

WHITEFORD, TAYLOR & PRESTON L.L.P.

SEVEN SAINT PAUL STREET
BALTIMORE, MARYLAND 21202-1636

MAIN TELEPHONE (410) 347-8700
FACSIMILE (410) 752-7092

ROSE M. MATRICCIANI
DIRECT LINE (410) 347-9476
DIRECT FAX (410) 234-2355
rmatricciani@wtplaw.com

BALTIMORE, MD
BETHANY BEACH, DE*
BETHESDA, MD
COLUMBIA, MD
DEARBORN, MI
FALLS CHURCH, VA
LEXINGTON, KY
OCEAN CITY, MD
PITTSBURGH, PA
ROANOKE, VA
TOWSON, MD
WASHINGTON, DC
WILMINGTON, DE*

WWW.WTPLAW.COM
(800) 987-8705

October 16, 2017

Via Hand Delivery

Ruby Potter, Administrator
Center for Health Care Facilities Planning and Development
Maryland Health Care Commission
4160 Patterson Avenue
Baltimore, MD 21215-2299
ruby.potter@maryland.gov

**RE: Presbyterian Senior Living Services, Inc.
d/b/a Glen Meadows Retirement Community
Docket No. 17-03-2395
Exceptions**

Dear Ms. Potter:

Enclosed please find thirty (30) copies of the "Exceptions to Staff Report and Recommendation" which Report was issued October 3, 2017 in the above-named matter.

Very truly yours,



Rose M. Matricciani

RMM:mrm

Enclosure:
Exceptions to Staff Report and Recommendation

Ruby
October 16, 2017
Page 2

cc: Peter Dabbenigno, Executive Director
Presbyterian Senior Living Services, Inc.
d/b/a Glen Meadows Retirement Community

Andrew L. Solberg, Consultant
A.L.S. Healthcare Consultant Services

2264073

IN THE MATTER OF	*	BEFORE THE
PRESBYTERIAN SENIOR	*	MARYLAND HEALTH
LIVING SERVICES, INC. d/b/a	*	CARE COMMISSION
GLEN MEADOWS RETIREMENT	*	DOCKET NO. 17-03-2395
COMMUNITY	*	

EXCEPTIONS TO STAFF REPORT AND RECOMENDATION

Presbyterian Senior Living Services, Inc. d/b/a Glen Meadows Retirement Community (“Glen Meadows”), by its undersigned attorney, and pursuant to COMAR 10.24.01.90B, submits the following Exceptions to the Staff Report and Recommendation issued October 3, 2017 in the above captioned matter.

Introduction

The Glen Meadows project was proposed because Glen Meadows has financial difficulties and this project will improve its financial health, of which there have been challenges due to the small nursing home center on its campus. This fact was acknowledged by Staff in the Staff Report and Recommendation where Staff found that high nursing home bed occupancy correlated with nursing home profitability, and with profitability of the CCRC as a whole. (Staff Report and Recommendation p.23).

Exceptions Summary

The Staff Report and Recommendation should be rejected because Staff did not apply up-to-date projections by using old 2009 data (which only projected need until 2016) in 2017, and because Staff acknowledged that Staff has been reviewing approaches to updating the State Health Plan’s Comprehensive Care Facility (“CCF”) forecasting methodology (Staff Report and Recommendation p.5), and Glen Meadow is not adding CCF beds to the inventory. Therefore, the Staff Report and Recommendation should be rejected and Glen Meadows found to have met the standard because Staff does not know if the use of new methodology or through the use of updated projections for the year 2017, whether the excess bed capacity in Baltimore County would be a lot less than the bed projection under the old 2009 data and 2016 projections.

