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HEALTH FACILITIES &
SERVICES REVIEW BOARD

January 26, 2016

BY FEDERAL EXPRESS

Michael Constantino
Supervisor, Project Review Section
Illinois Health Facilities and Services Review Board
525 West Jefferson Street, 2nd Floor
Springfield, IL 62761
ATTN: Courtney R. Avery, Administrator

**Re: Opposition to Project No. 15-056,
Transitional Care of Lisle**

Dear Ms. Avery:

We represent a group of existing long-term care facilities, all of which provide services in Health Planning Area 7-C, which have joined together **to oppose** Project No. 15-056, Transitional Care of Lisle's ("Applicant") proposal to establish a 68-bed long-term care facility in Lisle, Illinois ("Project #15-056" or the "Project"). Several of these same facilities previously opposed a strikingly similar project proposed in nearby Naperville which the Health Facilities and Services Review Board ("HFSRB" or the "Board") denied. The overall shortcomings of the Project, the lack of need for *this* Project, and the adverse impact it will have on existing facilities warrants the denial of Project #15-056.

I. It is Unclear Why the Project is Being Considered at the February 16, 2016 Meeting.

A. The Application Was Not Submitted Timely to be Deemed Complete for the HFSRB's February 16, 2016 Meeting.

To be considered at the February 16, 2016 HFSRB meeting, "[a]pplications must be deemed complete by December 4, 2015." This notice is published on the HFSRB website. The Project application was not received by HFSRB staff until December 3, 2016, and was not complete when it was submitted.

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HFSRB regulations provide:

Within 10 business days after receipt of an application for permit, HFSRB staff shall determine whether the application is substantially complete and ready to be reviewed for compliance with applicable review criteria and standards.

77 Ill. Admin. Code 1130.620(c)(1).

Given the ten-day period allowed for HFSRB staff to perform its completeness review, it would be presumptuous to expect a substantive application proposing the establishment of a new healthcare facility to be deemed complete in one day.

More importantly, when the current Project was submitted, the application was missing fundamentally important information including, but not limited to, the Project's financial viability ratios and *pro forma* financial statements. Section 620(c)(2) further provides:

An application shall be incomplete if any of the elements described in subsection (c)(1) are not present or if additional information or documentation is required to clarify a response.

77 Ill. Admin. Code 1130.620(c)(2).

These omitted materials were not received by Board staff until December 4, 2016, and there was information relevant to the elements of Section 620(c)(1) that were not present.

These facts likely yielded the conclusion that the Project would be considered at the Board's March 2016 meeting. This would make sense considering that Project #15-057, Fresenius Medical Care Spoon River, Canton, which was also received by the Board on December 4, 2015 (and did not require the submission of supplemental information) has been scheduled for the Board's March 29, 2016 meeting.

B. Applicant Filed a "Request for Expedited Review" to Avoid Losing Its Site.

Further evidence that the Project was originally scheduled to be heard in March 2016 is the fact that the Applicant submitted a "*Request for Expedited Review*" specifically requesting consideration in February 2016.

It is worth noting that HFSRB rules do not create a right to or even a process for "expedited review." To the contrary, this appears to be a request of the Applicant's own creation presented to prioritize its own needs. More importantly, the reasoning outlined in the request presents a substantial basis for concern. The *Request for Expedited Review* claims that:

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Under the terms of the Real Estate Purchase and Sale, the Applicants must obtain a [Certificate of Need (“CON”) permit for the project prior to April 21, 2015 (*sic*). While the CON application arguably could be heard at the March 31, 2015 (*sic*) State Board meeting, if the project receives an intent to deny at that meeting, the project cannot be reconsidered prior to April 21, 2015 (*sic*). Failure to obtain a CON permit by April 21, 2015 (*sic*) could result in loss of the site and significant and costly delays as the Applicants seek to secure a site in Lisle.

As an initial matter, the Real Estate Purchase and Sale agreement is not included as part of the application.¹ Therefore, the Project contains no evidence of any control over the site upon which the facility is proposed. To the contrary, the level of control seems sufficiently tenuous that “if the project received an intent to deny ... [the delay] ... could result in loss of the site.”

