[Cite as *In re Progressive Medina Real Estate, L.L.C.* , 2012-Ohio-1071.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re:	:	
Progressive Medina Real Estate, LLC,	:	
(Willowood Care Center of Brunswick, Inc., and Samaritan Care Center, Inc.,	:	No. 11AP-141 (O.D.H. No. 9010-01-09A)
Appellants).	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on March 15, 2012

Rolf Goffman Martin Lang Co., L.P.A., *Ira S. Goffman*, and *Michele Conroy*, for appellee Progressive Medina Real Estate, LLC.

Michael DeWine, Attorney General, and *Barbara Pfeiffer*, for appellee Ohio Department of Health.

Taft Stettinius & Hollister LLP, *Geoff E. Webster*, and *Clint B. Charnes*, for appellants.

APPEAL from the Ohio Department of Health.

BROWN, P.J.

{¶ 1} This is an appeal by appellants, Wildwood Care Center of Brunswick, Inc. ("Wildwood"), and Samaritan Care Center, Inc. ("Samaritan"), from an order of the director of the Ohio Department of Health ("the director"), granting approval of a certificate of need ("CON") application filed by appellee, Progressive Medina Real Estate, LLC ("the applicant").

{¶ 2} On December 1, 2009, the applicant submitted an application for a CON for approval of a project to relocate 70 licensed nursing home beds from the Pearlview Care Center ("Pearlview") in Brunswick, Ohio, to a new facility to be constructed in Medina,

Ohio. The application proposed construction of a 53,586 square foot facility on two parcels of land in the city of Medina, consisting of all private rooms, each with its own shower; the facility would include approximately 2,700 square feet of dining space, and 4,200 square feet of activity space. The estimated cost of the project was $9,938,000.

{¶ 3} The applicant and Progressive Rolling Hills, LLC ("Rolling Hills") entered into a bed purchase and sale agreement on November 23, 2009. The agreement recited that Rolling Hills operates the Pearlview facility pursuant to a lease agreement with Nata-Lea, LLC ("Nata-Lea"), and that Nata-Lea has granted to Rolling Hills an option to purchase the 127 beds in the facility, an option that Rolling Hills intends to exercise; further, provided Rolling Hills exercises the option and purchases the beds, it desires to sell and transfer to the applicant the operating rights to 70 nursing home beds licensed at Pearlview.

{¶ 4} On December 21, 2009, the Ohio Department of Health ("the department") submitted a first round of questions to the applicant, and the applicant responded by letter dated December 31, 2009. The department submitted a second round of questions on January 21, 2010, including a request that the applicant provide information with respect to the Pearlview lease and the option to buy. In response, the applicant stated that Rolling Hills was expected to notify Nata-Lea of its intent to exercise the option within 60 days after final CON approval, with the closing of the sale to occur within 90 days thereafter. The applicant stated that it had entered into a new bed purchase agreement with Rolling Hills reflecting those revised dates.

{¶ 5} By letter dated February 24, 2010, the department notified the applicant that the application was deemed complete, and instructed the applicant on procedures for public notice. Along with this letter, the department submitted a third request for additional information. On January 28, 2010, the applicant responded to the department's request.

{¶ 6} On March 10, 2010, Wildwood, a long-term care facility in Brunswick, Ohio, and Samaritan, a long-term care facility in Medina, Ohio, both notified the department of their objections to the application. Wildwood and Samaritan (collectively "appellants") claimed that the application was not in compliance with provisions of Ohio Adm.Code 3701-12-20, and that the application did not satisfy various requirements and criteria

under Ohio Adm.Code 3701-12-23. On March 24, 2010, Evergreen Realty of Medina, Ltd. ("Evergreen"), a long-term care facility in Medina, Ohio, notified the department of its objections to the application based upon similar grounds raised by appellants.

{¶ 7} On September 13, 2010, an evidentiary hearing was conducted before a hearing examiner. Appellants argued during the hearing that the project was not needed, that it was not financially feasible, and that the application failed to provide all required or requested information in order to allow the director to make an informed decision.

{¶ 8} On December 8, 2010, the hearing examiner issued a report and recommendation, recommending that the CON application be granted. Appellants filed objections to the report and recommendation, including objections that the hearing examiner erred in finding that the applicant owns the nursing home beds to be relocated, and that the applicant has a right, through contract, to acquire the 70 beds. By adjudication order dated January 21, 2011, the director approved the CON application.

{¶ 9} On appeal, appellants set forth the following two assignments of error for this court's review:

> I. THE DIRECTOR OF HEALTH ERRED IN APPROVING PROGRESSIVE MEDINA REAL ESTATE, LLC'S CERTIFICATE OF NEED APPLICATION BECAUSE THE DIRECTOR'S DECISION WAS BASED ON FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT WERE NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE.
>
> II. THE DIRECTOR OF HEALTH ERRED IN APPROVING PROGRESSIVE MEDINA REAL ESTATE, LLC'S CERTIFICATE OF NEED APPLICATION BECAUSE THE DIRECTOR'S DECISION WAS BASED ON FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT ARE NOT IN ACCORDANCE WITH OHIO LAW.