The Staff acknowledged that the actual physical bed supply in Baltimore County would not be affected by the Glen Meadows project, and then erroneously noted that the transfer of beds to the general public would effectively increase by twenty-two (22). (Staff Report and Recommendation p.13). This analysis is incorrect because 22 beds are already in the inventory, and Glen Meadows would not be adding beds to its current complement of CCF beds. Furthermore, while acknowledging that Glen Meadows projects that no more than 10 beds would be available to the public because of the needs of continuing care residents (“CCR”), the Staff failed to note that this would further reduce the current use of CCF beds in Baltimore County. (Staff Report and Recommendation p.13). The Recommendation should be rejected because the proposed project does not add CCF beds to the CCF beds in Baltimore County, and Glen Meadows should be found to be in compliance with the standard.

The Staff found several nursing homes within a 15-30 minute drive of Glen Meadows. (Staff Report and Recommendation p.14). On the premise that all nursing homes are the same, the Staff found the argument that Glen Meadows is the only CCF in the north-eastern section of Baltimore County not compelling. In addition, the Staff did not perform an analysis of the distance between the outlying areas of Baltimore County and the distance to Glen Meadows in comparison to the distance to other CCF beds, nor did it fully analyze the remoteness and lack of CCF beds in the north-eastern section of Baltimore County. The Recommendation should be rejected because the Staff failed to analyze the isolated north-eastern section of Baltimore County where there are no CCFs; failed to properly consider the quality of care at Glen Meadows; and failed to note that Glen Meadows is situated well to attract residents in that isolated north-eastern section of the County to its five-star quality facility.

While the Staff acknowledged that the standard for CCF occupancy of 90% or higher is intended for use as a test for facilities that are actually adding physical bed capacity, rather than simply expanding the population that can use the facility’s existing bed capacity as in the Glen Meadows project, and that this standard is not applicable to this project (Staff Report and Recommendation p.16), the Staff continued to opine on the bed occupancy at Glen Meadows, which has only CCF beds restricted to CCRC residents, and the need in Baltimore County. The Staff’s Recommendation should be rejected because the Staff admitted that this standard should not apply to this project, and trying to rationalize why it should apply is clearly erroneous. The Staff acknowledged that this standard does not apply. Even if the Commission agreed with Staff

about the application, the occupancy of Comprehensive Care Beds (“CCF”) in Baltimore County was essentially 90% (89.4% - 89.9%). Therefore, the Staff Report and Recommendation should be rejected and Glen Meadows found to have met the standard because the percentage of occupancy noted in the Staff Report and Recommendation was over 89% occupancy, and Staff found the Glen Meadows did not meet the standard because of a .1% to .6% difference using outdated projections.

When determining the viability of the Glen Meadows project, Staff acknowledged that higher CCF census at Glen Meadows correlated to higher nursing home profitability and profitability to the continuing care retirement community (“CCRC”) as a whole. (Staff Report and Recommendation p.23). However, after acknowledging the correlation, Staff found it difficult to believe that the Glen Meadows project, which results in higher revenues for the nursing home, would lead to long-term viability. (Staff Report and Recommendation p.23). This analysis by the Staff should be rejected because they admit the correlation showing higher nursing home occupancy results in higher profitability.

In addition, the standard for viability of the project includes that the Staff consider community support. Staff failed to address the broad support that the Glen Meadows project received from its Resident’s Association, the State Association that represents CCRC residents in Maryland and the former Chief of Continuing Care of the Maryland Department of Aging. Therefore, the Staff Report and Recommendation should be rejected and the Commission should find that Glen Meadows met the standard for viability of the project.

I. RELEVANT REGULATIONS AND EXCEPTIONS SPECIFIC TO THE REGULATIONS

A. Comar 10.24.08.05A(1)

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

B. COMAR 10.24.08.05B(1)

(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.