The Board’s instructions for preparing an application provide:

Proof of ownership or control of the site is to be provided as Attachment 2. Examples of proof of ownership are property tax statement, tax assessor’s documentation, deed, notarized statement of the corporation attesting to ownership, an option to lease, a letter of intent to lease or a lease.

The only proof of ownership or control of the site provided at Attachment 2 is a letter of intent executed between IH Lisle Owner, LLC (“IH Lisle Owner”) and IH Lisle OpCo, LLC (“IH Lisle OpCo”) which Bradley Haber (“Haber”) executed on behalf of both parties. Neither party owns the property or has control over it. This is a non-binding letter of intent from the applicant’s right hand to its left. There is absolutely ***no documentation whatsoever from anyone who holds, owns, or controls the site.***

Presumably, IH Lisle Owner does not already own the land because, if it did, the concerns raised regarding the potential “loss of the site” would not exist. The Board, its staff, and the public are left guessing as to every detail regarding the acquisition of the land for the Project because the application does not contain ***any documentation at all*** regarding the proposed purchase of this site. It claims a purchase price of \$925,000 and references some undisclosed term that makes the site unavailable if a CON is not obtained by April 21st, nothing more.

¹ The lack of necessary and important documentation supporting the claims contained within this Certificate of Need application will be raised repeatedly throughout this analysis.

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Additional concerns remain beyond the lack of documentation that raise the legitimate risk of the Project losing its proposed site. There is a notable amount of information missing from the Project application, outlined in more detail below. If either the Board or Board staff request the Applicant to submit any of this missing documentation, it will likely cause a delay in approval of the Project. It would take some time for the Applicant to collect and submit the information, for if it were already in the Applicant's possession, it would have presumably already submitted it. It will also take time for the Board staff to review the information, which would inevitably include a delay in the consideration of the Project, and the risk of "loss of the site" comes back into play. If this Project is so tenuously situated that a delay in consideration of the Project will result in the "loss of site," the Board should be hesitant to approve this Project.

Finally, it is worthwhile for an inquiry to be had into whether other concerns related to the application exist given that a substantive application proposing the creation of a new healthcare facility was designed and submitted precariously perched upon restrictive time constraints that could affect the viability of the Project. Whether the application should have been submitted earlier or the CON deadlines negotiated to be later is irrelevant. The overall facts raise substantial concern as to the stability of the Project.

This is particularly relevant because one of the predecessor applications to the Project (in adjacent Naperville) faced similar challenges that it was unable to overcome. Project #11-055, Transitional Care Center of Naperville, had to be abandoned because it was unable to obtain the zoning necessary to complete its project.² The subsequent effort to revive that project was denied by the Board. There is ample reason to believe this Project could find itself in a similarly unenviable position because, as noted above, ample reason exists to delay consideration of the Permit.

To ensure that the Board and the public have access to all of the relevant information, we encourage the deferral of this application until these issues are resolved and the appropriate information and documentation is provided.

II. A Substantial Amount of Information is Missing from this Application.

The Project application contains many representations for which there is *no documentation*, nor any evidence to substantiate the claims being made. Unless and until this information is provided, this Board should be reluctant to consider this Project or to accept the representations contained herein. One such example, the failure to include the Real Estate

² This is not a call for comparative review. The Project should be reviewed and evaluated on its own merits. However, as discussed further below, the commonality between the Project and two previous Transitional Care projects a concern as to whether all of the necessary co-applicants have been identified.

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Purchase and Sale agreement, is noted above. There is reference to the document and the various limitations it imposes, yet it is not included in the CON application.

Another instance would be the repeated reference to the Project specializing in “post-acute rehabilitation services.” This self-selected focus on post-acute patients would appear to necessitate or be founded upon an agreed-upon relationship with an existing acute care hospital, yet none is documented or even referenced.

A. Individuals Who Might be Necessary Co-applicants are Not Identified as Co-applicants within the Project.

Who needs to be a co-applicant is, in part, about control. Parental entities who hold the ultimate control are often considered by the Board as necessary co-applicants. So, too, are individuals with financial guarantees over the land or the buildings. There are several individuals or entities introduced within the permit application without any explanation of their role. As a result, questions exist as to what degree of ownership interest, financial interest, or operational control these individuals or entities hold. Include among these are:

- Transitional Care Management (“TCM”);
- Jerry Williamson (“Williamson”) and Horace Winchester (“Winchester”);
- OnPointe Health Development LLC (“OnPointe”);
- Lockwood Investments, LLC (“Lockwood”); and
- Innovative Health, LLC (“Innovative Health”).