{¶ 10} Appellants' assignments of error are interrelated and will be considered together. Under these assignments of error, appellants argue that the director erred in concluding that the applicant had entered into a contract to acquire the operating rights to the 70 beds, and in its determination that appellants failed to establish the project is not needed and is not financially feasible. Appellants further argue that the director erred

in the acceptance and utilization of a CON staff report, dated January 12, 2011, in determining to issue an adjudication order granting the CON.

{¶ 11} R.C. 3702.52(C)(1) provides in part: "If the project proposed in a certificate of need application meets all of the applicable certificate of need criteria for approval under sections 3702.51 to 3702.62 of the Revised Code and the rules adopted under those sections, the director shall grant a certificate of need for all or part of the project that is the subject of the application by the applicable deadline." During the adjudication hearing, "[t]he affected persons bear the burden of proving by a preponderance of evidence that the project is not needed or that granting the certificate would not be in accordance with sections 3702.51 to 3702.62 of the Revised Code or the rules adopted under those sections." R.C. 3702.52(C)(3).

{¶ 12} The standard of review for this court in considering an appeal from the director is set forth under R.C. 3702.60(F)(3), which provides in part: "The court shall affirm the director's order if it finds, upon consideration of the entire record * * * that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order."

{¶ 13} Appellants first contend that the director erred in concluding that the applicant entered into a contract to acquire the 70 beds being relocated as required under Ohio Adm.Code 3701-12-23.2(B)(2). Appellants challenge the applicant's response to the department's requests for information on this issue.

{¶ 14} Ohio Adm.Code 3701-12-23.2 states in part:

> (A) In addition to review under other applicable provisions of the Administrative Code, the director shall not approve an application for a certificate of need to replace an existing long-term care facility or to relocate existing long-term care beds from one site to another unless the application meets all of the criteria prescribed by this rule. To the extent that they are made applicable by the provisions of this rule, the criteria also shall apply to an application for relocation of long-term care beds for which a certificate of need has been granted but which have not been licensed ("approved beds").
>
> (B) The applicant or the person proposed to own or operate the replacement facility or the facility to which the beds will be relocated:

> (1) Owns the operating rights to the facility being replaced or from which the beds are being relocated and is the licensed operator of that facility;
>
> (2) Has entered into a contract to acquire the right to operate the facility being replaced or has acquired or entered into a contract to acquire the beds being relocated; or
>
> (3) In the case of an application to relocate approved beds, is the holder of the certificate of need for the beds or is proposed in the application to enter into a contract to acquire the certificate.

{¶ 15} Section 10.40 of the CON application requests information pertinent to the language of Ohio Adm.Code 3701-12-23.2(B), including an inquiry whether the applicant has entered into a contract to acquire the operating rights to the beds being replaced or relocated. In response to this inquiry, the applicant provided the following answer:

> Progressive Rolling Hills, LLC leases and operates the beds to be relocated from Nata-Lea, LLC ("Lessor"). The lease, which is attached hereto as **Exhibit K**, contains an option to purchase the beds from the Lessor and Progressive Rolling Hills, LLC is currently in the process of exercising its option to purchase the beds located at Pearlview. Progressive Rolling Hills, LLC has also entered into an agreement [to] sell 70 beds to the Applicant once it has exercised its option to purchase. The purchase agreement is also attached hereto as **Exhibit K**. (Record at A00052.)

{¶ 16} The department, in a letter dated December 21, 2009, requested additional information from the applicant with respect to the Pearlview lease and the option to buy, including: "[A] brief plain language overview of what will take place including dates * * * on which transactions will take place"; "[t]he closing dates of the operating rights transfers between Nata-Lea and Progressive Rolling Hills and Progressive Rolling Hills and Progressive Medina"; and "proof of Progressive Rolling Hills' ownership of the operating rights to the 70 beds in question." (Record at B00002.)

{¶ 17} On January 4, 2010, the applicant filed the following response:

> Progressive Rolling Hills, LLC currently leases the real estate and the beds at the Pearlview Care Center from Nata-Lea LLC pursuant to a lease agreement which was attached to the application as part of Exhibit K. The lease does not exclude

> the operating rights to the beds, as paragraph 2.1(B) of the lease states: "all rights to apply to operate the Facility as a licensed nursing home in the State of Ohio and all rights to apply to obtain Medicaid and Medicare certification." This provision refers to the operating rights beds, because nursing home beds are licensed and certified not the buildings. An operator can only license and certify a building as a nursing home if it has acquired licensed beds to place in the building.
>
> The lease also contains an option for Progressive Rolling Hills, LLC to purchase the "Leased Premises," which includes the land building and right to nursing home beds. As discussed above, per the terms of the lease, the operating rights to the beds is included in the definition of "Leased Premises" under paragraph 2.1. Progressive Rolling Hills, LLC is in the process of exercising its option and expects to have the transaction closed by Summer 2010. As noted above, the option agreement does include the operating rights to the beds and gives Progressive Rolling Hills, LLC the right to the beds once they are purchased. Therefore, there are no other documents to submit. As soon as that purchase closes, Progressive Rolling Hills, LLC will own the operating rights to the beds to be relocated via this application.
>
> With regard to the bed purchase agreement between the Applicant and Progressive Rolling Hills, LLC, that sale is not expected to close until the Applicant receives a final non-appealable CON. Therefore, the agreement will not close until a minimum of 6 weeks after the Director has rendered his decision on this application. (Record at C00004.)