The bed need projections that were used were from 2016 (based on 2009 data) even though the letter of intent was submitted in February 2017. While acknowledging that the 2016 numbers were in effect at that time because Staff had not updated the projections, we note that the Glen Meadows project does not add any beds to the inventory and that the 2016 projections are out of date. Because the methodology does not have applicable bed need projections that go past 2016, Glen Meadows prepared its own calculation based upon the 2019 data supplied by the Staff. The purpose of the exercise showed that compared to the current 2016 bed need projections, 523 additional beds were needed in Baltimore County than the MHCC projections show. That constitutes a significant reduction in bed excess. The number of additional beds needed could be higher, but the calculation was performed using the old data.

Even if you accept the 2016 projection of bed needs, the Glen Meadows project does not add additional beds to the inventory, and the Staff Report and Recommendation fails to recognize that the projected use on a regular basis will be ten (10) beds because of CCR needs.

COMAR 10.24.08.05B(2) and (3)

(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.

The Staff acknowledged that this standard is not truly applicable to this project. However, Staff then went on to find Glen Meadows inconsistent with the standard. This is clearly erroneous.

The facility occupancy standard for a nursing home requires the approval of a nursing home 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. However, in FutureCare Homewood, Docket No. 17-24-2396 (“FutureCare”), Staff allowed FutureCare to adjust its occupancy rate, which did not meet the 90% occupancy rate in 2015 and 2016, by allowing it to factor in patient days lost due to the closure of beds providing discretion in meeting in 90% standard. (FutureCare Staff Report and Recommendation p.12). Since the Staff obviously has discretion in how it looks at the 90% occupancy issue, why then should Glen Meadows be penalized for a minimal bed occupancy discrepancy? This lack of consistency treats CCRCs differently than it treats free-standing nursing homes. This standard should be considered met for purposes of Glen Meadows’ application.

(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.

Although acknowledging that the project does not result in a new nursing home (Staff Report and Recommendation p.17), the Staff continued an analysis noting that Baltimore County CCF beds were just under the 90% threshold by citing the 2014 data of 89.4% occupancy. (Staff Report and Recommendation p.17). However, staff noted that since the application was filed, more recent occupancy data indicates Baltimore's jurisdictional bed occupancy in 2015 to be 89.9% on the average. (Staff Report and Recommendation p.17). Therefore, regardless of which calculation is used, Glen Meadows is being denied a CON because of a spread of a .1 to .6% occupancy rate.

B. COMAR 10.24.08.08G(3)(b) Need

(3)(b) 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.

The Glen Meadows project does not add any beds to the Baltimore County inventory and the Staff fails to acknowledge its CCF beds are the only CCF beds in the far north-eastern section of Baltimore County where Glen Meadows is situated well to attract residents to its five-star quality facility.

Rather than focus on the ability of Glen Meadows to provide quality care in an outlying area, the Staff focuses on the fact that Glen Meadows is a continuing care retirement community ("CCRC") and should not be allowed to convert CON-excluded beds to publicly-available status through the acquisition of beds from a facility closure because it is not consistent with the regulatory policy established for CCRC development. (Staff Report and Recommendation p. 21). This point made by Staff only indicates their strong inclination to look at the purchase of delicensed beds differently for a CCRC than it does for any other nursing home purchasing delicensed beds. The fact that CCRCs can have beds for its residents is not the issue. The issue is the purchase of delicensed beds by a facility that: does not intend to add beds to the current Baltimore County inventory; is situated in an isolated section of Baltimore County; and can offer quality care to residents.

Staff stated that: "While the applicant's proposal is an understandable business response to its desire to boost revenue and generate net income in its operations, this institutional objective

is not what this criterion is meant to measure.” Glen Meadows disagrees with this premise because the instructions to the CON application state: “If the current bed need projection published by the MHCC based on the need formula in the State Health Plan does not project a need for all of the beds proposed, the applicant should identify the need that will be addressed by the proposed project by quantifying the need for all facility and service capacity proposed for development, relocation or renovation in the project.” (Comprehensive Care Facility [Nursing Home] Application for Certificate of Need, p.17.). Glen Meadows has addressed a legitimate need for its financial viability and ability to continue to serve seniors, and if granted the CON, serve others needing comprehensive care services in a high quality institution in a north-eastern area of the County. Contrary to the Staff’s recommendation that the Commission find that the applicant has not demonstrated a need for the project (Staff Report and Recommendation, p.21), Glen Meadows believes that it has demonstrated a need for the project and that it meets the standard.

