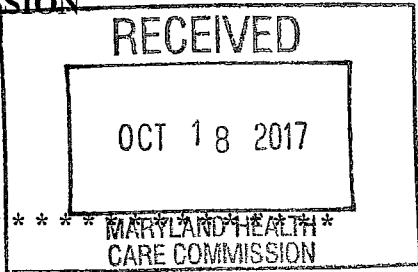


**IN THE MATTER OF**  
**PRESBYTERIAN SENIOR**  
**LIVING SERVICES, INC. d/b/a**  
**GLEN MEADOWS RETIREMENT**  
**COMMUNITY**  
**Docket No. 17-03-2395**

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**BEFORE THE**  
**MARYLAND**  
**HEALTH CARE**  
**COMMISSION**



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**COMMISSION STAFF'S RESPONSE TO EXCEPTIONS**  
**FILED BY PRESBYTERIAN SENIOR LIVING SERVICES, INC.**  
**d/b/a GLEN MEADOWS RETIREMENT COMMUNITY**

The Commission should reject the exceptions filed by Presbyterian Senior Living Services, Inc. d/b/a Glen Meadows Retirement Community (Glen Meadows) and adopt the Staff Report and Recommendation as the decision of the Commission. As detailed in the Staff Report, Glen Meadows' Certificate of Need (CON) application fails to comply with requirements in Commission regulations, and, for this reason, should be denied by the Commission.

Glen Meadows failed to make the essential showing of public need for its proposal to add temporarily delicensed, publicly-available nursing home beds from a former Baltimore County nursing home to replace most of Glen Meadows' subscriber-restricted nursing home beds. The applicant did not and cannot demonstrate that there is an unmet need among Baltimore County residents for publicly available nursing home beds.

Glen Meadows cannot make the required showing of need because Baltimore County has an excess of over 1,000 nursing home beds, as shown in the Commission's published nursing home bed need projections that are applicable in this review. While it may be natural to have sympathy for Glen Meadows, Maryland law and Commission regulations require that the Commission not

award a Certificate of Need<sup>1</sup> unless an applicant satisfies an applicable needs analysis in the State Health Plan or demonstrates that the project will meet an unmet need of the population that would be served in nursing home beds that are available to the general public.

**Glen Meadows' Nursing Home is Different from Nursing Homes that are Available to the General Public.**

Glen Meadows is a continuing care retirement community (CCRC), a “closed” community that obtained comprehensive care facility (CCF, or nursing home) beds without having to undergo Certificate of Need review and approval. A CON is not required under Maryland law for a nursing home at a CCRC because “the facility is *for the exclusive use of the provider's subscribers* who have executed continuing care agreements and paid entrance fees ....” (Maryland Code Ann., Health-General §19-114(d)(2)(ii) (emphasis added)).<sup>2</sup>

Under Maryland CON law, a CCRC nursing home is specifically excluded from the definition of “health care facility” and may operate a nursing home for its subscribers if the number of nursing home beds do not exceed a certain percentage of the CCRC’s number of independent living units. (*Id.*). Thus, a CCRC nursing home is quite different from nursing homes that are available to members of the general public, which, as defined health care facilities under Maryland law, must be established through CON review and approval, and must meet and comply with standards in the State Health Plan for Facilities and Services: Nursing Home Services, COMAR 10.24.08 (Nursing Home Chapter).

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<sup>1</sup> The Commission’s governing statute defines Certificate of Need as “a certification of *public need* issued by the Commission „, for a health care project.” (Health-General Article §19-114(c), Maryland Code Annotated (emphasis added)). “Health-General” will be used to refer to the Health-General Article, Maryland Code Annotated.

<sup>2</sup> A parallel definition is found in the Commission’s procedural regulations at COMAR 10.24.01.02B(12).

**The Commission's Nursing Home Bed Need Projections, which "Remain in Effect" Until Replaced, Show No Nursing Home Bed Need in Baltimore County.**

The Commission's bed need projections, published at 43 *Maryland Register* 9:246 (April 29, 2016), show a surplus of 1,139 nursing home beds in Baltimore County. In the application process, Glen Meadows performed what it characterized as an update of the Baltimore County nursing home bed need projections and concluded that there were *only* 616 excess nursing home beds in Baltimore County. (Staff Report at 5, citing DI #2, pp. 21-25). In its exceptions, Glen Meadows continues to acknowledge that Baltimore County has a surplus of nursing home beds; however, it nevertheless insists that Commission staff's recommendation should not be adopted by the Commission because the nursing home bed need projections are based upon old data. (Exceptions at 1).

