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MARK J. SILBERMAN
DIRECT DIAL: 312.499.6713
PERSONAL FAX: +1 312 277 6957
E-MAIL: MJSilberman@duanemorris.com

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April 19, 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. 16-002,
Transitional Care of Fox Valley, Aurora, Illinois

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. 16-002, Transitional Care of Fox Valley's ("Applicant") proposal to establish a 68-bed long-term care facility in Aurora, Illinois ("Project #16-002" or the "Project").

Several of these same facilities opposed a strikingly similar project previously proposed in nearby Naperville and denied by the Health Facilities and Services Review Board ("HFSRB" or the "Board"). Some are also opposing Project #15-056, Transitional Care of Lisle's project, which proposes to establish a virtually identical facility to that proposed by Project #16-002, in Lisle, on the other side of Naperville. That project has yet to be considered by the Board.

HFSRB Staff already addressed many of the mechanical failures of this application in its request for additional information. The magnitude of those failures was reflected in the February 17, 2016 request for additional information, the need to perform a Type A Modification, and the need for the Applicant to submit 288 pages of supplemental materials to the original application.

The focus of this letter is the lack of need for ***this*** Project, its deficiencies, and the adverse impact it will have on existing facilities, thus warranting the denial of Project #16-002.

We are hopeful the Board will consider the adverse impact that approval of this Project could have upon the community it is proposing to serve, how it could adversely affect adverse access to care, and how despite the existence of a bed need there is not a need for this Project.

I. Just Because There is a Bed Need Does Not Mean There is a Need for This Project.

There may be a need for additional services in the Health Service Area ("HSA"), but ***this proposed Project is not the proper proposal to meet that need***. The Board has identified a future need for additional skilled care beds. Yet, this Project is designed to only serve individuals requiring short-term rehabilitation. Approving this Project would commandeer beds identified and expected to meet a need for general long-term care to serve a subset of short-term rehabilitation residents that are facing no barriers of access to care.

The Illinois Department of Public Health has calculated a need for one hundred thirty eight (138) skilled care beds in Planning Area 7-C for 2018. However, that conclusion is undermined by the fact that an overwhelming majority of facilities within the immediate area are operating under the Board's target occupancy of ninety percent (90%). This underutilization of existing facilities in the immediate area calls into question whether the proposed location is appropriate for a new facility or whether or not it would result in a maldistribution of services in the area.

The planning process is designed, and the case law is clear, that ***just because there is an identified bed need that does not mean that a project is entitled to be approved***. Consider *Charter Medical of Cook County, Inc. v. HCA Health Services of Midwest, Inc.*, in which the Court commented:

> The stated bed need in a planning area is a projection made by the State agency. Although a critical factor in determining need, there is nothing in the rules to indicate that the Board is without authority to deny a proposed project if not needed even though there is a projected bed need.

Charter Medical of Cook County, Inc. v. HCA Health Services of Midwest, Inc., 185 Ill. App. 3d 983, 988 (1st Dist. 1989). The mere fact that a bed need exists does not support the conclusion that additional beds are needed in the location or in the manner in which the Project proposes.

The Board's ***bed need projection is only one component of the Board's multi-pronged need assessment***. The bed need calculation addresses the "yes or no" question of whether more beds are needed in a particular HSA. The remainder of the CON process, involving the assessment of a project's compliance with all of the Board's criteria, addresses the far more complex question of whether a particular project should be approved. If the only relevant question were whether a bed need exists, it would convert the process into a mechanical one. It would allow this Project to bypass having to address legitimate concerns that are reflected in the

several criteria we expect that this Project will fail to meet (*e.g.,* Service Accessibility, Unnecessary Duplication & Maldistribution, and Adverse Impact on Other Area Providers). It is the Project's failure to meet the Board's criteria, all related to the need for and appropriateness of this Project, which highlights the basis for its properly being denied.

A. This Facility Will Have an Adverse Impact on Other Area Providers.

"Impact on Other Area Providers" addresses the question of whether the proposed project will exacerbate the underutilization of other existing facilities. The CON process is designed to prefer better utilization of existing facilities in favor of the unnecessary establishment of a new facility. To comply with this criteria, an applicant needs to prove that its project:

- will not lower the utilization of other area providers below the occupancy standards specified in Section 1125.210(c); and
- will not lower, to a further extent, the utilization of other area facilities that are currently (during the latest 12-month period) operating below the occupancy standards.