In Ingleside at King Farm, Docket No. 14-15-2355, the Staff Report and Recommendation noted that the “addition of beds can improve operating scale for smaller nursing homes, thereby lowering unit cost, and helping those facilities eliminate antiquated room accommodations, such as three and four-bed rooms.” (Staff Report and Recommendation, p.12). Similarly, Glen Meadows would be able to improve its operating scale and would allow it the opportunity to update its older accommodations.

Furthermore, in its recent opinion in FutureCare, the Staff recommended approval of the purchase of 30 delicensed CCF beds from MedStar Good Samaritan Hospital which notified the Commission of its intention to sell its temporarily delicensed beds in Baltimore City similar to the notification given by Presbyterian Home of Maryland, Inc. d/b/a Carsins Run (“Carsins Run”) who is the seller of the beds in this instance. In the FutureCare situation, the Staff noted under the Standard/Criteria for “Need and Capacity” that the FutureCare proposal did not seek to increase the total number of CCF beds in the Commission’s inventory for Baltimore City, which has excess bed capacity, but to relocate them. (FutureCare Staff Report and Recommendation p.16) The same situation exists in this matter where Glen Meadows does not seek to increase its beds or the CCF inventory in Baltimore County. Furthermore, in FutureCare, the Staff considered the fact that the facility had a history of quality (FutureCare Staff Report and Recommendation p. 3) which Staff acknowledged with regard to Glen Meadows’ CCF noting its overall rating was strong. (Staff

Report and Recommendation p.18.) Therefore, Glen Meadows should be found to have met this standard.

C. COMAR 10.24.08.08G(3)(c) Availability of More Cost-Effective Alternatives

(3)(c) 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.

The Staff concluded that the proposed project has not been demonstrated to be the most cost effective alternative; however, the Staff provides no basis for their conclusion. While Glen Meadows acknowledges that it has the burden to prove, Staff has provided no data or analysis demonstrating that providing care at other facilities would be more cost effective than providing it at Glen Meadows. This project included no construction or renovation costs. There are no interested parties in this matter, and Staff determined that the likely impact of the projected additional admissions to Glen Meadows would be small. (Staff Report and Recommendation p. 25).

D. COMAR 10.24.01.08G(3)(d) Viability of the Proposal

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

Glen Meadows demonstrated that it needs the publicly-available beds for financial viability. In fact, the Staff notes in 2012 and 2013, high nursing home bed occupancy correlated with nursing home profitability, and with profitability of the CCRC as a whole. (Staff Report and Recommendation p.23). The Staff further states that: "While this outcome would not be surprising, it is difficult to then draw the conclusion that higher nursing home occupancy will be the salvation of Glen Meadows CCRC which is essentially the premise of this application." (Staff Report and Recommendation p.23). Why is this conclusion difficult to believe since the application and Proposed Decision show that higher occupancy does correlate with nursing home

profitability as acknowledged by the Staff's comments? Glen Meadows has met this standard by showing that higher occupancy correlates to profitability as acknowledged by the Staff's own comments.

Furthermore, the Staff states that "it appears that the long term viability of Glen Meadows may very well depend on Presbyterian Senior Living's ongoing ability and willingness to provide ongoing support, unless the potential for additional revenue created by approval of this proposal was sufficient to put Glen Meadows in the black." (Staff Report and Recommendation pgs. 24-25). This very statement by the Staff proves the premise of the application that Glen Meadows demonstrated that it needs publicly-available beds for financial viability.

