services, attesting that the investors in St. Mary's Healthcare Realty have the necessary cash to fund the cash contribution. (DI #4, Ex. 5 & 6, DI #11, Ex 12 & 13)

Availability of Resources Necessary to Sustain the Project

The applicant projected the following utilization statistics for the proposed facility in its first two years of operation.

Table 8: Applicant's Projected Utilization of the Nursing Home Beds and Assisted Living Units

	Projected Years	
	Year 1	Year 2
Admissions		
Nursing Home	48	86
Assisted Living	13	25
Patient Days		
Nursing Home	17,418	31,390
Assisted Living	4,852	9,125
Occupancy Percentage		
Nursing Home	53.0%	95.6%
Assisted Living	44.3%	83.3%
Payer Mix (Percent of Patient Days by Payer)		
Medicare	31.7%	25.6%
Medicaid	42.7%	47.7%
Commercial Insurance	4.6%	5.8%
Self-pay	21.0%	20.9%
Total	100.0%	100.0%

Source: DI #57, replacement pp. 44 and 55-56

Based on the utilization and payer mix assumptions detailed in the previous table, the applicant projected a loss from nursing home operations in the first year and positive operating income in the second year, as detailed in the following table.

**Table 9: Revenue and Expense Statement
Blue Heron Nursing and Rehabilitation Center (Nursing Home)**

	Projected Years	
	Year 1	Year 2
Gross Patient Revenue	\$5,981,591	\$10,393,810
Allowance for Bad Debt	119,632	207,876
Contractual Allowance	0	0
Net Patient Services Revenue	5,861,959	10,185,934
Other Operating Revenue	0	0
Net Operating Revenue	\$ 5,861,959	\$10,185,934
Salaries, Wages, Professional Fees (including benefits)	2,833,418	4,544,185
Contractual Services	872,692	1,244,722
Rent	1,012,500	1,037,813
Supplies	436,479	725,324
Other Expenses	1,135,008	1,689,890
Total Operating Expenses	\$ 6,290,097	\$9,241,934
Income from Operation	-428,138	944,000
Net Income	\$ (428,138)	\$944,000

Source: DI #57, replacement pp. 54-55

Blue Heron also projected the overall performance in the second year including the projected operating performance of the assisted living units, which increased positive performance by about \$8,000.

The applicant expects to hire a total of 80.1 full-time equivalent employees to staff the nursing home. The following table provides the total number of direct employees and the estimated cost of contractual employees for housekeeping and laundry that will staff the 90 bed nursing home during the second year of operation. The table also provides the cost of benefits for the direct employees.

**Table 10: Nursing Home Workforce
Blue Heron Nursing and Rehabilitation Center**

Position	# FTEs	Projected Salary
Administration		
Employees	9.7	\$574,912
Direct Care		
Employees	55.6	\$2,581,284
Support		
Employee	14.8	\$521,473

Total FTEs	80.1	\$ 3,677,505
Replacement Positions/Bonus		231,584
Total Salaries & Wages		\$ 3,909,090
Employee Benefits*		\$ 635,095
Total Salary & Benefits		\$4,544,185
Contracted Laundry & Housekeeping		\$194,250
Total Salaries, Benefits, & Contractual Employees		\$ 4,738,435

Source: DI #57, Replacement p. 64

The following table details the planned direct care staffing of the nursing home as specified by Blue Heron. The expected direct care staffing ratios at 3.6 hours per bed per day during the week and 3.5 hours per bed per day on weekends is more than 150% above the minimum of two hours per bed per day required by COMAR 10.07.02.12. In addition to the staff specified below, Blue Heron plans to employ a director of nursing and an assistant director of nursing.

**Table 11: Nurse Staffing by Shift –
Blue Heron Nursing and Rehabilitation Center - 90 CCF beds**

Staff Category	Weekday			Weekend/Holiday		
	D	E	N	D	E	N
RN	3.0	3.0	2.0	3.0	3.0	2.0
LPN	1.0	1.0	2.0	1.0	1.0	2.0
CNAs	9.0	9.0	6.0	9.0	9.0	6.0
Unit Manager RN	1.0			1.0	0.5	
Restorative Aides	2.0			2.0		
Wound Nurse	1.0					
Total FTEs	17.0	13.0	10.0	16.0	13.5	10.0
Total Hours by Shift*	136	104	80	128	108	80
Total Hours			320			314
Total Number of Beds			90			90
Hours Per Bed Per Day			3.6			3.5

* Assuming 8 hours per shift

Source: (DI #57, Replacement p. 66)

Interested Party Comments

Comments by Chesapeake Shores

Chesapeake Shores continues to question the viability of the project because it does not believe that Blue Heron has demonstrated how it will recruit sufficient qualified staff, given the limited supply in St. Mary's County as described in its comments on the original application. (DI #60, p. 7) In its comments on the original application, Chesapeake Shores gave examples of its difficulty in recruiting staff. (DI #23, pp. 12-13)²⁹