{¶ 18} On January 21, 2010, the department sent an additional information request asking the applicant to "explain what the applicant has done – and when – to exercise this option, including pertinent documents," including, if available, "a purchase agreement between Nata-Lea, LLC and Progressive Rolling Hills, LLC, a draft if not already executed," as well as "an expected closing date for the sale, either a firm date or in relationship to the potential grant of a CON and the closing of the sale of the beds from Progressive Rolling Hills to Progressive Medina." (Record at D00002.) On January 28, 2010, the applicant responded to this request as follows:

> Progressive Rolling Hills, LLC ("Rolling Hills") is the entity selling the beds to the Applicant. Rolling Hills has the right to exercise an option to purchase the operating rights to the beds

> from Nata-Lea, LLC pursuant to the Option Agreement that was attached as Exhibit K to the application. However, Rolling Hills is not intending to exercise this right until after the approval of this CON application. Rolling Hills expects to provide Nata-Lea, LLC with written notice of its intent to exercise its option to purchase the beds pursuant to Section 5(a)(ii) of the Option Agreement within 60 days after final CON approval, provided the CON is not appealed. According to the terms of the Option Agreement, the closing date "shall take place ninety (90) days from the notice of the exercise of the option." Accordingly, page 10 of the application has been revised and is attached hereto as **Exhibit 1**, as the Applicant does not expect to obtain a bill of sale for the operating rights to the beds until at least 6 months after CON approval.
>
> After Rolling Hills has acquired the 70 beds from Nata-Lea, LLC, it will sell the beds to the Applicant in accordance with the terms of the bed purchase agreement. Please note that the Bed Purchase Agreement between Rolling Hills and the Applicant, which was submitted as Exhibit K, has been terminated. The parties have entered into a New Bed Purchase Agreement with a revised time frame for closing the purchase. The New Bed Purchase Agreement is attached hereto as **Exhibit 2**. (Record at E00002, E00003.)

{¶ 19} Appellants contend that the applicant's right to purchase the 70 beds at issue, which is subject to the conditions that Rolling Hills exercise its option to purchase the bed rights from Nata-Lea and the granting of a final CON, is insufficient under Ohio law to satisfy the requirement of Ohio Adm.Code 3701-12-23.2(B) that an applicant has entered into a contract to acquire the beds being relocated. Appellants argue that the applicant executed an illusory bed purchase agreement with Rolling Hills to acquire the rights to the 70 nursing home beds. Appellants maintain that Rolling Hills, which leases the Pearlview facility and its beds from Nata-Lea, only has an unexercised option to purchase the bed rights from Nata-Lea pursuant to a separate lease agreement, and that Rolling Hills is not going to exercise its option to purchase the beds from Nata-Lea until after some future event (i.e., the applicant's receipt of a final, non-appealable CON).

{¶ 20} In addressing appellants' arguments on this issue, the hearing examiner made the following determination:

> Where, as in this case, the evidence establishes that the applicant has entered into a bed purchase agreement with a

> related entity which owns the operating rights to the facility from which the beds will be relocated and holds an unexpired option to purchase the beds from the owner of that facility, the applicant has demonstrated compliance with OAC 3701-12-23.2(B), such that denial of the application is not mandated. The bed purchase agreement is a valid contract to acquire the beds being relocated, supported by consideration, contingent upon the exercise of the option. If the contingency is not met, the contract fails, as is the case with any contract containing a contingency, but that possibility is not a ground for denying a CON application (Report and Recommendation at 60.)

{¶ 21} The bed purchase and sale agreement between Rolling Hills, as "Seller," and the applicant, as "Buyer," states in part:

> A. Pursuant to a certain Nursing Home Lease * * * by and between Seller and Nata – Lea, LLC * * * ("Landlord"), Landlord currently leases to Seller, and Seller currently leases from Landlord, substantially all of the assets of Landlord constituting the nursing home commonly known as Pearlview Rehab & Wellness Center * * * including, without limitation, the operating rights to all one hundred twenty-seven (127) nursing home beds currently licensed at the Facility.
>
> B. Pursuant to a certain Option Agreement * * * by and between Seller and Landlord, Landlord has granted to Seller, and Seller has accepted from Landlord, an option to purchase the Assets ("Option").
>
> C. Seller intends to exercise the Option and purchase the Assets.
>
> D. Provided that Seller exercises the Option and purchases the Assets, Seller desires to sell and transfer to Buyer, and Buyer desires to purchase and accept from Seller, on the terms and conditions contained herein, the operating rights to seventy (70) nursing home beds licensed at the Facility ("Beds").
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> * * *
>
> **(1) Purchase and Sale of Beds.** On the date of Closing * * *, Seller shall sell and transfer to Buyer, and Buyer shall purchase and accept from Seller, the Beds, including all rights, duties and obligations with respect to the Beds that may be transferred or are transferable in accordance with Ohio and