Criterion 1125.590, related to Staffing Availability, requires applicants to provide the necessary documentation to evidence that the relevant clinical and professional staff will be able to staff the facility. The application simply announces that the facility will be staffed "in accordance with all State and Medicare staffing requirements" without offering any explanation from where these employees will be derived. Fortunately, there is no need for speculation. The Project intends to take staff from competing facilities.

Several employees of the very facilities opposing this Project have reported that ***representatives of the Applicant are soliciting employees of area facilities via social media and email to leave their current positions*** to work for the Project upon its approval. This provides further evidence of the concrete impact the approval of the Project would have on existing facilities. It further highlights how its approval could throw off the balance of healthcare delivery in this community without improving access to care in any meaningful way. This Project should be denied.

B. This Facility will Result in a Maldistribution and Unnecessary Duplication of Services.

This application claims that the services it proposes are not available within the area. There is no documentation to support this claim and ample evidence available that disproves it. Consider the testimony at the public hearing of facility representatives who testified in opposition to this Project, each of whom verified these very same services are available at their and other area facilities. Since the services already abundantly exist within the community, some documentation should be required of the Applicant to justify its further expansion. None has been provided.

Maldistribution presents the question of where within the HSA particular services should be located. The goal of the Board is to strategically guide the development of healthcare to ensure appropriate access to care, especially for indigent and underserved communities. 20 ILCS 3960/2 (2012). It is questionable whether there is an actual need for additional short-term rehabilitation care, since these services are amply available at quality facilities in the immediate area of the proposed Project.

There is no strategic benefit to concentrating the entirety of services for one HSA into a single geographic location. This criteria addresses the possibility that an HSA might need additional beds or additional services but that the proposed project is not in the proper location within the HSA. It reflects the reality of the marketplace that providers will look to to build or expand within geographically dense areas or to obtain access to communities with a better payor mix or establish in more affluent communities, rather than expand into rural or indigent areas. The Board is responsible for evaluating those issues through this criteria and for being critical of projects that are claiming to meet an identified need—but not in a way that is improving access to care. 20 ILCS 3960/2 (2012). This is such a project.

It cannot be overlooked that while there is a projected need in Health 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 immediately 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. When the Staff report is prepared, it would be worth noting how many facilities are below utilization and their proximity to the proposed site. The abundance of nearby facilities opposing the Project suggests that it is not.

C. These Services Already Exist in This Community, and There is No Challenge to Finding Short-Term Rehabilitative Care.

The facilities opposing the Project each provide care to residents requiring short-term rehabilitation. More importantly, none of those facilities are facing challenges to identify beds for short-term rehabilitation patients. To the contrary, where facilities are facing challenges to identify beds are for more medically complex residents requiring long-term care and residents who are underinsured, without insurance, or beneficiaries of the Medicaid program. This Project does nothing to address those challenges.

The Project's claim that "no existing skilled nursing facility in the area provides the level of care proposed...." is simply and demonstrably false. Several facilities in the HSA provide these very services. More so, ***there is no documentation of any kind to justify such a bold allegation***. More important is the question of overall impact on access to care. Plainly stated, ***it is not high-value, high-reimbursement residents who are unable to access healthcare***. This Project does nothing to assist the patient population with access issues.

Moreover, existing facilities are already providing quality care across the full spectrum of long-term care residents. The co-existence of these facilities in competition with each other is often dependent upon being able to maintain a balance in patient population between those with the highest profit margins (short-term rehabilitation) and those whom caring for includes economic challenges (residents with notable medical complexity and/or duration of stay, including government beneficiaries). We understand that it is not the role of the Board to protect any facility's market share. However, the Board should not approve a Project proposing an unnecessary expansion that would undermine the economic viability of multiple facilities serving a community.