Applicant's Response to Comments

Blue Heron's response to the comments on the modified application focused in part on the fact that the modified proposal is for fewer beds than its original proposal. The rest of the applicant's response to comments reiterates and refers back to its response to the comments on the original application. Specifically, the applicant stated that it is connected to a large network of health care facilities with a successful track record of recruiting staff. The applicant also stated that St. Mary's County is a vibrant community that can attract staff for a third nursing home. (DI # 63, pp. 6-7)

In its earlier response to comments on the original application, the applicant maintained that Chesapeake Shores has only offered anecdotal statements about the difficulties it has recruiting staff to work at its facility but it did not provide any evidence that there is a general lack of staff in St. Mary's County. Blue Heron pointed out that its affiliates operate in urban, suburban, and rural markets in many states with minimal long-term staffing shortages. It noted that the central management of its affiliates' facilities uses recruiting directors that work with local schools and colleges. They also partner with therapy providers that can allocate extensive national resources for securing therapy staff. Blue Heron also pointed to the employee benefits it will provide, especially education and training benefits. Blue Heron stated that the projected increase in population in St. Mary's County will increase the pool of workers. (DI #28. pp. 17-18)

Reviewer's Analysis and Findings

Regarding the availability of the financial resources necessary to implement the project, I think it is likely that St. Mary's Healthcare Realty and its investors will have the cash that has been budgeted for the project. The historical relationship of companies affiliated with St. Mary's Healthcare Realty and the bank that has expressed an interest in providing the mortgage financing suggest that such financing can be obtained. Of course, it is not clear that the financial institution is aware of the relatively low bed occupancy experience of the existing nursing homes in recent years, the general decline in bed demand for St. Mary's County that has occurred in the last ten years, the manner in which bed inventories have been reduced in response to this declining demand, and the small number of additional beds projected as needed in St. Mary's

²⁹ I have addressed Chesapeake Shores' comments regarding recruitment and retention of staff under the impact criterion, Part IV.F, *infra*.

County in 2016, representing just 16% of the 90 additional beds proposed through implementation of the Blue Heron project.

Blue Heron must also demonstrate that it has resources to sustain the project. While the applicant projects an operating profit in the second year of operation, this projection is based on the highly dubious assumption that Blue Heron's 90 nursing home beds will operate at over 95 percent occupancy in its second year. This projected level of utilization appears highly optimistic given recent utilization trends and the historic bed occupancy rate experience of the two existing facilities. The level of projected performance, accepting the dubious occupancy rate projection, also appears to be highly optimistic when one considers the record of performance reported by the two St. Mary's County nursing homes with which Blue Heron will directly compete. A review of Medicaid Cost Reports for the fiscal years 2009 to 2013, as shown in the table below, indicates margins (income as a proportion of total expenses) consistently lower than the 10.2% margin projected by Blue Heron in the second year of operation. St. Mary's Nursing Center had a cumulative negative margin for the five-year period, managing to generate a positive margin in only two of those years. Chesapeake Shores, with its higher occupancy levels, managed to generate a small profit during this period (cumulatively, a margin of 2.7%), but its highest reported annual margin in the last five years was 6.2%. These figures also suggest the likely negative impact of the Blue Heron project on the ability of these facilities to operate "in the black."

**Table 12: Financial Performance: Chesapeake Shores and St. Mary's Nursing Center
FY2009 to FY2013**

	Income (Net Revenue – Total Expenses)	Margin (Income/Total Expenses)	Occupancy Rate
CHESAPEAKE SHORES			
FY2009	\$352,951	3.9%	83.4%
FY2010	\$121,899	1.3%	90.5%
FY2011	\$591,948	6.1%	89.3%
FY2012	\$173,694	1.7%	87.1%
FY2013	\$71,173	0.7%	90.6%
ST. MARY'S			
FY2009	(\$247,672)	(1.8%)	80.8%
FY2010	(\$390,849)	(3.0%)	82.8%
FY2011	\$261,700	1.9%	82.1%
FY2012	(\$9,427)	(0.1%)	79.5%
FY2013	\$268,561	1.9%	78.6%

Source: Medicaid Cost Reports. Note that these numbers do not in all cases match those in Table 2, which more correctly account for interim or temporary changes in licensed bed capacity.

Based on my analysis, I find that the applicant has not shown that the project will be viable.

E. COMPLIANCE WITH CONDITIONS OF PREVIOUS CERTIFICATES OF NEED

COMAR 10.24.01.08G(3)(e) Compliance with Conditions of Previous Certificates of Need. An applicant shall demonstrate compliance with all terms and conditions of each previous Certificate of Need granted to the applicant, and with all commitments made that earned preferences in obtaining each previous Certificate of Need, or provide the Commission with a written notice and explanation as to why the conditions or commitments were not met.

Applicant's Response

The applicant stated that it is a new entity and does not have any prior CONs.

Interested Party Comments

There were no interested party comments on the applicant's response to this criterion.

Reviewer's Analysis and Findings

Because the applicant is a new entity with no previous CON activity and there is no record of any Maryland CON activity for any of the affiliated entities within the Fundamental family of health care companies, I find that this criterion is not applicable to this application.