> federal law, such as, without limitation, the CON with respect to the Beds.
>
> **(2) Purchase Price.** The total purchase price of the Beds shall be Two Million One Hundred Thousand and 00/100 Dollars ($2,100,000.00).
>
> * * *
>
> **(3) Closing.** Subject to the satisfaction of the Contingencies * * *, Closing of the transaction * * * will occur no earlier than fifteen (15) days following the expiration of all appeal periods relative to the grant of a CON for the relocation of the Beds to Buyer's Facility.
>
> **(4) Contingencies; Termination.** Notwithstanding anything to the contrary contained herein, Closing is expressly contingent upon the following (collectively, "Contingencies"): (a) Seller exercising the Option and purchasing the Assets; and (b) Buyer obtaining a final, non-appealable CON for the relocation of the Beds to Buyer's Facility. If either or both of the Contingencies are not satisfied or do not occur for any reason whatsoever, this Agreement shall automatically terminate and become null and void in all respects without any further action of the parties hereto. (Record at E00010, E00011.)

{¶ 22} In arguing that the bed purchase agreement between the applicant and Rolling Hills is illusory, appellants maintain there is nothing in the agreement requiring Rolling Hills to exercise the option to purchase the bed rights from Nata-Lea. Appellants contend that Rolling Hills retains an unlimited right to determine the nature or extent of its performance, i.e., that it is solely within Rolling Hills' discretion as to whether or not it will ever exercise its option to acquire the beds from Nata-Lea.

{¶ 23} We are not persuaded by appellants' claim that the bed purchase agreement is illusory. Under Ohio law, "every contract contains an implied duty of good faith and fair dealing." *Kirkwood v. FSD Dev. Corp.*, 8th Dist. No. 95280, 2011-Ohio-1098, ¶ 9. This duty " 'emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party,' " and that "bad faith may consist of inaction." *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, ¶ 26 (1st Dist.), quoting Restatement of the Law 2d, Contracts, Section 205, comment a (1981). Further, in

construing an agreement, a court "should prefer a meaning which gives it vitality rather than a meaning which renders its performance illegal or impossible." *Kebe v. Nutro Machinery Corp.*, 30 Ohio App.3d 175, 177 (8th Dist.1985), citing *Cincinnati v. Cameron*, 33 Ohio St. 336, 364 (1878); *State ex rel. Gordon v. Taylor*, 149 Ohio St. 427 (1948), paragraph two of the syllabus. Where the parties "presumably intended to make an enforceable agreement * * * courts will ordinarily prefer an interpretation consistent with that purpose." *Kebe* at 177.

{¶ 24} In the present case, closing of the transaction is dependent upon mutual obligations of the buyer and seller, i.e., the seller exercising the option to purchase the assets, and the buyer obtaining a final, non-appealable CON. Pursuant to the terms of the agreement between Rolling Hills and the applicant, Rolling Hills set forth its intent "to exercise the Option and purchase the Assets" (from Nata-Lea). Implicit in the agreement is that the buyer will make a good-faith effort to obtain a final CON, and that the seller will exercise the option to purchase the assets. The hearing examiner recognized that the agreement contained a contingency and that, if such contingency was "not met, the contract fails, as is the case with any contract containing a contingency." (Report and Recommendation at 60.)

{¶ 25} This court addressed a similar issue in *In re: 4307 Care, L.L.C., Certificate of Need*, 10th Dist. No. 05AP-672, 2006-Ohio-2071, in which the Moskowitz Family IV, LLC ("Moskowitz"), contracted with another entity, Mountain Crest, to purchase 20 long-term care beds. By means of an assignment agreement, Moskowitz assigned to the CON applicant, 4307 Care, all of its rights and interest under the agreement with Mountain Crest. The appellants, who owned a competitor nursing home facility, challenged the enforceability of the assignment agreement based upon a provision in the agreement between Moskowitz and Mountain Crest that prohibited assignment without express written consent. The appellants argued there was no evidence Mountain Crest had furnished written consent to the assignment, and further argued that the director erred in concluding the applicant had entered into a contract to acquire the beds.

{¶ 26} This court rejected appellants' arguments, finding in part:

> Appellants * * * presented no affirmative evidence establishing that Mountain Crest refused to allow the

> assignment. Further, nothing in the record indicates that Mountain Crest *will attempt* to repudiate its agreement to sell, thus preventing 4307 Care from obtaining the beds. As the director recognized, refusal to give consent to the assignment would jeopardize the agreement itself, as the very purpose of the agreement was to supply beds for the new facility. Finally, *enforceable or not*, 4307 Care has entered into the contract necessary to satisfy Ohio Adm.Code 3701-12-232(B)(2).

(Emphasis added.) *In re 4307 Care* at ¶ 17.

{¶ 27} Similarly, in the instant case, there is nothing in the record to indicate that Rolling Hills does not intend to exercise the option to purchase the assets. In addition to language in the agreement explicitly setting forth Rolling Hills' intent to exercise its option, the hearing examiner heard the testimony of Eitan Flank, the applicant's managing member (and ten percent owner of Rolling Hills), who represented that Rolling Hills intends to exercise the option to purchase the assets of the Pearlview facility.[1] Further, while Ohio Adm.Code 3701-12-23 requires an applicant to enter into a contract to acquire the beds, the rule does not specifically prohibit contingencies.