Glen Meadows ignores the requirement in the Nursing Home Chapter, at COMAR 10.24.08.07K(3), that the "[p]ublished [need] projections remain in effect until the Commission publishes updated nursing home bed need projections ...."<sup>3</sup> The Staff Report points out (as again acknowledged by Glen Meadows) that Commission staff has begun the process of preparing a replacement Nursing Home Chapter and has been considering various methodologies to arrive at an updated nursing home bed need in Maryland. The comprehensive planning that will result in a replacement Nursing Home Chapter is needed because the system of long term care is evolving. This is particularly true in Maryland because the proposed Total Cost of Care Model Agreement that is expected to replace the current All-Payor Model Agreement with the Centers for Medicare & Medicaid Service regarding payment for hospital services in 2019. Under the Total Cost of

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<sup>3</sup> Another provision of the Nursing Home Chapter, COMAR 10.24.01.08.05A(1), addresses bed need, and provides that "[t]he bed need in effect when the Commission receives a letter of intent ... will be the need projection applicable to the review." (Staff Report, p. 5).

Care Model, all Part A and Part B will be subject to the budget limits in the Agreement, not just for Part A hospital inpatient services and Part B hospital outpatient services, as is the case today. Furthermore, there is less use of institutional nursing home care, with many older Maryland residents preferring to receive home health agency or other in-home care and avoid moving to an institutional setting as long as possible. This is the situation with Glen Meadows' residents as well as with others who would traditionally be admitted to publicly available nursing homes.

The fact that the nursing home bed need projections are based on underlying older data does not affect the applicability of the bed need projections under the "remains in effect" regulations. In the case of *Adventist HealthCare Midatlantic v. Suburban Hospital, Inc.*, 350 Md. 104 (1998), the Court of Appeals addressed the issue of the continued applicability of a predecessor Commission's out-of-date need projections regarding cardiac surgery when the Cardiac Surgery Chapter had "remains in effect" language like that in the current Nursing Home Chapter. In that case, as here, Commission staff had begun the process of preparing a replacement State Health Plan chapter.

The Commission, as well as the Court of Appeals, rejected the attempts of applicants to come up with new need projections during a CON review. It is still true today, with the Commission's update of the Nursing Home Chapter, as it was in the Court of Appeals' decision regarding an earlier Cardiac Surgery Chapter, that, in updating State Health Plan chapters, the Commission "historically review[s] the underlying assumptions of the methodology employed based on current utilization patterns, advancements in medical practice, refinements in available data, and changes in financing." (*Id.* at 115). The Court of Appeals determined that it was not "appropriate to use a CON contested case proceeding to determine the validity and applicability of the published need projections contained in the existing State Health Plan." (*Id.* at 122).

Under the guidance of the Court of Appeals, and the Nursing Home Chapter's bed need projections that "remain in effect," there is no need for additional nursing home beds that are available to the general public in Baltimore County. Commission Staff's recommendation that the application be denied was correct under existing Maryland law and regulations.

**Glen Meadows Seeks to Make 22 Additional Nursing Home Beds Available to the General Public in Baltimore County, Despite a Surplus of Existing Nursing Home Beds in the County.**

In its exceptions, Glen Meadows states repeatedly that, if the 22 publicly available nursing home beds were added to its CCRC nursing home, there would be no increase in the inventory of CCF beds. While this is technically true, it misses the point. Glen Meadows also states that, if its CON application is approved, it really intends to use only ten of the 22 publicly available beds. There is, of course, nothing that, if approved, would require Glen Meadows to limit admissions to ten beds. Thus, the project must be viewed as the Glen Meadows sought in its CON application. It is an application to add 22 publicly available beds at Glen Meadows, thereby increasing the number of publicly available nursing home beds in Baltimore County.

It is important to note that the 22 publicly available beds that Glen Meadows seeks to relocate to its CCRC nursing home are temporarily delicensed, or "paper beds" that would not otherwise be in use in Baltimore County. The facility where these 22 publicly available paper beds were located is closed. As noted in the Staff Report, although Glen Meadows' proposed project

does not result in establishment of a new nursing home, as that would be commonly understood, ... the project does have the effect of establishing an additional CCF in Baltimore County that can compete with other CCFs for admissions from the general population [and that] adds to the generally available bed capacity in Baltimore County ....