F. IMPACT ON EXISTING PROVIDERS AND THE HEALTH CARE DELIVERY SYSTEM

COMAR 10.24.01.08G(3)(f) Impact on Existing Providers and the Health Care Delivery System. An applicant shall provide information and analysis with respect to the impact of the proposed project on existing health care providers in the health planning region, including the impact on geographic and demographic access to services, on occupancy, on costs and charges of other providers, and on costs to the health care delivery system.

Applicant's Response

Citing a need for an additional 192 beds, Blue Heron stated that St. Mary's County residents will have to leave the county for nursing home care if the proposed project is not approved. The applicant also reiterated its previous position that the project will not have any impact on the costs or charges of other facilities. It also listed the programs that it would offer, as the market demands. (DI #63, Replacement p. 62)

In response to staff questions on the original application, the applicant stated that it does not believe that the development of a new nursing home in the county will have a negative impact on the existing nursing homes because of the expected growth in the population aged 65 and older. (DI #11, Ex. 18)

Interested Party Comments

Both interested parties have maintained throughout this review process that the addition of Blue Heron would have a significant adverse impact given the lack of demand as indicated by the relatively low bed occupancy rates³⁰ that the two nursing homes have experienced, despite reductions in bed inventory. Both pointed to recruitment problems and stated that the staff required by Blue Heron would make retention and recruitment of staff more difficult and expensive due to increased competition, which would result in increased charges.

Comments by Chesapeake Shores

Chesapeake Shores stated that, if its occupancy rate falls below 80%, it would not be able to generate sufficient revenue to meet its expenses and would no longer be viable as a going concern. (DI #22, pp. 12-13; DI #23, p. 14). In its comments on the viability standard, Chesapeake Shores referenced its difficulty in recruiting and retaining staff that are relevant to impact. Chesapeake Shores provided examples of the problems that it has had recruiting for some positions: (1) its medical director and psychiatrist both commute more than 60 miles; (2) its pulmonologist commutes 40 miles; (3) it took more than one year for Chesapeake Shores to fill an occupational therapy position and a certified occupational therapy assistant position; (4) it took six months to fill an Assistant Director of Nurses; and (5) it took three months to fill an RN supervisor position. (DI #23, pp. 12-13)

St. Mary's Nursing Center

In commenting on the modified application, St. Mary's Nursing Center stated that the likelihood of significant adverse impacts on existing providers was true when the projected need was incorrectly reported to be 192 beds and is more clearly true now that the projected need has been corrected to 14 beds. The interested party further stated that competition in the area for residents would harm the existing facilities and hamstring a new facility's start-up efforts. (DI #63)

Applicant's Response to Comments

Blue Heron's response to the interested party comments on the modified application did not include a response to comments on this criterion. Blue Heron's response to comments on the original application stated that while the interested parties claim that approval of a new facility would have a negative financial impact on them, neither provided any evidence such as financial analysis that considers fixed and variable expenses to support such claims. (DI #28, p. 19)

³⁰ When the interested parties filed comments on Blue Heron's application, occupancy percentages had been below 90%, even though the number of licensed nursing home beds had decreased because of the delicensure of beds. Through 2013, historical trends also reflected a steady, uninterrupted decline in patient days in the county. This decline was broken in 2014 by a 4% increase in patient days over 2013. I note that, despite this recent increase, the facilities' 2014 patient days were still 8% lower than in 2007.

In addition, Blue Heron conceded “that, if the MHCC did not project any additional bed need, the establishment of a new nursing home in St. Mary’s County would have substantial impact on CS and SMNC.” (DI #28, p. 19)

Reviewer’s Analysis and Findings

The applicant again cited the 2013 erroneous projection of a need for 192 additional beds in claiming that the proposed project would not have any impact on the costs or charges of other facilities. It also cited the projected growth in the population 65 and over as a reason why the approval of an additional nursing home in the county would not have a negative impact on the existing facilities. I conclude that a new nursing home would have little impact on charges to consumers since Medicare and Medicaid are the primary payors for these services. I find, however, that the proposed project, if approved, will have a significant negative impact on the existing facilities’ unit costs of providing nursing home services. Consequently, there is a likelihood of significant adverse impact on the health care delivery system in the county.

As previously explained, the corrected nursing home bed need projection is only for an additional 14 beds in the county. I reiterate that this bed need projection accounts for projected population growth. I note that the two nursing homes had their first increase in patient days in 2014 after many years of decline, and are still below their 2007 utilization. For these reasons, I conclude that approval of a new 90-bed nursing home would probably result in the three facilities competing for essentially the same number of patients as currently served by the two facilities. This would be likely to cause reductions in patient days at the two existing publicly available nursing homes and the financial distress of one or more of the facilities.