HFSRB regulations, 77 Ill. Admin. Code 1130.220, require the following groupings to be co-applicants for any project proposing the construction of a healthcare facility:

1. the person who will hold the license;
2. the person who has final control of the person who will hold the license;
3. any related person who is or will be financially responsible for guaranteeing or making payments on any debt related to the project; and
4. any other person who actively will be involved in the operation or provision of care and who controls the use of equipment or other capital assets.

Since there is no explanation of what role the above people/entities have or will have, it is impossible to gauge whether they need to be co-applicants. Based upon the information that *is* contained in the application, there is reason to believe they might need to be.

1. Transitional Care Management

Whether or not TCM should be a co-applicant was first raised in a footnote above. TCM is mentioned throughout the Project’s application, but is not listed as a co-applicant for the

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Project. This is particularly confusing, however, since TCM *was a co-applicant* for Project #11-006 and again for Project #11-055.

It would be difficult for this Project to claim a meaningful difference in the design of these various projects, as each project's narrative description begins with an *identical* description of the project, stating:

Transitional Care Management proposes to construct and operate [Facility Name], a short term skilled rehabilitation skilled nursing facility offering post-acute rehabilitation services for patients with high rehabilitation and complex care needs, focusing primarily on high acuity patients.

Given the absolutely identical descriptions, it is seemingly problematic that TCM was not included as a co-applicant for the Project. Some explanation has to be provided to explain this, yet the Project application is completely silent as to this issue.

This is not only fundamentally important information for the Board to have to allow for the proper evaluation of this Project, but it is particularly relevant to the question of *when* this application should be considered. One of the required pieces of information without which a project cannot be deemed complete is that "all persons who are applicants have been identified." 77 Ill. Admin. Code 1130.620(c)(1)(G). This does not seem to have occurred here.

There are numerous references to TCM throughout the application beyond identifying TCM as the entity proposing the Project (p. 1). However, there are other examples of TCM's key role in the Project. The zoning letter references TCM's proposed new construction project (p. 90). Attachment 10 explaining the purpose of the Project touts TCM's ability to provide high acuity care. The section outlining alternative identifies the option of building a new facility as "allowing TCM to accomplish its goals."

There are two additional examples where the language of the Project application is almost verbatim to that contained in Project #11-006 (purpose of project at pp. 71-72 and alternatives at p. 74) and Project #11-055 (purpose of project at pp. 98-99 and alternatives at p. 101). This further highlights the need for an explanation as to why TCM was a necessary co-applicant to those projects and was not included as a co-applicant in this Project.

Despite the clear involvement of TCM, its role is neither fully described in the narratives, nor is it included in the operational/ownership flowchart accompanying the application. This issue should be clarified and properly documented before consideration of the permit.

2. Jerry Williamson and Horace Winchester

IH Lisle OpCo *is* identified as co-applicant. However, no information is provided to explain what role, if any, Williamson or Winchester maintain other than that they own 80% of IH Lisle OpCo.

In describing the Innovative Health model, it was stated that a small group of private investors would fund the developments. <http://seniorhousingnews.com/2015/07/22/industry-veterans-launch-four-seasons-style-post-acute-pipeline/>. Haber was quoted as stating that “it’s a short list of half a dozen people that we’ll be raising money from — people we’ve done business with before.” *Id.* Presumably, Williamson and Winchester are a part of this small group of private investors. However, *there is no documentation as to what their investment is and what degree of control they possess* over the various aspects of the Project. These are fundamentally important questions that warrant an explanation before the Project is considered.

3. OnPointe Health Development LLC

OnPointe has “extensive experience in both development and operations across the senior care continuum.” <http://www.onpointe.com/who-we-are/>. Its website lists 19 facilities that OnPointe currently operates, including several which it developed. It is worth noting that Williamson and Winchester are its two principles, with Winchester serving as the Chairman of OnPointe.