The Applicant is likely to focus its argument on the bed need of 138 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***. The Board must be aware of and address the fact that this Project is designed to skim the highest reimbursement patients away from existing facilities to the benefit of its own facility. Most facilities are dedicated to serving the full spectrum of patients requiring skilled nursing care after an acute care hospital stay. 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. 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. If there is a need for more skilled beds in this HSA, it should be met by a project designed to serve all patients in a manner that meets the Board's identified need for more skilled nursing beds, not just a single subset of high-reimbursement residents.

Allowing the Project to skim off a subset of high reimbursement patients creates an imbalance in the existing healthcare delivery system. The impact would be adversely affecting the very facilities caring for the underserved and the indigent. If existing facilities fail, it undermines access to healthcare. This is not an untenable possibility, given that to succeed, the Project would need to acquire virtually all of the short-term rehabilitation patients being served by the multiple facilities throughout the community already providing these services. When the HFSRB identified a bed need, it was 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.

D. There Appears to Be an Overlap In Referrals Between This Project and Another Project Currently Before the Board.

There seems to be a potential overlap in the proposed sources of resident referrals for this Project with another application proposed by the same individuals. It is not clear if the correspondence would actually qualify as a referral letter, as it does not commit to the referral of any patients. However, it appears to be intended to act as such.

Innovista LLC provided documentation for the current project, 16-002, in which it recounts providing "management services to numerous IPAs in the area that manage thousands of commercial, Medicare, and Medicaid patients and anticipate as many as 425 patients could utilize Transitional Care of Fox Valley." A virtually identical letter was submitted for Project 15-056, in which it recounts providing "management services to numerous IPAs in the area that manage thousands of commercial, Medicare, and Medicaid patients and anticipate as many as 350 patients could utilize Transitional Care of Lisle." Neither letter contains the traditional certification that the referrals have not been used to support another pending or approved certificate of need permit application.

It is certainly understandable that a potential referral source (if that is what this is) would see a similar value in these two separate projects, as they both seek to fulfill the same identified bed need in the same HSA and serve the same patient population with the same model of care. However, Board rules require that any referral being utilized to justify a project not be utilized to justify another Project. It is certainly worth the Board Staff and/or the Board to look into this issue further, including whether the management services company has the ability or authority to direct the referrals of these patients.

This further highlights another concern regarding this Project. The application claims "strategic partnerships with hospitals." Yet, there is no reference to any commitment of any patient referrals or existing relationships with any acute-care hospitals. In fact, none of the referrals identified to support this Project are coming from hospitals. There is a claim to being a "low-cost provider of high acuity post-acute services" ***without any documentation to identify how it will be low cost and with whom there is a post-acute relationship***. If this Project is, in fact, bypassing the hospital as the source of patient referrals, there should be an evaluation of where these patients will originate from. No documentation is provided to address this issue.

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

It is one thing to present a claim; it is quite another 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 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. 56.) One claim is undermined by the other. If the Applicant wants to reference and utilize the historic involvement of its principals at other facilities, then the historic performance and

compliance of those individuals or the entities in which they have been involved should have been presented as part of the Project. It was not. Even after adding two new co-Applicants, no information was provided regarding their ownership or operation experience.

As referenced above, 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. This appears to be a boutique facility designed to operate outside the traditional continuum of care and designed to serve the financial interests of the Applicants more than meet an existing need for additional services within the community.

The application contains no demographic information to support its claim that there is additional need for short-term rehabilitation beds in this community. If such a need truly exists the application is required to contain documentation necessary to reflect appropriate indicators of need. This is particularly important where, as here, the application proposes to create a facility that is not reflected in the Board's rules as an identified category of service. To the contrary, the application simply presents the unsupported claim that there is a need for a facility dedicated to serving a subset of high-reimbursement residents without providing any information that justifies the need nor any evidence that this subset of residents is facing barriers to access.

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.

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.

II. Conclusion

This Project does nothing to document how it would be better suited to address the pressures of modern healthcare, would result in increased access or reduced cost, or would yield any benefit other than to its own bottom line. The Project appears to be designed to work outside the traditional post-acute care 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 are 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 #16-002, and request that the Board deny Transitional Care of Fox Valley's application to establish a new facility.

Respectfully submitted,

Mark J. Silberman