While the applicant is correct in pointing out that neither interested party thoroughly quantified the financial impact of approval of proposed project, Chesapeake Shores stated that, if its occupancy rate falls below 80%, it would not be able to generate sufficient revenue to meet its expenses and would no longer be viable as a going concern. I note that Blue Heron did not offer a contrary analysis. While I would have preferred a more thorough quantification of the financial impact, I have no reason to question the Chesapeake Shores’ claim. I find it to be very reasonable that the nursing home would face serious financial challenges. I also note Blue Heron’s acknowledgement “that, if the MHCC did not project any additional bed need, the establishment of a new nursing home in St. Mary’s County would have substantial impact on CS and SMNC.” (DI #28, p. 19) I conclude that, given the projection of the need for only 14 additional beds, Blue Heron’s statement remains true. In addition, I conclude that approval of a new 90-bed nursing home at this time is likely to have a significant negative impact on St. Mary’s County’s health care delivery system by adversely affecting revenue causing financial strains on one or more of the existing facilities, which is likely to impact quality of care and at the most extreme cause closure and dislocation of patients.

For these reasons, I find that the proposed 90-bed Blue Heron facility would likely have a significant adverse impact on the existing nursing home providers and the county’s health care delivery system and, therefore, is not consistent with this criterion.

IV SUMMARY AND RECOMMENDATION

I have analyzed the proposed project's compliance with the applicable State Health Plan standards in COMAR 10.24.01.08.05A and .05B, and with the other Certificate of Need review criteria, COMAR 10.24.01.08G(3)(b)-(f).

For reasons detailed in my Recommended Decision and briefly summarized below, I recommend that Blue Heron's application for a Certificate of Need to establish a new 90-bed nursing home in St. Mary's County be **DENIED**.

Blue Heron did not demonstrate need for the beds

As discussed in more detail in Part IV.A-A(1) of this Recommended Decision regarding compliance with COMAR 10.24.08.05A(1), I find that the corrected and updated need projection published on October 3, 2014 applies to this review. Thus, the projected need for additional nursing home beds in St. Mary's County is 14 and the proposed project would add more than six times the beds projected as needed in 2016.

At the same time, the historical levels of jurisdictional occupancy and utilization suggest that there is no unmet need. Despite a moderate rebound in utilization of the two existing nursing homes in the most recent 12 month reporting period available, utilization and occupancy rates have generally been weak since 2008, when the Commission granted a CON for a new nursing home in the county, a project that was abandoned by the holder of the CON. The existing facilities can fill the projected need for 14 additional CCF beds, if increased patient days or demand shows that the addition of beds is warranted.

Availability of more cost-effective alternatives

I find that the Blue Heron's application for 90 beds is not the most cost effective alternative to meet the 2016 projected need for 14 CCF beds and that a new nursing home is not needed in St. Mary's County.

I note that both Chesapeake Shores and St. Mary's Nursing Center have invested in physical plant improvements in recent years and that, when I toured both nursing homes in May 2015, I was generally favorably impressed with what I saw. Each of the interested party nursing homes performs well on CMS' Nursing Home Compare and has done well in the Commission's Nursing Home Family Satisfaction Survey. In addition, each of the existing nursing homes has the physical capacity to reintroduce delicensed bed capacity, through relicensure of temporarily delicensed beds³¹ or through the addition of up to ten beds if demand increases. Migration of

³¹ As previously noted, eight beds are temporarily delicensed at Chesapeake Shores, effective January 1, 2015. pursuant to COMAR 10.24.01.03C(5)(a), Chesapeake Shores can relicense these beds by providing notice to the Commission on or before December 1, 2015. St. Mary's Nursing Center last changed its licensed bed capacity on July 1, 2013, when it downsized from 180 CCF beds to 160 beds. Thus, as of July 1, 2015, it could obtain ten beds (commonly called "waiver" beds) under COMAR 10.24.01.02A(3) if it has "licensable" space in which to operate the beds.

patients leaving St. Mary's County to receive nursing home services is slightly below the State average.

Viability

I find that the applicant has not demonstrated that its proposed project is viable. While I conclude that Blue Heron and its related real estate entity are likely to be able to secure the necessary resources to implement the project, the availability of resources necessary to sustain the project is highly questionable. The applicant's projection of operating performance is based on the 90 nursing home beds operating at over 95 percent occupancy in the second year of operation. This projected level of utilization appears unrealistic given the historic trend of declining demand for beds in St. Mary's County, and the delicensure of CCF beds in the county over the last ten years.

Impact

I find that approval of Blue Heron's proposed establishment of 90-bed nursing home in St. Mary's County is likely to have significant adverse impact on the county's existing nursing home providers. There is a small projected need for additional nursing home beds in the county. Except for 2014, patient days at the two existing publicly available St. Mary's County nursing home have declined steadily since 2007 and, even now, are below the 2007 level. For these reasons, I conclude that approval of a new 90-bed nursing home would probably cause the existing facilities and the new facility to compete for an inadequate pool of patients and would likely result in inefficient use of capacity at some or all of the nursing homes and consequent financial distress.