The standard also requires the Commission to consider Community support. While mentioning it in the Procedural History, the Staff ignores, for the purpose of viability, that this project has broad Community support including the support of the former Chief of Continuing Care of the Department of Aging who met with and suggested that Glen Meadows consider purchasing publicly-available beds as a way to reduce its financial burden. In addition, the Glen Meadows Residents' Association requested that consideration be given to "our isolated geographic location . . . where there are no health care facilities in Glen Arm, Baldwin, Phoenix or Fallston." This project was also supported by the Maryland Continuing Care Residents' Association, the Voice of Residents in Annapolis, that urged consideration for the area that Glen Meadows serves where there are no health care facilities.

In addition, Glen Meadows would have had a letter of support from the Maryland Department of Aging had the Commission's Staff not requested that they not send a letter.

II. CONCLUSION

Glen Meadows should be found to have met the standards for nursing homes and be permitted to transfer 22 delicensed beds from Carsins Run to its campus because the:

1. CCF bed need projection was grossly out of date and should have no standing, and the 90% threshold was essentially met;
2. Glen Meadows' project is not adding beds to Baltimore County's inventory but transferring beds;

3. Commission recently has permitted the transfer of delicensed beds in a section of the State that already has an excess of CCF beds and has accepted the manipulation of the 90% standard;
4. cost effectiveness of not adding beds and utilizing current facilities is feasible;
5. ability of Glen Meadows to provide quality care and access in a north-eastern area of Baltimore County where access to CCF beds is limited or non-existent;
6. additional revenue generated by the publicly-available beds has been acknowledged and makes the project viable; and
7. Glen Meadows project has broad support from residents at the facility, residents from other CCRC facilities and from the former Chief of Continuing Care at the Maryland Department of Aging.

Dated: October 16, 2017

Respectfully submitted,



Rose M. Matricciani

Whiteford, Taylor & Preston L.L.P.

7 St. Paul Street

Baltimore, Maryland 21202

Phone: 410-347-9476

Fax: 410-234-2355

rmatricciani@wtplaw.com

Counsel for Presbyterian Senior

Living Services, Inc. d/b/a

Glen Meadows Retirement Community
(Applicant)

IN THE MATTER OF

*

BEFORE THE

PRESBYTERIAN SENIOR

*

MARYLAND HEALTH

LIVING SERVICES, INC. d/b/a

*

CARE COMMISSION

GLEN MEADOWS RETIREMENT

*

DOCKET NO. 17-03-2395

COMMUNITY

*

.....

APPLICANT'S EXCEPTIONS TO STAFF REPORT AND RECOMMENDATION

ATTESTATION BY JEFFREY J. DAVIS

Affirmation: I hereby declare and affirm under the penalties of perjury that the facts stated in the Exceptions to Staff Report and Recommendation are true and correct to the best of my knowledge, information and belief.



Jeffrey J. Davis, Senior Vice President & CFO
Presbyterian Senior Living, Inc.

10-13-17

Date

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October 2017, a copy of the foregoing Exceptions to Staff Report and Recommendation was sent via e-mail and hand delivery to:

Suellen Wideman, Esquire
Assistant Attorney General
Maryland Health Care Commission
4160 Patterson Avenue
Baltimore, MD 21215-2299
suellen.wideman@maryland.gov

Kevin McDonald, Chief
Certificate of Need
Maryland Health Care Commission
4160 Patterson Avenue
Baltimore, MD 21215-2299
kevin.mcdonald@maryland.gov

Ruby Potter, Administrator
Center for Health Care Facilities Planning and Development
Maryland Health Care Commission
4160 Patterson Avenue
Baltimore, MD 21215-2299
ruby.potter@maryland.gov

Thirty copies of the foregoing Exceptions to Staff Report and Recommendation was hand delivered to:

Ruby Potter, Administrator
Center for Health Care Facilities Planning and Development
Maryland Health Care Commission
4160 Patterson Avenue
Baltimore, MD 21215-2299
ruby.potter@maryland.gov


Rose M. Matricciani