{¶ 28} As noted, the hearing examiner concluded that the applicant had entered into a valid contract, supported by consideration, to purchase 70 beds from Rolling Hills, a related entity that owns the operating rights and which holds an option to purchase the beds from the owner of the facility. We agree, and find no error with the hearing examiner and director's determination that the applicant demonstrated compliance with Ohio Adm.Code 3701-12-23.2(B).

{¶ 29} Appellants next argue that the director erred in holding that appellants failed to establish the project is not needed and will adversely impact other providers of similar services. Appellants argue that its witnesses established the lack of need for the applicant's project.

{¶ 30} Ohio Adm.Code 3701-12-20(E) states:

> The director shall consider the need that the population served or proposed to be served has for the services to be

[1] Eitan Flank testified that there is a common ownership between the applicant and Rolling Hills, but that the two companies are "separate legal entities." (Tr. Vol. I at 177.)

> provided upon implementation of the project. In assessing the need for a project, the director shall examine:
>
> (1) The current and proposed primary and secondary service areas and their corresponding population;
>
> (2) Travel times and the accessibility of the project site and of the sites of similar services to the proposed service area population;
>
> (3) Current and projected patient origin data, by zip code; and
>
> (4) Any special needs and circumstances of the applicant or population proposed to be served by the proposed project, including research activities, prevalence of a particular disease, unusual demographic characteristics, cost-effective contractual affiliations, and other special circumstances; and
>
> (5) Special needs related to any research activities, such as participation by the applicant in research conducted by the United States food and drug administration or clinical trials sponsored by the national institute of health, that will be conducted as a result of implementation of the reviewable activity.

{¶ 31} Ohio Adm.Code 3701-12-20(F) states: "The director shall consider the impact of the project on all other providers of similar services in the service area specified by the applicant including the impact on their utilization, market share and financial status."

{¶ 32} Appellants argue that the hearing examiner heard testimony of three owner/operators of Medina County long-term care facilities regarding the issue of need for the proposed project and the impact the project will have on their businesses. Specifically, Michael Francus, the operator of two facilities in Medina County, testified that the countywide census for Medina nursing homes was 84 percent, but that his facilities were running in the high 60 to low 70 percent range. Edward Telle, the owner and administrator of Wildwood, testified that the average census for Wildwood during 2010 was 80 percent. According to Telle, Medina County has too many nursing homes, and had 260 empty beds as of September 10, 2010. Robert Banasik, the operator of Samaritan, testified that the proposed project puts his facility's survival at risk because the

project is to be built near his facility. At the time of the hearing, the census for Samaritan was averaging between 80 to 85 percent.

{¶ 33} In response, the applicant argues that evidence presented throughout the hearing indicated a need for a modern, less institutionalized nursing facility in Medina County, as well as the need for additional private rooms in the applicant's projected service area to meet the expectations of existing and future consumers. The applicant argues that population projections also demonstrated a need for the project.

{¶ 34} In addressing the issue of need, the hearing examiner noted that appellants had presented the testimony of Francus, Telle, and Banasik, "each of whom testified that there are a significant number of empty beds in Medina County," and who also "testified that they were concerned for their long-term survival and profitability." (Report and Recommendation at 56.) The hearing examiner further noted that these witnesses "conceded * * * that private rooms are desirable and that the project as proposed by the Applicant is in compliance with current regulations governing the construction of new facilities." (Report and Recommendation at 56.)

{¶ 35} In its conclusions of law, the hearing examiner determined:

> Where * * * the evidence, including testimony of the Objectors' witnesses, establishes that private beds are required by new regulations, more desirable for rehabilitation patients than semi-private or ward beds, and lacking in many facilities in the county, the objectors have failed to establish, by a preponderance of the evidence, that the project is not needed. Moreover, the objectors' evidence of an overall bed excess in the county does not carry the objectors' burden to show that the project is not needed. The number of licensed beds in the county will not change, bed excess is only one factor to be considered by the Director, and a bed excess does not necessarily lead to a conclusion that the CON application should be denied.

(Report and Recommendation at 61.)

{¶ 36} The record indicates that the hearing examiner heard testimony that short-term residents prefer private rooms, and that the Pearlview facility, because it is an older building with fewer private rooms, cannot meet that identified need. Applicant's witness, Flank, the chief executive officer of Progressive Quality Care, testified that each room at

Pearlview has "two people in it and they share a bathroom and there's four people to a bathroom, and none of us want to put our parents in a facility like this." (Tr. Vol. I at 199.) He further stated there were no showers in those bathrooms.

{¶ 37} The hearing examiner noted that appellants' own witnesses acknowledged the desirability of private rooms, and that the proposed project is in compliance with current regulations governing the construction of new facilities. Francus, who oversees six skilled nursing facilities in northeast Ohio, testified as to the advantages of private rooms. He described the Pearlview facility as an "older building" that was "no longer marketable." (Tr. Vol. I at 56.) Francus noted that, under current regulations, "if you build a private room, you have to have a full bath in it," and "the baths cannot be shared between the rooms." (Tr. Vol. I at 52.) According to Francus, "[e]veryone should have a private room. I strongly believe in that." (Tr. Vol. I at 53.) Francus further opined that, "if they're not all private rooms, it's a crappy building." (Tr. Vol. I at 56.)