APPENDIX A

Record of the Review

Docket Item #	Description	Date
1	Howard L. Sollins, Esquire, filed a letter of intent (LOI) on behalf of St. Mary's Long Term Care, LLC ("St. Mary's or SMLTC") to establish a new 124-bed continuing care facility in St. Mary's County. MHCC staff responded in a letter dated February 28, 2013 that "(T)he most recent CON Application review Schedule, published in the <i>Maryland Register</i> on October 19, 2012, states that (t)hese schedules are for CCF projects that do not involve any addition of CCF bed capacity within the jurisdiction in which the project is located. No schedule for submission of projects involving the addition of CCF beds is being established and no such projects will be accepted for review and docketing by MHCC until an update of the 2011 CCF bed need projections, established in 2007, is published....When MHCC publishes an updated CCF bed need projection, a review schedule will be published, establishing review cycles for any jurisdictions in which a net need for CCF beds is identified."	2/26/2013
2	Howard L. Sollins, Esquire, responded to MHCC's February 28 th letter that "the current Long Term Care chapter of the State Health Plan (the "Chapter") identifies a current need for CCF beds in St. Mary's County. Under the Chapter, that need projection remains in effect until updated....The State Health Plan is required to be periodically updated, every five years. (t)his particular Chapter has not been updated within five years....The failure to update the Chapter cannot support a moratorium on valid LOIs." MHCC staff responded on April 12, 2013 that "although (MHCC) disagrees with the arguments stated in your March 20, 2013 letter, Commission staff has reconsidered its refusal to accept the February 26, 2013 letter of intent submitted on behalf of St. Maryland's Long Term Care, LLC....Commission staff will hold the letter of intent until the submission date published in the <i>Maryland Register</i> for nursing home projects."	3/20/2013
3	Howard L. Sollins, Esq., filed a LOI on behalf of St. Mary's Long Term Care, LLC, to establish a new 140-bed CCF located in St. Mary's County. MHCC staff acknowledged receipt of the LOI on August 8, 2013.	8/2/2013
4	St. Mary's Long Term Care, LLC, d/b/a Blue Heron Nursing & Rehabilitation Center ("Blue Heron or BHNRC"), submits a Certificate of Need (CON) application seeking to establish a 140-bed comprehensive care facility in St. Mary's County (Matter No. 13-18-2348).	10/4/2013
5	MHCC acknowledges receipt of this CON application by letter.	10/7/2013
6	Staff requests that <i>The Enterprise</i> publish notice of receipt of the CON application for St. Mary's County.	10/7/2013
7	Staff requests that the <i>Maryland Register</i> publish notice of receipt	10/7/2013

	of the CON application.	
8	<i>The Enterprise</i> provided proof of publication on the receipt of the application.	10/21/2013
9	Commission staff finds the CON application incomplete and requests additional information. A copy of an email from staff acknowledging that the set of completeness questions was sent electronically to the applicant.	10/21/2013
10	BHNRC requests extending the date for submission of responses to completeness questions from November 4 th to November 18 th . Staff acknowledges receipt of BHNRC's request on November 1 st and grants the extension of time to submit responses to November 18 th .	11/1/2013
11	Commission receives responses to the October 21, 2013 request for additional information.	11/18/2013
12	Henry E. Schwartz, LLC, on behalf of St. Mary's Nursing Center, which is an existing CCF operating in St. Mary's County, stated the proposed CON would adversely affect this facility and requested as an "interested party" to receive copies of documents filed with respect to the current application. Commission staff acknowledged receipt of this request on December 5 th and sent instructions on the location of the CON application, completeness questions and the completeness information on the Commission's website. Staff informed Mr. Schwartz that his client must meet the definition, and file written comments within 30 days of docketing the CON application to become an "interested party."	10/30/2013
13	Commission staff completes review of the responses to completeness questions from November 18 th and sends a second request seeking clarification to these responses.	12/6/2013
14	BHNRC requests extending the date for submission of responses to the second set of completeness questions from December 20 th to January 9, 2014. MHCC staff acknowledges receipt of this request on December 20 th and grants the extension of time for BHNRC to submit responses to January 9 th .	12/18/2013
15	Commission receives responses to the December 6, 2013 request for additional information.	1/9/2014
16	Commission requests publication of notification for the formal start of review in <i>The Enterprise</i> .	1/24/2014
17	Commission requests publication of notification for the formal start of review in the <i>Maryland Register</i> .	1/24/2014
18	Staff sends a copy of the CON application to the St. Mary's County Health Department for review and comment.	1/24/2014
19	Commission acknowledges receipt of BHNRC's January 9, 2014 response and informed notification of docketing for the application in the <i>Maryland Register</i> effective February 7, 2014. While the application is docketed, staff requested that the applicant provide response to additional questions.	1/27/2014