It is certainly possible that neither Williamson nor Winchester retained any personal control over the Project as a result of their 80% ownership of IH Lisle OpCo, but less likely that neither Messrs. Williamson and Winchester *nor* OnPointe (which owns 90% of IHOP JV OPCO, LLC, which in turn owns 90.01% of IH Lisle OpCo) have any control over the Project or the facility it proposes to create. Regardless, given the lack of documentation, both the Board and the public are left to speculate. It is clear under the Board’s rules that the Applicant should have explained and provided documentation regarding this information.

4. Lockwood Investments, LLC

No information is included in the Project application about Lockwood Investments, other than that it is a 9.99% owner of IH Lisle OpCo. What role, if any, it has in the operation or control of the facility is unknown. Whether it will hold the license or exercise any of the discretionary or non-ministerial rights or powers that create “control” as that term is defined by HFSRB regulations (*see* 77 Ill. Admin. Code 1130.140) is unknown. No information is provided in the Project application, nor is any documentation supporting the answers to these questions included as part of the Project application.

5. Innovative Health, LLC

The two “ultimate” owners, as listed on the organizational chart (p. 38) of the Project application, appear to be Innovative Health and OnPointe. However, neither is included as a

co-applicant, nor is any explanation provided as to what role(s) each holds. As Haber has executed various certifications relevant to this Project on behalf of Innovative Health (or entities that would appear to be related to Innovative Health), there should be an explanation as to what degree of control (operational or ownership) is maintained by Innovative Health.

6. Conclusion Regarding Co-applicants

No project should be deemed complete until “all persons who are applicants have been identified.” 77 Ill. Admin. Code 1130.620(c)(1)(G). While we acknowledge not having enough information to be able to perform a complete and meaningful analysis into how the various parties intend to interrelate to meaningfully and fully evaluate the Board’s regulations related to “control” of this Project and the proposed facility, that highlights the problem. Whatever the roles of these various people/entities, it should be included in the Project application so that it can be evaluated by the Board staff and the Board members. The fundamental lack of information reveals this as an important issue for the Board to look into further.

B. The Claim that This Project will Not Adversely Impact Other Facilities is Undermined by the Evidence and Should be Explored.

The Project claims that “no existing skilled nursing facility in the area provides the level of care proposed...” First and foremost, this claim is simply false. There are several facilities in the Health Service Area (“HSA”) that provide these very services. Second, *there is no documentation of any kind to justify such a bold allegation.*

TCM has repeatedly made this allegation, and every time it does, facilities step forward to point out that, in fact, these exact services are being provided within the community. Articles announcing the launch of Innovative Health promise facilities that will “look and feel like a ‘Four Seasons’” but do not describe new levels of care that do not exist within existing communities. <http://seniorhousingnews.com/2015/07/22/industry-veterans-launch-four-seasons-style-post-acute-pipeline/>. The fundamental difference between the Project and other existing facilities is that the other facilities are committed to providing care across the entire spectrum of skilled nursing, where the Project seems focused upon serving only short-term rehabilitation, thus higher reimbursement, patients. This should be viewed as a shortcoming of the Project, not touted as an attribute.

HFSRB rules require an applicant to document that, within 24 months after project completion, the proposed project:

1. Will not lower the utilization of other area providers below 90% occupancy; and
2. Will not lower, to a further extent, the utilization of other area facilities that are currently operating below 90%.

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77 Ill. Admin. Code § 1125.580(c)(1)-(2).

The application attests to the fact that this Project “will not lower the utilization of other area providers below the occupancy standards” and “will not lower, to a further extent, the utilization of other area facilities that are currently operating below the occupancy standards” (p. 64). This appears to be impossible.

While the insufficiency of the referral letters will be addressed in more detail below, the referral letters each reference prospective referrals from people who have received care *within the service area* and who may be referred to the Project. These referral letters both belittle the claim that the Project will be providing services that cannot already be obtained in the HSA and undermine any claim that the care to be provided will not redirect patients away from existing facilities, thus lowering their census.