{¶ 38} Robert Banasik, who operates the facility of appellant Samaritan, acknowledged this industry trend and the client demand for private rooms with private showers. According to Banasik, "[t]he typical person who is looking for rehabilitation will want a private room." (Tr. Vol. I at 134.) Banasik testified that he had converted 11 rooms at Samaritan to private rooms in response to "market conditions" and because of new regulatory requirements. (Tr. Vol. I at 134). Banasik did not dispute representations by the applicant as to limitations at the Pearlview facility.

{¶ 39} Upon review, the record sufficiently supports the determination of the hearing examiner and director that appellants failed to prove, by a preponderance of the evidence, that the project is not needed. Here, the hearing examiner gave weight to evidence concerning the condition of Pearlview, and a demonstrated need for private beds, "more desirable for rehabilitation patients than semi-private or ward beds, and lacking in many facilities in the county." (Report and Recommendation at 61.) The hearing examiner also determined that evidence of bed excess in the county was not sufficient to warrant denial, noting that the application involved the relocation of existing beds (leaving unchanged the number of beds within the county). As noted by the hearing examiner, bed excess is only one factor to be considered by the director. *See In re*

Certificate of Need Application for Parkside Villa, 10th Dist. No. 04AP-1232, 2005-Ohio-5699, ¶ 41 ("bed need is only one factor to consider in determining a CON application").

{¶ 40} Appellants next argue that the director erred in holding that appellants failed to establish the project was not financially feasible.

{¶ 41} Ohio Adm.Code 3701-12-20(J) states as follows:

> The director shall consider the short-term and long-term financial feasibility and the cost effectiveness of the project and its financial impact upon the applicant, other providers, health care consumers and the medicaid program established under Chapter 5111. of the Revised Code.
>
> Among other relevant matters, the director shall evaluate:
>
> (1) The availability of financing for the project, including all pertinent terms of any borrowing, if applicable;
>
> (2) The operating costs specific to the project and the effect of these costs on the operating costs of the facility as a whole based upon review of balance sheets, cash flow statements and available audited financial statements;
>
> (3) The effect of the project on charges and payment rates for the facility as a whole and specific to the project; and
>
> (4) The costs and charges associated with the project compared to the costs and charges associated with similar services furnished or proposed to be furnished by other providers; and
>
> (5) The historical performance of the applicant and related parties in providing cost-effective health care services.

{¶ 42} Appellants first argue that the applicant's evidence of financial feasibility from a financing standpoint is vague and lacking any depth. Appellants contend the applicant presented as evidence an unsigned pre-qualification letter from Evergreen Equity Partners ("Evergreen Partners"), which indicated that the applicant is pre-qualified to apply for a two-year term construction loan in the amount of seven million dollars. Appellants argue that the letter from Evergreen Partners is nothing more than evidence that a loan is possible in the future.

{¶ 43} Section 10.14(b) of the CON application requests the following information of the applicant: "For projects involving debt financing, provide a copy of the secured financing agreement. If not available, provide documentation from the financial institution evidencing, at minimum, their review of the proposal and willingness to accept an application for financing." (Record at A00038.) In response, the applicant submitted a letter from Evergreen Partners, attached as Exhibit T, stating in part: "Evergreen Equity Partners, LLC ("Lender") is pleased to inform you that your request for a construction loan * * * is hereby prequalified by the Lender." (Emphasis sic.) (Record at A00231.) The letter sets forth the preliminary terms, including a loan amount of $7,000,000.

{¶ 44} In addressing this issue, the hearing examiner rendered the following conclusions:

> Where * * * the application contains a letter from a lender that is not a commitment for financing, but states an agreement to accept an application for financing from the applicant, and states the terms upon which that loan might be issued, the objectors have failed to establish, by a preponderance of the evidence, that the applicant has not complied with OAC 3701-12-20(J), such that the Director should consider denying the application. The rule requires only that the Director consider the "availability" of financing and the pertinent terms, if applicable.

(Report and Recommendation at 62.)

{¶ 45} As noted by the applicant, the rules do not require an applicant to submit a signed commitment with respect to financing at the time of the application. Rather, as observed by the hearing examiner, the rule "requires only that the Director consider the 'availability' of financing and the pertinent terms, if applicable." In *In re Cumberland Care Ctr.*, 123 Ohio App.3d 616, 622 (10th Dist.1997), a case cited by appellants, this court noted the practical reality that "it is reasonable * * * there would not be a binding loan agreement until a CON was issued." *See also In re: Mill Run Care Ctr. v. Arbors E.*, 10th Dist. No. 94APH04-591 (Dec. 20, 1994) (rejecting argument that appellees lacked financial feasibility required because they allegedly had "no documentation"; "[a]lthough contracts have not yet been signed," evidence before the Certificate of Need Review Board indicated the projects could successfully proceed).

{¶ 46} Appellants cite *Cumberland Care* as support for denial of the CON, arguing that this court affirmed the denial of a CON application in a case in which we observed that a letter from a lender constituted "little more than an expression of some interest in the loan contingent on a number of things to be done by appellant." *Cumberland Care* at 620. Appellants maintain that the applicant's evidence of available financing in the instant case is, at best, marginally better than what was presented by the applicant in *Cumberland Care*.