20	Commission receives responses to the additional questions requested from the January 27, 2014 docketing letter.	2/12/2014
21	<i>The Enterprise</i> sent confirmation that a Notice on the Formal Start of Review was published on February 7, 2014.	2/10/2014
22	Henry E. Schwartz, Esq., on behalf of St. Mary's Nursing Center, submitted a request for Interested Party status pursuant to COMAR 10.24.01.01B(20)(e) and comments on how the applicant does not meet the State Health Plan standards and review criteria.	3/5/2014
23	Marta D. Harting, Esq., on behalf of LP Lexington Park, LLC, d/b/a Chesapeake Shores, submitted a request for Interested Party status pursuant to COMAR 10.24.01.01B(20).	3/10/2014
24	Howard L. Sollins, Esq., requested confirmation via email from MHCC that the applicant has 15 days after receipt or until March 25, 2014 to respond to Interested Party comments from both Chesapeake Shores and St. Mary's Nursing Center. Commission staff confirmed agreement with the March 25 th date in an email response dated March 11, 2014.	3/10/2014
25	Marta D. Harting, Esq., submitted an Errata to Interested Party Comments of LP Lexington Park, LLC, d/b/a Chesapeake Shores.	3/24/2014
26	Marta D. Harting, Esq., submitted a request for an Evidentiary Hearing.	3/24/2014
27	Marta D. Harting, Esq., submitted a copy of email sent to Howard L. Sollins, Esq. and Henry E. Schwartz, Esq., requesting an evidentiary hearing. Howard L. Sollins, Esq., responded in email on March 24, 2014 that the applicant requests time to file a response to the request for an evidentiary hearing. Suellen Wideman, Assistant Attorney General, responded in email on March 24, 2014 to representatives from BHNRC, LP Lexington Park, and Chesapeake Shores that MHCC will appoint a Commissioner as Reviewer who will rule upon Interested Party requests and any subsequent requests and motions, and asked that all parties respond to the request for evidentiary hearing on or before April 3, 2014.	3/24/2014
28	Howard L. Sollins, Esq., submitted responses by BHNRC to comments from LP Lexington Park, LLC, d/b/a Chesapeake Shores and St. Mary's Nursing Center.	3/25/2014
29	Howard L. Sollins, Esq., submitted response to LP Lexington Park, LLC, d/b/a Chesapeake Shore, opposing the request for Evidentiary Hearing.	4/3/2014
30	Marta D. Harting, Esq., submitted response to SMLTC for Motion to Strike Response to Request for Evidentiary Hearing or In the Alternative, for Leave to File Reply and present Oral Argument on the need for an evidentiary hearing.	4/10/2014
31	Howard L. Sollins, Esq., submitted the Opposition to LP Lexington Park, LLC, d/b/a Chesapeake Shores' Motion to Strike its Response to the Request for Evidentiary Hearing.	4/16/2014

32	Letters of Support for Blue Heron Nursing & Rehabilitation Center	5/7/2014
33	Henry E. Schwartz, Esq., and Marta D. Harting, Esq., filed jointly a copy of the Memorandum Opinion on Motions to Dismiss issued on March 14, 2014 by the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, in the case captioned <i>In re Fundamental Long term Care, Inc., Debtor, and Estate of Jackson, et al., Plaintiffs, v General Electric Capital Corporation, et al., Defendants</i> , Case No. 8:11-bk-22258-MGW Chapter 7).	5/13/2014
34	Paul Fronstin submitted letter to Blue Heron Nursing & Rehabilitation Center, LP Lexington Park, LLC d/b/a Chesapeake Shores, and St. Mary's Nursing center: announcing his appointment as Reviewer; granting Chesapeake Shores and St. Mary's Nursing Center Interested Party status and finding that both filed comments that meet the requirements for the acceptance of written comments by a person seeking interested party status; and granting Chesapeake Shore' request to file a response to Blue Heron's opposition to an evidentiary hearing.	5/16/2014
35	Marta D. Harting, Esq. submitted response from Chesapeake Shore's Reply to Response to Request for Evidentiary Hearing	5/27/2014
36	Jeff Anderson, signed "a concerned citizen," submitted information on the Principal owners of Fundamental Administrative Services, Inc. ("FAS"), Fundamental Clinical and Operational Services, LLC ("FCOS"), and Fundamental Long Term Care Holdings ("FLTCH").	5/28/2014
37	Howard L. Sollins, Esq., submitted response to two issues filed by Chesapeake Shores and St. Mary's Nursing Center.	5/28/2014
38	Paul Fronstin submitted request for tentative dates to conduct a site visit at the proposed Blue Heron Nursing and Rehabilitation Center and to the existing Chesapeake Shores and St. Mary's Nursing Center.	6/16/2014
39	E-mails from Howard L. Sollins, Esq., Marta D. Harting, Esq., and Henry E. Schwartz, Esq. regarding available dates for the proposed MHCC site visit.	6/16 through 6/17/2014
40	E-mails between Howard L. Sollins, Esq., Marta D. Harting, Esq. and Henry E. Schwartz, Esq. regarding the date for the proposed MHCC site visit.	6/20/2014
41	Paul Fronstin sent to Howard L. Sollins, Esq., Marta D. Harting, Esq., and Henry E. Schwartz, Esq. the corrected comprehensive care facility bed need for St. Mary's County published in 40:8 <i>Maryland Register</i> 767 (April 19, 2013); Mr. Fronstin also allowed the applicant to decide by July 10, 2014 whether Blue Heron chooses to modify its CON application to account for this corrected CCF bed need projection.	6/27/2014
42	Howard L. Sollins, Esq., submitted a Motion for Disclosure of Information, Stay, and Revised Schedule regarding the MHCC's issuance of an amended comprehensive care facility bed need	7/3/2014