There is a substantial number of facilities in the immediate HSA that are operating below the 90% utilization threshold. The Board’s own regulations provide that “facilities providing a general long-term nursing care service should operate those beds at a minimum annual average occupancy of 90% or higher.” 77 Ill. Admin. Code 1125.210(c). There is no way the Project will not be able to document that “all services within the 45-minute normal travel time meet or exceed the occupancy standard specified in Section 1125.210(c).” See 77 Ill. Admin. Code 1125.570(a)(5).

Utilization of existing facilities is one of the Board’s identified means of assessing need for a project. Inherent in the fact that that majority of existing facilities are operating below their 90% target utilization is the reality that adding an additional 68 beds to the HSA will further reduce the census of those facilities. The Applicant should be able to actually document from where these patients will originate and how it will not adversely impact other existing providers. Given the limited spectrum of high-reimbursement patients the Project is focused upon serving, the risk of adversely affecting existing facilities is notably increased.

C. It is Important to Evaluate the Interests of the Entire Community, Not Just the Interests of this Provider.

The Applicant is likely to focus its argument on the bed need of 168 skilled nursing beds in HSA 7-C. However, it is equally important for the Board to evaluate *how this Project proposes to meet that need*.

Most facilities are dedicated to serving the full spectrum of patients requiring skilled nursing care. Some require short-term stays, others require longer term. These patients cover a spectrum of ages and socio-economic groups and, admittedly, are reimbursed at different levels. As this Board is well aware, for facilities that are dedicated to providing care to lower reimbursement, often more indigent individuals, it is the shorter-term higher-reimbursement patients who offset the economic losses that often accompany these residents. The Project

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proposes to skim those “high-value” residents for its “Four Seasons” of short-term post-acute rehabilitation. Allowing that to happen will notably disrupt the delivery of healthcare and skew the economics in a way that could affect the potential viability of some facilities. The net effect will be to potentially reduce access to healthcare in the community, rather than enhance it.

When the HFSRB identifies a bed need, it is for skilled nursing services. The Project does not propose to meet those needs. Rather, it proposes to provide care for a self-selected subgroup of care in a high-end setting that it believes will yield the most revenue. This cannot be overlooked in evaluating the Project.

The subgroup of patients the Project proposes to meet is not a separate category of service. These are skilled nursing beds, and the Board should evaluate the question of whether the Project truly enhances access to care. In all of the challenges related to access to care flowing from the lingering economic downturn and the impact of the Affordable Care Act, *it is not high-value, high-reimbursement residents who are unable to access healthcare*. Therefore, is a project designed to serve only those patients an appropriate way to meet the Board’s identified need for more skilled nursing beds?

It cannot be overlooked that while there is a projected need in Planning Area 7-C, there is an overall excess of beds within HSA 7 of over 1,700 beds. Moreover, given that so many of the facilities surrounding the proposed site are operating below the 90% target utilization, it begs the question of whether this is the right location within the Planning Area for such a project. The abundance of facilities opposing the Project suggests that it is not.

D. Insufficient Documentation Is Provided Regarding the Financing of The Project

There is a reference on page 21 of the Project application to “cash and securities” in the amount of \$3,168,241. There is not, however, any explanation about these funds. Who is the source of this \$3 million? TCM? Williamson and Winchester? OnPoint or Lockwood Investments? Perhaps Innovative Health? We have no idea. HFSRB instructions require:

[T]he applicant *shall document* that financial resources shall be available and be equal to or exceed the estimated total project cost plus any related project costs *by providing evidence* of sufficient financial resources....

Project Application, p. 21.

HFSRB rules regarding the availability of funds also require that the applicant “*shall document* that financial resources will be available.” See 77. Ill. Admin. Code 1125.800. Despite all of the documentation requirements, the Project includes *no documentation* regarding these funds.

Nor do we know what control or security interest is being obtained in exchange for this \$3 million? What interest or other expenses accompany these funds? From where did this \$3 million originate? What restrictions are there on the use of these funds? Until these questions are answered, the Project should not be approved by the Board.

E. There Are Inadequate Referrals To Justify This Project

The Applicant is required to present documentation to identify the projected referrals necessary to justify the Project and verify the need for and projected utilization of a proposed new facility. See 77 Ill. Admin. Code 1125.540. The Applicant repeatedly states that there is a need for 735 annual referrals, yet has only identified 380 referrals over the next two years.³ The total number of predicted referrals for residents from Lisle is 63 over a two-year period. This falls far short of referrals necessary to justify this Project.