{¶ 47} In response, the applicant argues that appellants' reference to the bank letter in *Cumberland Care* is misleading, and that the facts of the instant case are distinguishable from those in *Cumberland Care*. Specifically, the applicant contends that the basis for denial of the CON in *Cumberland Care* was because: (1) there was a question as to clear ownership of the operating rights; (2) the project was not shown to be financially feasible; and (3) the applicant failed to comply with a previously approved CON.

{¶ 48} Upon review, we agree with the applicant that the facts of *Cumberland Care* are distinguishable from those here. In *Cumberland Care*, the evidence showed "the necessity of appellant's borrowing significantly more than is needed to construct the facility," that "[o]ver ten percent of the loan amount is already allocated to non[-]project costs," and that the projected cost overrun in the case "exceeds the amount allowed by ODH rules." *Cumberland Care* at 622. This court noted that the appellant "offered no evidence as to how it expected to construct its facility when ODH would not be able to approve all costs necessary in order to complete the project, including the projected cost overrun." *Id*. This court also found significant that the applicant was "apparently not able to obtain a loan directly from a lending institution despite its previous years' experience in the nursing home field." *Id*. at 623. Further, the hearing examiner in *Cumberland Care* determined that the applicant's inability to obligate capital expenditures for a prior CON was a proper consideration for the director to utilize in considering whether or not to grant the CON. Finally, as noted by the applicant, unlike the present case, the bank letter in *Cumberland Care* did not include a pre-approval or projected loan terms.

{¶ 49} In light of the various shortcomings presented in *Cumberland Care* with respect to the financial feasibility of that project, we do not find appellants' reliance upon

that case to be determinative of the issues in the instant case. Rather, we conclude that the hearing examiner and director properly considered the issue of availability of financing for the project pursuant to Ohio Adm.Code 3701-12-20(J)(1).

{¶ 50} Appellants further argue that the applicant failed to provide sufficient information to demonstrate the project has sufficient unencumbered cash on hand for the equity portion of the costs. Appellants contend that the evidence in this case shows that the equity portion of the cost for the project is $870,544, but that neither the applicant nor its owners have the cash to cover this amount.

{¶ 51} Section 10.14(a) of the CON application requires the applicant to "[d]iscuss the availability of funds for the project," including, for a "new equity," identifying "sufficient funds held by the applicant to meet the equity contribution and working capital needed for startup," as well as "assurance that the funds will remain available at the time the project is undertaken." (Record at A00037 and A00038.) In response, the applicant stated it "intends to finance approximately $7,000,000 of the project," and that it "has entered into an agreement for the purchase of the 70 beds, which enables the Applicant to pay for the beds over a two-year period." (Record at A00038.)

{¶ 52} ODH requested additional information, including a demonstration that "the applicant's owners have the necessary unencumbered cash." (Record at C00010.) The applicant gave the following response to this inquiry:

> Mike Flank is 100% owner of Progressive Quality Care, Inc., which is the management company for all of the facilities listed in 9.15, except the Parma Care Center. Mr. Flank also owns 25% of the Applicant. Mr. Flank intends to utilize cash from Progressive Quality Care, Inc. to cover the equity portion of this project. A Huntington Bank statement for Progressive Quality Care, Inc., which shows a balance of $1,102,517.86, is attached as **Exhibit 5.**

(Record at C00010.)

{¶ 53} During the hearing, Eitan Flank was questioned on cross-examination by counsel for Evergreen as to whether the amount stated in the Huntington Bank statement was unencumbered. Flank testified that Progressive Quality Care "does not guarantee leases," and "does not have any mortgages. It has one line of credit." (Tr. Vol. I at 160-161.) He further testified that the Huntington Bank balance was "not encumbered." (Tr.

Vol. I at 161.) Flank stated: "I could pull a million out tomorrow and write a check out to you, or to me, or whoever, nothing restricts me from doing so." (Tr. Vol. I at 161.) Flank further testified that the applicant's owners, including himself, Mike Flank, Joel Sausen, and Shaul Flank, had "committed to" contributing the equity portion of the project. (Tr. Vol. I at 184.) Upon review, there was evidence upon which the department could have concluded that the applicant demonstrated the availability of sufficient cash funds for the project.

{¶ 54} Appellants next contend that the evidence demonstrates that the application was riddled with factual financial inaccuracies such that the feasibility of the project could not be reasonably determined. Appellants maintain that the total costs for the project were understated in the application. In support, appellants point to the testimony of several of its witnesses, including Francus, who testified that the projected debt load was "kind of astounding." (Tr. Vol. I at 37.) Another of appellants' witnesses, Telle, stated that "[t]he financials are way off base." (Tr. Vol. I at 87.) Appellants also cite the testimony of their financial expert, Pamela Richmond, a certified public accountant, who opined that the financial feasibility of the proposed project was "questionable." (Tr. Vol. II at 12.) Richmond expressed concern about the accuracy of the applicant's cash flow statement in conjunction with the balance sheet and income statement.