	projection for St. Mary's County in the <i>Maryland Register</i> .	
43	Howard L. Sollins, Esq. submitted a letter advising the Commission that his client preserves the right to modify its application or pursue the application as docketed.	7/10/2014
44	Henry E. Schwartz, Esq. submitted a letter on behalf of St. Mary's Nursing Center stating "no objection to providing Blue Heron ... adequate time in which to respond to the need projection," but disagrees with "the applicant's position that it is inappropriate or contrary to law for the Commission to fix a simple mistake in the need calculations."	7/14/2014
45	Marta D. Harting, Esq. submitted Chesapeake Shore's Response to Motion for Disclosure of Information, Stay and Revised Schedule by Blue Heron Nursing and Rehabilitation Center.	7/14/2014
45A	Paul E. Parker e-mailed the attorneys representing the applicant and the two interested parties that the amended CCF bed need projection for St. Mary's County would be in the July 25, 2014 edition of the <i>Maryland Register</i> , and not the July 11 th edition.	7/15/2014
46	Howard L. Sollins, Esq. submitted a Reply Memorandum in Support of Motion for Disclosure of Information, Stay and Revised Schedule.	7/16/2014
47	Paul Fronstin sent e-mail to applicant and interested parties cancelling the July 31 site visit.	7/19/2014
48	Howard L. Sollins, Esq. submitted a Supplemental Memorandum in Support of Motion for Disclosure of Information, Stay and Revised Schedule.	8/1/2014
49	Marta D. Harting, Esq. submitted Response to Supplemental Memorandum in Support of Motion for Disclosure of Information, Stay and Revised Schedule.	8/8/2014
50	Howard L. Sollins, Esq. submitted a response to the Reviewer's June 27 th letter, stating that Blue Heron was not filing a modification to the CON as of August 11 th , and that the Commission must use the CCF bed need projection in effect when the Blue Heron letter of intent was filed.	8/11/2014
51	Paul Fronstin submitted to the applicant and two interested parties his ruling to deny the Motion for Disclosure of Information, Stay, and Revised Schedule. The Reviewer also granted Blue Heron an extension until November 10, 2014 to determine what action it wants to take regarding its pending CON application.	9/9/2014
52	State Senator Roy P. Dyson, representing Calvert, Charles, and St. Mary's Counties, submitted a letter of opposition to the establishment of another nursing facility in St. Mary's County.	9/18/2014
53	Howard L. Sollins, Esq. notified the Commission that the Applicant intends to maintain its pending CON application but with a modification, and requests an additional sixty (60) days beyond the December 10, 2014 date to file the Modified CON application.	11/10/2014

54	Howard L. Sollins, Esq. submitted a memorandum from Andrew L. Solberg, consultant, explaining why MHCC's St. Mary's County CCF bed need projection remains inaccurate, and that further correction to this bed need is warranted.	11/19/2014
55	Marta D. Harting, Esq. submitted Chesapeake Shore's objections for an extension of time for Blue Heron to file a modified CON application beyond December 10, 2014.	11/19/2014
56	Paul Fronstin submitted his ruling that the Corrected CCF Projections published in 41:20 Maryland Register 1180 (Oct. 3, 2014) accurately reflect the treatment of migration specified in the formula and granting the request by Blue Heron for an extension of 60 additional days until February 9, 2015 to file the modified application.	12/2/2014
57	Melissa Warlow submitted the modified CON application for Blue Heron Nursing and Rehabilitation Center.	2/9/2015
58	MHCC posted and gave notice regarding the modification of the Blue Heron CON application for the construction of a 90 bed CCF to be located at 20877 Point Lookout Road in Callaway, Maryland.	2/11/2015
59	Henry E. Schwartz filed on behalf of St. Mary's Nursing Center comments stating the applicant does not meet State Health plan standards and review criteria.	2/18/2015
60	Marta D. Harting, Esq. submitted comments on behalf of Chesapeake Shores regarding Blue Heron's modified CON application.	2/27/2015
61	Paul Fronstin submitted request to applicant and two interested parties regarding possible dates for a site visit to the proposed Blue Heron Nursing and Rehabilitation Center and to Chesapeake Shores and St. Mary's Nursing Center.	3/6/2015
62	E-mails from Howard L. Sollins, Esq., Marta D. Harting, Esq. and Henry E. Schwartz, Esq. regarding proposed dates for the Reviewer's site visit to St. Mary's County	3/9 through 3/11/2015
63	Howard L. Sollins, Esq. submitted Response to Interested Party Comments on Modified CON application.	3/13/2015
64	Henry E. Schwartz, Esq. submitted Response to the applicant's comments regarding the Interested Party opposition to the filed Modified CON application.	3/24/2015
65	Howard L. Sollins, Esq. submitted Motion to Strike the Response submitted by St. Mary's Nursing Center.	3/30/2015
66	E-mails from Howard L. Sollins, Esq., Marta D. Harting, Esq., and Henry E. Schwartz, Esq. regarding the proposed site visit by Reviewer and staff. Marta D. Harting, Esq., submitted representatives from Chesapeake Shores who would be present at site visit.	March 2015
67	Howard L. Sollins, Esq. provided a list of representatives from Blue Heron who would attend the site visit and Mapquest driving directions.	4/1/2015