The Project has made it clear it is focusing on shorter length of stay residents requiring short-term rehabilitation. If you presume an average length of stay of 30 days, the 380 referrals (which are actually only 190 per year) results in a 23% occupancy rate—well below the HFSRB's 90% target utilization. Moreover, it is worth noting that, despite referencing multiple strategic partners throughout the Project application, there are no referrals from hospitals and no referrals from the physicians identified. This is particularly important because all admissions to licensed nursing homes require a physician order. The lack of this documentation undermines the allegations contained in the Project application.

F. There is a Repeated Trend of Claims that are Unsupported by Documentation or Evidence.

It is one thing to present a claim. It is another thing to support that claim. Throughout the Project application, there are HFSRB requirements that are not complied with without any acknowledgement by the Applicant. There are also various statements presented to justify the need for the Project, despite the complete lack of documentation to justify the claims. Several examples are outlined below.

The Project is required to “provide documentation regarding *compliance* with the requirements of the Historic Preservation Act.” The Project does not do that. To the contrary, the Project simply includes a letter sent on November 24, 2015—only 11 days before the Project was to be deemed “complete”—seeking the information it was required to present. This is another example of missing documentation.

³ There are an additional 350 potential referrals that were submitted after the Project was filed, but these referrals do not identify the zip code of the identified referrals and, thus, do not comply with Board regulations.

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The Applicant claims that the Project will provide care with a “quality and service mix” unlike any other facility. There is no documentation nor explanation by what basis the Project will provide care at a higher quality than other existing facilities. Instead, the representation is made that “the Applicants have not previously owned or operated any health care facilities.” p. 55. One claim is undermined by the other. If the Applicant wants to reference and utilize the historic involvement of its principles at other facilities, then the historic performance and compliance of those individuals should have been presented as part of the Project. It was not.

The Applicant references “strategic partnerships with hospitals,” yet no relationship with any existing hospital is included. This is another claim that is not supported by documentation or evidence.

The Applicant references “specialized staffing” that is “especially beneficial to orthopedic groups,” but no identified orthopedic physicians presented referrals to support the Project.

The Applicant claims that it is providing services “not currently offered in the planning area,” yet references that the referral sources are “attesting to the number of prospective residents *who have received care at existing long-term care facilities located in the area* during the 12-month period prior to submission of this application.” The reality is that other facilities are already meeting the needs of these patients. This claim that the Project will provide unique services that are not available is an unsubstantiated claim not supported by any documentation or any evidence.

In discussing the potential for maldistribution, the Applicant simply glosses over that there are a substantial number of facilities not operating at the Board’s target utilization of 90%, which evidences maldistribution. Rather than provide any explanation or rationale, the Applicant simply states that the facilities are collectively “operating at 80%.” While this statement is technically true, it seems designed to overlook the fact that there are approximately 50 facilities within 30 minutes of the proposed facility that are below the Board’s utilization threshold.

Unless and until there is documentation provided to justify the Project, the HFSRB should be hesitant to simply accept the representations of the Applicant without any evidence. Based upon the information currently available, the Project should either be deferred for the submission of additional documentation or denied.

III. Conclusion

The healthcare delivery system is changing as a result of market pressures, reimbursement issues, and the Affordable Care Act. However, the Applicant does not document how the Project would be better suited to address the pressures for anyone other than its own bottom line. The Project appears to be designed to work outside the traditional post-acute care

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referral base, and to be a boutique nursing home that would allow businesses and private insurance carriers to circumvent the current healthcare delivery model, essentially cannibalizing the most desirable (highest reimbursement) short-term rehabilitation patients. This is not what the CON program was designed to facilitate.

There is an abundance of existing, quality facilities, each with a proven track record of providing care to this community, and each with the capacity to provide more care. Approving this Project would be an attack on the existing providers struggling to continue providing care in the changing landscape of modern healthcare.

On behalf of these facilities, we respectfully present these comments **in opposition** to Project #15-056, and request that the Board deny Transitional Care of Lisle's application to establish a new facility.

Respectfully submitted,



Mark J. Silberman