{¶ 55} In response, the applicant argues that Francus and Telle did not offer any meaningful support for their views. Specifically, the applicant argues that Telle, in testifying that the financials were "way off base," cited a $30 per day cost of ownership versus a $13 rate of reimbursement. On cross-examination, Telle conceded that the $13 reimbursement only included Medicaid reimbursement, and did not take into account other sources of reimbursement for managed care, private pay, and Medicare residents. With respect to the statement by Francus regarding debt load, the applicant notes that Francus, when questioned on cross-examination, did not find anything unreasonable about the rates projected by the applicant for Medicaid, Medicare, and managed care. The applicant further argues that, although Richmond noted some discrepancies in the financial schedules, she conceded that she did not know the assumptions used to create the financial projects in the application. The applicant further notes that appellants'

financial expert affirmatively stated that she did not have an opinion as to the financial feasibility of the project.

{¶ 56} The hearing examiner found that "[m]ere disagreement with the applicant's projections does not carry the objectors' burden." (Report and Recommendation at 61.) Rather, the hearing examiner concluded, where the objectors "question or disagree with the applicant's financial projections, but deny that those projections are 'not feasible' or that they 'can't do it,' and that new facilities attract a higher payor mix and operate more efficiently than older facilities, the objectors have failed to establish, by a preponderance of the evidence, that the project is not feasible." (Report and Recommendation at 61.)

{¶ 57} In the instant case, there was competing testimony with regard to the financial feasibility of the project, and the record indicates that the hearing examiner considered all of the testimony, including that of the appellants' financial expert. The hearing examiner noted that Richmond, when initially questioned by appellants' counsel, declined to express a formal opinion as to the financial feasibility of the project, stating she "was not hired to produce an opinion." (Tr. Vol. II at 12.) When pressed by appellants' counsel as to whether she had an opinion, Richmond stated the project was "questionable." (Tr. Vol. II at 12.) When examined by counsel for the department as to her opinion, Richmond stated: "I'm not saying it's not feasible and I'm not saying they can't do it." (Tr. Vol. II at 57.)

{¶ 58} Accepting Richmond's statement that the financial feasibility of the project was "questionable," appellants' expert did not render an opinion that the project was financially unfeasible. According due deference to the administrative agency's resolution of conflicting evidence, we find there was reliable, probative, and substantial evidence to support the determination of the hearing examiner and director that the project was financially feasible, and that appellants failed to establish that the applicant did not comply with the requirements of Ohio Adm.Code 3701-12-20(J).

{¶ 59} Finally, appellants contend that the director erred in considering a department staff report, dated January 12, 2011, attached to the director's adjudication order. Appellants argue that the staff report analysis contains matters outside the record, and is in contravention of R.C. 3702.52(C)(4), which provides that the director shall "base

decisions concerning applications for which an adjudication hearing is conducted * * * on the report and recommendation of the hearing examiner."

{¶ 60} In response, the applicant argues that there is no support for appellants' suggestion that the director did not base its decision on the report and recommendation of the hearing examiner. The applicant further argues that the staff report, cited by appellants, is simply a summary of the CON application, and that all of the information in the staff report is obtained from the CON application and from follow-up information received by the department's reviewer and admitted at the adjudication hearing as Joint Exhibit No. 1.

{¶ 61} The director's adjudication order states in part:

> NOW THEREFORE, after taking into consideration the Report and Recommendation of the Hearing Examiner and all briefs, motions, and objections filed to date, I hereby find and conclude as follows:
>
> 1. I accept the Hearing Examiner's Findings of Fact 1 to 15.
>
> 2. I accept the Hearing Examiner's Conclusions of Law with the exception of the statement in Conclusion of Law I that "private rooms are required by new regulations."
>
> 3. R.C. 3702.52(C)(3) provides that the "Objector" or the "affected person" bear[s] the burden of proving by a preponderance of evidence that the project is not needed or that granting the certificate would not be in accordance with R.C. sections 3702.51 to 3702.62 or the rules adopted under those sections.
>
> 4. The Hearing Examiner concluded in his Report and Recommendation and I agree, that the Objectors did not meet the burden of proving by a preponderance of the evidence that the project is not needed or that granting the certificate would not be in accordance with R.C. sections 3702.51 to 3702.62 or the rules adopted under those sections.

{¶ 62} Upon review, we agree with the applicant that, despite appellants' observation that the staff report was attached to the adjudication order, there is nothing in the record to suggest that the director did not base its decision on the hearing examiner's report and recommendation. Further, to the extent that the staff report

contains a summary of information derived from the CON application, appellants cannot demonstrate prejudice. *See In re Wedgewood Realty, LLC*, 10th Dist. No. 06AP-273, 2006-Ohio-6734, ¶ 25 ("While we agree with the general proposition that an agency should not base its decision upon matters outside the record * * *, appellant cannot show prejudice in the instant case because the objectionable matters cited in the director's decision constituted evidence that was already before the hearing examiner by way of testimony and exhibits").

{¶ 63} Upon review of the record, we conclude that the order of the director, finding that appellants failed to meet their burden of proving that the project was not needed, is supported by reliable, probative, and substantial evidence and is in accordance with law. Accordingly, appellants' two assignments of error are overruled, and the order of the director is hereby affirmed.

Order affirmed.

FRENCH and DORRIAN, JJ., concur.

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