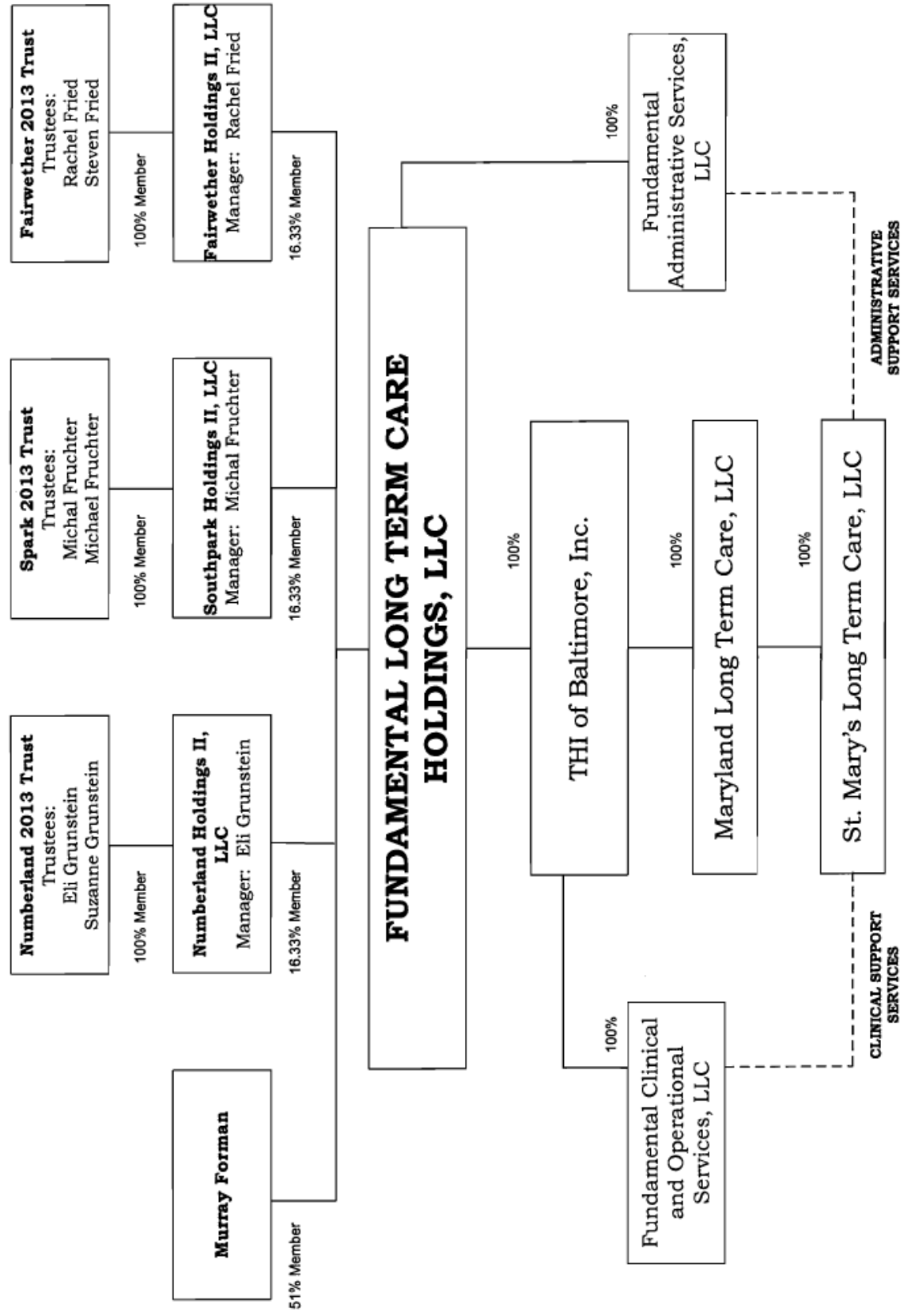
68	Henry E. Schwartz, Esq. submitted representatives from St. Mary's Nursing Center who would be present at site visit.	4/6/2015
69	Paul Fronstin submitted the site visit itinerary to the applicant and two interested parties.	4/8/2015
70	E-mails between Reviewer, applicant, and interested parties regarding postponement of MHCC site visit.	April 2015

APPENDIX B

Ownership Interests and Organization Charts

Provided by Applicant January 9, 2014 (DI #15, Att. 1)

PROPOSED ORGANIZATIONAL CHART



Organizational Structure of **St. Mary's Healthcare Realty, LLC**