(Staff Report, p. 17).

Thus, the publicly available beds that Glen Meadows wants to add to its CCRC subscriber-restricted nursing home would, in reality, create new non-restricted nursing home bed capacity in Baltimore County.

Under the Nursing Home Chapter, at COMAR 10.24.08.05B(1)(a) and (b), an applicant using beds in the Commission's inventory must demonstrate unmet needs of the population to be served, which in this review means those residents of Baltimore County who will use publicly available nursing home beds. In addition, the applicant must make the same demonstration of need for the publicly available beds at the new location.

The Commission's procedural regulations, at COMAR 10.24.01.08G(3)(b), require that "[i]f 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." (emphasis added). As previously discussed, the Commission's nursing home bed need projections that apply in this review show a large surplus of publicly available nursing home beds in Baltimore County. This means that Glen Meadows cannot demonstrate that there is an unmet need of the population that uses publicly available beds (in contrast to Glen Meadows' subscribers who used the CCRC's subscriber-restricted nursing home beds).

The FutureCare-Homewood (Homewood) project, cited by Glen Meadows, is limited to the specific facts of that review. Homewood is an existing publicly-available, freestanding nursing home (i.e., not a CCRC subscriber-restricted nursing home) that, in the periods preceding the review, had experienced high occupancy of its available nursing home beds. Homewood purchased and received Commission approval to relocate publicly available nursing home beds that had been in a subacute unit at Good Samaritan Hospital. Those beds experienced high

occupancy prior to delicensure. In addition, the hospital stated that it would refer to Homewood those hospital patients who were being discharged and were in need of the level of care provided at Homewood.

Glen Meadows also cited the Staff Report in the Ingleside at King Farm review (Docket No. 14-15-2355). That review is directly on point. Ingleside at King Farm, like Glen Meadows, is a CCRC that sought CON approval to relocate temporarily delicensed nursing home beds that were available to the general public, without actually adding any physical bed capacity. Commission staff recommended denial of the application because Ingleside failed to demonstrate need, with staff noting that there was an excess of publicly available nursing home beds in Montgomery County, where Ingleside at King Farm is located. The Staff Report was never considered by the full Commission because, in the face of the recommended denial, Ingleside at King Farm withdrew its application.

Furthermore, under the Commission's criterion that it assess the availability of more cost-effective alternatives, COMAR 10.24.01.08G(3)(c), Glen Meadows' project is not the most cost-effective alternative for providing nursing home beds to the general public in Baltimore County. As the Staff Report notes, although the cost to Glen Meadows of implementing the proposed project is relatively low, existing nursing homes in Baltimore County currently have more than sufficient nursing home beds that are available to the general public without the facilities needing to spend additional funds. (Staff Report, p. 22).

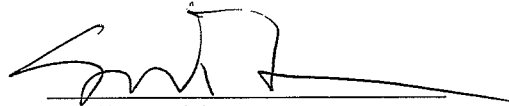
Because Glen Meadows has not shown – and cannot show – that there is an unmet need of Baltimore County residents for the publicly available beds it wants to implement at the CCRC, the Commission should deny Glen Meadows' application.

## CONCLUSION

Glen Meadows urges the Commission to be swayed by Glen Meadows' private need and award it a CON despite a lack of public need, which required under Maryland law and regulations. Commission staff properly concluded that Glen Meadows failed to demonstrate that its proposal to add publicly available nursing home beds would satisfy "an unmet need for additional beds by the general population in Baltimore County ...." (Staff Report at 20). Because Baltimore County has a substantial excess of publicly available nursing home beds, Glen Meadows cannot show the public need for its project.

For the foregoing reasons, the Commission should adopt the Staff Report and Recommendation as its decision and reject the exceptions filed by Glen Meadows.

Respectfully submitted,



Suellen Wideman  
Assistant Attorney General  
*Counsel to Staff of the Maryland Health Care  
Commission*

## CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of October, 2017, a true and exact copy of the foregoing Response to Exceptions was sent by email to:

Rose M. Matricciani, Esquire  
Whiteford, Taylor & Preston, L.L.C.  
7 St. Paul Street  
Baltimore, Maryland 21202



Suellen Wideman